



## 2002-666

Representative: Lois Kit, BPA

Decision No: 100000472666

Decision Type: Entitlement Appeal

Location of Hearing: Teleconference between Charlottetown, Prince Edward Island and London, Ontario

Date of Decision: 10 December 2002

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As a result of the Appellant's Entitlement Appeal hearing held 10 December 2002, this Board rules as follows:

### RULING

#### RECURRENT DYSTHYMIA WITH MAJOR DEPRESSION

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

Original signed by:

\_\_\_\_\_ Presiding Member

J.A. Boisvert

\_\_\_\_\_ Member

M.M. Habington

\_\_\_\_\_ Member

I.M. Murray

### ISSUES

An Entitlement Appeal hearing was held by way of teleconference between Charlottetown, Prince Edward Island, and London, Ontario, on 10 December 2002, as the Appellant was dissatisfied with an Entitlement Review decision of 24 July 2001. Ms. Lois Kit, Bureau of Pensions Advocates, was the representative.

### EVIDENCE

Submitted as additional evidence for this claim is:

- EA-F1: Transcript of the Entitlement Review Hearing, Veterans Review and Appeal Board, held in North Bay on 24 July 2001;
- EA-F2: Letter dated 3 October 2002 from the Appellant;
- EA-F3: Report dated 8 April 2002 from Dr. G. Nicholl, Psychologist;
- EA-F4: Report dated 30 May 2002 from Dr. G. Nicholl, Psychologist;
- EA-F5: Report dated 9 July 2002 from Dr. G. Nicholl, Psychologist;

- EA-F6: Medical Reports from National Defence Headquarters which changed the medical profile at release from "Voluntary" to "Medical" release;
- EA-Attach-F1: Report dated 20 September 2001 from Dr. David Cochrane; and
- EA-Attach-F2: VAC decision dated 15 November 2001.

## **Recurrent Dysthymia with Major Depression**

### **FACTS AND ARGUMENT**

The Advocate, on behalf of the Appellant, argued that his Recurrent Dysthymia with Major Depression arose out of certain stressors which he was subjected to during his military service. More particularly, she argued the Appellant suffered from abuse and harassment at the hands of various supervisors and that there was inadequate medical management of his claimed condition by military medical authorities.

In support of her argument, the Advocate referred the Board to a transcript of the Entitlement Review Hearing held in North Bay, Ontario, on 24 July 2001, and which is found in EA-F1. In this transcript, she underscored the Appellant's claim to have suffered abuse, both verbal and physical, at the hands of a certain Warrant Officer. In addition to these allegations, the Appellant testified to having been exposed to "troubling service experiences where he witnessed death during a NATO exercise and ... gruesome death of a service personnel in London."

The Advocate then pointed out that in a decision dated 15 November 2001 (EA-Attach-F2), the Appellant was awarded full pension entitlement for Post Traumatic Stress Disorder, essentially on the basis of the same factors now argued by the Advocate, on behalf of the Appellant. She referred the Board to a Psychological Assessment dated 8 April 2002, which was prepared by Dr. George M. Nicholl, Psychologist, for the diagnosis of the claimed condition (EA-F3).

In the same report prepared by Dr. Nicholl, dated 8 April 2002, the Advocate pointed out that the psychologist concluded that; "the Appellant is suffering from a clinical depression and post traumatic stress that are both directly related to the emotional impact of his experiences while serving in the military."

The Advocate then referred the Board to two other reports from Dr. Nicholl dated 30 May 2002 and 9 July 2002 (EA-F4 and EA-F5), in which he once again confirms the diagnosis of Post Traumatic Stress Disorder and Chronic Major Depressive Disorder and restates: "It has been established that the symptoms of PTSD that he is suffering are directly connected to his military service and I believe that his depressive symptoms have a similar origin."

The Advocate concluded her arguments by stating that taking into consideration the nature and extent of the Appellant's service experiences, the medical opinion of Dr. Main, and the psychological opinion of Dr. Nicholl, who has spent the most time reviewing the Appellant's past history, and asking the Board to expand the original diagnosis to Major Depressive Disorder Severe, as indicated by Dr. Nicholl.

### **REASONS AND CONCLUSION**

In this case, the Appellant seeks a pension for the claimed psychiatric condition of "Recurrent Dysthymia with Major Depression." It was submitted by the Appellant's Advocate that certain stressful experiences suffered by the Appellant during his military service, caused the Appellant's Recurrent Dysthymia with Major Depression.

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 listened attentively to the arguments presented by the Advocate, on behalf of the Appellant, and carefully reviewed all of the documentation on file, including the new exhibits and attachments. After an extensive review and consideration of all of the facts before it, the Board rules to affirm the decision of the Entitlement Review Panel for the following reasons:

1. The evidence on file indicates that the Appellant currently holds a pension for another psychiatric condition: Post Traumatic Stress Disorder. The Board is conscious of the fact that the pension, which has already been awarded to the Appellant by the Department, has been granted for essentially the same reasons, on the same facts for which he is now seeking entitlement for Recurrent Dysthymia with Major Depression.
2. On the issue of causation of the claimed condition of Recurrent Dysthymia with Major Depression, the Board is unable to reasonably conclude that this is a disability arising out of or directly connected to military service, as required by subsection 21(2) of the *Pension Act*. It must be kept in mind that entitlement to pension for disability does not flow simply from the fact that a disability arose at the same time during which the Appellant was a member of the Force. Instead, there must be evidence of a causal connection between service and the disability, because the legislation specifies that pension entitlement *arises* where the disability arose out of, or was directly to service as a member of the Forces.
3. In order to conclude that a psychiatric disability arose out of or was directly connected to military service under subsection 21(2) of the *Pension Act*, it is not enough that military service played a minor contributing or incidental role in the development of the psychiatric condition. Military service should be the primary cause. This follows from the judgment of the Federal Court in *McNeill v. Canada* (1998), (dealing with a judicial review of a decision of the Veterans Review and Appeal Board), where Mr. Justice Nadon stated that every application for a pension under subsection 21(2) of the *Pension Act* must satisfy two conditions before the applicant can be said to be entitled to a service related disability pension.

First, the Appellant's claimed condition must be pensionable - in that it must be a condition which can be classified as a "disability" resulting from an injury or disease - and it must be a permanent condition, in the sense that it is one which the Appellant continues to suffer. Secondly, the original condition which caused the disability must arise directly from the Appellant's service. On the issue of the causal connection, Mr. Justice Nadon concluded that subsection 21(2) of the *Pension Act* requires that the applicant's military service be the primary cause for the disability.

4. In determining the issue of causal connection, under subsection 21(2) of the *Pension Act*, the Board also follows the approach taken by Canadian courts and tribunals in cases involving claims for compensation for psychiatric disability. It is accepted in Canadian law that the role or contribution of personal stressors, the Appellant's psychiatric history, and inherent personality factors must be taken into account in determining what caused a psychiatric disability. In each case, objective evidence should be assessed along with the appellant's subjective evidence concerning the role of service stressors.
5. While the evidence on the file shows that the Appellant now places a greater subjective emphasis on the role of service factors in the development of his problems, than on personal factors, the Board is not required to simply accept this as being conclusive of the issue under subsection 21(2) of the *Pension Act*. In determining whether the claimed psychiatric condition in this case arose out of, or was directly connected to military service under subsection 21(2) of the *Act*, the Board has assessed the Appellant's subjective perceptions and beliefs concerning the service-related events, which he feels have caused his psychiatric problem, in light of the objective evidence on file concerning those same events. The Board has reviewed all of the evidence in the file, and has performed an objective analysis of the subjective complaints and perceptions of the Appellant against the other evidence on file. The Board has also considered the role that personal stressors in the Appellant's life, and other personal causes, played in contributing to the psychiatric disability.

After reviewing the entire picture, which emerges from a review of the file and service documents, the Board must note that it has been unable to find any objective documented support for allegations made by the Appellant, regarding both physical and verbal abuse by a superior officer, nor for any incidence of traumatic experience while serving in the Regular Force.

The Board has concerns over the credibility of the Appellant's testimony and evidence. The Board has reviewed all of the documentation on the file and finds there are too many contradictions found in descriptions of the events - as they were described by the Appellant to the various treating physicians - to enable the Board to place a greater deal of weight on his testimony than on the other evidence on the file and in the service document.

6. While the Appellant's evidence shows a greater subjective emphasis on the role of service factors in the development of his problems, it is evident from the medical information on file that the Appellant has a family history of depression and that there were a number of non-service factors at play prior to his diagnosis of depression, including a marriage break-up, an abusive upbringing, and a history of alcohol abuse. The Appellant's objective perceptions, concerning harassment he experienced while in military service, are not borne-out by any objective evidence on file.

The evidence, as a whole, shows that he tended to come into conflict with his colleagues, and that he experienced intense personal reactions to the situations he encountered. The evidence suggests that the Appellant's intense personal *reactions* to events in military service events, played some role in the manifestation of his psychiatric problems. However, the Board cannot reasonably infer, from the entire body of evidence before it, that it was the stressors from the Appellant's military service which were the direct cause, or even the significant or primary cause of the Appellant's psychiatric problem.

There is no objective evidence to support the conclusion that the Appellant's experiences in military service were unusual or outside of the realm of difficulties or challenges experienced by persons attempting to meet the demands and challenges of military service. Nor does the evidence objectively suggest that the interpersonal conflicts experienced by the Appellant stemmed from any systemic pattern of abuse directed at the Appellant, or that his commanders directed malicious or abusive conduct toward him. However, the medical evidence on file does indicate that the Appellant suffers from emotional over-sensitivity and difficulty in coping with everyday stresses of life. A weighing of the Appellant's subjective perceptions concerning the severity of the stressors he experienced during military service, against the other evidence on file, does not reasonably support the inference that the stressors identified subjectively by the Appellant as the major causal factor in the development of his psychiatric illness, were in fact the direct or primary cause of his disability. The evidence could only reasonably and credibly support the inference that stresses related to military service played an incidental role in the manifestation of his psychiatric disability, rather than constituting the direct or primary cause of the Appellant's condition.

After reviewing the entire body of evidence on the file, the Board can only conclude that Dr. Nicholl reached his conclusion regarding a cause and effect relationship between the Appellant's service and the claimed condition, solely on the basis of the Appellant's anecdotal and subjective evidence, without having an opportunity to assess the role that non-service factors may have played. The Board also finds that the gap between the Appellant's discharge from service in 1990 and his diagnosis and treatment, which began only in late 2001, has not been adequately addressed by Dr. Nicholl.

As well, the Board notes that in a psychiatric report, dated 7 December 2000, the treating psychiatrist, Dr. O'Toole, pointed out that it was not until the Appellant was denied benefits from the provincial government that he ever mentioned anything about his military service as cause for his current problem. In the words of Dr. O'Toole, he stated:

...Let me point out that when I first saw this man the focus was certainly not on his military service in any way: we never even discussed his military service until he was turned down for a disability by the provincial government. He then found out he could apply for disability from the DVA. At no point was the focus on the military as being the cause of his problems....

This statement from Dr. O'Toole raises questions once again about the credibility of the Appellant's subjective recollections and raises serious concerns about the Appellant's later statements to Dr. Nicholl. The evidence concerning the changing nature, focus and timing of the Appellant's recollections suggests that secondary factors may have influenced the Appellant's recollections or adversely impacted his ability to recall events and provide history to his medical professionals, in an accurate or objective manner. It should be noted that in assessing reliability of an expert opinion, one of the most

relevant factors in the assessment of credibility and reliability of the evidence, is the factual basis for the opinion. When the facts relied upon by the medical expert in rendering an opinion come directly from the interested party, and the facts relied upon by the medical expert are inconsistent with those accepted by the finder of fact, the evidence may be given less weight.

7. In conclusion, the Board would also like to address the similarity between the Appellant's PTSD and his claim for Recurrent Dysthymia with Major Depression. Not only are these two conditions purported to have arisen as a result of the same events, while the Appellant was in the Regular Force, but it would appear that the symptoms are much the same, which raises a question about a second application or claim for what appears to be essentially the same condition. In fact, even Dr. Nicholl, in his report of 9 July 2002, states very clearly that: "It is my opinion that the most appropriate diagnosis at this point would be the dual diagnoses indicated in my psychological assessment dated April 8, 2002: Post Traumatic Stress Disorder; Chronic and Major Depressive Disorder; Severe." It is interesting to note that in Dr. Nicholl's regional Psychological Assessment, dated 8 April 2002, he lists both Post Traumatic Stress Disorder - Chronic and Major Depressive Disorder; Severe under Axis 1 of DSM-IV.

In any event, the Board must also note that there is no authority in subsection 21(2) of the *Act*, nor in any other section of the *Pension Act*, for providing more than one pension for the same type of symptoms. The *Pension Act* does not pension diagnoses, symptoms, injuries or conditions. It pensions disability. "Disability" is defined in section 3 of the *Pension Act* as the "loss or lessening of the power to will and to do any normal mental or physical act." In this case, the Board has not been provided with any evidence to show that the latest pension claim is based on a new and distinct disability which has further lessened the Appellant's power to will and to do any normal mental or physical act.

For all of the above reasons, the Board rules to affirm the decision of the Entitlement Review Panel dated 24 July 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.

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.

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.

## **DECISION BEING APPEALED**

### RECURRENT DYSTHYMIA WITH MAJOR DEPRESSION

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

The Appellant first applied for pension entitlement for the above condition on 27 September 2000.

Date Modified: 2012-01-19