



1999-744

Representative: Eric Marinacci, BPA
Decision No: 6671744
Decision Type: Entitlement Review
Location of Hearing: Kingston, Ontario
Date of Decision: 25 October 1999

As a result of the Applicant's Entitlement Review hearing held 25 October 1999, this Board rules as follows:

RULING

MIGRAINE HEADACHES
FIBROMYALGIA

Not consequential upon the pensioned condition of Post Traumatic Stress Disorder.
Subsection 21(5), *Pension Act*

Dorothy M. Goubault
Presiding Member

Milton J. Lewis, Q.C.
Member

ISSUES

The Applicant appeared before an Entitlement Review Board on 25 October 1999 in Kingston, Ontario, as she was dissatisfied with respect to her denial of entitlement for the conditions of migraine headaches and fibromyalgia following a Minister's Decision dated 19 April 1999. The Applicant was represented at the hearing by Mr. Eric C. Marinacci, Bureau of Pensions Advocates.

EVIDENCE

Counsel, on behalf of the Applicant, introduced the following exhibits:

- | | |
|-------------|--|
| Exhibit P-1 | Letter from Larry A. Cebulski, Ph.D., Psychologist, involving an unrelated Applicant |
| Exhibit P-2 | Extract from <i>The Merck Manual</i> , Centennial Edition, pages 480 to 483 |

Migraine headaches
Fibromyalgia

FACTS AND ARGUMENT

The Applicant acknowledged that she had a history of migraine headaches prior to the regrettable incident in 1991 that gave rise to the ultimate diagnosis of the condition of post traumatic stress disorder and the pensioning of same pursuant to subsection 21(2) of the *Pension Act*. She states, however, that prior to 1991 the migraine headaches were relatively moderate and that she coped by using regular Tylenol. Since the triggering incident in 1991 she advised the Board that the migraine headaches are more frequent, more persistent, more painful and she now uses much stronger medication including occasional stints in hospital when injections are administered to alleviate the pain.

Counsel submits that the pensioned condition of post traumatic stress disorder has permanently worsened the pre-existing migraine headache condition. Counsel also submits that the condition of fibromyalgia has been adversely affected by the pensioned condition pursuant to subsection 21(5) of the *Pension Act*.

Counsel referred the Board to the extract from *The Merck Manual* (Exhibit P-2) which describes primary fibromyalgia syndrome as follows:

(PFS) is a generalized, idiopathic form that is likely to occur in healthy young or middle-aged women who tend to be stressed, tense, depressed, anxious, and striving, but may also occur in children or adolescents (particularly girls) or in older adults . . .

The Applicant felt that this definition fairly described her situation.

Counsel referred the Board to Exhibit P-1 which is a letter from a psychologist in an unrelated matter wherein the psychologist takes exception to the suggestion that psychologists are unqualified to make a diagnosis of a psychologically-based disorder.

In the subject case Counsel relies exclusively upon a report from a psychologist dated 14 July 1998 for the establishment of the diagnosis of the subject conditions fibromyalgia and migraine headaches as well as their relationship to the pensioned condition of post traumatic stress disorder.

The Board does not have before it a medical opinion from a medical practitioner or a psychiatrist that confirms the diagnosis of fibromyalgia or migraine headaches or provides a medical linkage between these conditions and the pensioned condition of post traumatic stress disorder.

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 Board wishes to make clear that there is no Veterans Review and Appeal Board policy that would disqualify psychologists from providing opinions relating to psychologically-based disorders. The Board, however, recognizes that psychologists have a wide range of expertise ranging from infant vision to post traumatic stress disorder. Not all psychologists have equal expertise and equal training or credentials with respect to any and all conditions that come before them.

The Board has a duty under the legislation to assess the credibility of the evidence before it. A careful evaluation of the credibility and persuasiveness of medical or other expert evidence in cases decided under the *Pension Act* is important for three reasons:

- a. The Federal Court has required that in some circumstances the Board must make an explicit finding about the medical evidence and must explain why it does or does not find the evidence credible.
- b. The explanation of any shortcomings in the medical evidence assists claimants and representatives in the preparation of appeals and reconsideration applications.
- c. A careful evaluation of the medical evidence is important to the outcome of a case and will help to make the decision credible in the eyes of the claimant and others who read it.

In evaluating the credibility of medical evidence there are three important factors that the Board would examine. First, are the qualifications of the medical expert. Second, the Board examines the accuracy and completeness of the information which the expert has access to in order to render the opinion. Third, the Board assesses the persuasiveness of the opinion. Its assessment would normally be based on the panel's view of whether or not the expert's conclusion appears to flow logically from the facts, whether or not the expert explored all the relevant factors, and whether or not the opinion could be said to reflect the general medical consensus as established through scientific study of the relevant condition. In cases where there is doubt as to the medical evidence the Board, under section 38 of the *Veterans Review and Appeal Board Act*, may obtain independent medical advice.

The diagnosis and opinion as to the cause or causes of a condition should be provided by an expert who is qualified to assess for that particular condition, particularly where the condition is not well understood and is therefore difficult to diagnose accurately, as would be the case with psychiatric conditions and others such as fibromyalgia or chronic fatigue syndrome which usually rely not on quantifiable or even verifiable physiological findings but rather on the subjective experience of the claimant and his or her own account of them. The expert's report should therefore include a description of the expert's qualifications which in most cases would include formal study and an academic or professional degree, training during a period of supervision, experience in the assessment of the relevant condition and continuing education.

In order for the Board to evaluate the accuracy and completeness of the information which the expert has access to in forming his or her opinion, the assessing psychiatrist, psychologist or physician's report should include a complete history so that the adjudicator will be able to evaluate the credibility of the opinion in light of the other evidence on the file. It is important for the Board to know whether or not the history recorded by the expert is consistent with the other evidence on the file.

Finally, the expert's report should include a description of the condition or conditions the claimant suffers from and the cause or causes. The expert should identify the injury or injuries or disease or diseases from which the claimant suffers, describe the etiology of any injury or disease, identify any factors, employment and other, that played a role in the development of any injury or disease. It should, if possible, describe the interrelation of the factors and describe the functional impact of any disease or injury.

Finally the panel would note that frequently it receives reports in response to communications from claimants' representatives without also being provided with a copy of the representative's correspondence which would include a letter by which the opinion is sought and any attachments. The panel believes that claimant's representative should be prepared to assist the Board in obtaining all relevant material required to make a decision. That would include all representative's letters by which medical opinions are elicited which are then placed before the Board as evidence.

In summary, a credible and persuasive medical or expert opinion for the Board's purposes will normally consist of three parts:

- The relevant facts or history
- The conclusion
- An explanation of how the conclusion is drawn from the facts

The opinion, which need not be lengthy, will likely be persuasive therefore if it has three features:

The facts or history are accurate and complete, that is, they are the same facts that are apparent from the other evidence.

The conclusion makes sense in that it flows logically from the facts.

The expert provides a reasonable explanation of how he or she has drawn the conclusion from the facts.

In addition, the opinion, when presented as evidence, should be accompanied by a description of the expert's qualifications and any correspondence or communication by which the opinion was elicited.

Before accepting the opinion of a psychologist with respect to any particular matter, the Board would require a detailed resume or curriculum vitae or other equivalent evidence that would demonstrate

the psychologist's expertise or experience in dealing with the subject matter with respect to which he or she offers an opinion. In the present case the Board has no evidence before it that Carl Sordoni, Ph.D., C. Psych. is qualified to offer the opinions in his report of 14 July 1998.

The Board therefore, is unable to conclude that there has been a proper diagnosis of either of the subject conditions and, further, that there is any proper medical evidence before it that would demonstrate the necessary linkage between the claimed conditions and the pensioned condition of post traumatic stress disorder.

Pension entitlement is therefore denied and the Minister's Decision of 19 April 1999 is hereby affirmed.

NOTE:

Section 25 of the *Veterans Review and Appeal Board Act* provides that an Applicant who is dissatisfied with the decision of a hearing may, by notice in writing, appeal the decision to the Veterans Review and Appeal Board. Representation is available, free of charge, from the Bureau of Pensions Advocates or from the service bureau of a veterans' organization or from any other representative of the Applicant's choice, at the Applicant's expense.

If the Applicant should require further information in regard to the foregoing, it will be available from the nearest district office of the Department of Veterans Affairs or from the representative who assisted with the present application.

RELEVANT LEGISLATION

Subsection 21(5) of the *Pension Act* states that in addition to any pension awarded under subsection 21(1) or 21(2) of the *Pension Act*, a member of the forces who

- a. is eligible for pension under paragraph (1)(a) or (2)(a) in respect of an injury or disease or aggravation thereof, or has suffered an injury or disease or aggravation thereof that would be pensionable thereunder if it had resulted in a disability, and
- b. is suffering an additional disability that is in whole or in part a consequence of the injury or disease or the aggravation referred to in paragraph (a)

shall, on application, be awarded a pension in accordance with the rates for basic and additional pension set out in Schedule I in respect of that part of the additional disability that is a consequence of that injury or disease or aggravation thereof.

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 therefor was first made, and
- b. a day three years prior to the day on which the pension was awarded to the pensioner.

Section 18 of the *Veterans Review and Appeal Board Act* states that the Board has full and exclusive jurisdiction to hear, determine and deal with all applications for review that may be made to the Board under the *Pension Act*, and all matters related to those applications.

Section 84 of the *Pension Act* states that where an Applicant who is dissatisfied with a decision made by the Minister under this Act or subsection 34(5) of the *Veterans Review and Appeal Board Act* may apply to the Veterans Review and Appeal Board to review this decision.

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

MIGRAINE HEADACHES FIBROMYALGIA

Not pensionable under subsection 21(5) of the *Pension Act*, as consequential to the pensioned condition of post traumatic stress disorder.
Minister's Decision, 19 April 1999

OTHER RELEVANT DECISION

POST TRAUMATIC STRESS DISORDER

Pensionable three-fifths for that part of the disability which arose out of, or was directly connected with, Military Service in Peacetime.
VRAB Entitlement Review, 26 June 1996

The Applicant first applied for pension entitlement for migraine headaches and fibromyalgia on 21 July 1998.

Date Modified: 2012-02-07