



2002-798

Representative: Sylvia E. Kissin, BPA
Decision No: 100000436798
Decision Type: Entitlement Review
Location of Hearing: Toronto, Ontario
Date of Decision: 11 December 2002

As a result of an Entitlement Review hearing held on 11 December 2002, on behalf of the remarried widow of the late Applicant, this Board rules as follows:

RULING

WIDOW'S PENSION (RETROACTIVITY)

THE BOARD AFFIRMS THE MINISTER'S DECISION.

No additional retroactivity is indicated in the circumstances of the present case. Subsections 51(1) and 56(1), *Pension Act*
Section 36, *Statute Law (Superannuation) Amendment Act*

Original signed by:

_____ Presiding Member
S.H. Forster

_____ Member
Charles J. Power

ISSUES

The remarried widow of the late Applicant appeared before an Entitlement Review Panel in Toronto, Ontario, on 11 December 2002 as she was dissatisfied with the three years retroactivity provided to her for the reinstatement of her widow's allowance by the Minister for a period of three years prior to the Minister's Decision dated 6 May 2002. At the hearing, the remarried widow was accompanied by her current husband. The remarried widow's interests at the hearing were represented by Ms. Sylvia Kissin, Bureau of Pensions Advocates.

EVIDENCE

At the hearing, the Advocate provided the Panel with a total of four attachments extracted from the Departmental files. Accepted as ER-Attach-P1, was some correspondence from the Canadian Pension Commission dated 20 November 1978 in which that Commission, after acknowledging the remarried widow's then recent marriage to her current husband, informed her that the widow's pension she had been receiving up to that time would be cancelled although the additional award on behalf of a dependent child, would continue.

As ER-Attach-P2, the Advocate introduced a Departmental letter dated 15 April 1980 in which it was recorded that the remarried widow and her husband were living with the child and that the remarried widow was employed as a teacher with her husband being employed as a commercial artist. It was noted that the

child was 15 years of age and it would appear that as there were no plans for the remarried widow's current husband to adopt the child, she would continue to receive the additional children's allowance.

As ER-Attach-P3, the Advocate introduced a Departmental letter which indicated that the pension on behalf of the child was to be paid to the remarried widow for administration.

As ER-Attach-P4, the Advocate introduced a letter from the Canadian Pension Commission dated 26 April 1982 which advised that an earlier letter from the remarried widow had been received and that the additional pension paid on behalf of the child had been suspended effective 1 March 1982 as it would appear that the child had reached the age of 17. The letter further indicated that should the child still be in attendance at school, an appropriate form should be forwarded so as to permit further dependent allowance to be paid.

Widow's Pension (Retroactivity)

FACTS AND ARGUMENT

At the hearing, the Advocate suggested that because the remarried widow had acted as a good citizen in completing all of the documentation and replied to all of the correspondence forwarded to her by the Department, including acknowledging to the Department that she had remarried, there was a moral obligation, if not a legal one for the Department to pay the maximum amount of retroactivity possible.

The Advocate acknowledged that according to the legislation in place in Canada in the 1970's, once the widow of a serviceman remarried, such a widow would not be entitled to receive any further pension arising out of the death or injuries sustained by her late husband. In accordance with the legislation in effect at that time, the Advocate acknowledged that no widow's pension would have been payable at the time of the remarried widow's marriage to her current husband after the death of her former husband, the late Applicant, some 13 years earlier in 1965. The Advocate did suggest to the Panel that once the legislation was again changed in 1989 so as to remove the bar to continuing to receive a widow's pension even after a remarriage, the remarried widow should have been contacted by Departmental officials at that time. The Advocate suggested that the attachments indicated quite specifically that the remarried widow was living at a particular address in 1982 at the time some correspondence from the Department was forwarded to her, and as she is still living in that same address as of the date of the hearing, it would have been no difficulty whatsoever for Departmental officials to contact her had they so chosen. The Advocate further suggested that there was a moral duty, if not a legal one, on the Department and the Minister and the Departmental officials to contact all persons who might be affected by the change of legislation that occurred in June 1989 so as to reinstate widow's benefits to those who previously had lost those benefits on remarriage.

The remarried widow advised the Panel that she was not aware of the change in legislation in 1989 and did not recall having read anything in newspapers or see anything on television or seen anything in magazines or other periodicals respecting this change of legislation. She advised that it was only quite recently that at a wedding in her home province in New Brunswick, an acquaintance asked her whether she continued to receive the widow's pension for her former husband, the late Applicant. When the remarried widow apparently advised this acquaintance that she did not receive such a pension, that person advised her to contact Departmental officials, which had occurred.

The Advocate suggested that as the Department had already agreed to three years of retroactivity in its ruling of 6 May 2002, it could equally have made a ruling pursuant to subsection 39(2) for an additional two years of retroactivity, but failed to do so for reasons unknown to the Advocate.

The Advocate initially suggested that the present Panel could provide for an entitlement back to the date of original change of legislation in 1989, but on being queried by the Panel as to the legal basis for that submission, subsequently agreed that as a minimum she was seeking a further two years of retroactivity pursuant to subsection 39(2) of the *Pension Act*.

In summary the Advocate suggested that in the circumstances, as the remarried widow had already lost a considerable amount of money in the form of unobtainable widow's pension benefits for the period after 1989, the Panel should ensure that the financial hardship was as minimal as possible.

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 Panel notes that although section 39 was referred to by the Advocate in arguing the case, it is actually section 56 which is applicable to this case as it deals specifically with the determination of the date of payment of a pension which is granted after death of a veteran. Section 56 of the *Pension Act* contains essentially the same wording, and has the same legal effect as section 39 of the *Pension Act*, which is the provision of general application for the determination of a payment date for disability pensions. On 3 June 1992, the predecessor board, to this Board (the "Veterans Appeal Board [the "VAB"]") outlined basic principles on the use and application of subsection 39(2) - and by analogy 56(2) - of the *Pension Act* in an Interpretation decision known as "I-42."

It was concluded in I-42 that:

1. subsection (2) was intended to apply only to cases where there is a delay between the date of application for that particular pension and the awarding of the pension which is in excess of 3 years.
2. The delay must be a delay which arose out of problems in securing service or other records, or out of other administrative difficulties beyond the control of the applicant.
3. There must be "evidentiary substantiation" of the type of delay which occurred in the appellant's case.
4. A change in policy is not an "administrative difficulty" within the meaning of subsection 39(2).

In this case, it was not a change in policy but a change in legislation which led to the request that the remarried widow be given an additional two years of pension payments, in addition to the three years of retroactivity which she had already been granted as a result of the Minister's decision of 6 May 2002. However, the Panel notes that just as a change in policy has not historically been considered a ground for invoking subsection (2), a change in legislation would also not fall within the definition of a "delay which arose out of problems in securing service or other records, or out of other administrative difficulties beyond the control of the applicant."

This Panel notes that at any time there is a change in legislation so as to make provisions more generous than they were before, there will always be individuals who will be affected by such change. It is for this reason that publication of information in official documents such as the Canada Gazette have been, for generations, considered by courts and other judicial and quasi-judicial bodies as being official notification to those who may be concerned. It is obviously impossible to personally notify everyone who is or may be affected of a change of legislation. On the other hand, as pointed out by the Advocate, the purpose of the Department is to provide those benefits possible to Veterans and their dependents. This Panel was not provided with any information which would in any way enable it to find that there was a program in effect to specifically notify all persons who had been affected by the change of legislation in 1989. Even if such a program were in effect, this would be a matter of policy to try and reach the largest numbers of people possible, as opposed to being a matter of law.

In the circumstances of this case it is extremely unfortunate that the remarried widow did not become aware of the change in legislation until 2002. That having been said, this Panel was not provided with any documentation which would in any way enable it to find, as a matter of law, that the Department was in any way negligent, or that it erred in law, by not specifically contacting the remarried widow in the circumstances of this case. Similar Veterans Review and Appeal Board Panels have found in other ameliorative legislative changes involving the Department that the lack of knowledge of such increased benefits by potential recipients of those benefits did not automatically mean the recipients would get the benefits right back to the change of legislation date in all circumstances.

In this case, the remarried widow's pension had been terminated in 1979, one year after her remarriage, in accordance with the legislation which existed at that time. The legislation was amended in 1989. The remarried widow approached the Department to re-apply for her allowance in October of 2001. In a decision

of 6 May 2002, the Minister approved payment of the remarried widow's pension. The pension was made payable from 6 May 1999. This gave the remarried widow her pension, along with three years of retroactive payments, dating back from the date of the Minister's decision.

In reaching its decision on the effective date of this survivor's pension, the Ministerial staff therefore quite rightly, at the time of consideration on 6 May 2002 of her request for reinstatement, gave the remarried widow the maximum permissible under subsection 56(1), namely three years back to 6 May 1999. The Minister did not grant an additional two years of retroactivity under subsection 56(2) of the *Pension Act*. Such further two years of retroactivity can only be awarded when either the Minister or a Panel such as this one or an Appeal Panel of the Veterans Review and Appeal Board is of the opinion that there were delays in securing service or other records or other administrative difficulties beyond the control of the Applicant.

In the circumstances of this case there was a lack of knowledge by the Applicant. That is a difficulty within the control of an Applicant. As noted at the beginning of this Decision, there has been for generations the deemed provision that all federal legislation is known to anyone affected by it, once it is published. To find that a lack of knowledge was beyond the control of any Applicant when such knowledge is available in official sources is not, as the Panel understands it, contemplated in Canadian law. Therefore, this Panel cannot find as a matter of law that the lack of knowledge of the remarried widow of the increased benefits available to her in 1989 by the change of legislation was an administrative matter beyond her control. As a result this Panel, with regret, must conclude that in the circumstances of this case it has no legal justification or reason upon which to invoke the provisions of subsection 56(2) of the *Pension Act*.

For the above reasons, the further two years of retroactivity requested by the Applicant is declined. In addition, as is obvious from a review of the legislation, neither this Panel or any other Panel of the Veterans Review and Appeal Board has the legal authority, justification or ability to extend entitlement retroactivities at times in excess of those contemplated by section 56 of the *Pension Act*. The original request to have the present Panel direct entitlement effective back as of June 1989 is found as a matter of law by this Panel to be without legal foundation.

Therefore, while mindful of its duties and responsibilities pursuant to section 39 of the *Veterans Review and Appeal Board Act* to resolve all doubt in favour of the Applicant, increased retroactivity of any amount beyond that previously awarded by the Minister is not indicated. Specifically, this Panel is limited, even if it were so inclined to do, to a further award of two years pursuant to subsection 56(2) and cannot, as a matter of law, go back beyond the maximum time limits for retroactivity in section 56. For the reasons already explained above, this Panel is of the opinion that this is not an appropriate circumstance in which to award a further two years entitlement pursuant to subsection 56(2) because there has been absolutely no indication by the testimony of the Applicant or of her spouse, or in the submissions of the Advocate, that there were "administrative difficulties beyond the control of the Applicant". In the circumstances, the Panel affirms the Minister's Decision dated 6 May 2002.

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 51(1) of the *Pension Act* states that except as otherwise provided in this Act, in any case where pension may be awarded under section 21 in respect of the death of a member of the forces, the member's surviving spouse is entitled to a pension only if

(a) the surviving spouse was married to the member before the member was granted a pension for the injury or disease that resulted in the member's death; or

(b) the marriage took place after the grant of the pension, and

(i) the member's death occurred one year or more after the date of the marriage, or

(ii) the member's death occurred less than one year after the date of the marriage and the Minister is of the opinion that the member had, at the date of the marriage, a reasonable expectation of surviving for at least one year thereafter.

Subsection 51(2) of the *Pension Act* states that no payment shall be made under this section from a date prior to that from which a pension is payable under section 56.

Section 36 of the *Statute Law (Superannuation) Amendment Act* states that where a pension did not commence, was suspended, discontinued or cancelled or ceased on the marriage or remarriage of a pension pursuant to Section 58 or 59 (repealed) of the *Pension Act*, that pension shall on application, commence or be resumed.

Subsection 56(1) of the *Pension Act* states that pensions awarded with respect to the death of a member of the forces shall be payable with effect as follows:

(a) to or in respect of the member's survivor or child, or to the member's parent or any person in place of a parent who was wholly or to a substantial extent maintained by the member at the time of the member's death, if paragraph (a.2) does not apply, and if an additional pension referred to in paragraph 21(1)(a) or (2)(a) was at the time of death being paid in respect of that person or that person is awarded a pension under paragraph 21(1)(b) or (2)(b).

(i) where a pension is awarded on a date less than three years after the date of death, from the day following the date of his death, or

(ii) where a pension is awarded on a date three years or more after the date of death, from a date three years prior thereto.

Subsection 56(2) of the *Pension Act* states that notwithstanding subsections (1) and (1.1), where a pension is awarded with respect to the death of a member of the forces, or an increase to that pension is awarded, and the Minister or, in the case of a review or an appeal under the *Veterans Review and Appeal Board Act*, the Veterans Review and Appeal Board is of the opinion that the pension or the increase, as the case may be, should be awarded from a day earlier than the day prescribed by subsection (1) or (1.1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension or two years increase in pension.

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 21 of the *Veterans Review and Appeal Board Act* states that a review panel may

(a) affirm, vary or reverse the decision of the Minister being reviewed;

(b) refer any matter back to the Minister for reconsideration; or

(c) refer any matter not dealt with in the decision back to the Minister for a decision.

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

WIDOW'S PENSION (RETROACTIVITY)

The Department of Veterans Affairs Canada has reviewed your application and determined that you are eligible for reinstatement of survivor's pension pursuant to subsections 51 and 56 of the *Pension Act* and Section 36 of the *Statute Law (Superannuation) Amended Act*.

Minister's Decision dated 6 May 2002.

The remarried widow first applied for widow's pension more than three years prior to date of hearing.

Date Modified: 2012-02-08