2002-170

Representative: Charles J. Keliher, BPA
Decision No: 100000095170
Decision Type: Entitlement Appeal - **RETROACTIVITY**
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 16 January 2002

As a result of the Appellant's Entitlement Appeal hearing held 16 January 2002, this Board rules as follows:

RULING

INTERNAL DERANGEMENT RIGHT KNEE
(RETROACTIVITY)

Claimed disability arose out of or was directly connected with service peace time in the Regular Force.
Subsection 21(2), *Pension Act*

Entitlement effective 19 August 1997 (the day on which application was first made).
Subsection 39(1), *Pension Act*

Change in effective date only.

Pursuant to subsection 29(1)(a) of the *Veterans Review and Appeal Board Act*, this decision varies the Review Panel's Decision of 19 January 2001.

Original signed by:
_____Presiding Member
Victor Marchand

Original signed by:
_____Member
M.M. Habington

Original signed by:
_____Member
C.L. DePontbriand

ISSUES

An Entitlement Appeal hearing was held in Charlottetown, Prince Edward Island, on 16 January 2002, as the Appellant was dissatisfied with an Entitlement Review decision of 19 January 2001. Mr. Charles Keliher, Bureau of Pensions Advocates, was the representative.

EVIDENCE

The Advocate submitted the following exhibits as evidence:

EA-Ex-R1: A letter from the Appellant dated 30 July 2001; and

EA-Ex-R2: A letter from A/Director Benefits and Services Administration, Veterans Affairs Canada, dated 28 August 2001.

Internal Derangement Right Knee (Retroactivity)

FACTS AND ARGUMENT

The Advocate claimed, on the Appellant's behalf, that the award for disability pension for his condition of Internal Derangement Right Knee should have been made effective 19 August 1997, the date he first contacted the Department to make application.

REASONS AND CONCLUSION

In arriving at this decision, this Board has carefully reviewed all the evidence, medical records and the submissions presented by the Representative, and has complied fully with the statutory obligation to resolve any doubt in the weighing of evidence in favour of the Applicant or Appellant as contained in sections 3 and 39 of the *Veterans Review and Appeal Board Act*.

This appeal concerns the effective date of the Appellant's pension for Internal Derangement Right Knee. In the Minister's decision dated 30 May 2000, the Minister had found that the effective date for payment of the pension for Internal Derangement Right Knee, should be 28 April 2000, based upon the date that the Appellant filed a completed application with the Department of Veterans Affairs. In a decision of 19 January 2001, a Review Panel of the Board affirmed the Minister's decision, based upon the Minister's powers under Section 3 of the *Award Regulations*. However, the Appellant argues that payment of his pension should have been made effective to the date on which he first approached the Department of Veterans Affairs to commence a pension application for that condition, which was19 August 1997.

Section 39 of the *Pension Act* which deals with the effective date for payment of awards made under the *Act*, clearly states that the date from which a disability pension shall be made payable is the later of either the date on which application for the pension was first made or a day three years prior to the date on which the pension was awarded. On behalf of the Appellant, the Advocate argued that under section 39, the proper effective date for the Appellant's award was 19 August 1997, as opposed to 28 April 2000.

In this case there were two "Applications for Disability Pension" (PEN-923) forms filled out in respect of the claim. The first form which was prepared in respect of the Appellant's claim for Internal Derangement Right Knee, indicates the date of the application to be 19 August 1997, although the application form itself was not signed by the Appellant until 15 September 1997. However, due to the fact that there was relevant medical information which was requested but never provided to the Department in relation to the initial (1997) application process, the Minister did not issue a decision in relation to that application process. Almost three years elapsed before the Appellant contacted the Department in April 2000 with the required medical information. At that time, another PEN-923 was completed and signed by the Appellant, dated 28 April 2000.

The issue before the Panel in this case therefore, is whether the application process which was commenced by the Appellant in 1997 but which was not completed at that time, could be considered to be a first application for a disability pension for Internal Derangement Right Knee. In its decision of 19 January 2001, the Review Panel confirmed that under section 3 of the *Award Regulations*, the Minister had a power to consider an application to be "withdrawn" where an applicant had not complied with the Minister's request for further information to support the application. The Panel reviewed the facts of this case and found that this was a reasonable case in which to make such a determination as the Appellant had been notified by his Pension Officer that he was required to have an additional Departmental Form, the Physician's Statement, PEN-819, completed and returned to the Department before his application would be submitted. The Review Panel found that as the Appellant made no apparent effort to comply with the Minister's direction to provide additional information, that the Minister was left with no alternative but to withdraw the matter from its system as it was not an active application. Based upon this, it appears that the Review Panel concluded that the 28 April 2000 application would be the "first" application, and the Panel affirmed the Minister's decision.

The main issue considered before the Review Panel in its decision of 19 January 2001 was the exercise of the Minister's discretionary powers in respect of the application process and specifically whether the Minister's decision was reasonable. The Review Panel's decision relied on the fact that the Minister possesses discretion to ask for additional documentation and to determine when an application was completed in accordance with section 3 of the *Award Regulations*. However, there is also another issue which was not specifically or directly addressed by the Review Panel in its decision. This is the Department's practice of "withdrawing" an application from the computer tracking system.

It appears to this Panel that there are actually two separate but inter-related issues here:

1. The first is whether the Minister has power and discretion to determine whether the application process has been completed or perfected, in a manner acceptable to the Minister;

2. The second is whether the Minister's practice of treating an application as "withdrawn" is reasonable and in accordance with the relevant provisions of the legislation and the Department's own Policies.

On the issue of the Minister`s powers in respect of the application process, this Panel notes that under sections 5, 87 and 91 of the *Pension Act* and section 3 of the *Award Regulations*, it is within the Minister's powers to determine what the application process should be for a pension application, and this would include whether an application process has been completed in the manner determined to be appropriate by the Minister, and in such form as prescribed under the legislation. Paragraph 91(a) of the *Act* states that the manner of making an application, the evidence and information to be furnished, and the procedure to be followed in dealing with applications may be prescribed by regulation. Section 3 of the *Award Regulations* was made pursuant to this statutory power, and it clearly indicates that the Minister possesses a power to require that certain documents be provided by an Applicant in support of their application. Under section 3 of the *Award Regulations* it states:

> An applicant for an award shall provide the Minister with
>
> (a) any documentation which is necessary to substantiate the applicant's claim;
>
> (b) information on the applicant's domestic status;
>
> (c) any other relevant information; and
>
> (d) an affidavit or statutory declaration attesting to the truth of the information provided.

This is a mandatory provision which places an onus on the applicant to do whatever is required by the Minister under section 3 of the *Award Regulations* in terms of substantiating their claim. The Minister also has the legal power to enforce this requirement. Under the legislation, the Minister has a discretionary power to determine whether or not an application is complete, sufficient and valid, and a power to reject any application which is not duly made, in compliance with the Minister`s directions. Furthermore, the fact that section 3 of the *Award Regulations* requires an applicant to provide the Minister with any documentation necessary to substantiate the applicant's claim, would indicate that if the Minister were to ask that an applicant provide additional evidence to substantiate a claim, and the applicant did not, the Minister possesses a right to find that an application was not duly made. The term "duly made" means that the full application process has been completed by an applicant in the manner prescribed or determined by the Minister, and that the Minister does not require any additional information or documentation, to substantiate it.

It is clear that under the legislation, the Minister is not required to treat any form of contact by an Applicant with the Department as an "application" or as the application date. However, Article 39 of the Department`s Pension Policy Manual would allow an initial contact which is made by phone or in writing to the Minister's staff to be considered the date on which an application was commenced. The Policy seems to view the "contact" as synonymous with the application process which must follow. The Board notes that while this policy may be reasonable in some cases, this would be so only where the applicant demonstrates an *bona fide* intention to commence an application, and complies with any direction or request from the Minister's staff to substantiate the application, within a reasonable time-frame after the first contact is made.

Article 81(1) of the Departmental Pension Policy Manual indicates that “telephone applications may be received directly from applicants or their representative provided they are followed by the completion of a signed, written application. The date of the telephone call will then constitute the date of application.” This Panel notes that there are no time-frames indicated under either of these policies to prevent large lapses of time between the date of the telephone contact, and the date on which a signed and written application is eventually completed by the applicant. These policies must also be read in conjunction with Article 81(2) of the Pension Policy Manual in order to understand the policy as it applies to the situation which arises where an applicant makes an initial contact by telephone and subsequently follows this up with a signed and written application, but then fails to complete the application process in accordance with the Minister’s request for substantiation of the claim by documentation under section 3 of *Award Regulations*. Article 81(2) of the Department of Veteran’s Affairs Pension Policy Manual provides that where an applicant has been asked to provide substantiation for the claim but has failed to provide the required documentation, the applicant is to be advised by registered mail that if the required documentation is not provided within 60 days or and there is no reasonable explanation for the delay, "the claim is to be submitted for adjudication as is".

The Panel notes that the policies do not seem to provide for a situation where the applicant has failed to comply with the application process as it is prescribed in the *Award Regulations*: in other words; where there is simply no duly made application. Regardless, it is clear that under the *Pension Act*, and the *Award Regulations*, it is not for the applicant to determine the manner in which they will make their application or whether it will be necessary to substantiate an application with additional information, or whether this will be done within a reasonable period of time. It is the Minister who possesses the power to decide whether a claim requires additional documents or information to substantiate the claim, and this would include by implication the power to reject any application process which is not in compliance with the Minister’s instructions. It must be kept in mind that the legislation is paramount to the policies and the Department’s Policies must be read and interpreted in light of the Minister’s power to determine whether an application has been duly made.

Accordingly, the Panel finds that a first contact may be sufficient to indicate that the applicant is interested in applying for a pension, but an indication of interest in applying for a pension would not, in and of itself constitute the application. Nor can a mere query which is not supported by any subsequent evidence of a serious intention to pursue an application, by itself be reasonably considered “an application”, or to be the date of application, especially where there was no compliance with a request for substantiation of a claim under section 3 of the *Award Regulations*. For example, in a case where there was an initial contact which resulted in an application being commenced which was later abandoned, it would not be reasonable to take the first contact leading up to the abandoned application as an application date under section 39 of the Act.

Nor does the legislation indicate that each and every time an “Application for Disability Pension” Form (PEN-923) is signed, this necessarily constitutes a completed and duly made application. There is more to the process of making an application, than merely contacting the Department or even filling out a form. In many cases, medical documentation will be necessary to provide the basic information necessary to substantiate a claim and it is well within the Minister’s powers to require such documentation be provided before the application is considered to be a complete and duly made application. Given this, it is foreseeable that there will be cases where a “first contact” never amounts to an actual duly made application for a pension. While section 39 of the *Pension Act* requires that an effective date for payment of an award be based on the date an application was first made, by necessary implication this could only occur where the contact initiated an application process which was properly followed through by the applicant and resulted in a completed and “duly made” application for the award in question. The applicant must respect the requirements established by the Minister for making an application, in order to rely on the date of first contact under Article 39 of the Pension Policy Manual.

On the other hand, there is also a statutory obligation on the Minister to counsel, advise, and to assist applicants in the preparation of their application under subsection 81(3). This would require that the Minister’s staff ensure that when the applicant contacts the Department for purposes of making an application, that the applicant is made fully aware of what will be required of them by the Minister in pursuing a claim for a pension. The issue of the documentation and information which is necessary to properly substantiate an application under section 3 of the *Award Regulations* and the time-frame within which the required information is to be provided to the Department following the “first contact” by an Applicant, should be addressed by the Minister’s staff when they are counselling an Applicant or prospective Appellant. This advice should be provided in writing either on the date of first contact or shortly thereafter.

Where the pension officer or other member of the Minister`s staff who is assisting an applicant in the preparation of their application notices that basic information is missing or realizes that additional information must be obtained from the applicant, before an application may be duly made, the Minister`s staff would then be under an obligation to identify this to the applicant and advise the applicant to obtain the necessary information. They should also advise that the information is being requested under the Minister's statutory authority under section 3 of the *Award Regulations* on the basis that it is necessary to properly substantiate the application. The applicant should also be notified that failure to obtain the required information or additional documentation within an identified time-frame will be taken as evidence that it is not the intention of the Applicant to complete the application process, and based upon this, the Minister will consider the application to be abandoned, and that in such a case, it will not be adjudicated.

In a case where the Minister's staff have clearly advised an applicant that additional documents or information is required to substantiate the claim, and this is not followed by any subsequent demonstration of intent by the applicant to comply with the request, or to complete or perfect their application within a reasonable period of time, then the Minister has the power to consider the application abandoned and the matter closed. The Minister would not proceed to adjudicate the claim because an application has not been duly made. However, where this occurs, the Minister must clearly communicate this to the applicant. This is particularly important given the way in which the current policies read, and are applied, as they would be capable of creating an expectation in an applicant that any form of contact which is followed by a written and signed application, will always constitute an "application." However, as noted by this panel, under the sections of the legislation which deal with the Minister's right to determine whether an application has been duly completed or not, this will not always be the case. It is therefore necessary for the Minister's staff to clearly notify an applicant that the consequences of non-compliance with the direction of the Minister to provide documents, or other information required under section 3 of the *Award Regulations* will be that the application is abandoned, and void.

It is also important to understand that a situation where an applicant has not made a valid application - by failing to substantiate their claim where required to do so by the Minister under section 3 of the *Award Regulations* - is distinct from the issue which arises once an application is accepted by the Minister as duly made. Where the applicant has failed to file an application in the form and manner prescribed by the Minister under section 3 of the *Award Regulations*, there is no duly made application, and therefore no application to adjudicate. However, once the application is accepted by the Minister as being duly made, then the Minister has a duty to consider the application without delay and issue a decision on the matter, under subsection 81 (2) of the *Pension Act*. In such a case, there would appear to be no power on the part of departmental staff, to withdraw an application from the computer tracking system, without a request from the applicant to do so.

With respect to this second issue, the Board finds that the Department's practice of "withdrawing" any duly made application from the tracking system is inconsistent with section 81 of the *Pension Act*, and it also appears to be in violation of its Policy under Article 21(1) of the Departmental Pension Policy Manual, in Section 4, which refers to the "Requirement To Adjudicate on Applications." This section directs that once an application is "duly made" to the Minister, it must be adjudicated forthwith regardless of whether there is evidence of a disability or not. The section indicates that:

> If the medical evidence provided with the claim does not support the existence of a disability, and the applicant is unable or unwilling to provide such evidence, then, unless the applicant chooses to withdraw the claim, the department must proceed with the adjudication.

This policy is based on the interpretation decision rendered by the Pension Review Board on 22 April 1976 in a decision referred to as "*I-17*." In *I-17*, the interpretation panel found that where an application for an award was made to the first level decision-maker in a manner which was in accordance with the applicable sections of the *Pension Act* - at that time - then the first level decision-maker was bound to consider the application, and could not dismiss it or in other words, put it "on hold." The Panel notes that this interpretation decision would apply to all applications made under the former section 12 - now section 21 - of the *Act*, and not just those made under subsection 21(1).

In light of this, the Panel finds that the current departmental practice of registering a withdrawal of a duly made application from its computer tracking system, would be in violation of the legislation and Departmental policy because it does not comply with the requirement that an application be adjudicated without delay under subsection 81(2) of the *Act*. The Board agrees with the submissions of the Advocate that

a “withdrawal” should have no impact upon the effective date of the application pursuant to section 39 of the *Pension Act*, but the Panel would add that this would only be the case where there has been a duly made application and it is withdrawn without the applicant`s consent.

In addition to being inconsistent with the requirements of the legislation, the practice of withdrawing an application from the computerized tracking system also creates confusion around whether there was a valid or duly made application or not. This is illustrated by the facts of the Appellant’s case, which indicates that the issue as to whether the first attempt made by the Appellant in 1997 to start the application process was sufficient to constitute a duly made application, was not specifically addressed. The facts on file indicate that the Appellant had completed the required Application for Disability Pension Form (PEN-923) which was dated and signed, with his complaint and a specific injury in military service identified as the cause of the disability. The 1997 application was subsequently found to be deficient by the Minister’s staff, in that there was no diagnosis. Accordingly, after the initial contacts were made to commence the pension application, and after the pension officer had an opportunity to review the service documents, the Appellant was subsequently contacted by a pension officer by way of letter dated 1 October 1997. In the letter, the pension officer indicated that she had performed a review of the Appellant’s medical records and noted evidence in the records of a duty-related injury to the right knee. The pension officer then went on to state:

> “However, before I can submit an application on your behalf, a **firm diagnosis must be established**.
>
> Therefore, please take the **Physician’s Statement** to your family doctor for completion and return.
>
> I look forward to receiving this information within the next 30 days. ...”

The record before this Appeal Panel indicates that no response was received from the appellant to the pension officer’s request of 1 October 1997 within the required 30-day time-frame. Based upon this evidence, the Review Panel found that as the Appellant had not provided the information necessary to support his claim, that the Minister was within his rights to find that the application made in 1997 was unsubstantiated, and was not duly made and therefore did not constitute the first application date under s. 39. The Panel in this case is in agreement with the review panel’s observation that the Appellant did not comply with the requirement that he provide the required information within the allotted time-frame.

In submissions made to this panel, the Appellant’s Advocate submitted that the review panel’s finding that the Appellant was unwilling to provide the necessary information was based on a misunderstanding, which could be remedied by the statements of the Appellant in his letter dated 30 July 2001 to the Advocate, which described his efforts to obtain the medical information which was requested by the Department in 1997. The Panel has reviewed this new evidence in the Appellant’s statement and notes that there did appear to be some legitimate difficulties encountered by him in obtaining a physician, and a referral to a specialist. However, the panel finds that the length of the delay between the date upon which the Appellant was requested to provide additional information on 1 October 1997, and the date on which he finally provided the information to the department, is not entirely explained. His statement leaves some question as to the degree of diligence applied by the Appellant in completing his application.

However, this Panel does not agree that in this particular case, that the Minister’s staff dealt with the 1997 application in a reasonable or proper manner, or as required under the legislation and applicable policies on applications which require that there be a mandatory ruling rendered on any application submitted to the Minister. First, it appears from a review of all the documents placed before this Panel, that the Minister’s officials never addressed their mind to the key question of whether there was a sufficiently completed application made upon the information contained the signed and dated PEN-923 form, to constitute a duly made application. In other words, it is not clear from the evidence before this Board, whether the Department in this case initially considered the Appellant’s dated and signed Application for Disability Pension Form (PEN-923) to be a complete and duly made application, even without the Physician’s Statement, or whether the Minister’s staff had decided that there was no duly made application under section 3 of the *Award Regulations*, and based upon this did not proceed to adjudicate the claim.

Although there is some evidence in this case which could support a finding that the 1997 application did not constitute a duly made application, it does not appear that the Minister`s staff actually reached this conclusion. Thus it is not entirely clear whether -in the opinion of the Minister’s staff - an application was ever duly or properly made for the disability in 1997, or whether the Minister accepted it as a duly-made

application, but found that the medical evidence provided was insufficient to fully support entitlement to the award, and so the application was effectively put on hold. The Panel notes that a review of the evidence suggests that latter seems to be the case, which means that the Department violated its legislation and its own policies by not proceeding to adjudicate, and by not seeking the consent of the Appellant before withdrawing the claim.

This is supported by statements made by a Departmental representative - in response to a question from the Advocate on the application of the Department's policies on effective dates - which was contained in correspondence tendered by the Advocate before this Panel at the appeal hearing (EA-Exhibit- R1). The correspondence, which is undated but was clearly provided after the Department, and a review panel of the Board had already ruled on the case, "confirms" the Departmental position that where an application was made, a withdrawal of the application from the tracking system should not affect the "effective date." The representative stated in the correspondence that in her opinion, the date of application in the present case should be 19 August 1997. The Departmental representative went on to explain the rationale for withdrawing claims from the system as follows:

> When such claims are "withdrawn," they are done so for tracking purposes so they are no longer reflected in turn-around-times or as work in progress. When the requested information is provided, the Department re-activates the claim on the system and the original date of application applies when determining an effective date for favourable entitlement. An exception to this would be if the client formally requests to have the claim withdrawn, however, there is no evidence to indicate this is a factor in the Appellant's case.
>
> The Department, in its decision dated 30 May 2000, should have awarded entitlement effective the date of application, **19 August 1997**, rather than the date on which the documentation was provided and the claim was "re-activated" on the system, 28 April 2000.

While this correspondence did not directly address whether the 1997 application was "duly made", it also indicates that there was simply no question in the minds of the Minister's staff that a valid and duly made application was in fact filed by the Appellant in 1997. The correspondence strongly suggests that the practice regarding withdrawals is motivated chiefly by statistical concerns, and meeting Departmental standards for turn-around times, rather than with the substance of the application process, or the proper completion of the application process. It is clear from the facts of this case that this misplaced emphasis on turn-around times has resulted in a failure on the part of the Department to direct itself to the correct issue, and to properly process applications and determine effective dates in accordance with the legislation. This correspondence, along with the other documents on file from the Department, serves to confirm to the Panel that the Department did not properly handle this particular matter, and that the current Departmental practice is not in compliance with the *Award Regulations* or even with current departmental policies.

If the Panel were to accept the opinion of the Departmental representative as expressed in the correspondence that there was a duly made application in 1997, this would means that the Minister`s staff erred in failing to adjudicate on the application without delay, as required by section 81 of the *Pension Act* and Article 81(1) of Pension Policy Manual. The Department's actions also did not comply with Article 81(2) of the Department of Veteran's Affairs Pension Policy Manual which would clearly be applicable to the Appellant's case, as this is the policy which deals with an applicant's failure to substantiate a claim. Article 81 (2) states that where an applicant has failed to provide documentation to substantiate a claim that the applicant is to be advised by registered mail that if the required documentation is not provided within 60 days, and there is no reasonable explanation for the delay, then "...the claim is to be submitted for adjudication as is." This was clearly not done in the Appellant's case.

The Department's handling of the application would also be in violation of Article 39 of the Department`s Policy Manual because Article 39 requires that the date on which a veteran initiates an application with any representative of the Department by telephone, will be considered the effective date for the application. However, this is not what occurred in the Appellant`s case, when the Department refused to acknowledge 19 August 1997 as the date of his application although it was his first contact in respect of the 1997 application process. As well, the Departmental Policy Manual at Article 21(1), Section 4, part B.2, indicates that where there is a duly made application, the Department must proceed to adjudicate the application even where it is of the opinion that medical evidence does not support the existence of a disability unless the Applicant chooses to withdraw the claim.

If, on the other hand, the Minister's staff who processed the application were not of the view that the Appellant had filed a duly made application, given that he did not comply with the requirement that he provide a completed Physician`s Statement, then the Panel must note that this matter was not properly dealt with either, as the Minister's staff did not notify or communicate to the Appellant that without the necessary information, his claim for a pension would not be adjudicated because he had failed to make application in a manner directed by the Minister, under section 3 of the *Award Regulations*. Here, the evidence indicates that the Department informed the Appellant by a letter that certain medical evidence was required, but the letter failed to indicate that his failure to obtain the medical evidence could negatively impact his pursuit of a pension. The letter suggests that his claim would not be proceeding to adjudication at that time, but did not indicate that this would change the date of payment for any eventual award, or indicate that the application itself would be treated as abandoned or void in the event of a failure to respond. While the letter stated the information requested would be necessary before an application could be submitted, there was absolutely no indication that his failure to respond would result in a "withdrawal" of the "application."

As this panel noted previously in this decision, the Department Pension Policy Manual is potentially misleading, in that it could leave the impression that any form of initial contact, especially contact which is later followed by a signed and dated application form in writing, would be sufficient to establish an effective date for an application. Thus, it is necessary in a case where the Minister's staff determines that the application process has not yet been completed, that an applicant be clearly advised that their application will not be accepted as valid or duly made by the Minister unless the applicant complies with the requirements of section 3 of the *Award Regulations*. However, it is clear from a review of the content of the communications between the Department to the Appellant in this case, that the Appellant was not so advised. Given this, in all likelihood, the Appellant would be under the impression that he had commenced a valid application for a disability pension for his right knee, and although the application would not be adjudicated immediately, the date of application would be based upon the date on which he initially contacted the Department on 19 August 1997.

Therefore, while the Panel must note that the facts of this case leave some question as to the degree of diligence and timely compliance which was demonstrated by the Appellant, the Panel also notes that the Department's own actions suggest that the Department had viewed the 1997 application as one which was valid or duly made, but missing an element of information which could have resulted in a favourable outcome. The description given to the 28 April 2000 application as "re-activated" lends support to this inference, as it suggests that the Department considered the 2000 application as a continuation of an earlier process.

The Panel has also reviewed the substance of the 1997 PEN-923 in order to determine whether the evidence supports the conclusion that this form, as it was filled out in 1997, could have been considered a duly made application. Normally this is a matter within the Minister's discretion and the Panel would not tend to interfere with such a determination. However, in this case, as the Minister's staff did not properly addressed their mind to the issue, it appears that this should now be canvassed. On this issue, the Panel notes that the PEN-923 which the Appellant signed and dated as of 15 September 1997, shows that the Appellant had identified the military service, place and the circumstances in which he had sustained an injury leading to the disability for which he sought a pension. The condition for which the Appellant was seeking pension, was accurately and specifically described. As well, the Panel notes that the facts indicated by the Appellant in his 1997 application form, did not vary from the facts indicated in his 2000 application form upon which his claim was later accepted. There appears to be sufficient evidence and information indicated on the 1997 application form, which would weigh in favour of drawing the inference in this case that the 1997 application was duly made.

Taking this into account, as well as the fact that the Department appears to have treated the1997 application form as a duly made application, the Panel concludes that the PEN-923 application form which was signed and dated in 1997 could be considered to be the first duly made application for the condition of Internal Derangement Right Knee. Given that the evidence on file indicates the Minister`s staff did not exercise its discretion in a manner consistent with the provisions of the *Pension Act*, and its own policies, it would not appear fair in the circumstances of this case, to find that the Appellant should be prejudiced by taking the later application as the proper effective date. Therefore, this Panel finds that the date of initial contact for the 1997 application as the effective date of the Appellant`s pension for Internal Derangement Right Knee, under ss 39(1) of the *Pension Act*.

After reviewing the evidence on file and taking into consideration the new evidence, the Board rules to award retroactivity based on 39(1) of the *Pension Act*, effective 19 August 1997, the day on which application was first made.

RELEVANT LEGISLATION

Paragraph 21(2)(a) of the *Pension Act* states that in respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time, where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member.

Subsection 39(1) of the *Pension Act* states that a pension awarded for disability shall be made payable from the later of

(a) The day on which application therefore was first made, and

(b) a day three years prior to the day on which the pension was awarded to the pensioner.

Subsection 29(1) of the *Veterans Review and Appeal Board Act* states that an appeal panel may

(a) affirm, vary or reverse the decision being appealed;

(b) refer any matter back to the person or review panel that made the decision being appealed for reconsideration, re-hearing or further investigation; or

(c) refer any matter not dealt with in the decision back to that person or review panel for a decision.

Section 25 of the *Veterans Review and Appeal Board Act* states that an applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.

Section 26 of the *Veterans Review and Appeal Board Act* states that the Board has full and exclusive jurisdiction to hear, determine and deal with all appeals that may be made to the Board under section 25 or under the *War Veterans Allowance Act* or any other Act of Parliament, and all matters related to those appeals.

Section 3 of the *Veterans Review and Appeal Board Act* states that the provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and the Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

Section 39 of the *Veterans Review and Appeal Board Act* states that in all proceedings under this act, the Board shall 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; accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and 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.

DECISION BEING APPEALED

INTERNAL DERANGEMENT RIGHT KNEE (RETROACTIVITY)

Claimed disability arose out of or was directly connected with service in peace time in the Regular Force. Subsection 21(2), *Pension Act*

No change in effective date.
Subsection 39(1), *Pension Act*
VRAB Entitlement Review, 19 January 2001

The Appellant first applied for pension entitlement for this condition on 19 August 1997.

Date Modified: 2012-02-07