



2011-107

Representative: Lise Cormier, BPA
Decision No: 100001676107
Decision Type: Entitlement Review
Location of Hearing: Bathurst, New Brunswick
Date of Decision: 15 September 2011

The Entitlement Review Panel decides:

DEGENERATIVE DISC DISEASE LUMBAR SPINE (OPERATED)

Entitlement granted in the amount of five fifths for service in Active Force.
Subsection 21(1), *Pension Act*

Entitlement effective 27 July 2010 (date of application).
Subsection 39(1), *Pension Act*

No entitlement granted for service in the Regular Force.
Subsection 21(2), *Pension Act*

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

Original signed by:

Reasons
delivered by:

B.T. LeBlanc

INTRODUCTION

This claim is brought forward as the Veteran is dissatisfied with the Department of Veterans Affairs decision dated 7 December 2010.

ISSUES

Is the claimed condition of degenerative disc disease lumbar spine (operated) attributable to or did it have its onset during or did it arise out of the Veteran's military service?

EVIDENCE AND ARGUMENT

The Applicant was born in 1926 and served in the Active Force from 25 August 1943 to 1 April 1947. As well he served in the Regular Force from 2 April 1947 to 18 January 1976.

The Advocate on behalf of the Veteran, submits that the exigencies of service in addition to specific trauma throughout almost 32 and a half years in his occupation as a firefighter led to the development of the claimed condition of degenerative disc disease lumbar spine (operated). Therefore pension entitlement is warranted.

The Advocate outlined the heavy demands involved in training which required heavy lifting, pushing and bending over long periods of time including lifting heavy cylinders and equipment caused by accumulative and specific traumas to the lumbar region.

The Veteran was sworn in and testified that he first had a spontaneous unprovoked sharp pain in his back while walking in approximately 1945 while he was in Active Force. He related that he did not know the triggering cause of this sharp pain to his back at that time.

The Veteran further related to the Panel that he recalls specific trauma to his back while lifting heavy cylinders and other heavy items in his capacity as a firefighter and would feel intense back pain afterwards. He related to the Panel the specifics of the demanding rigours associated with his occupation over a long period of time. He testified that he received no trauma to his back outside of service nor any specific back trauma since his discharge in 1976.

There were no related complaints at the time of enrollment in the Active Force as evidenced by the Certificate of Medical Examination in 1943 nor any related complaints upon enrollment in Regular Force as evidenced by a Medical Examination conducted in 1946.

There is a complaint as evidenced in a Consultant's Report dated 19 July 1962 which states in part:

Low back pain - Chronic low back pain X 10 years with recent radiation down right leg.

. . . This man 2 weeks ago was moving - developed pain in his back and in thighs anteriorly. He has improved but not completely since onset. He has pain in back and is worse in the morning. . . .

There is a diagnosis of back strain at that time.

In an X-ray Requisition and Report dated 19 July 1962 by Dr. A. Haber it states in part:

Questionable degenerative change and minimal lipping is noted at the level L5-S1. The remaining disc spaces are well maintained and the vertebral bodies appear of average size and shape and they maintain a normal alignment. No injury or spondylolisthesis was seen the sacro-iliac joints appear within normal limits.

The Panel notes there are numerous entries following the 1962 entry with respect to back pain and a diagnosis of lumbar disc disease provided in 1964. A Case History sheet dated 20 January 1964 states in part:

This 37 yr old man had a history dating back 15 years, when pain came on spontaneously following walking, in the low back region. He has had five episodes since that time. . . .

In a Case History sheet dated 18 February 1964 it states in part:

This 38 year old RCAF sgt. has a long history of low back pain dating back to 1945. He has had several exacerbation of pain each of which subsided on conservative management. . . .

In an Operation Record dated February 1964 it states in part: "This 37 year old Airforce sergeant had a long history of low back pain dating back to 1945."

In a Case History sheet dated 19 October 1965 it states in part:

His duties are fire fighting and four weeks ago was lifting some hose when his left leg gave out on him and he collapsed, - since then has had pain down back left leg, into calf. Not into foot. The numbness on lateral aspect of foot has returned.

In a Consultant's Report dated 20 October 1965 it states in part:

This 39 year old RCAF Sgt. has had back pain since 1945. In February, 1964, Dr. Schatz explored his L5-S1 disc on the left side. . .

A Medical Questionnaire: Musculoskeletal Thoracolumbar Spine, Pelvic and Sacroiliac Joint Conditions completed by Dr. Lynn Glazier-Goldie on 25 May 2010, chiropractor, provides a diagnosis of chronic

L4-L5 and left sacroiliac joint syndrome secondary to post surgical in nature and suspected DDD/DJD at this level.

Dr. Joseph Hancirik, family physician in his completed Medical Questionnaire: Musculoskeletal Thoracolumbar Spine, Pelvic and Sacroiliac Joint Conditions dated 24 October 2010, provides a diagnosis of low back pain L4-L5 and left sacroiliac joint syndrome and notes that the condition is aggravated by lifting, stooping activities and makes reference to the Veteran injuring his back in 1963.

The Advocate concludes that the exigencies of the Veteran's labourious trade for well over three decades which included specific trauma, led to the claimed condition and is seeking pension entitlement pursuant to section 21(2) of the *Pension Act*, Regular Force service.

ANALYSIS/REASONS

The Panel has carefully read the full contents of the file and has taken into consideration the credible testimony of the Veteran and the presentation made by the Advocate.

The Panel grants full pension entitlement pursuant to subsection 21(1) of the *Pension Act*, Active Force service.

The Panel acknowledges that the Department categorized the Veteran's claim pursuant to subsection 21(2) of the *Pension Act*, Regular Force service. However, this Panel in its jurisdiction and in its discretion is modifying the application to include an application for pension entitlement for the condition of degenerative disc disease lumbar spine (operated) pursuant to subsection 21(1) of the *Pension Act*, Active Force service.

The Veteran testified that while in Active Force in 1945 he had a sudden unexplained onset of severe back pain. He testified that his back pain essentially remained with him since that time. The back pain occurred while he was in Active Force service and pursuant to the *Pension Act*, the 24/7 insurance principle applies. That is any disease or injuries which has its onset during service in Active Force is automatically covered for pension entitlement regardless of the cause of the disease and/or injuries.

The Veteran's credible testimony is corroborated by the independent objective contemporaneous evidence in the medical file. There are a few references to his back pain having its onset in 1945. The Panel is mandated by the provisions of the *Pension Act* to grant pension entitlement for his back condition as having its onset in 1945 while in Active Force and therefore subsection 21(1) is a more appropriate statutory provision on which to base pension entitlement.

Alternatively, the Panel notes the Veteran served for almost 33 years as a firefighter which required long hours of carrying heavy equipment, lifting, pulling, pushing and hauling hoses and lifting cylinders amongst other labourious and physically demanding tasks. There are specific incidences of trauma to the back as a result of lifting cylinders while he was at work.

The Panel however notes that it's not necessary to analyse the remaining factual and legal requirements for pension entitlement pursuant to Regular Force service as the onset of his back condition occurred during Active Force service.

DECISION

For these reasons, pension entitlement is warranted pursuant to subsection 21(1) of the *Pension Act*, Active Force service.

EFFECTIVE DATE OF RETROACTIVITY

The Applicant first applied for pension entitlement for the condition of degenerative disc disease lumbar spine (operated) on 27 July 2010. This Board will award retroactivity effective 27 July 2010 pursuant to subsection 39(1) of the *Pension Act*, which allows for retroactivity from the later of the day on which application is first made or a day three years prior to the day on which pension is awarded. As the application date for pension entitlement does not exceed three years from the date of this decision, there is no provision for an award under subsection 39(2) of the *Pension Act*.

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:

Pension Act, [R.S.C. 1970, c. P-7, s. 1; R.S.C. 1985, c. P-6, s. 1.]

- Section 2
- Subsection 21(1)
- Subsection 21(2)
- Section 39

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

Date Modified: 2012-03-08