



2002-005

Representative: Katharine Roney, RCL DOM
Decision No: 100000470005
Decision Type: Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 5 September 2002

As a result of the Appellant's Entitlement Appeal hearing held 5 September 2002, this Board rules as follows:

RULING

OSTEOARTHRITIS LUMBAR SPINE
BILATERAL OS CALCIS FRACTURES RESULTING IN OSTEOARTHRITIS OF THE BILATERAL SUBTALAR JOINT

Did not arise out of nor were they directly connected with service in peace time in the Regular Force.
Subsection 21(2), *Pension Act*

Original signed by:

_____ Presiding Member
M.M. Habington

Original signed by:

_____ Member
Robert Benoit

Original signed by:

_____ Member
Wm (Bill) Malenfant

ISSUES

An Entitlement Appeal hearing was held in Charlottetown, Prince Edward Island, on 5 September 2002, as the Appellant was dissatisfied with an Entitlement Review decision of 13 June 2001. Ms. Katharine Roney, Service Officer, The Royal Canadian Legion, was the representative.

EVIDENCE

The Service Officer submitted the following exhibit as evidence:

EA-H1: Letter from Dr. Carl Farmer, Orthopaedic Surgeon, dated 13 May 2002.

Osteoarthritis Lumbar Spine

Bilateral Os Calcis Fractures Resulting in Osteoarthritis of the Bilateral Subtalar Joint

FACTS AND ARGUMENT

The Service Officer on the Appellant's behalf, submitted that the claimed conditions are directly related to a fall which the Appellant incurred in February 1956, while he was serving in the Regular Force and that the claimed conditions are therefore, pensionable under subsection 21(2) of the *Pension Act*.

The Service Officer advised the Board that her arguments would address both conditions together since they are the result of the same fall.

The Service Officer directed the Board's attention to a Physician's Statement, dated 28 April 1998, for the diagnosis of osteoarthritis of the lumbar spine, as well as osteoarthritis of the bilateral subtalar joint secondary to fractures of the Appellant's heels.

The Service Officer reviewed the evidence related to the Appellant's fall in 1956. According to the Appellant's statement within the file, which was confirmed by the Appellant at his Entitlement Review hearing, he was returning to the H.M.C.S. *Haida*, which was in dry-dock on 5 February 1956, around 11:30 p.m. There was freezing rain at the time. He went up the gang-plank and when he reached a platform, he slipped and fell to the deck below, a fall of approximately 20 feet. The evidence revealed that the Appellant fractured both his heels and he also suffered a fracture of the D12 vertebra.

The Entitlement Review decision, dated 13 June 2001, concluded that the Appellant was not in the performance of his duties when the fall occurred and denied pension entitlement based on the Board of Inquiry findings held in February 1956. These findings are summarized as follows:

- (a) The cause of the accident is attributed to the slippery conditions existing on the centre platform and the man's impaired judgment as a result of his consumption of beer immediately prior to the accident.
- (b) The man was returning to his ship from short leave and in consequence was not considered to have been on duty at the time of the accident.
- (c) It is evident that the man did not exercise due caution while on this ladder and in consequence is partially to blame.
- (d) The injury cannot be attributed to military service as such...

The Entitlement Review Board also referred to the fact that the Appellant had been drinking, that he was on leave when the accident occurred and that he was not on Department of National Defence property or military premises.

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*.

The Board has reviewed the medical evidence and will first address the claimed condition of osteoarthritis lumbar spine. The Board, based on that evidence, finds that there was no injury to the lumbar spine due to the Appellant's fall in 1956. Therefore, the Board could not relate the claimed osteoarthritis lumbar spine to that fall.

The Board notes that Dr. Carl Farmer's opinion, submitted as EA-H1, identified the fracture of D12 resulting from the fall in 1956 as a possible cause of the osteoarthritis condition the Appellant now suffers at that level of his back. The fracture of D12, however, relates to the dorsal spine and a claim for a dorsal spine disability was not before this Appeal Panel. Additionally, Dr. Farmer identified a possible consequential relationship

between the Appellant's current lumbar spine problems and the fracture of D12. However, neither was any consequential claim pursuant to subsection 21(5) of the *Pension Act* before the Board.

In respect of the claimed bilateral os calcis fractures resulting in osteoarthritis of the bilateral subtalar joint condition, the medical evidence does indicate that the Appellant fractured his heels in the fall in 1956. Therefore, the disability pension claim for that bilateral os calcis condition depends upon the question whether the fall in 1956 can be found to have arisen out of, or to have been directly connected to the Appellant's peace-time service in the Regular Force. Mere service in the military at the time of the incident is not sufficient to establish such a service connection.

The evidence in this case revealed that the Appellant was returning from leave to his ship which was in dry-dock. He indicated in his statement to the Board of Inquiry that he had gone to the "wet canteen in STADACONA" and drank approximately ten glasses of draft beer. He stated that he did not feel unsteady because of this, as he had consumed the beer over a period of time which he indicated was between 8:30 and 10 p.m.

While the Appellant stated that he did not remember anything after leaving the canteen, he nevertheless recalled "running up the steps, there was no trouble". This recollection was supported by the testimony of two of his ship-mates, who indicated that at one point the Appellant had successfully negotiated the gangway and steps to the top platform, but refused assistance to actually board his ship. He is then reported by one witness as having returned to the level of the next lower platform. That witness, who was present with the Appellant at the time of the fall, testified before the Board of Inquiry that the Appellant had stated while on the "top platform" that he was feeling sick and, when he later saw the Appellant on the "second landing", he was "doubled over clear of the railings". The witness then heard a yell from the Appellant, went to investigate and found the Appellant had fallen "below the second landing on the ground".

The second witness, who was on duty on the gangway, told the Board of Inquiry that the steps were slippery as a result of wet weather, but later confirmed that "the stairs had been salted". That witness also confirmed that the Appellant had been offered assistance to board the ship when he was on the "top platform", but had refused any help. There is no evidence that other persons had falls or accidents due to the conditions of the steps.

The Board finds that the accident did not happen during the Appellant's normal working hours and that the Appellant was clearly on leave at the time of his fall. The Appeal Panel thus could not find that the fall and any resulting disability were directly connected to the performance of the Appellant's military duties.

Relying on the evidence gathered by the Board of Inquiry, neither could the Board find that the fall and any resulting disability arose out of the Appellant's military service as he had been drinking and did not exercise due care. More specifically, the available evidence makes it clear that the weather, the Appellant's inebriation, his repeated refusal of assistance to board the ship and his lack of care in failing to ensure his footing was secure on an icy surface were the factors which caused his accidental fall.

Therefore, based on the evidence, the Board is unable to find that any disability the Appellant suffers as a consequence of the above-noted accidental fall, including the claimed bilateral os calcis fractures resulting in osteoarthritis of the bilateral subtalar joint condition, is directly related to, or arose out of, his peace-time service in the Regular force.

The Board thus rules to affirm the Entitlement Review decision of 13 June 2001.

RELEVANT LEGISLATION

Paragraph 21(2)(a) of the *Pension Act* states that in respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time, where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member.

Subsection 29(1) of the *Veterans Review and Appeal Board Act* states that an appeal panel may

(a) affirm, vary or reverse the decision being appealed;

(b) refer any matter back to the person or review panel that made the decision being appealed for reconsideration, re-hearing or further investigation; or

(c) refer any matter not dealt with in the decision back to that person or review panel for a decision.

Section 25 of the *Veterans Review and Appeal Board Act* states that an applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.

Section 26 of the *Veterans Review and Appeal Board Act* states that the Board has full and exclusive jurisdiction to hear, determine and deal with all appeals that may be made to the Board under section 25 or under the *War Veterans Allowance Act* or any other Act of Parliament, and all matters related to those appeals.

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

OSTEOARTHRITIS LUMBAR SPINE

BILATERAL OS CALCIS FRACTURES RESULTING IN OSTEOARTHRITIS OF THE BILATERAL SUBTALAR JOINT

Did not arise out of nor were they directly connected with service in peace time in the Regular Force.

Subsection 21(2), *Pension Act*

VRAB Entitlement Review, 3 June 2001

The Appellant first applied for pension entitlement for the above noted conditions more than three years ago.

Date Modified: 2012-01-19