

**2015-943**

Representative: Dawn M. Francis
 Decision No: 100002312943
 Decision Type: Entitlement Reconsideration Appeal
 Location of Hearing: Charlottetown, Prince Edward Island
 Date of Decision: 6 October 2015

The Entitlement Reconsideration Panel decides:**COMPASSIONATE AWARD**

Compassionate award is not indicated.

Section 34, *Veterans Review and Appeal Board Act*

Before:	Thomas W. Jarmyn	Presiding Member
	J.M. Walsh	Member
	Brent Taylor	Member

Reasons delivered by: _____
 Thomas W. Jarmyn

INTRODUCTION

This is an Application for Reconsideration of a decision of the Veterans Review and Appeal Board (VRAB) dated 3 December 2014 pursuant to subsection 34(7) of the *Veterans Review and Appeal Board Act*. That decision declined to consider the full merits of the Applicant's application, pursuant to subsection 34(1) of the *Veterans Review and Appeal Board Act*, for a compassionate award. The Application for Reconsideration is made upon the basis that the Panel made an error of law in its decision.

The Application for Reconsideration proceeds in two stages: 1) the Panel considers whether grounds for Reconsideration exist; and, if grounds for Reconsideration exist, 2) the Panel addresses the merits of the appeal and determines whether the decision in question should be confirmed, varied, or, reversed.

PRELIMINARY MATTERS

Pursuant to subsection 28(1) of the *Veterans Review and Appeal Board Act*, the Applicant has chosen to have his hearing held by written submission.

ARGUMENT

In arriving at this decision the Panel considered the Statement of Case (with particular attention to pgs 12-16), the written submissions of the Advocate, one exhibit, one attachment, a letter from Laura Kell to Dawn Francis dated 22 July 2015 (with enclosure), and, a letter from Dawn Francis to Laura Kell dated 24 August 2015 (with enclosures).

The Advocate submitted that the Panel's decision was in error because it found that the Applicant did not meet the criteria for the award because he had failed to exhaust all avenues of redress with respect to two claimed conditions. She submitted that all levels of review and appeal had been exhausted with respect to the condition of Cervical Disc Disease and therefore the Applicant was eligible to be considered for a compassionate award.

The Advocate argued that the facts of the case support the making of a compassionate award. She asked the Panel to rely upon the Applicant's financial statements (received by the Department in June 2014) in the Statement of Case (pg 20 SOC) in support of the application. She advised the Panel that the Applicant's physical condition made him unable to provide financial information requested by the Panel in the letter dated 22 July 2015.

The argument was made that, although the application with respect to Cervical Disc Disease was made under the *Pension Act*, that subsection 34(4) of the *Veterans Review and Appeal Board Act* gives the Panel the jurisdiction to make a lump sum award equal to the amount the Applicant would have received if he was found entitled under the *Canadian Forces Members and Veterans Re establishment and Compensation Act*. The submission was that the Applicant's age and immediate need for financial assistance justified this position.

The submission in support of the need for a compassionate award is based upon:

- The need for the purchase of a power scooter to provide the Applicant with greater mobility; and,
- The desire for a more reliable car to allow the Applicant to resume missionary work; and,
- The hope of saving money for future unexpected expenses.

The Advocate submits that the purpose of the compassionate award is to benevolently improve the situation of the Applicant. Further, that the Applicant's life history of service to the community, the military, and, his poor and deteriorating health justify the making of an award.

The assertion was made that to determine the extent of the award the Panel should rely upon the Medical Questionnaire dated 5 October 2007 and the Quality of Life Questionnaire dated 31 October 2007 (enclosed with the 24 August 2015 letter). The Advocate argued that the Applicant's neck condition prevented him from obtaining a more current assessment.

An award of \$30,669.82 was requested. This amount was calculated based upon assessing the rating of the impairment associated with the Applicant's neck condition at 9 and modifying that rating by a Quality of Life rating of Level 1. The total impairment rating suggested was 10.

The Reconsideration Stage 1 Should the Board Reconsider the Previous Decision?

The language in subsection 34(7) of the *Veterans Review and Appeal Board Act* dealing with reconsideration of compassionate awards is different from the language used in the general reconsideration of decisions provisions within Section 32 of this same Act. Subsection 34(7) says that an applicant may only seek reconsideration "if new evidence is presented to the Board". In this case no new evidence has been presented, and therefore, the request for reconsideration must be denied on these grounds.

In arriving at this conclusion the Panel acknowledges the submissions of the Advocate referring to email messages between a lawyer from the Bureau of Pension Advocates and the Board concerning compassionate awards. There was no information in these emails pertaining to the Applicant's facts or circumstances, and therefore, they do not constitute new evidence relevant to the Applicant's case.

However, subsection 34(7) also says that the Board may reconsider its decision on its own motion "if it determines that an error has been made with respect to any finding of fact or the interpretation of any law". In the present case the previous Appeal Panel determined that the Applicant must exhaust redress with respect to all possibly entitled conditions before it could determine whether the Applicant should receive a compassionate award. For the reasons noted in this section the Panel finds that this is an error of law; and therefore, it will reconsider the previous Panel's decision.

Eligibility to apply for a compassionate award arises from subsection 34(1) of the *Veterans Review and Appeal Board Act*.

A person who has been refused an award under . . . and who has exhausted all procedures for review and appeal under this Act may apply to the Board for a compassionate award.

The plain language supports the conclusion that there are three prerequisites to applying for a compassionate award. The Applicant:

1. Must have been refused an award or benefit;
2. The award or benefit must be one of the benefits listed in subsection 34(1 & 3); and,
3. All procedures for review and appeal with respect to the application for the particular award or benefit must have been exhausted.

This leads to the conclusion that the Applicant must only have been denied an application with respect to one condition or claim by the VRAB on Review and Appeal. This conclusion is further supported by the language of subsection 34(4) which limits the amount of the compassionate award to the amount that the Applicant would have been granted if his claim had been successful.

In the present case the Applicant applied for entitlement under the *Pension Act* with respect to the claimed condition of Cervical Disc Disease in relation to his Regular Force service. That application was denied by the Minister and that denial was affirmed by a predecessor board in 1984, (pg 106 SOC).

A second application was brought forward indicating that the condition was a consequence of an entitled right shoulder condition. That application was denied by the Department in a decision dated 10 May 2011. That decision was affirmed at Review and then again affirmed by a VRAB Appeal Board in a decision dated 4 September 2013.

This Panel, therefore, finds that the prerequisites for eligibility to make an application for a compassionate award have been met. This application under section 34 was based on the disability claim for cervical disc disease which the applicant was unqualified to receive under the statutory tests set out in the *Pension Act*. It was, therefore, an error of law for the previous Appeal Panel to have refused to consider the Applicant's application for a compassionate award.

The Reconsideration - Stage 2 - Merits of the Application

The Applicant argues that his service to the military and his community justify the exercise of benevolence and compassion and, therefore, an award is justified. Subsection 34(3) of the *Veterans Review and Appeal Board Act* says that "a panel may grant a compassionate award if it considers the case to be specially meritorious and the applicant is unqualified to receive" an award or benefit.

The Panel does not find it helpful to attempt to assess the quality of an applicant's service to Canada. The practice of evaluating the quality of an individual's military service to determine whether it merits compassion is a highly subjective exercise and does not recognize that everyone who signs up for the military or RCMP has incurred the same potential liability. The legislation makes no reference to the quality or meritorious nature of service, and therefore, such a consideration is not a statutory requirement. This Panel finds that the service of any individual who is honourably discharged or released from the Canadian Armed Forces or RCMP is sufficient to be considered for a compassionate award.

In arriving at this conclusion the Panel acknowledges the comments of the 1965 Woods Committee report:

Every case must be considered on its own merits, once reviewing all of the facts, that the circumstances of the case constitute a specially meritorious case. The economic or financial condition of the claimant is not sufficient grounds for entertaining an application for Compassionate Awards, and destitution without proof of circumstances of special merit is an insufficient basis for a compassionate pension.

The compassionate award is not intended to be a general assistance program or to replace other social programs or benefits that are generally available to Canadians. This is evident from the fact that a compassionate award is contingent upon denial of an award or legislative benefit that is restricted to veterans, and, giving authority to VRAB to determine entitlement and the extent of the award. These provisions support the conclusion that there must be some relationship of the need for the award and military service.

Subsection 34(4) limits the amount of the compassionate award to the amount that would have been awarded with respect to the claimed condition if its relationship to service had been established. This supports the conclusion that there must be a relationship between the claimed condition and the need which the award is intended to address.

Section 34 of the *Veterans Review and Appeal Board Act* and the Woods Committee Report lead to the conclusion that in order to establish entitlement to a compassionate award, the Applicant must show that:

- The Applicant requires assistance because he is in a state of need;
- His need for financial assistance arises from, or is related to, a medical condition that he has been unable to relate to service under the applicable statutory test for entitlement; and,
- There is an apparent relationship of the claimed medical condition to the Applicant's service.

It also supports the conclusion that there will be some relationship between the circumstances giving rise to the need for compassionate assistance and service in the CF or RCMP.

In determining whether a compassionate award is merited the Panel will consider the following:

- Is the Applicant in need?

- Is the need due to a medical condition or other circumstance which was the basis of the application for entitlement which was previously refused?
- Is there some plausible or circumstantial (but not legal) relationship between the claimed medical condition and the Applicant's service?
- Does income exceed expenses?
- What is the nature of identified expenses?
- What proportion of the expenses is associated with medications, treatments and assistive devices related to the claimed medical condition?
- To what degree is any income deficit or financial need associated with the expenses on the necessities of life, medications and other aids for the Applicant?

The argument before the Pension Commission and the Pension Review Board was that the claimed condition was caused during tumbling exercises in 1960 when the Applicant landed on his head while flipping over a box horse. The Applicant injured his right shoulder during this incident and received entitlement with respect to that injury. The Pension Review Board found that, while there were records of injury to the Applicant's shoulder, there was no evidence of record of injury to the cervical spine. It denied entitlement in relation to the condition of cervical disc disease.

The subsequent application to the Minister was based upon the argument that the claimed cervical condition was consequential to the entitled right shoulder condition. The VRAB Review Panel accepted the Applicant's evidence with respect to his belief regarding the relationship between his shoulder and neck conditions but noted that there was no medical evidence of this relationship (pg 56 SOC). When the matter was heard on Appeal the Panel again noted the lack of medical evidence supporting the consequential relationship while acknowledging the Applicant's belief in the relationship.

The Panel has some doubt about the existence of an apparent relationship of the claimed cervical disc condition to service. This doubt is made more substantial by the Applicant's pattern of not obtaining evidence or information that would allow the Board to properly and fully assess his claim. Twice Panels have remarked upon the lack of medical evidence but the Applicant has not provided necessary evidence. In preparation for this hearing the Applicant was requested to provide further financial information in support of his claim but did not. In determining the extent of his disability, the Board was asked to rely upon a questionnaire from 2007.

Compassionate awards are discretionary and applicants have an obligation to provide requested information in order to assist the Board in determining them. However, in extending the greatest benefit of the doubt to the Applicant, the Board finds that an apparent relationship has been established between service and the claimed condition.

When it comes to the question of need the Panel finds that the Applicant has not established that a compassionate award should be granted. The Applicant has submitted that an award of \$30,669.82 should be made. His request has been made because he wants to:

- Purchase a scooter so he has greater mobility,
- Purchase a more reliable car so he can resume missionary work, and,
- Save funds for future expenses.

The Applicant's financial statements show that he has a monthly surplus of \$255 (pg 22 SOC). This includes a monthly payment of \$289 for a car which has a market value of \$21,000 (pg 20 SOC). Other than market value (and the size of the associated loan) the Panel has no objective evidence with respect to the condition of this vehicle or its reliability. The Applicant has no exceptional medical expenses (related to his condition or otherwise) or unsatisfied financial obligations.

The Client Service Delivery Network (CSDN) Client Note dated 14 August 2014 regarding the scooter indicate that a scooter was not recommended for the Applicant because he should keep walking as much as possible, (pg 123 SOC). They also record that the Applicant had located a scooter for \$1,999.00. While the Panel is well aware of the Applicant's desire for a scooter it has not been provided with any medical evidence of need in relation to the acquisition of a scooter.

The Applicant is in a surplus financial position. The items that he identifies as forming the basis of his compassionate claim are best characterized as desires rather than needs. The amount being sought is out of all proportion to the costs identified by the Applicant and seems to be built upon the Applicant's desire to build a nest egg for future emergencies.

Typically, in a compassionate award case, the Panel would expect to see evidence of medical or financial need that exceeds the Applicant's ability to pay. It would look for expenses in relation to the Applicant's necessary medication, food, housing or treatment that are unsatisfied. Such facts are not present in this case.

Pension Act or Canadian Forces Members and Veterans Re-establishment and Compensation Act?

If the Panel had found that a compassionate award was justified any such award would have to be made under the *Pension Act*. Subsection 34(4) of the *Veterans Review and Appeal Board Act* says that the Panel may fix an amount but that the amount:

. . . may not exceed the amount to which the applicant would have been entitled if the applicant's claim under the *Pension Act* or the Canadian Forces Members and Veterans Re establishment and Compensation Act had been upheld. . . .

This section clearly establishes the Applicant's claim as the reference point for the determination of the amount of a compassionate award. Since the Application with respect to Cervical Disc Disease was made under the *Pension Act* (as it was in this case) then the compassionate award must be made under the *Pension Act* as well.

Cervical Disc Disease Rating

The Panel finds that if the Applicant were to establish entitlement then the October 2007 questionnaire enclosed with the Advocate's letter of 24 August 2015 supports assessing the cervical disc condition at 10% under Table 17.17. This is based upon a loss of up to one-half of the range of motion and a Quality of Life Rating of 1.

DECISION

The Panel rules that the Applicant has not established entitlement to a compassionate award under section 34 of the *Veterans Review and Appeal Board Act*.

Application denied.

Applicable Statutes

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 31

Section 34
Section 39

Exhibits:

- R1-D1: Email correspondence between Anthony Sweet and François Comeault (three pages)
- R1-D2: Letter from Laura Kell to Dawn Francis dated 22 July 2015, with attachments (eight pages)
- R1-D3: Letter from Dawn Francis to Laura Kell dated 24 August 2015, with attachments (12 pages)

Attachments:

- R1-Attach-D1: Compassionate award decision for another applicant dated 28 September 2004 (six pages).

Date Modified: 2016-02-15