

**2015-692**

Representative: Steven Woodman, Bureau of Pensions Advocates
 Decision No: 100002386692
 Decision Type: Entitlement Appeal
 Location of Hearing: Charlottetown, Prince Edward Island
 Date of Decision: 22 May 2015

The Entitlement Appeal Panel decides:**EXCEPTIONAL INCAPACITY ALLOWANCE**

Award for Exceptional Incapacity Allowance is indicated at Grade 2, with effect from 1 March 2011.

Change in effective date only.
 Section 72, *Pension Act*

Before:	Thomas W. Jarmyn	Presiding Member
	Roger B. Langille	Member
	J.S. Martel	Member

Reasons delivered by:

Thomas W. Jarmyn

This is an Appeal Hearing pursuant to a Federal Court Consent Order dated 27 February 2015, which directed the Veterans Review and Appeal Board (VRAB) redetermine the Appellant's application to vary the effective date of his Grade 2 Exceptional Incapacity Allowance (EIA).

The Consent Order directed the following:

- The 2006 Table of Disabilities is to be applied;
- The effective date is to be established based upon the earliest date on which the Applicant establishes he was:
 - in receipt of a pension in the amount set out in Class 1 of Schedule I; and,
 - suffering an exceptional incapacity which is a consequence of, or caused in whole or in part by, the disability for which he was receiving a pension or disability award under the Pension Act; and
- The date of application for the EIA is not a relevant fact.

The Entitlement Review Panel decision dated 5 July 2013, with effect from the date of application (29 October 2012), awarded the Appellant an EIA at Grade 2. The Appellant argued he suffered an exceptional incapacity as of 17 February 2009, and his EIA should be effective from this date. The Appeal Panel finds the Appellant was in receipt of a pension in the amount set out in Class 1 of Schedule I as of 25 March 2010. The Appeal Panel further finds, taking into account all of the evidence in the file and extending the benefit of the doubt, the Appellant suffered an exceptional incapacity as of 1 March 2011. The 1 March 2011 date is based upon evidence in the file, which shows the Appellant began to suffer significant symptoms in relation to his kidney cancer in March of 2011.

The Panel therefore awards a Grade 2 EIA, with effect from 1 March 2011.

EVIDENCE AND ARGUMENT

In deciding this application, the Panel has considered the Statement of Case (SoC), the written and oral arguments of the Advocate, three new exhibits, and one new attachment. The argument in support of the application for further retroactivity will only be summarized here.

The Advocate submitted the Review Panel had placed unjustified reliance upon the date of application as the basis for determining the effective date of the EIA. They did this because they incorrectly relied upon the 1995 Edition of the Veterans Affairs Canada Table of Disabilities, instead of the 2006 Edition.

The Advocate also highlighted the evidence in the file and the Appellant's affidavits with respect to his various medical conditions (a heart attack; a diagnosis of coronary heart disease; diabetes; lumbar disc disease; cervical disc disease; hearing loss/tinnitus). He submitted the entirety of these conditions supports the conclusion the Appellant's condition merited a Grade 2 EIA with an effective date of 17 February 2009.

ANALYSIS/REASONS

The Panel has reviewed all of the evidence, and has also taken into consideration the Advocate's submissions. In doing so, the Panel has applied the requirements of section 39 of the *Veterans Review and Appeal Board Act*. This section requires the Panel to:

- 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.

This means that in weighing the evidence before it, the Panel will look at it in the best light possible, and resolve doubt so it benefits the Appellant. The Federal Court has confirmed, though, this law does not relieve appellants of the burden of proving the facts needed in their cases to link the claimed condition to service. The Panel does not have to accept all evidence presented by an appellant if it finds it is not credible, even if it is not contradicted.

Section 72 of the *Pension Act* governs the awarding of Exceptional Incapacity Allowances. This section says a pension shall be awarded if the veteran is:

1. In receipt of a pension in the amount set out in Class 1 of Schedule 1 (greater than 98%); and,
2. Suffers an exceptional incapacity that is a consequence of or caused in whole or in part by the disability for which the member is receiving a pension or disability award.

The Panel has to determine whether the Applicant suffers from an exceptional incapacity, and when did such an incapacity begin.

Application of the Table of Disabilities

Reference was made in the previous decisions to the 1995 and 2006 editions of the Table of Disabilities. The Panel finds the 1995 Table of Disabilities has no application to this case.

The Table of Disabilities is a regulatory instrument which was promulgated pursuant to subsection 35(2) of the Act for the purposes of assessing the extent of a disability. The instructions contained in the 2006 Table clearly limit the application of the 1995 Table to decisions rendered with respect to cases arising before 1 April 2006. This case arose in 2009, at the earliest, and therefore the 1995 Table does not apply.

The Panel finds the 2006 Table of Disabilities is not relevant to the issue of determining entitlement to an EIA. The Table is produced for the sole purpose of assessing the extent of a disability. It is not established for the purposes of determining entitlement. If the Panel were to rely upon the Table for the purposes of determining entitlement, then it would be improperly fettering its discretion.

The 2006 Table of Disabilities sets out factors which should be considered when determining the grades of incapacity. Once it has been determined an individual suffers from an exceptional incapacity, the Table of Disabilities (1995 or 2006 as appropriate) is appropriately used to assess the grade of the incapacity.

Receipt of a pension greater than 98%

The first element requires the Panel to determine whether the Appellant has been assessed at a level greater than 98%, and the date at which he received a pension reflecting such an award.

In a Reassessment Decision dated 24 May 2007, the Minister awarded assessments, effective 25 July 2006, of 6% for tinnitus; of 16% for cervical disc disease; and of 16% for lumbar disc disease (16%).

The total paid assessment amount on 24 May 2007 was 43%.

This decision was appealed to an Assessment Review Panel which, on 17 January 2008, increased the lumbar disc disease assessment to 21%.

The total paid assessment amount on 17 January 2008 was 48%.

This decision was appealed to an Assessment Appeal Panel which, on 6 January 2009, increased the cervical disc disease assessment to 21%, and the lumbar disc disease assessment to 26%.

The total paid assessment amount on 6 January 2009 was 58%.

The Applicant submitted an application with respect to post traumatic stress disorder (PTSD) on 17 February 2009.

In a decision dated 29 July 2009, the Minister awarded an interim assessment of 10% for PTSD.

The total paid assessment amount on 29 July 2009 was 68%.

The Minister made a further assessment on 25 March 2010, and awarded a 49% assessment for PTSD, effective 17 February 2009.

The total paid assessment amount on 25 March 2010 was 107%.

The effective date of decision raising the total paid assessment at 107% is 17 February 2009, and the date upon which the Appellant was in receipt of this pension was 25 March 2010.

This distinction is an important one. Section 72 says an EIA shall be awarded if the veteran is "in receipt of . . . a pension in the amount set out in Class 1 of Schedule I."

As a matter of statutory interpretation, the Panel finds the word 'receipt' was used on purpose, and should be taken to have the plain meaning of the word. This conclusion is based upon the fact the phrase "effective date of award" is used in other sections of the Pension Act [s. 21(1)(g), s. 21(2)(d), and s. 21(3.1)]. If Parliament had intended for an EIA to be made payable upon the effective date of a Class 1 pension, then it would have used words which conveyed such an entitlement, as it did in the sections previously indicated. The use of the word "receipt" means that entitlement to an EIA award can occur for the first time on the date of the decision that awards a pension in the amount set out in Class 1 of Schedule 1.

The Panel therefore finds the Appellant met the first criteria with respect to an EIA on 25 March 2010, which is the date he was in receipt of a pension of 107%. The Panel also notes this was the Appellant's initial contention when he first contacted the Department with respect to an application for EIA. Client Service Delivery Network Client Notes from 1 November 2012 state the "Client contends his effective date for EIA should be March 25, 2010 the date he became a class 1 pensioner." (SoC 44 as transcribed)

What is Exceptional Incapacity?

Section 72 limits entitlement to an EIA to those veterans who are in receipt of a pension assessed at 98% or greater, and who suffer an exceptional incapacity. Implicit in this section is that not all veterans in receipt of an assessment of 98% or greater are entitled to an EIA.

In this Panel's experience, not all 98% or greater assessments are created equal. The Panel is aware of cases in which a veteran with a 98% assessment was totally unable to carry out any of the functions of day-to-day living. In other cases, the veteran with a 98% or greater assessment was able to drive and work.

In order to be eligible to receive an EIA, a veteran must suffer a degree of incapacity which is greater than the limitations, disability and impairments normally associated with his/her entitled condition(s). If a veteran suffers such a degree of incapacity, and is assessed at 98% or greater, then s/he is suffering from an exceptional incapacity.

Section 72 is clear: the exceptional incapacity may result from the cumulative impact of the entitled disability(ies), or, the impact of the entitled disability (ies) combined with a non service disability.

The question then in this case is whether the Appellant's entitled and non entitled disabling conditions cause him to suffer an exceptional incapacity.

Did the Appellant suffer an exceptional incapacity on 25 March 2010?

The Panel finds 25 March 2010 is the first date on which the Appellant could possibly be eligible for an EIA, as it is the first date he was "in receipt" of a Class 1 pension, when his total paid assessment reached the 98% or greater threshold.

On 25 March 2010, the Appellant was disabled as a result of the following conditions:

- Coronary artery disease (non entitled)
- Diabetes (non entitled)
- Hearing loss (entitled)
- Cervical disc disease (entitled)
- Lumbar disc disease (entitled)
- Tinnitus (entitled)
- Post traumatic stress disorder (entitled)
- Major depressive disorder (entitled, and bracketed with the PTSD for the purposes of assessment).

The effective date of the decision granting of entitlement for the PTSD and major depressive disorder conditions is 17 February 2009. The Appellant had also previously suffered a heart attack in 2001, which was treated surgically.

There are no medical opinions from March 2010 which consider the issue of exceptional incapacity.

There is one lay opinion (SoC 45) from November 2012 by an Area Counsellor which supports the March 2010 date. This opinion considers all of the Appellant's conditions, and also refers to his kidney cancer, which was diagnosed in 2011 and treated surgically in October 2011. The opinion does not attempt to separate the impact, either psychological or physical, of the kidney cancer upon the Appellant's circumstances. In her conclusion that the Appellant meets the baseline incapacity associated with an EIA, the Area Counsellor refers to the ". . . onset of 4 major medical conditions: he suffered a heart attack, has diabetes, can coronary artery disease and has had cancer." [as transcribed]

The Area Counsellor's 2012 conclusion, whereby entitlement to abbr title="Exceptional Incapacity Allowance">EIA was merited, relies upon a condition, cancer, which was not present in 2010.

All of the Appellant's conditions, other than the cancer, were present in 2009. The medical and psychological opinions from this period were used to support the assessment of the PTSD and major depressive disorder. They also are useful in assessing the degree of incapacity suffered by the Appellant.

The attachments to the Applicant's affidavit dated 30 March 2015 (EA S1) paint the picture of an individual who, in 2009/2010, is diligently working towards recovery and is hopeful of returning to work.

In a report dated 24 April 2009 (EA S1, p. 10), Dr. Genest writes the following:

I continue to be optimistic that we are nearing the time to consider return to work options, and in fact, have had some preliminary discussions along these lines. . . .

In a report dated 28 April 2009 (EA-S1, p. 11), Dr. Genest says the Appellant is making good progress on his recovery. It appears the Royal Canadian Mounted Police (RCMP) wanted to accelerate the process of returning to work unacceptably. As a result, the Appellant chose to retire from the force.

The somewhat hopeful picture is continued in Dr. Genest's report of 30 May 2013 (SoC 93). He writes that by early 2011, there had been a level of reduction in the intrusive recollections, and the Appellant was focussing on rebuilding his life. The Appellant had concerns these gains could be lost, but the medical evidence is that there were some gains. Whatever medical conditions were present in 2010 and prior to March 2011, the Panel finds the medical reports support the conclusion the Appellant did not suffer from an exceptional incapacity at this time.

This conclusion is supported by the Appellant's own statements, the submissions of the Advocate, and the submission filed in support of the judicial review application (EA S3), which base the claim for EIA upon symptoms normally associated with the entitled conditions.

The assessments awarded for each of the entitled conditions considered in 2009 include a Quality of Life level of Level 2. These decisions include the Assessment Appeal decision for the cervical and lumbar spine conditions (SoC 156 7), as well as the Minister's assessment decision for the PTSD and major depressive disorder conditions (SoC 43).

A Level 2 Quality of Life level is defined in Table 2.1 of the Table of Disabilities as follows:

Moderate interference with the ability to carry out the usual and accustomed activities of independent living, recreational and community activities, and/or personal relationships due to the entitled condition or bracketed entitled conditions:

The fact a Level 2 Quality of Life was awarded is not determinative, because it only relates to entitled conditions. However, the available medical evidence supports the conclusion the Appellant's other conditions existed well prior to 2009, and the record does not provide evidence they caused a significant impairment to the Appellant's quality of life either.

When did the exceptional incapacity arise?

In its Official Decision of 17 December 2012, the Minister concluded the Appellant was entitled to a Grade 3 Exceptional Incapacity Allowance, with an effective date of 29 October 2012. It is unclear what medical evidence provided the foundation for this decision. The Panel is not going to engage in detailed inquiry into this decision. It will limit itself to asking what changed medically between early 2011, when the Appellant was continuing with his recovery and was focussing on rebuilding his life, and the state of exceptional incapacity in October 2012.

The Panel finds the fundamental change in the Appellant's condition, incapacity and outlook was associated with a kidney cancer diagnosis in June 2011, a condition serious enough it merited surgery.

The Panel takes note of the severe impact of cancer on life expectancy, and of a cancer diagnosis on one's psychological well being. This finding is consistent with the report of 30 May 2013 from Dr. Genest, who noted an increase in the frequency of appointments with the doctor, and an elevation of distress as a result of the cancer diagnosis (SoC 93).

The finding is also consistent with the Area Counsellor's conclusion, which lists kidney cancer as one of the contributing conditions to the Appellant's exceptional incapacity. This supports the conclusion the cancer was the final factor which led to the incapacity.

Dr. Genest's report indicates the physical symptoms leading to testing for cancer manifested in March 2011. While the Appellant may not have known he suffered from kidney cancer, the Panel, in extending the greatest benefit of the doubt to the Appellant, finds these symptoms would have affected his overall outlook and disposition.

Therefore, the Panel finds the effective date for the Grade 2 Exceptional Incapacity Allowance award should be 1 March 2011.

DECISION

The Panel awards a Grade 2 Exceptional Incapacity Allowance, under section 72 of the *Pension Act*, with effect from 1 March 2011.

Applicable Statutes:

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

- Section 2
- Section 39
- Section 72

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

Exhibits:

- EA-S1: Affidavit of the Appellant dated 30 March 2015, with attachments (18 pages);
- EA-S2: Affidavit of the Appellant dated 11 March 2015 (seven pages);
- EA-S3: Affidavit of the Appellant dated 11 March 2015, with attachments (57 pages).

Attachments:

- EA-Attach-S1: Entitlement Appeal decision for the Appellant dated 2 July 2014 (10 pages)

i. *MacDonald v. Canada* (Attorney General) 1999, 164 F.T.R. 42 at paragraphs 22 & 29; *Canada (Attorney General) v. Wannamaker* 2007 FCA 126 at paragraphs 5 & 6; *Rioux v. Canada* (Attorney General) 2008 FC 991 at paragraph 32.

Date Modified: 2015-05-29