Veterans Review and Appeal Board

Representative:	Jacqueline O'Keefe, BPA
Decision number:	100003174857
Decision type:	Federal Court Order to Rehear Reconsideration
Location of Hearing:	Charlottetown, Prince Edward Island
Hearing Date:	8 August 2017

The Reconsideration Panel decides:

PROSTATE CANCER (OPERATED)
CHRONIC LYMPHOCYTIC LEUKEMIA

Entitlements granted in the amount of five-fifths for service in the Reserve Force.
Subsection 21(2), *Pension Act*

Entitlements effective 8 August 2014 (three years prior to the date of award).
Subsection 39(1), *Pension Act*

Pay an additional award in an amount equal to 24 months of pension.
Subsection 39(2), *Pension Act*

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

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

Panel Members: Thomas W. Jarmyn
D. Dietrich
B.T. LeBlanc

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Thomas W. Jarmyn

This is a rehearing, pursuant to a Federal Court Order dated 25 May 2017, of the Appellant's appeal of a denial of entitlement under subsection 21(2) of the *Pension Act* of his application with respect to the conditions of Prostate Cancer (Operated) and Chronic Lymphocytic Leukemia. In that decision the Board was directed to rehear the appeal within three months of the date of the Federal Court Order. Given the Board's normal service standards that means that it would have been expected to render a decision by October 2017.

On 4 July 2017 the Federal Court issued a decision in the matter of *Blount v. Canada (Attorney General)*, 2017 FC 647[3]. That matter was an Agent Orange case in which the Court determined that the Board was incorrectly evaluating the Furlong Report with respect to whether or not there were restrictions on entry into the Agent Orange spray area during the periods in which there were hazardous concentrations of the chemical.

The *Blount* decision may have long term implications for the Board's handling of cases where exposure to Agent Orange in 1966 or 1967 has been alleged to cause a disability.

However, long term uncertainty regarding these matters does not relieve the Board of its obligations to comply with an order of the Federal Court.

The Panel has reviewed all of the evidence and has also taken into consideration the Advocate's written 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:

> (*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.

This means that in weighing the evidence before it, the Panel will look at it in the best light possible and resolve doubt so that it benefits the Appellant. The Federal Court has confirmed, though, that this law does not relieve appellants of the burden of proving the facts needed in their cases to establish entitlement to a critical injury benefit. The Panel does not have to accept all evidence presented by an appellant if it finds that it is not credible, even if it is not contradicted.[1]

The Panel has reviewed all of the documents contained in the Statement of Case and other evidence provided to it. The Panel has considered the written submissions of Counsel and determined that oral argument was not necessary to arrive at its conclusion.

It specifically finds that this evidence does not, even taking into account all of the obligations under section 39 of the *Veterans Review and Appeal Board Act* to draw favourable inferences and accept uncontradicted evidence, establish that the Appellant was exposed to Agent Orange.

The Furlong Report, in an aspect of the report that has never been questioned makes the following conclusions:

- Canadian Forces Base Gagetown is 110,000 hectares.
- The training area is 30,000 hectares.
- Eighty-three acres were used for Agent Orange spray tests in 1966 and 1967.
- Spraying of Agent Orange was carried out from 14 to 16 June 1966 and 21 to 24 June 1967.

Further, the Furlong Report, in findings that are unrebutted and uncontradicted:

- There might have been elevated exposure to Agent Orange if an individual was less than 800 metres down-wind from a sprayed area.
- The dissipation rate of the Agent Orange solution used for testing in 1966 and 1967 is such that only individuals who were allowed access to the area sprayed with Agent Orange during, immediately after, or within 24 hours of spraying would be subject to potential risk of incurring negative health effects.

The Furlong Report is clear that extensive spraying of registered herbicides occurred after 1956. In addition there was annual spraying to control the spruce budworm. None of the statements provided by the Appellant provide any foundation for the conclusion that the witnesses were sprayed by Agent Orange and not one of the many other substances. None of the witnesses provide any foundation for their evidence that they were in the area sprayed by Agent Orange during the period in which it was hazardous.

The timelines dictated by the Federal Court compel the Board to hold a hearing on the merits of the case before 25 August 2017 and render the decision within expected service standards. This is not sufficient time to address the evidentiary ambiguity created by the decision in *Blount.* The Panel is therefore compelled to issue a decision based upon incomplete evidence. Being fully aware that there may be evidence that addresses the issues raised in *Blount* and that may establish as a matter of fact whether or not the Appellant was exposed to Agent Orange the Panel determines that it will, in

consideration of s. 39 of the *VRAB Act*, resolve doubt in favour of the Appellant and grant entitlement.

The Appellant first applied for benefits with respect to the claimed conditions on 28 June 2005. Pursuant to subsection 39(1) of the *Pension Act* the effective date of a decision is the later of date of application or three years prior to the date of decision. The Panel therefore awards full entitlement effective three years prior to the date of decision.

The Reconsideration decision that formed the basis of the judicial review was dated 25 August 2016. The Panel has considered the decision of the Federal Court of Canada in *Rivard*[2] with respect to the impact on time lost during judicial review on the entitlement to an award under subsection 39(2) of the *Pension Act*. This combined with the difficulties on the part of the Minister in obtaining records establishing the Appellant's period of service and confirming his service in Gagetown support the maximum award under subsection 39(2) of the *Pension Act* of the equivalent of 24 months.

EFFECTIVE DATE OF RETROACTIVITY

The Appellant first applied for pension entitlement for the conditions of Prostate Cancer (Operated) and Chronic Lymphocytic Leukemia more than three years prior to this decision. This Board will award retroactivity effective 8 August 2014 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. The application date for pension entitlement does exceed three years from the date of this decision and there is evidence to substantiate an award of pension under subsection 39(2) of the *Pension Act*.

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(2)
Subsection 39(1)
Subsection 39(2)

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

Attachments:

R1-Attach-N1: Affidavit of the Applicant dated 6 December 2016 (six pages)

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[1] *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.
[2] *Rivard v. Canada (Attorney General),* 2003 FC 1490
[3] *Blount* v Canada (Attorney General) 2017 FC 647