2003-588

Representative: Daniel Assh, BPA
Decision No: 100000570588
Decision Type: Entitlement Review
Location of Hearing: Nanaimo, British Columbia
Date of Decision: 23 July 2003

As a result of the Applicant's Entitlement Review hearing held 23 July 2003, this Board rules as follows:

RULING

HEPATITIS C

THE BOARD AFFIRMS THE MINISTER'S DECISION.

Did not arise out of nor was it directly connected with service in the Royal Canadian Mounted Police.
Section 32, *RCMP Superannuation Act*
Subsection 21(2), *Pension Act*

Original signed by:
_____Presiding Member
Richard Bonin

_____Member
Hal H. Singleton

ISSUES

The Applicant appeared before an Entitlement Review Panel in Nanaimo, British Columbia on 23 July 2003, as he was dissatisfied with his denial of entitlement for the condition of Hepatitis C, following a Minister's Departmental Review decision dated 22 January 2003. This claim was presented by Mr. Daniel Assh, Bureau of Pensions Advocates.

EVIDENCE

The Advocate submitted the following as evidence:

ER-Attach-H1:	a VAB decision dated 4 December 1990 for another Applicant; and
ER-Attach-H2:	a VAB decision dated February 1997 for another Applicant (unclear date).

Hepatitis C

FACTS AND ARGUMENT

At the onset of his presentation, the Advocate referred the Panel to the current diagnosis wherein it was mentioned that the probable cause of the claimed condition was a massive blood transfusion. The Advocate indicated that the evidence on file revealed that the Applicant received blood transfusions, and he indicated

that the basis of this claim is that the RCMP, through the Department of Veterans Affairs, are truly responsible for the outcome of his treatment.

The Advocate then referred to ER-Attach-H1 and ER-Attach-H2, and argued that the jurisprudence indicated that in such cases you don't have to prove medical mismanagement.

In his testimony, the Applicant indicated that when he woke up early in the morning he experienced some problems. He was examined at St. Joseph's Hospital on the 19th, and on the 20th of June 1962 he was flown by an Army helicopter to Comox, the Veterans Hospital, where he got blood transfusions.

The Advocate argued that the Applicant did not have any choice of the hospital where he was to be treated. In reference to Chapter 2 of RCMP Health Services document in the Statement of Case, the Advocate indicated that there was an agreement between the RCMP, the Department of Veterans Affairs, and Treasury Board in regards to treatment received by a member of the RCMP, and he indicated that this agreement was in force until 1976.

The Applicant also indicated that he had been told by two inmates from the Williams Head Penitentiary, that the blood that he had received when he had his blood transfusions was from inmates, as mentioned in his written statement dated 17 December 2001. He also stated that he got compensation from the Red Cross Organization in the province of British Columbia.

The Advocate indicated that the claim for epistaxis, a condition that was brought forward under a First Application and Departmental Review decision dated 29 October 2002, will be appealed if this decision is unfavourable.

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 Advocate argued that because the Applicant did not have any choice in selecting the institution or medical personnel who treated his condition, that the RCMP then became responsible for the outcome of the treatment. To prove that the Applicant had no choice in selecting which hospital or which medical doctors treated him after his experience with epistaxis in 1962, the Advocate placed an Agreement made between Treasury Board and the Department of Veterans Affairs and the RCMP before the Board.

While the Agreement in question provided for medical care for RCMP personnel to be provided by DVA facilities, there is no evidence that the Agreement completely constrains an RCMP officer. In any event, the issue of whether or not the Applicant had a "choice" is not the issue to be resolved here. In this case, the claim concerns a disability which allegedly arose out of medical treatment, rather than out of RCMP service itself. It was argued that there is a link between epistaxis and the claimed disability of Hepatitis C, based on the fact that blood transfusions were administered for treatment of epistaxis. However, it was not argued before the Panel that epistaxis arose out of RCMP service, and the evidence suggests no reasonable basis on which it may causally be related to service. The issue arising here is that while there may be a basis for finding a causal link between epistaxis and Hepatitis C, there is no causal link between either of these conditions and RCMP service.

The gist of the Advocate's argument appears to be that any disability arising out of the administration of medical treatment accessed through the RCMP, DVA, DND, or " the Service", is automatically pensionable. While this may be true in cases concerning treatment of injuries which themselves arose out of military service, it is not applicable to cases where the original medical condition resulting in a need for treatment was non-service related. Pension claims which are based on an allegation that a disability was caused by medical treatment require the same evidence of a causal link between the disability and an Applicant's service, as other claims adjudicated under subsection 21(2) of the *Pension Act*.

Therefore, the Panel notes that notwithstanding that the Advocate suggested that the Panel could award a pension under subsection 21(2) of the *Act* simply because medical treatment was administered, by a medical

professional *accessed by or employed through or on behalf of DND or the RCMP*, and provided two decisions of the defunct Veterans Appeal Board (VAB) in support of this contention, this argument is simply not supported by the legislation.

The applicable legislation in this case is subsection 32(1) of the *Royal Canadian Mounted Police Superannuation Act* which states that where injury, disease or aggravation thereof resulting in disability arose out of or was directly connected with service in the RCMP Force, an award may be granted in accordance with the *Pension Act*. The section of the *Pension Act* which must be applied in determining eligibility for any disability claim concerning Regular Force service is subsection 21(2). Under these provisions, the Panel may legally award a pension for any disability arising out of, or directly connected to service activities, including a disability resulting from medical treatment of a service-related medical condition. Furthermore, it may also award a pension for any part of a disability which arose out of medical treatment which was negligently administered by medical professionals within the control of the Forces. However, it may not award a pension simply because medical treatment *was administered*, by a medical professional accessed by or employed through or on behalf of DND or the RCMP. The Panel cannot follow the decisions of the VAB panels (Attachments H1 and H2) for several reasons, but namely because the panels in both of these decisions erred in their application of subsection 21(2) of the *Pension Act*, by awarding a pension without having evidence of a direct causal connection between the disability and service.

Where it is argued that a disability is pensionable even though it was caused by medical treatment, rather than by military or RCMP service, the *underlying reason* why medical treatment was required is a relevant factor. The *actual and direct cause of the claimed disability* is also a *key relevant factor*. Because the medical condition requiring treatment did not itself arise directly out of military service, the issue which must be resolved is whether a link between service and the disability could be established on an alternative basis.

This form of pension claim is commonly referred to as a claim for “medical mismanagement” and it may only be made where there is evidence to show that some part of the ultimate disability could be directly attributed to negligence of medical personnel under the control of the Service. The general principles which apply to the adjudication of medical mismanagement cases were established in an interpretation decision rendered by the Pension Review Board (the “PRB”), dated 20 June 1978. In this decision which is referred to as “*I-25*,” the PRB found that DND should be held responsible for negligence on the part of military medical personnel under its control.

In order for such claims to succeed, there must be evidence that negligence caused or resulted in a new or separate disability, over and above the disability which would have inevitably resulted from the underlying non-service related condition. The sole causal link for pensioning a disability based on a claim of medical mismanagement, is based on the reasoning that the necessary causal link on which the disability may be related to military service under subsection 21(2) of the *Pension Act* is ***evidence of negligence which has been committed by medical professionals working on behalf of, and under the control of the institution in question***. It is also noteworthy that in *I-25* the PRB also distinguished the circumstances in which medical treatment was given to DND members, from the RCMP personnel, finding that DND exercised a degree of control over the medical care of its members which was quite different from that experienced in the RCMP.

Accordingly, the Panel rejects the submission that it may legally grant a pension for any disability simply because a disability allegedly resulted from medical treatment. The evidence provided in this case (to show the arrangement between the RCMP and DVA for the provision of medical treatment to the RCMP personnel at Veterans hospitals) does not by itself, establish the causal link between actual service and a disability as required under Subsection 32(1) of the *Royal Canadian Mounted Police Superannuation Act* and 21(2) of the *Pension Act*. Every claim for disability alleged to have been caused by medical treatment - as opposed to some activity or duty related to RCMP or military service - will require proof that the disability was:

1. caused by negligence in the provision of medical treatment; and,

2. that the medical personnel who were guilty of negligence were under the control of the Force in question, and thus the Force could be held responsible for the negligence of its medical personnel.

In this case there is no such evidence. Even if the Panel accepts that the Applicant simply had no choice in personally selecting the doctor or the hospital in which he would receive treatment for his epistaxis, this fact alone does not suggest that the medical treatment provided to the Applicant by the medical professionals at the Veterans Hospital in 1962 was negligent, or fell below the acceptable standard of care, and that this negligence caused the Applicant to contract Hepatitis C.

In order to find negligence, there would have to be some evidence that the medical treatment provided to the Applicant in 1962 at the Veterans Hospital was unorthodox, or not in accordance with accepted standards of medical care for medical professionals treating this condition at that time. There is no evidence to suggest the same treatment (blood transfusions) would not have been administered at any civilian hospital at that time. There is no evidence to suggest that the blood transfusions given to the Applicant in 1962 were an unorthodox or unacceptable form of medical treatment for his medical condition. The evidence does not indicate that quality of his treatment or the nature of the blood supply used to provide the blood transfusions was any different from the treatment which would be administered in any other hospital, such as a civilian hospital within the province of British Columbia.

There is no reliable or credible evidence to suggest that had the same treatment been administered at any other hospital in the province of B.C., that the Applicant would not have contracted Hepatitis C. The public record shows that the Government of British Columbia provided compensation not just to persons treated at the Victoria Veterans Hospital, but also to others, who were not patients at the Victoria Veterans Hospital as part of its class action settlement. It is fair to point out that in providing compensation, the B.C. Government made no apparent distinction between blood products available at civilian hospitals and those provided at DVA-administered hospitals.

Therefore, while it is clear from the evidence before the Panel that the Applicant received medical treatment for the non-service related medical condition of epistaxis at the Victoria Veterans Hospital in 1962, the evidence does not reasonably support the inference that the primary or direct cause for the eventual contraction of Hepatitis C was negligence on the part of the medical professionals at the Victoria Veterans Hospital.

Also, given that the B.C. government has provided compensation for the disability in question, other issues arise in relation to the legal basis on which the RCMP could potentially assume direct responsibility for the contraction of Hepatitis C, on the basis that it “arose out of or was directly connected to service in the RCMP.” The *Pension Act* contains provisions to prevent double recovery, and the effect of section 25 of the *Pension Act* on the Applicant’s entitlement to a pension for Hepatitis C, is another relevant issue that the Applicant should be aware of in relation to his case.

In conclusion, given that the evidence before this Panel could not reasonably support the inference that Hepatitis C is a disability which arose out of, or was directly connected to RCMP service, nor could it be directly attributed to negligence in the provision of medical care by personnel under the control of the RCMP, the Panel is therefore unable to reasonably infer that the Applicant is entitled to a pension for the claimed disability of Hepatitis C under subsection 32(1) of the *Royal Canadian Mounted Police Superannuation Act* and subsection 21(2) of the *Pension Act*.

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

Section 32 of the *Royal Canadian Mounted Police Superannuation Act* states that an award in accordance with the Pension Act shall be granted to or in respect of

(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960, who, either before or after that time, has suffered a disability or has died, or

(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act, and who has suffered a disability, either before or after that time, or has died,

in any case where the injury or disease or aggravation thereof resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force.

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 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.

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 in accordance with the rates for basic and additional pension set out in Schedule I.

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

HEPATITIS C

Not pensionable under section 32 of the *R.C.M.P. Superannuation Act*, in accordance with the provisions of the *Pension Act*
Departmental Review Decision, 22 January 2003.

The Applicant first applied for pension entitlement for the condition of Hepatitis C on 4 October 2001.

Date Modified: 2012-02-07