2011-486

Representative: Mark Gallant, BPA
Decision No: 100001530486
Decision Type: Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 3 February 2011

The Entitlement Appeal Panel decides:

LEFT PES PLANUS
RIGHT PES PLANUS

Entitlement granted in the amount of two-fifths for service in Regular Force.
Subsection 21(2), *Pension Act*

Entitlement as previously awarded.

Pursuant to Paragraph 85(1)(a) of the *Pension Act*, the Appellant is given permission to refer a claim for Plantar Fasciitis to the Minister.

Before:	J.M. Walsh	Presiding Member
	Brent Taylor	Writing Member
	Dorothy O'Keefe	Member

Signed by: Original signed by:
Brent Taylor

INTRODUCTION

The Appellant brings his claim forward, seeking pension entitlement greater than two-fifths for his left pes planus and right pes planus under Subsection 21(2) of the *Pension Act*.

ISSUES

This Entitlement Appeal Panel must determine the degree, if greater than two-fifths, to which the Appellant's right and left foot disabilities arose out of or are directly connected with the performance of his Regular Force service in peacetime.

EVIDENCE AND ARGUMENT

The Appellant, now 44 years of age, served in the Regular Force for slightly under 23 years, releasing in 2008 at the age 41. His service also included a 1988 tour to Cyprus, a Special Duty Area.

In January 2000, the Appellant forwarded an application to Veterans Affairs Canada (the Department) for right and left pes planus, basing his claim on his career with the Infantry and his running in combat boots which resulted in the diagnosis of the bilateral disability as well as plantar fasciitis.

In a decision dated 15 March 2000, the Department ruled to deny entitlement to the Appellant, accepting his diagnosis but concluding that there was no medical support for the claim that military-issued footwear could lead to the development of his flat feet. Dissatisfied, the Appellant took his claim to an Entitlement Review Panel of the Board and a hearing was held on 16 October 2000 in Kingston, Ontario. At the hearing, the Review Panel was presented with a precedent decision from a separately constituted Panel from September 1999, a 1993 decision from the Board's predecessor, the Veterans Appeal Board, and an extract from the Army Lessons Learned Centre from May 1999. Following the hearing, the Review Panel ruled to award partial entitlement to the Appellant, writing as follows:

> . . . The Panel notes that although the Advocate suggested that full entitlement should be found appropriate, the information contained in the Veterans Affairs Canada Table of Disabilities and Medical Guidelines under "Foot Conditions" refers to Pes Planus as a naturally developing condition. There is no medical information that has been provided regarding the particular circumstances of this Applicant that would in anyway contradict the information contained in those Medical Guidelines. The Panel understands that with a naturally developing condition, increased activities involving improper footwear can accelerate the condition. In this regard, the Panel notes that while the Applicant complained of foot problems when running in combat boots, he did not have any such problems running in running shoes. Further, the Panel notes that even after the requirement to run in combat boots had ended for the Applicant in 1991, his foot condition continued to deteriorate. The Panel understands that this would be the normal progress of a developing condition which would be occurring naturally.
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> The Panel would accept that the requirement to run in combat boots between 1985 and 1991 might have hastened this naturally occurring degenerative condition to a minor extent. In this regard, the Panel notes that the information contained in Exhibits T-1 and T-2 deal with entirely differently factual circumstances and, unlike the present case, there was not an indication of a deterioration from natural causes after the requirement to run in combat boots had ceased.
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> Therefore, 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 an Applicant or Appellant, this Panel is of the opinion that a minor portion of the current claimed condition bilaterally could be related to the Applicant's military service in the requirement to run in combat boots for extended periods of time as part of physical training activities between 1985 and 1991. The bulk of the entitlement, however, is withheld since it would appear that this was a naturally occurring condition according to the Medical Guidelines. These guidelines reflect the generally accepted consensus of medical opinion that, as a naturally occurring developmental condition, the Applicant's problems with his feet continued to worsen after the requirement to run in combat boots had ceased. Under the circumstances, a two-fifths aggravational award appears appropriate and the Panel so rules.

Dissatisfied with receiving two-fifths and having three-fifths withheld from his award of pension entitlement, the Appellant now refers the above decision to this Entitlement Appeal Panel of the Board. A hearing was held on 3 February 2011, at which time the Appellant's claim was presented by a Pensions Advocate using written and oral submissions. A package of new evidence was presented to the Appeal Panel, consisting of the Appellant's enrolment medical, clinical reports, statements from the Appellant, and other medical records and information.

The Advocate elaborated on his written submissions before the Panel and asked it to note that in 1993, there was a medical employment limitation change. However, the Advocate submitted, the change was clearly associated pes planus complaints with military related activities of the Appellant being on his feet, as was evidenced in EA-Attach-T3.

The Advocate also referred the Panel to the directive from the Canadian Forces regarding the eventual prohibition of running in combat boots as a training practice. Finally, the Advocate asked the Appeal Panel to focus on the letters of Dr. Michael P. Kawam from 2003 as well as the information from Dr. Simurda from 1991.

During the hearing, the Panel discussed with the Advocate the conclusion of Dr. Kawam in his letter of 9 December 2003 (EA-Attach-T5) that the Appellant had flexible flat feet. The Panel explained to the

Advocate that it was its understanding that flexible flat feet were identified in the Department's Entitlement Eligibility Guidelines as the congenital variety and that the Panel would have to consider this factor in its deliberations. The Panel also informed the Advocate that it was its experience in recent cases that the Department had been issuing rulings for plantar fasciitis as an alternative to pes planus in an effort to more accurately reflect the medical diagnosis that can be credibly related to the manifestation of the disability.

ANALYSIS / REASONS

In making the decision below, this Entitlement Appeal Panel has applied itself fully to its statutory direction as found in its enabling legislation, the *Veterans Review and Appeal Board Act*, at Section 39:

> (a) 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;
> (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
> (c) 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.

As the Panel discussed with the Advocate at the hearing, it is abundantly evident from the file that the Appellant possesses diagnoses for both pes planus and plantar fasciitis. As it discussed with the Advocate, the Panel knows pes planus to have two different etiologies. Firstly, the one that is normally found pensionable, is where a claimant has suffered an injury to the foot itself that causes a fixed flexion deformity. The second etiology, by far the most common, is the flexible flat foot that is also known as "hypermobile". With hypermobile, according to the Entitlement Eligibility Guidelines used by the Department, a foot appears to have a normal arch at rest when it is not bearing weight, but upon pressure of weight bearing, the arch flattens.

As this Entitlement Appeal Panel views the case, and in fact most or all cases of flat foot claims that come before the Board, entitlement should only be offered when it can be demonstrated that a claimant's foot has flattened to some permanent degree in a manner directly connected with the performance of military service. If the foot is not any flatter at discharge then it was on enrolment, it could not be said to have permanently worsened and, therefore, no additional disability has accumulated if one is speaking specifically of flat feet as opposed to other foot conditions.

That being said, the Panel is also well aware that there are likely thousands of still serving and former members of the Canadian Forces who currently hold pension entitlement for pes planus and who have hypermobile flat feet.

The new medical evidence brought forward by the Advocate at EA-Attach-T5 from Dr. Kawam, reads as follows:

> . . . On examination of his feet he has similar findings on both sides. There is a mild to moderate pes planus deformity with standing. When he dangles his feet over the edge of the bed his arch is reasonable. All the joints in his hind foot, mid foot and fore foot are supple. He is maximally tender around the plantar medial aspect of the calcaneus around the insertion of his plantar fascia. The distal neurovascular is intact. His achilles tendon mechanism is supple. . . .

The Panel is also considering the comments of Dr. Simurda at EA-Attach-T2, wherein he writes:

> . . . This man is active in sports, jogs every night. He has been using a Brooks running shoe with a good arch support, finds this comfortable. However in his combat boots he has been wearing a half arch support but still he has been having discomfort when he exercises vigerously causing him to experience pain at the top of his instep just anterior to the ankle joint and in his heel. He does indeed have flattened longitudinal arches. He is having symptoms of strain on his arch and also strain on his heel at the plantar fasia attachment. He requires to wear a good firmer arch support in his military boots and a arch support with a cupped heel support build into it and I'm therefore recommending Birkenstock arch support for his boots to try and relieve his symptoms. If after wearing these he still has symptoms then the army is going to have to decide whether they are going to put a category on him or

> not, I feel that he should be given a trial of a better arch support then he has at the present time for his boots before this decision is made. [*As transcribed*]

The Panel has no doubt that the Appellant suffers from the congenital variety of pes planus being manifested as a hypermobile flat foot. It appears, therefore, that the 2000 decision of the Entitlement Review Panel would not stand when tested against the Department's contemporary entitlement guidelines which were adopted several years later and distinguish between congenital and acquired pes planus. This Appeal Panel, however, has no intention of interfering with that award of two-fifths entitlement. However, given the current medical evidence in the file and a consideration of the Veterans Affairs Canada Entitlement Eligibility Guidelines for Plantar Fasciitis, it appears that consideration should be given to the issue of whether the pain and disability suffered by the Appellant is related to his plantar fasciitis.

Following the appeal hearing, the Board reviewed the Appellant's claim history, as found in the Department's records, and noted he had tried to pursue a claim for Plantar Fasciitis in an application initially filed on 27 January 2009. After internal correspondence among staff within the Department, a Pension Officer removed the Plantar Fasciitis from the Appellant's application on the basis he already had entitlement for Pes Planus and her belief the two conditions were essentially the same. The Appellant tried once again, on 16 April 2010, to persuade the Department to give him a ruling. This attempt was also unsuccessful.

For the reasons that follow, this Panel concludes that the Department erred when it determined that the Appellant was not entitled to a decision on his 2009 and 2010 applications for Plantar Fasciitis, because of his pension for Pes Planus.

First, the Panel notes that the Appellant did all that he could to pursue an application relating to Plantar Fasciitis with the Department. The Appellant pursued his applications for Plantar Fasciitis on the advice of his doctor to the effect the two conditions were not the same (see CSDN note made 26 April 2010). He pressed forward with the matter, and insisted his application go forward.

The Pension Officer moved the claim forward to adjudication (following the procedure outlined in the Pension Officer Reference Manual on 26 April 2010). However, despite the clear request made by the Appellant to get a ruling on his claim, the Department still declined to issue a decision on his Plantar Fasciitis application, concluding "a ruling is not necessary for the Plantar Fasciitis" (email dated 25 October 2010 from a Disability Adjudicator to the Pension Officer). The Adjudicator then directed the Pension Officer to withdraw the claim. The Adjudicator then wrote to the Appellant to explain the Department's course of action.

The difficulty with this process is that since the Department refused to render a decision, the Appellant has no recourse in the event he disagrees with the Adjudicator's conclusion that he is not entitled to make a claim for Plantar Fasciitis. Since he did not receive a ruling and his claim was "withdrawn" instead, it cannot be brought before the Board on review.

When the Department declines to issue a ruling and unilaterally "withdraws" an application, there is no opportunity to have this Board sit in review or appeal of it, as the withdrawal does not appear to be a "decision of the Minister," and is not entered in the Appellant's database profile (known as CSDN) as an unsuccessful claim.

A reading of the internal exchanges between Department staff, indicates that the Department concluded that it was not necessary to decide the Appellant's Plantar Fasciitis applications on the basis that entitlement for Pes Planus already includes entitlement for Plantar Fasciitis and because the Appellant already had partial entitlement for pes planus. The Department then reasoned that as the two conditions were essentially one and the same and the Appellant had partial entitlement for one, that no further determination was necessary. However, this was an error given that the Appellant has only partial entitlement for pes planus, and that the entitlement criteria in the Minister's Entitlement Eligibility Guidelines for Plantar Fasciitis are based on pension considerations distinct from those which apply to pes planus and may potentially result in a different conclusion on the issue of causal connection to military service. The two conditions are clearly inter-related, but they are not one and the same, and the same set of factual circumstances could suggest different degrees (0/5 to 5/5) of entitlement for each of them. The most glaring evidence of their difference is the fact that the Department itself has published two distinct entitlement guidelines dealing individually with the conditions. The Plantar Fasciitis guideline was published in May 2002, updated in February 2005 and

was in existence at the time of the Department's refusal to rule. This is separate from the Pes Planus guideline, which exists in parallel but relies on separate medical principles.

And there are precedents where the Department and this Board have issued rulings on Plantar Fasciitis after a ruling has already been rendered on Pes Planus. Most recently, in a Decision reached on 5 August 2010 for another client of the Department (Veterans Affairs Canada Decision # 1-1554926), Veterans Affairs Canada granted a three-fifths disability award for Plantar Fasciitis after a Review Panel of this Board had already affirmed its denial of entitlement for Pes Planus (in Veterans Review and Appeal Board decision #1-1465216).

This Panel concludes the legitimate expectations of our Appellant have not been met: he is not able to fully participate in his claim; he has been denied reasons for the decision that can be appealed; and the outcome of the claim is of high importance to him. This, in the view of this Panel, amounts to a denial of procedural fairness owed to the Appellant (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

As well, the *Pension Act* specifically requires that where an application is made to the Minister, the Minister is required to provide a decision with reasons, to the applicant. This legal obligation is set out in Subsection 81(2)(b) of the Pension Act, which reads as follows:

> (2) The Minister shall consider an application without delay after its receipt and shall
> (b) where the Minister is not satisfied that the applicant is entitled to an award, refuse to approve the award and notify the applicant of the decision.

The Minister also has a duty to render a decision with reasons where it receives an application for a review of an earlier Minister's decision, under Section 82 of the *Act*. Section 82 of the *Act* reads in part as follows:

> 82. (1) Subject to subsection (2), the Minister may, on the Minister's own motion, review a decision made by the Minister or the Commission and may either confirm the decision or amend or rescind the decision if the Minister determines that there was an error with respect to any finding of fact or the interpretation of any law, or may do so on application if new evidence is presented to the Minister.

Sections 5 and 6 of the *Award Regulations* under the *Pension Act* (SOR/96-66) confirm there is a duty to provide a decision with reasons, upon the Minister upon receipt of an application:

> DECISIONS
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> 5. Every decision of the Minister with respect to an award under the Act shall contain the reasons for that decision.
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> REVIEWS
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> 6. (1) An applicant who, pursuant to section 82 of the Act, requests the Minister to review a decision shall forward to the Minister the new evidence that the applicant is relying on as a basis for the review.
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> (2) Where the Minister, after reviewing a decision, confirms, amends or rescinds the decision, the Minister shall notify the applicant and provide reasons for the Minister's decision.

The Minister would only have a legal duty to adjudicate a claim where the applicant has met the requirements of the application process which have been established by statute, regulations, and by the Minister. In this regard, the authority to make Regulations to prescribe the manner in which an application must be made, is established under Section 91 of the Act, which states:

> 91. The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect, including regulations prescribing
> (a) the manner of making an application or a statement or of giving notice under this Act, the information and evidence to be furnished and the procedure to be followed in dealing with applications;

The *Award Regulations* which have been prescribed pursuant to Section 91 of the Act read as follows:

3. An applicant for an award shall provide the Minister with
(a) any documentation necessary to substantiate the applicant's claim;
(b) information on the applicant's domestic status;
(c) any other relevant information; and
(d) an affidavit or statutory declaration attesting to the truth of the information provided.

It is clearly within the Minister's authority to set out the requirements for a duly completed application. Once an application has been perfected or duly completed by an applicant, the Minister has a statutory obligation to adjudicate the claim.

Conversely, the Minister does not have a legal duty to adjudicate a claim where the applicant has failed to satisfy the various requirements that are part of the application process, as prescribed under the Awards Regulations or by the Minister. An Applicant's failure to provide supporting medical evidence within a reasonable time frame would be one reason. Similarly, a lack of diligence or disinterest on the part of a applicant in moving an application forward in a timely way would mean that the application process was never completed. In those cases, the Minister would not be legally obligated to adjudicate the claim, and would be fully entitled to **lapse** an application, upon proper notice to the applicant, because the requirements of the application process were never properly completed or satisfied.

However, that is not the case here. In this case, our Appellant duly and properly completed and submitted an application for Plantar Fasciitis to the Department and provided medical evidence to support his claim. It was therefore contingent on the Department to respond to his application with a decision containing reasons.

Twice he tried to press forward with his application and on both occasions the Department's Pension Officer sent it for a ruling by an Adjudicator. However, the ruling never came and consequently the Appellant's only recourse to address his bilateral foot disability is to try to get increased entitlement for his Pes Planus – which this Panel must conclude is not available due to the congenital formation of his feet. In this case the Department's refusal to rule on the Appellant's Plantar Fasciitis, following two requests to do so, denied him his right to receive reasons and, by extension, the right to have those reasons taken to the Board on review and/or appeal.

In conclusion on the main issue, it is the decision of this Panel to affirm the Review Panel's award of two-fifths entitlement for Pes Planus on 16 October 2000.

On the secondary issue, previously noted by this Panel, the Minister's Entitlement Eligibility Guidelines for plantar fasciitis raise new and distinctive issues which have never been considered or determined by the Minister or the Board. Since the Appellant's Plantar Fasciitis claim raises separate issues from the original Pes Planus claim, this Panel concludes the Appellant is entitled to a ruling from the Minister on Plantar Fasciitis.

The Panel concludes, as well, that the Minister should proceed to render a decision with reasons on the issues raised the Appellant's plantar fasciitis claim. The Panel also confirms that the Veterans Review and Appeal Board has not determined the merits of the Appellant's plantar fasciitis claim, nor does it make any comment on the merits of that claim or on the substantive issues of entitlement which are raised by it. As a result, the Minister has jurisdiction to consider and determine the issues raised by the Appellant's plantar fasciitis claim. In the interests of certainty however, the Panel will also confirm that the Appellant has its permission to seek a determination and ruling from the Minister on the issues raised by his 27 January 2009 and 16 April 2010 applications for bilateral Plantar Fasciitis, under paragraph 85(1)(a) of the *Pension Act*.

Finally, the Panel notes that the while the applications for plantar fasciitis were made after the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* came into effect, the plantar fasciitis claim would nevertheless be adjudicated under Subsection 21(2) of the *Pension Act* due to the effect of Section 56 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

DECISION

The 16 October 2000 decision of the Entitlement Review Panel as to Pes Planus is affirmed.

Pursuant to Subsection 85(1)(a) of the *Pension Act*, the Veterans Review and Appeal Board confirms that the Minister has jurisdiction to issue a ruling to the Appellant on his Plantar Fasciitis applications of 27 January 2009 and/or 16 April 2010.

Applicable Statutes:

Pension Act, [R.S.C. 1970, c. P-7, s. 1; R.S.C. 1985, c. P-6, s. 1.]

Section 2
Subsection 21(2)
Section 39
Section 85

Veterans Review and Appeal Board Act, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3
Section 25
Section 39

Exhibits

EA-T1:	Statement from the Appellant dated 5 May 2008. (1 page)

Attachments:

EA-Attach-T1:	Report of Physical Examination for Enrolment dated 21 January 1985. (1 page)
EA-Attach-T2:	Consultant Clinical Report dated 3 October 1991. (1 page)
EA-Attach-T3:	Career Medical Review Board dated 12 February 1993. (1 page)
EA-Attach-T4:	Extract from the Veterans Affairs Canada Entitlement Eligibility Guidelines - Pes Planus. (4 pages)
EA-Attach-T5:	Excerpts from the Appellant’s medical service records. (11 pages)
Addendum:	Documentation extracted from the Appellant’s medical service records. (10 pages)