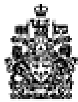

Veterans Review and Appeal Board Canada | Tribunal des anciens combattants (révision et appel) Canada

Canada

# 2013-659

Representative: Susan O'Keefe, BPA
Decision No: 100001804659
Decision Type: Assessment Review
Location of Hearing: St. John's , Newfoundland and Labrador
Date of Decision: 9 January 2013

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**The Assessment Review Panel decides:**

**TINNITUS**

Assessment rating is 11% with effect from 9 January 2010 (three years prior to the date of this decision).
Section 35, *Pension Act*.

| **Before:** | Brent Taylor | Presiding Member |
|---|---|---|
| | Richard E. Woodfield | Member |

Original signed by:

Reasons delivered by: ______________________

Brent Taylor

## 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.

## INTRODUCTION

This is a Review requested by the Applicant as he is dissatisfied with the 6 June 2012 Assessment Decision which continued a 6% assessment for his pensioned disability of Tinnitus.

## PRELIMINARY MATTERS

The hearing was held by video conference, with both members of the Review Panel in Charlottetown, Prince Edward Island and the Advocate and Applicant in St. John's, Newfoundland and Labrador.

## ISSUE

This Review Panel must determine whether the Applicant is properly assessed under the Veterans Affairs Canada Table of Disabilities.

## EVIDENCE AND ARGUMENT

The Applicant, now 52, carries full entitlement for Tinnitus as a result of noise exposure during his Royal Canadian Mounted Police (RCMP) service. Veterans Affairs Canada ("the Department") granted entitlement in a decision dated 24 November 2009 and made it effective 26 May 2009; the date of pension application.

At the time entitlement was issued, the Department interpreted the medical information on file to be supportive of an assessment of 6%. The assessment and entitlement decisions were combined in one document and sent to the Applicant. The letter also included, as is the standard practice in all Departmental decisions, a standard section advising the Applicant of his right to refer the decision for a review by the Department itself, or to the Veterans Review and Appeal Board.

The Applicant accepted this assessment, and the monthly pension payments then followed.

Some years later, on 21 March 2012, the Applicant spoke with a Department case worker and discussed his dissatisfaction with his Tinnitus (page 20). The Case Manager suggested he be reassessed by the Department, and the Applicant agreed. He was examined by Dr. G.A. Higgins (Senior District Medical Officer, Veterans Affairs) on 25 April 2012. Following the examination a Department adjudicator reviewed Dr. Higgins' report and determined that the Applicant was still correctly assessed at 6%. The decision was forwarded to him two days later, on 8 June 2012.

That decision is now the subject of this Assessment Review by the Board.

### VRAB Review

On 9 January 2013 the Board convened a hearing with the Applicant and his Pensions Advocate. The Advocate asked the Panel to note that the criterion for a Medical Impairment rating of "ten" in tinnitus cases was the prescription of a masking device, and that the Applicant has clear evidence in his file dating back to the time of entitlement supporting the claim that he required masking.

In fact, noted the Advocate, it was evident that the Applicant warranted a Medical Impairment rating of "ten" back at the time of his first assessment. On that basis, the Advocate requested the Panel consider taking jurisdiction over the original assessment and give the Applicant the benefit of a "ten" rating back to the date on which his entitlement became effective. In the alternative, the Advocate proposed, the Panel could consider an award based on subsection 39(1) of the *Pension Act*, which would make the increase effective three years prior to the date of the hearing, or 9 January 2010.

## ANALYSIS AND REASONS

In considering this claim, the Panel believes it has fully applied the favourable inferences required by section 39 of the *Veterans Review and Appeal Board Act* which directs the Board 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, the Panel will look at it in the best light possible and resolve doubt so that it benefits the Applicant. The Federal Court has confirmed, though, that this law does not relieve applicants of the burden of proving the facts needed in their cases. The Board does not have to accept all evidence presented by an applicant if the Board finds that it is not credible, even if it is not contradicted.

**The Law**

The Department is authorized by law to create instructions and a Table of Disabilities, which are designed to guide decision-makers in setting fair and consistent payments for claimants. The goal of the Table is consistency. The Federal Court has ruled that the Board is to determine the most appropriate table based on the medical circumstances of each case, and not necessarily the table that is requested by an Applicant or one that would be preferred simply because it would result in a higher payment.

The Table is used by first determining a Medical Impairment rating, and then adding a Quality of Life rating to arrive at a final figure for payment.

**Choice of Table**

The Panel concludes the table used by the Department, from Chapter 9 of the Table of Disabilities, is correct. Table 9.3 - Other Impairment - Tinnitus reads as follows for Medical Impairments ratings of five and ten, respectively:

| Rating | Criteria |
|---|---|
| Five | • Continuous tinnitus, present all day and all night, every day, affecting one or both ears, but does not require use of prescribed masking devices or other prescribed modalities but may use non-prescribed devices such as radio, etc. |
| Ten | • Continuous tinnitus, present all day and all night, every day, affecting one or both ears, and has been prescribed a masking device and/or other prescribed modalities (i.e., prescribed meds for tinnitus) . When prescribed modalities e.g., meds are prescribed, supporting documentation from the health care professional should be provided) |

Clearly, from the above, the distinction between a “five” and a “ten” rating is the existence of a prescribed masking device or modality.

The Panel accepts the prescription of masking for the Applicant dating as far back as 2009. Page 32 of the Statement of Case features part of a report written by Dr. David Lyon, audiologist, on 1 June 2009 wherein he writes:

> . . . **It was strongly recommended he be provided with binaural amplification as the tinnitus and hearing loss together will make communication, especially in noise difficult.** There is no doubt he would benefit from amplification in the right ear for tinnitus masking and speech enhancement and clarity. The use of an aid on the left side for masking purposes should be tried as this may help. He has been using aids for 3 weeks and is still on trial. The process of rehabilitation can take some time before any tinnitus management is achieved. Fortunately the newer models have a program that can be used to help mask the tinnitus when he is not in conversation and sitting in quiet. It is at times like this that the tinnitus is at its most aggravating. He currently uses radio, music and fans to help calm and mask the tinnitus. He will be monitored by this office. . . .

On the same day Dr. Lyon endorsed a questionnaire confirming the need for a masking device [Page 30].

Notwithstanding the clear expression of a prescription to manage tinnitus, the Department declined to issue a Medical Impairment rating of “ten” and, instead, granted the Applicant a “five” which, when added to an additional point for a Level “One” Quality of Life rating, resulted in a total assessment of 6%.

The Panel, from its reading of the evidence, has no hesitation in concluding the Applicant merits an assessment of 11%, from a Medical Impairment rating of ten and Quality of Life rating of one. The Panel will so order, and therefore the Applicant shall have his assessment set at 11%.

**Effective date**

With the merits of the assessment dealt with, the Panel now turns to the date upon which the higher assessment should be made effective. As the Panel sees it, there are three possible dates it could choose.

- The date of the request for a reassessment
- The date of original entitlement
- A day three years prior to the date of this decision

We shall explore each of the above possibilities.

**Date of request**

Assessments are not fixed for all time. Common sense shows us that as we age we may develop more acute symptoms from our disabilities. Therefore, from time to time, a pensioner may request a reassessment from the Department based on a worsening of symptoms.

Normally, the date of a request for reassessment is flagged as the best date to make effective any increase in that assessment. It represents the date on which a pensioner expresses dissatisfaction with the assessment that is in effect. Another date recognized on occasion is when there is clear medical evidence that establishes a worsening of symptoms that preceded the pensioner's stated request for an increase.

The principle here is that one should be compensated for actual symptoms at a given point in time and not over- or under-compensated. It is necessary, therefore, to be able to track the waxing (and perhaps waning) of symptoms and try to reflect those symptoms with correct rates of compensation.

These principles are not overly controversial, and are explored in detail in the policy manuals used by the Department. They have been widely applied by the Department and the Board for many years.

**Date of original entitlement**

When a pension is first granted there is a second step that is often necessary. The **entitlement** question is: "should there be a pension, yes or no?" When the answer to that question becomes "yes" then a second **assessment** decision must be made: "how much should that pension be?" As was explained above, adjudicators use the Table of Disabilities to make assessment decisions.

One hopes that the assessment decisions made by the Department are accurate. But, if a **first** assessment decision is varied later by the Board, then it is open to us to take the effective date of that variance right back to the original date of entitlement.

If – on the other hand – a first assessment has been superceded by one or more subsequent Departmental assessments, then the dates on which those assessments are performed become "new" dates in the past; beyond which it is difficult to go.

For instance, if a pensioner is initially granted 15% for a knee disability in 1999, accepts that assessment, but then requests a reassessment in 2005 giving him 20%, that reassessment is based on the presumption his knee **worsened**. In other words, before 2005 the knee was not at the 20% level. Therefore, if the pensioner at some later date (2009 for example) decided to seek a review of his 1999 assessment of 15%, his claim should not succeed because he has already based a subsequent claim on the principle his knee had **worsened** to 20% in 2005 and therefore was not capable of being assessed at a higher rate **before** 2005.

**A day three years prior to the date of the decision**

Section 39 of the *Pension Act* establishes the parameters around the setting of effective dates for pension awards. The effective date chosen is the latter of the date of application or three years prior to the date of application. This permits pensioners to not miss out on benefits while their claims are awaiting final decisions. When a monthly pension is finally awarded and the disability is assessed, a lump sum payment reflecting the processing time (to a maximum of three years) is made also. In exceptional circumstances of administrative delays beyond the control of a pensioner, subsection 39(2) provides for an additional lump sum payment equivalent to a maximum of two years' pension.

There have been questions raised in the past as to whether section 39 applies to assessment decisions once entitlement has already been awarded. The best analysis of this was in the case of *Canada (Attorney general) v. MacDonald*, 2003 FCA 31, where the Federal Court of Appeal wrote, in part:

> [25] I appreciate that the generous provisions for appeals and reconsiderations may justify limiting the extent to which an assessment may be backdated. Nonetheless, in the absence of any compelling reason to limit section 39 to entitlement decisions, particularly bearing in mind the liberal construction of the Act mandated by section 2, it would seem very unfair, and contrary to the spirit of the Act as enunciated in section 2, to interpret the Act as precluding any backdating of an assessment made to correct a previous erroneous assessment of the extent of the disability by Veterans Affairs and the Board.

Thus, from the above, it is apparent that section 39 may be applied to assessments also. The Court in MacDonald also noted that [in paragraph 23], "when a pensioner requests a reassessment because a pensionable condition has deteriorated, the pensioner may then properly be said to be making an application for a new pension."

**Facts of this case**

When our Applicant received his initial entitlement and assessment of 6%, two pieces of medical evidence (at least by our analysis) suggested he ought to have been assessed at 11%. The Department issued the 6% decision, but did not explain in any detail why it had chosen 6% instead of the higher figure. Trusting as he was that the Government of Canada would treat his claim fairly and accurately, the Applicant did not challenge the 6% assessment.

Only three years later, in 2012, did the Applicant again mention his Tinnitus disability to the Department. A reassessment was suggested, and accepted by the Applicant. The subsequent reassessment decision confirmed his 6%, notwithstanding additional evidence from Dr. Higgins that his symptoms (again) matched an 11% assessment.

Only now, in the hands of this independent tribunal, has all of the historical documentation been collected and put forward for a fresh look. We instantly saw that the Applicant had signs – clear signs – of prescribed masking for his Tinnitus as far back as 2009 when his entitlement came into effect.

In neither of its decisions (2009, 2012) did the Department explain how the 6% assessment was arrived at – in the face of documentation suggesting 11%. Did the Department find as not credible the report of Dr. Lyon in 2009? Did the Department find as not credible the report of its own Senior District Medical Officer Dr. Higgins in 2012?

The Panel is left to speculate.

What is without any doubt is that the Department had evidence before it suggestive of an 11% assessment from the time of first entitlement, and had additional confirmatory evidence placed before it by its own staff three years later. The evidence was not followed and the Applicant was not advised in detail of the reasons for his assessment.

In trying to arrive at a fair and appropriate effective date, another consideration in our minds is the fact the Applicant did not request a reassessment per se, but agreed to one when it was suggested by a Department employee (see page 20). This is significant, because had the Department employee instead referred the Applicant to the Bureau of Pensions Advocates or the Board itself to challenge his original 2009 assessment, any favourable review or appeal could have been made effective from an earlier date.

By agreeing to a new assessment instead of exercising his rights to review his old assessment (and very likely not understanding the implications of the differences between those two choices), the Applicant lost access to a date earlier than his date of contact – if the normal policies were applied in this case.

Of course, not all of the responsibility for this chain of events should be laid at the feet of the Department. The assessment tables are published and available to the general public electronically. Pensioners should inform themselves as to their rights and responsibilities. The system of administrative decision making is founded on the expectation that actors in the agency will do the right thing, but can occasionally make

mistakes. When mistakes are made, a process is provided to correct them. Customers of the agency, therefore, play an important role by being vigilant, and asserting their rights of redress.

In this case it appears the Applicant was satisfied by his 6% assessment in 2009, although he did not know it was perhaps under representative of his recorded medical circumstances.

Dissatisfaction is the trigger that starts the process of redress in this system. Whether the Applicant ought to have known or not, it is plain the Applicant was, from 2009 to 2012, effectively satisfied with the amount of his Tinnitus pension.

However, as the Panel will determine as part of this decision, the degree of knowledge and sophistication required of this first-time client of Veterans Affairs to have achieved his 11% assessment earlier in time would have been significant and outside the understanding of an ordinary person.

The medical professionals involved in his assessments, Dr. Higgins and Dr. Lyon, provided the Department with documentation suggestive of an 11% assessment. The Department was not obligated to issue the 11%, but at least it should have advised the Applicant of the reasons why the more favourable information was not accepted, at either time.

The Award Regulations under the *Pension Act* direct the Department as follows:

> 5. Every decision of the Minister with respect to an award under the Act shall contain the reasons for that decision.

It is open to debate whether the Applicant was properly advised of the reasons for either of his two assessments. To the extent there is an open question on this point, the Panel believes it should be answered in favour of the Applicant in this particular case.

Accordingly, the Applicant's 11% assessment the Panel is awarding shall be made effective 9 January 2010, being three years prior to the date of this decision as provided by subsection 39(1) of the *Pension Act*.

As for whether subsection 39(2) should apply, the Panel believes that not all of the delays in securing a correction to the 2009 assessment can be considered to be outside the reach and control of the Applicant, and therefore the Panel believes an additional award of pension is not appropriate.

## DECISION

For all of the reasons above, the decision of the Department dated 6 June 2012 is set aside and replaced with an assessment of 11%, representing a 5% increase over the assessment awarded by the Department. As provided by subsection 39(1) of the *Pension Act*, this award shall be effective 9 January 2010, three years prior to the date of this decision. Subsection 39(2) is not applicable in this case.

**Applicable Statutes:**

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

Section 35
Subsection 39(1)

*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: 2014-11-24