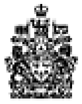

Veterans Review and Appeal Board Canada — Tribunal des anciens combattants (révision et appel) Canada

Canada

2014-390

Representative: Jillian E. Frank
Decision No: 100001951390
Decision Type: Federal Court Order to Rehear Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 14 January 2014

The Entitlement Appeal Panel decides:

TYPE 1 DIABETES

Entitlement granted in the amount of one-fifth for service with the Royal Canadian Mounted Police.
Section 32, *RCMP Superannuation Act*
Subsection 21(2), *Pension Act*

Entitlement effective 14 January 2011 (three years prior to the date of award)
Subsection 39(1), *Pension Act*

Pay an additional award in an amount equal to 5 months and 5 days of pension.
Subsection 39(2), *Pension Act*

Before:	J.M. Walsh	Presiding Member
	Roger B. Langille	Member
	Brent Taylor	Member

Reasons delivered by:

J.M. Walsh

REASONS FOR DISSENT HEREINAFTER INCLUDED

INTRODUCTION

This claim is brought forward for hearing pursuant to an order dated 9 August 2013 by Justice Russell of the Federal Court which allowed the application for judicial review in the matter of the Applicant, and The Attorney General of Canada, Respondent. The order sets aside the Entitlement Appeal decision of the Veterans Review and Appeal Board (VRAB) dated 18 June 2012. Accordingly, a new Appeal Panel of three members was constituted to rehear the case. The hearing took place via video-conference on 14 January 2014, with the Appellant's lawyer.

PRELIMINARY MATTERS

The Advocate's written submission contained arguments addressing the assessment of the Appellant's claimed Type 1 Diabetes condition. The Panel advised the Advocate that the assessment for the Appellant's claim was not before this Entitlement Panel. If a favourable decision is reached regarding the Appellant's entitlement for a pension for his diabetes, an initial assessment of the degree of disability incurred from his diabetes would then be determined by Veterans Affairs Canada (the Department). If the Appellant is not satisfied by the Departmental assessment decision, he can then

request a Departmental review of that decision or request a review of the Departmental decision by VRAB.

History of Proceedings

The Appellant served in the RCMP from 1 July 1980 to 7 November 2012. He applied for a disability pension for the claimed condition of Type 1 Diabetes on 9 August 2010. The Appellant contends his diabetes has been permanently worsened as a result of his inability to monitor his diabetes and administer insulin treatment as prescribed due to factors related to his RCMP service and postings after his initial diagnosis of diabetes in 1992.

The Department denied entitlement under Section 32 of *RCMP Superannuation Act*, in accordance with subsection 21(2) of the *Pension Act* in a decision dated 26 January 2011.

The Appellant appeared before an Entitlement Review Panel of the Veterans Review and Appeal Board in Winnipeg, Manitoba on 10 August 2011. The Panel denied entitlement, finding insufficient credible medical evidence establishing the Appellant's diabetes was permanently worsened since initial diagnosis in 1992 and the lack of evidence showing factors arising out of his RCMP service were responsible rather than his own lack of personal commitment and responsibility for treatment.

A further appeal to VRAB was heard by an Entitlement Appeal Panel. Its decision of 15 May 2012 denied entitlement. The Appeal Panel found there was insufficient evidence that the Appellant's diabetes was permanently worsened during his RCMP service and that workplace factors were not sufficiently beyond the care and control of the Appellant as to impede his ability to manage his diabetes.

The Appellant filed an Application for Judicial Review, and Justice Russell's order of 9 August 2013 allowed the Application. The resulting decision details a number of reasons why Justice Russell quashed the VRAB decision:

- The Board did not say why it chose to ignore Dr. Wiseman's opinion that specifically attributed the deleterious consequences of the Appellant's diabetes to RCMP factors.
- The Board failed to address the evidence from fellow RCMP officers who served as Staff Relations Representatives. These statements corroborated Dr. Wiseman's opinion regarding the cause of the deleterious effects of the Appellant's diabetes.
- The Board should not have rejected Dr. Silha's opinion on the basis that it failed to address the Appellant's smoking history.
- The Board failed to consider what is basically uncontradicted medical evidence that establishes the aggravation and deleterious consequences of the Appellant's diabetes arose out of, or are directly connected with his RCMP service, thus did not reasonably apply Section 39 of the *Veterans Review and Appeal Board Act*.

EVIDENCE AND ARGUMENT

The Appellant, in his statement submitted with his pension application and in his testimony before the Review Panel, contended his diabetes was permanently worsened as a result of RCMP service factors after diagnosis in 1992, as evidenced by the development of peripheral neuropathy and retinopathy, stating:

- 1992 - 1994 - Shamattawa Posting: the heavy work demands causing him to skip meals and insulin injections, the lack of a medical doctor in the remote community, the lack of access to proper foods (eg. fresh fruit) and the lack of exercise facilities made it very difficult to control his blood sugar levels;
- 1994 - 1997 - Criminal Intelligence Section, Winnipeg Posting: long hours of work led to skipping meals and a poor diet that included eating chocolate bars to raise his blood sugar led to high blood sugar levels;

- 1997 - 2000 - Corporal, Winnipeg Drug Section: irregular hours working on major projects resulted in an erratic eating schedule and job expectations of an undercover agent led to increased smoking and alcohol consumption;
- 2000-2005 - Division Staff Relations Representative (SRR) for Manitoba: 24 hour a day responsibilities and extensive travel made it difficult to eat properly;
- 2005 until retirement - National Executive of the SRR Program: extensive travel caused further difficulties with establishing a proper eating regime and led to an increase of smoking to two packs of cigarettes per day.

Medical Evidence

Diabetes Diagnosis and Treatment:

The Appellant was initially diagnosed with Type 1 Diabetes by Dr. Wiseman on 16 April 1992, prior to his posting in Shamattawa, Manitoba. Dr. Wiseman continued to treat the Appellant's diabetes at the Manitoba Clinic until retirement in 2010. At the time of diagnosis, Dr. Wiseman noted a strong family history of insulin dependent diabetes, a random blood sugar of 22.5, a microaneursym in the left eye indicating a longer history of diabetes than symptoms suggest, a history of smoking cigarettes and periodic binge drinking and no regular exercise. Dr. Wiseman determined the Appellant was medically able to serve in Shamattawa, stating:

> . . . I do not think there is any specific contraindication for him going to Shamattawa as long as his blood sugars are well controlled and he is compliant with his diabetic regimen and as long he does not go out for long treks without any supervision. I advised him strongly to stop smoking and his periodic binging should also be discontinued. He will be returning to see me in two weeks. . . .

[*As transcribed*]

In November 1999, Dr. Wiseman was requested by Dr. Orr, RCMP Health Service Officer and Family Physician, for an assessment of the Appellant's diabetic control and health status. Dr. Orr noted as the Appellant was not considered a front line constable, he was not required to meet the most stringent occupational restrictions. Dr. Wiseman, in his letter to Dr. Orr dated 7 February 2000 reports:

- He has treated the Appellant's diabetes since diagnosis in 1992.
- The Appellant denied any hypoglycemic reaction but did have a blood sugar one morning in 1998 of 1.7, with no loss of consciousness.
- Other than a few scattered microaneurysms noted by Dr. Harrington, the Appellant had no evidence of other diabetic complications.
- The Appellant did not keep a record of home blood sugar monitoring but reported blood sugars between 5 and 10.
- Recent lab tests showed a hemoglobin A1C 8.8% (normal 3.5-6%) and a random blood sugar of 7.6

Dr. M. Orr completed a Medical Examination Report for Drivers with Diabetes treated with Injectable Insulin on 30 April 2002. Dr. Orr reported the Appellant:

- understood diabetes and the close relationship with insulin, diet and exercise;
- conscientiously followed doctor's directions about proper care of diabetes;
- did not experience a severe hypoglycemic episode;
- alcohol impairment was not a factor in managing the Appellant's diabetes; and

- has not been prevented from driving from peripheral neuropathy, cardiovascular problems or retinopathy/visual problems.

Dr. Prodan, in his letter to the Appellant dated 6 March 2004, states the Appellant's blood sugar was not under ideal control, with a recent hemoglobin AIC test of 9.1%.

The Appellant was followed on a regular basis by Dr. Wiseman at the Manitoba Clinic from the time of diagnosis in 1992 until Dr. Wiseman's retirement in 2010. Dr. Wiseman did not find the Appellant was unfit for RCMP duty or that he required any restrictions of his RCMP duties, as noted on the Clinical Reports during that time period.

In his brief note dated 12 November 2010, Dr Wiseman states, in full:

> I agree with the Appellant's suggestion that the work load and regular hours required for his occupation at the Royal Canadian Mounted Police had a deleterious effect on his diabetic control, leading to diabetic complications, particularly the neuropathy in his legs.

Since Dr. Wiseman's retirement in 2010, the Appellant has been treated by specialist, Dr. Josef Silha. Dr. Silha, in his letter dated 16 April 2012, states that although the Appellant was appropriately treated with insulin since his diagnosis of diabetes, he developed complications of diabetes, specifically neuropathy and diabetic retinopathy. Dr. Silha notes that the Appellant's glycemic control during his RCMP service was not adequate and was impeded by his RCMP occupation, with improvement in his blood sugar levels since retiring from the RCMP. He further opines the Appellant will continue to suffer the consequences of past periods of inadequate glycemic in the future, despite present glycemic control.

Diabetic Retinopathy:

The Appellant was assessed for diabetic retinopathy by Dr. Harrington on 21 and 30 April 1992 and 9 July 1992. Dr. Harrington noted that during his second visit, the Appellant's visual acuity was 20/20 and he could read N5 type print with glasses and at the time of the third visit in July the Appellant's vision was back to normal without glasses since his diabetes was under control. Intermittent blurred vision was noted in April 1993 and the Appellant was referred to Dr. Harrington for a complete eye examination. In June 1994, Dr. Harrington reported the Appellant's right visual acuity was decreased without glasses, 20/20 vision in the left eye and the presence of a few small microaneurysms. In December 1999, Dr. Harrington reported the Appellant's right and left vision was 20/20, unaided and that he uses reading glasses only for small print. Dr. Harrington's examination revealed about three small scattered microaneurysms of a diabetic nature. He opined there was no proliferation of the Appellant's eye disease and no cause for alarm.

In August 2001 specialist Dr. R. Leicht reported the Appellant's vision uncorrected was 20/20 bilaterally and that he wore reading glasses occasionally. Dr. Leicht reported that although Dr. Harrington had previously noted some microaneurysms in 1999, he did not see any significant background changes during his examination. He concluded the Appellant had very minimal background retinopathy.

Peripheral Neuropathy

Numbness in the Appellant's right foot was first recorded in September 1992. The file is then silent for any foot complaints or problems until February 2008 when neurologist Dr. Christopher Bourque reports the Appellant had no significant neurological complaints except some left foot numbness that was present since 1992. He notes this physical finding is to be expected.

Blood Sugar testing:

The Appellant's random blood sugar at the time of diagnosis in 1992 was 22.5%, just prior to his posting in Shamattawa. There are no further blood sugar levels prior to his posting in Shamattawa. Although previous decisions, including the Federal Court decision, refer to a blood sugar level of 4.85 prior to the Shamattawa posting, this number is actually the billing cost for the test, not the result of the blood sugar test. Dr. Silha summarizes the Appellant's glycemic control in his 2012 letter. He notes the Appellant's initial hemoglobin A1C in April 1992 was

11.6% (upper limit normal 6%), with subsequent testing between July 1992 and November 2010 between 8% and 10.2%. Dr. Silha notes that with time to appropriately time his insulin injections and with more appropriate nutrition and carbohydrate intake since ceasing his RCMP duties, the Appellant's hemoglobin A1C improved to 7%.

Witness Statements:

The Appellant submitted twelve affidavits from RCMP Officers who had also served with the Division Staff Relations (DSR) program. These affidavits describe the nature of the DSSR work and, in summary, state:

- DSSR work averages 10-14 hours a day, with additional urgent calls outside working hours.
- Frequent travel is required with missed or irregular meal hours.
- The Appellant's work demands and work environment resulted in missed meals, eating fast foods, and interfered in his blood testing and insulin injection regime.

The Advocate acknowledged that the cause of Type 1 Diabetes is unknown and that there were several non-service factors that could be considered aggravational factors for a worsening of the Appellant's diabetes, including personal factors such as cigarette smoking and alcohol consumption. She also acknowledged there was not a second blood glucose level recorded prior to the Shamattawa posting as 4.85 was actually the billing fee for the test, not a report of the blood sugar level.

The Advocate submitted a major aggravational award of three-fifths entitlement is warranted in recognition that the demands and working conditions of the Appellant's RCMP duties permanently worsened his diabetes, based on:

- the Appellant's testimony and statements, corroborated by the witness statements on file, showing the conditions of his RCMP assignments interfered with his ability to appropriately control his blood sugar levels;
- the medical evidence on file showing the Appellant did not maintain adequate control of his blood glycemic levels from diagnosis until he ceased his RCMP duties;
- the uncontradicted expert medical opinions of Dr. Wiseman and Dr. Silha, physicians who treated the Appellant throughout his RCMP career, showing his RCMP assignments and postings permanently worsened his diabetes.

The Advocate acknowledged the Board's ability under Section 38 of the *Veterans Review and Appeal Board Act* to obtain an independent medical opinion addressing the Appellant's claim that his diabetes was permanently aggravated by RCMP factors. However, she contended that as there is sufficient credible medical evidence from Dr. Wiseman and Dr. Silha connecting a worsening in the Appellant's diabetes to RCMP factors, an independent medical opinion is not necessary in the circumstances of the Appellant's case.

The Advocate submitted maximum retroactivity of three years under subsection 39(1) of the *Pension Act* is warranted. She further submitted an additional award under subsection 39(2) of the Pension Act for administrative delays beyond the control of the Appellant, resulting in an additional award back to the date of pension entitlement, 9 August 2010.

ANALYSIS/REASONS

The Board has reviewed all of the evidence and has also taken into consideration the Advocate's submissions. In doing so, the Board has applied the requirements of Section 39 of the *Veterans Review and Appeal Board Act*. This section requires 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 before us, the Board 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 link the claimed condition to service. 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.[1]

First, the Panel wishes to address a number of the evidentiary issues that have arisen in this case, some of which formed the basis of Justice Russell's quashing of the previous VRAB decision:

1. The Appellant's hemoglobin A1C at the time of diagnosis in April 1992 was well above normal (6%) at 11.6, as reported by Dr. Silha. There is no evidence it returned to a normal level prior to his posting in Shamattawa. The 4.85 level reported in the Federal Court decision is actually the billing cost for the laboratory test, not a blood sugar reading. The Appellant's blood sugar levels from 1992 until his retirement remained higher than medically recommended for optimal glycemic control, fluctuating between 8% and 10.2% and improved to 7% after retirement.

2. The Panel accepts that the circumstances of the Appellant's RCMP assignments and postings from 1992 until his retirement involved long and irregular hours of work and times, which at times, could interfere with his daily schedule for blood monitoring and insulin administration.

3. The witness statements from former DSS colleagues corroborate the Appellant's statements and testimony that his DSS service made it difficult for him to follow an appropriate blood testing and insulin injection regime during certain work situations; however, to the extent their evidence attempts to establish that the Appellant's diabetes was worsened because of service factors, it cannot be given much weight. While these witnesses are qualified to speak on issues of fact which fall within their knowledge, they are not qualified to speak on medical issues around causation of medical conditions. That area is the domain of medical experts and it is the Panel's job to determine whether the medical evidence is credible and sufficient.

4. At the time of diagnosis in 1992, the Appellant presented with several risk factors for poor diabetic control, including a lack of exercise, cigarette smoking and periods of binge drinking, as identified by Dr. Wiseman.

5. Complications of diabetes, both retinopathy and neuropathy, were present at the time of diagnosis in 1992 and had not significantly deteriorated during his RCMP service, as noted by medical specialists, Drs. Harrington, Leicht and Bourque.

Having made these findings, the Panel is left with one question to address: is the medical evidence provided by the Appellant sufficient to allow a finding that his Type 1 Diabetes arose out of or is directly connected to his RCMP service pursuant to subsection 21(2) of the *Pension Act*.

Under subsection 21(2.1) of the *Pension Act* pension entitlement is awarded in fifths, to reflect the degree a disability can be directly connected with RCMP service. If the disability is totally caused by service, full or five-fifths pension entitlement is granted. However, the Appellant does not contend his diabetes was caused by his RCMP service. The Advocate has acknowledged diabetes is a condition with an inherited predisposition but an unknown exact cause. Rather, the Advocate argued the evidence shows the Appellant's diabetes was permanently worsened by his inability to manage his blood glucose levels appropriately after initial diagnosis in 1992, resulting in a major aggravational award of three-fifths pension entitlement.

The Panel has carefully weighed the evidence and considered the submissions of the Advocate. In weighing the evidence as a whole and in looking at it in the best possible light as it is required to do, it finds it reasonable to infer the Appellant's Type 1 diabetes was permanently worsened as a result of his RCMP service. In determining the degree in which both service and non-service factors contributed to the disability related to the Appellant's diabetes, the Panel finds it reasonable to infer the Appellant's RCMP duties permanently worsened his diabetes to a minor degree, resulting in one-fifth pension entitlement. The Panel finds that four-fifths of the Appellant's diabetes disability is related to non-service factors: a diagnosis of a constitutional disease with an inherited predisposition, personal lifestyle factors (smoking, alcohol consumption and lack of exercise), and the presence of complications prior to the introduction of RCMP work factors between 1992 and retirement.

The Panel has arrived at this conclusion for the following reasons:

- As acknowledged by the Advocate, the Appellant's RCMP service did not cause him to develop diabetes. The cause is unknown and the Appellant presented with a strong family history of diabetes.
- When diagnosed with diabetes in 1992 the Appellant presented with a number of factors that are considered factors that aggravated diabetes: smoking cigarettes, alcohol consumption, and lack of exercise. These factors existed prior to his RCMP postings from 1992 to retirement. The Appellant continued to smoke cigarettes, consume alcohol and to not exercise after his diagnosis. The Panel, therefore, finds it reasonable to infer personal lifestyle factors aggravated his diabetes.
- When initially diagnosed with diabetes in 1992, the Appellant already presented with complications of diabetes, as noted by Drs. Wiseman, Harrington, Leicht and Bourque. There is no objective medical evidence on file showing these complications were significantly worsened during his RCMP service. However, the Panel finds it reasonable to infer the Appellant's diabetes did worsen, at least to a minor degree as a result of his inability to manage his blood glycemic levels because of his RCMP work environment, as explained by his treating physician, Dr. Silha.
- The medical evidence, particularly the evidence provided by Drs. Wiseman and Silha, indicates an inability to appropriately manage blood glycemic levels had a deleterious effect on the Appellant's diabetes, resulting in complications, including retinopathy and neuropathy.
- The evidence shows that the Appellant's ability to maintain appropriate blood glycemic levels was affected by both service factors (his irregular, demanding work schedule) and his own personal lifestyle factors (smoking, alcohol consumption and lack of exercise).

Under Section 39 of the *Veterans Review and Appeal Board Act* the Board must draw every favourable inference which appears reasonable in the evidence and circumstances of the case. However, the Appellant is also under an obligation to provide sufficient evidence to support the favourable inference being sought. The Panel is not in a position to draw a favourable inference unless it has some evidence that would reasonably support or raise the inference. The evidence in this case does provide a basis on which the Panel could reach the conclusion that the Appellant's Type 1 diabetes was aggravated to a minor degree by his RCMP service. However, the evidence did not provide any basis on which the Panel may reach the conclusion that the Appellant's Type 1 diabetes was permanently aggravated more than a minor degree by RCMP service.

The Board will award an additional 5 months and 5 days under 39(2) of the *Pension Act* for delays in waiting for the case to be heard in Federal Court. Since the date of application for the condition is 9 August 2010, any additional amount of retroactivity cannot predate this date of application. The additional amount of retroactivity available between 14 January 2011 and back to the date of application, (which is 9 August 2010), is 5 months and 5 days.

EFFECTIVE DATE OF RETROACTIVITY

The Appellant first applied for pension entitlement for the condition of Type 1 Diabetes more than three years prior to this decision on 9 August 2010. This Board will award retroactivity effective 14 January 2011 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.*[2] The Board will award an additional maximum of 5 months and 5 days under 39(2) of the *Pension Act* for delays in waiting for the case to be heard in Federal Court.

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)
Section 39

Royal Canadian Mounted Police Superannuation Act,[R.S.C. 1970, c. R-11, s.1; R.S.C. 1985, c. R-11, s.1.]

Section 32

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

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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 FCT 1490

REASONS FOR DISSENT

I have reviewed the entire file, the submissions of his Representative, and deliberated with my colleagues on the merits of the case. I would not award entitlement in this case, for the reasons I will provide below.

Diabetes - Type 1

Diabetes of this variety usually has an unknown cause (except in cases of injury or disease affecting the pancreas itself). Thus, in the main, there would be no opportunity to find any degree of causal entitlement that could be grounded in RCMP service.

That said, I realize the Appellant's representative was not arguing for full causation, and instead was requesting a "major" aggravation award of three-fifths (3/5) in recognition that the disability's genesis is multi factorial.

The majority is awarding an aggravation award of one-fifth (1/5) under subsection 21(2.1) of the *Pension Act*. While I understand their reasons for this conclusion, I would conclude that the Appellant has not demonstrated his employer's role in the exacerbation of his diabetes is even to the degree of one-fifth when compared with the constellation of factors that are not associated with his work.

Issues

I see two issues that must be addressed:

1. Can a permanent worsening in the Appellant's Type 1 Diabetes be shown to have taken place from the time of his 1992 diagnosis?
2. If there has been a permanent worsening, can any of the reason for it be directly connected with or found to have unavoidably arisen out of the Appellant's RCMP service, as opposed to other factors within his control?

Permanent Worsening

A review of the Appellant's medical files shows that he was initially diagnosed in the spring of 1992, just prior to a scheduled two-year posting to Shamattawa, Manitoba. He was reviewed by Dr. Wiseman (pages 15-16) who determined he should not be at a high risk of diabetic complications "as long as his blood sugars are well controlled and he is compliant with his diabetic regimen..." Dr. Wiseman also advised smoking cessation and an end to "periodic binging".

After deploying to Shamattawa, the Appellant returned to Winnipeg on several occasions for consultations. In 1994, when his posting to Shamattawa ended, he was back in the city and had ready access to the medical system.

The two overt symptoms that were of a concern to doctors from the time of the first diagnosis in 1992 were peripheral neuropathy and diabetic retinopathy – well-known complications of diabetes. At the time of the first diagnosis Dr. Wiseman noted a "microaneursym on the left" fundus (retina) which, to the doctor, demonstrated that the Appellant "has had diabetes for much longer than his symptoms suggest" [page 16]. Other than noting occasional numbness in the fingers and toes, Dr. Wiseman could find no other objective signs of neuropathy at the time. Vibration tests to the feet were normal.

Some years later, in late 1999, Dr. Harrington reported [page 32] that the Appellant "has about three small scattered micro aneurysms of a diabetic nature in the eyes, but there is certainly no proliferative disease and no cause for alarm at the moment."

On 24 August 2001 [page 35] Dr. Leicht noted the 1999 findings of Dr. Harrington, and reported, "I do not see any significant background changes today." He concluded by writing the Appellant "has very minimal background diabetic retinopathy."

Over six years later, on 13 February 2008 [page 52], Dr. Bourque commented, "He has no significant neurological complaints except for some numbness involving his left foot, presumably related to his diabetes which has been present since 1992." In his examination Dr. Bourque found "diabetic retinopathy bilaterally," but that it was "relatively minor."

The Appellant continued to attend the Manitoba Clinic throughout this period, and I note a detailed summary of the evolution of his sugar readings by Dr. Silha at page 125, from a letter written in 2012 to support the Appellant's case before the previous Appeal panel.

The Appellant's haemoglobin A1C reading (a three-month rolling average of blood sugar) began at 11.6% in 1992, and varied between 8 and 11% from then until October 2011. In the year preceding the report, Dr. Silha noted a drop from 9.6% to 7%, which he attributed to the Appellant's ability to "appropriately time his insulin injections, as well as appropriate nutrition and carbohydrate intake."

Dr. Silha goes on to conclude the Appellant's inability to gain optimal control "has been impeded by his demanding occupation." He also writes of the "legacy effect," where inadequate glycemic control "contributes later in the course of the disease even though glycemic control is subsequently adequate."

But, when reading each statement carefully, I note that Dr. Silha did not discuss whether these problems with timing and nutrition made an overall difference in the Appellant's clinical course over the last 20 years.

From my analysis, I would conclude it has not been demonstrated that the Appellant's Type 1 Diabetes permanently worsened from 1992 to the present. His A1C readings have, for the most part, been stable – although above normal throughout this period. In very recent times his A1C numbers are better still, according to Dr. Silha.

Neither can a permanent worsening of his diabetes be demonstrated from examinations of his consequential disabilities such as retinopathy or neuropathy. Those symptoms appear to have been static, if not improving, throughout this period.

Thus, I would conclude the Appellant's basic metabolic disease appears to be no worse now than it was at the time of diagnosis in 1992. That said, for the purposes of analysis on the service relationship issue I will presume a worsening did take place, even if that worsening is only one predicted to arrive in the future by Dr. Silha – based on sub-optimal glycemic control in the past.

Relationship to RCMP Service

On this issue the real question before me is the "but for" test.

But for RCMP service as performed by the Appellant, would his diabetes be any less worse than it is?

In other words, had he had other employment (not in the RCMP) would the clinical course of his diabetes have been altered in any meaningful way from 1992 to the present day? Or, in a similar vein, is there a reasonable occupational element at all, and would not the Appellant's diabetes eventually have worsened anyway due to the simple passage of time?

Notwithstanding the able submissions of the Appellant's representative, like my colleagues I would conclude that four-fifths of the Appellant's diabetes should be attributed to nature alone. He has a strong family history of the disease and does not have the acquired variety.

That leaves one-fifth that may reasonably be altered by the course of history; the same one-fifth that is available for consideration as part of this decision.

The Review panel took the Appellant's testimony and found it was left with considerable doubt; a doubt that could not be resolved in favour of the claim. That Panel made explicit credibility findings. Its analysis is already on the record (pages 79-82) and will not be repeated here.

Ultimately, the Panel concluded that any failure in optimal glycemic control rested not with the RCMP but with the Appellant himself. The Panel concluded he was not seriously invested in his health care at that time, and that his occupation would not have substantially limited his ability to maintain good control if he had wanted to.

The Review panel provided a detailed analysis, addressing each point raised by the Appellant, and dealt with all elements of the claim. The Panel also made credibility findings that I, at the Appeal level, am very reluctant to overlook. The Panel clearly did not believe that the Appellant was sufficiently dedicated to his personal health over this period.

While it would be reasonable to conclude there would be occasions where the Appellant would have been temporarily prevented from addressing his blood sugars due to an ongoing work issue, there is no evidence before me that this would have been a significant and chronic problem lasting through decades. Considering the limited degree to which the natural course of history could have been altered by *any* factor, I am left with the smallest of a "sub-portion" of that one-fifth that would *not* be grounded solely in the Appellant's personal choices as to his health care, diet, exercise, continued smoking, etc.

Given the changeable risk factors as first identified by Dr. Wiseman, and given the ongoing comments in the record pertaining to the Appellant's lifestyle choices, there could not be – in my view – a meaningful portion of that one-fifth that could be made available for entitlement.

Four-fifths are clearly unrelated to any environmental factor, and I conclude the preponderance of the remaining fifth is attributable to the Appellant's own choices.

I do not have any medical evidence, opinion or otherwise, that deals with the “but for” issue in a straightforward way. In order for me to favour even a one-fifth award I would need to have seen a report that dealt squarely with whether the Appellant’s Type 1 Diabetes would have a better clinical presentation today if it had not been for his RCMP service.

In the absence of such an analysis I would not award any degree of pension entitlement.

Signed by: ________________________

Brent Taylor

Date Modified: 2014-07-29