



2010-868

Representative: Barbara Cowel, BPA
Decision No: 100001524868
Decision Type: Entitlement Review
Location of Hearing: Ottawa, Ontario
Date of Decision: 28 October 2010

The Entitlement Review Panel decides:

SURVIVING SPOUSE

Eligibility established for surviving common-law spouse. Subsection 2(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*

Before: B.T. LeBlanc Presiding & Writing Member
Pierre Champagne Member

Signed by: _____
Original signed by:
B.T. LeBlanc

INTRODUCTION

This claim is brought forward as the surviving spouse is seeking survivor benefits as she is dissatisfied with respect to the Minister's decision of Department of Veterans Affairs dated 13 July 2009, and she is also dissatisfied with a Departmental Review Decision dated 5 January 2010.

PRELIMINARY MATERS

This Panel wishes to express its sincerest sympathies to the survivors of the deceased Applicant who paid the ultimate sacrifice while in service to our Country.

ISSUES

Does the survivor meet the definition of a surviving common-law spouse pursuant to subsection 2(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act (CFMVRCA)*?

EVIDENCE AND ARGUMENT

The late Applicant was born in 1980 and died in 2009 while serving in Afghanistan. He is survived by his common-law spouse and a dependant child. Death benefits have been made payable to his child in trust. The remaining death benefits have not been paid to the surviving spouse and it is the issue to be decided by this Panel.

The surviving spouse and the deceased commenced a common-law relationship on 8 March 2008. Their child was born in 2008. The late Applicant was deployed to Afghanistan on 29 September 2008. The common-law relationship which commenced in March of 2008 is not an issue. They shared a home together. They lived together as man and wife, and in fact they were engaged to be married.

The surviving spouse was listed as a beneficiary under the late Applicant's will and she was appointed as his Power of Attorney for property purposes dated 28 August 2008. Both the surviving spouse and the deceased had publically, in writing and orally, acknowledged their common-law relationship. This is corroborated by various documentation in the file in the form of Government documentation, e-mails and legal documents.

In a decision dated 13 July 2009, the Department of Veterans Affairs denied survivor benefits for the surviving spouse on the basis that she did not meet the eligibility criteria necessary to be considered a "survivor" as set out in subsection 2(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (CFMVRCA).

The Department indicated that a "common-law" partner is defined by subsection 2(1) of the Act to mean a person who is cohabiting with a member in a conjugal relationship, having so co-habited for a period of at least one year; and therefore, in order to be eligible for benefits under the Act as a surviving common-law partner of the deceased, they must have lived together for a period of at least one year. The Department in its detailed decision, acknowledged that a common-law relationship commenced on 8 March 2008, but since the deceased was deployed to Afghanistan on 29 September 2008, the common-law relationship was deemed to have existed for only seven months, and therefore well short of the 12 months required to be eligible for survivor benefits.

In its Departmental Review Decision on 5 January 2010, the Department confirmed its previous decision. It felt that there was no error in fact or in law, and therefore there were no grounds to undertake a review of the previous unfavourable decision.

The Advocate, on behalf of the surviving spouse, submits that the eligibility criteria has in fact been met. The relationship commenced on 8 March 2008 and the deceased suddenly passed away on 20 March 2009.

The Advocate relied on subsection 2(2) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (CFMVRCA) which states as follows:

For the purposes of this Act, a spouse is deemed to be residing with a member or a veteran, and a person does not cease to be a member's or a veteran's common-law partner, if it is established that they are living apart by reason only of

- a. one or both of them having to reside in a health care facility
- b. circumstances of a temporary nature; or
- c. other circumstances not within the control of the member or veteran or the spouse or common-law partner

The Advocate submitted that the late Applicant was deployed to Afghanistan as a result of his mandatory requirement as a soldier and this was "circumstances of a temporary nature" or other circumstances not within the control of the member or Veteran or the spouse or common-law partner.

In conclusion, the Advocate submitted that the surviving spouse is entitled to survivor benefits as she was in a common-law relationship which lasted a year, and that the interruption of this relationship was due to the late Applicant's deployment in Afghanistan, and therefore pursuant to subsection 2(2), they are deemed to still have been residing together, and this relationship did not cease because of circumstances of a temporary nature or because of circumstances not within the deceased or surviving spouse's control.

The surviving spouse also referred this Panel to an additional exhibit and an attachment and references (ER-L1, ER-Attach-L1 and References L1-C21 and L2).

The Panel acknowledges the e-mails, Marriage License Application and Civil Case Law from the Court of Queen's Bench of Manitoba and Ontario.

A friend of the deceased was sworn in and testified that he served with the deceased and was a good friend of the late Applicant and the surviving spouse, and it was certainly their intention that they would get married and that they did have a common-law relationship.

The surviving spouse was sworn in and testified that she was in a common-law relationship with the deceased from 8 March 2008, that she paid the bills, ran the household and raised their child, and as well, she had continuous contact with the deceased and they had intended to marry.

The Panel also notes that the deceased and the surviving spouse spent numerous weekends together prior to commencing their common-law relationship.

The surviving spouse's position is that she meets the definition of a survivor as she was in a common-law relationship beyond a year and that this relationship was interrupted during that time frame because of his deployment; however, subsection 2(2) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (CFMVRCA) makes provisions for this, and therefore, survivor benefits should be paid to the surviving spouse.

The Panel has carefully reviewed the full contents of the file, has taken into consideration the credible testimony of the surviving spouse, and has taken into consideration the presentation made by the Advocate.

The Panel grants survivor benefits to the surviving spouse, as a surviving common-law spouse of the deceased.

The Panel finds that the eligibility criteria necessary to be considered as a survivor is met as set out in subsection 2(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

The Panel notes that the Department's decision dated 13 July 2009 is based on subsection 2(1) of the Act which includes a definition for survivor as meaning "survivor, in relation to a deceased member or a deceased veteran, means:

- a. their spouse who was, at a time of the member's or veteran's death, residing with the member or veteran; or
- b. a person who was, at the time of the member's or veteran's death, the member's or veteran's common-law partner.

Common-law partner is defined, as "common-law partner in relation to a member or a veteran, means a person who is co-habiting with the member or veteran in a conjugal relationship, having so co-habited for a period of at least one year."

The Panel notes, however, the Department makes no reference to subsection 2(2) of the Act. In its Departmental Review decision dated 5 January 2010, the Department again refers to subsection 2(1) of the Act, and indicates that the surviving spouse does not meet the eligibility criteria to be considered a survivor, but then states that they are unable to apply the provisions of subsection 2(2) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (CFMVRCA).

The Panel, with all due respect, does not agree with the submission made by the Advocate that this situation falls within subsection 2(2) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*. This provision is meant for couples who have already, in the past, resided for over a year in a common-law relationship and, for other situations, have had to separate due to situations beyond their control. The Panel is of the view that subsection 2(2) is not applicable. The Panel is of the view that the parties in this case have resided as common-law partners in a conjugal relationship for a period of at least one year. They commenced on 8 March 2008 and the relationship terminated on 20 March 2009 while the late Applicant was serving in Afghanistan. This relationship lasted for one year and 12 days.

It was certainly the intention of the parties to continue their common-law relationship by virtue of the fact that they were to formalize their relationship by getting married upon the late Applicant's return from Afghanistan. A child was born of this union in 2008. There was no evidence to indicate that there was any voluntary separation nor was there any intention to terminate the relationship. The parties kept in contact via the Internet and by telephone and during his time away the surviving spouse raised the party's child, paid the bills, and maintained their joint household.

The definition provided in the legislation requires cohabitation in a conjugal relationship and having so cohabited for a period of at least one year. In this case, the Panel is of the view that the deployment did not cease the conjugal relationship, and the one-year criteria has been met.

A review of English dictionaries and jurisprudence has established that the criteria for conjugal relationships include shared shelter, sexual and personal behaviour, services, social activities, economic support, the societal perception of the couple, and the intention of the couple. These criteria were recently reaffirmed by the Supreme Court of Canada in the case of *M v H* [1999] 2 S.C.R. 3 at paragraph 59 per Cory J. It is clear that a conjugal relationship does not depend exclusively upon sexual relations, but does require that applicants establish a relationship of emotional intimacy analogous to a spousal relationship. For instance, a conjugal relationship has not been interpreted to include casual friendships, but has certainly been meant to include couples who share a home, share an offspring, share expenses, and have publicly declared in writing and orally their conjugal status.

The Panel is of the view that Parliament did not intend for this couple's relationship to have been terminated at the time of his deployment. The Panel is of the view that the common-law relationship continued throughout the deployment, as evidenced by the fact that they were in daily contact with each other via the Internet and by telephone and, as well, the surviving spouse maintained the household, maintained the late Applicant's motor vehicle and both continued to pay their joint bills. The physical separation was mandatory due to his employment but was meant to be of a temporary nature. Had Parliament intended for this couple to have terminated their relationship at the time of his deployment, Parliament would have indicated so in the legislation.

The Panel is of the view that the situation in this particular case falls within the definition of a common-law partner as defined in the legislation. Subsection 2(2) of the legislation is not applicable to this circumstance.

The Panel notes that the legislation itself, when applied to this particular circumstance, could be interpreted as being ambiguous. In that case, the Panel relies on the interpretation principles as set out in the *Interpretation Act*, RSC 1985 1-21, subsection 12, which states in part:

Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best insures the entailment of its objects.

The Panel is also guided by sections 3 and 39 of the *Veterans Review and Appeal Board Act*. Section 39 states, "In all proceedings under this Act, the Board shall":

- a. draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;
- b. accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
- c. resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

In conclusion, the definition section of common-law partners is broad enough and does not prohibit the ongoing conjugal relationship by virtue of mandatory and temporary deployment. For these reasons, the Panel grants survivor benefits to the surviving spouse.

DECISION

Given all of the circumstances of this particular case, the Panel is of the view that the eligibility criteria have been met for the surviving spouse to be considered a survivor of the deceased, and for these reasons, benefits should be conferred to the surviving common-law spouse.

APPEAL RIGHTS

If you are dissatisfied with this decision, you may appeal it to an Appeal Panel of the Veterans Review and Appeal Board, which may affirm, vary or reverse the decision.

In pursuing this right of appeal, you may be represented, free of charge, by the Bureau of Pensions Advocates or a service bureau of a veterans' organization or at your expense by any other representative.

Applicable Statutes:

Canadian Forces Members and Veterans Re-establishment and Compensation Act, [S.C. 2005, c.21.]

Subsection 2(1)

Veterans Review and Appeal Board Act, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3

Section 25

Section 39

Exhibit:

ER-L1: E-mail from the late Applicant's surviving spouse, dated 27 August with attachments (twenty-seven pages).

Attachment:

ER-Attach-L1: Four cases addressing issue of "cohabiting in a conjugal relationship" under various legislation (five pages).

REFERENCE: L1-C21 - CFMVRCA - excerpts (s.2, 57) L2 - CSDN Printout (six pages); and L2- CSDN Printout for the late Applicant with start date of 11 September 2008 and end date of 20 March 2009 (one page).

Date Modified: 2012-02-10