2012-169

Representative: Daniel Assh, BPA
Decision No: 100001746169
Decision Type: Entitlement Review
Location of Hearing: Teleconference/Videoconference
Date of Decision: 27 March 2012

The Entitlement Review Panel decides:

ATTENDANCE ALLOWANCE

Attended Allowance is awarded pursuant to Subsection 38 of the *Pension Act*.

This matter is referred back to the Minister for a definition of the Grade.
Section 21, *Veterans Review and Appeal Board Act*

Before:	Richard Bonin	Presiding Member
	W.F. Watson	Member

Original signed by:

Reasons delivered by: _____

Richard Bonin

INTRODUCTION

This claim is brought forward as the Veteran is dissatisfied with the Minister's decision dated 20 December 2011 which ruled unfavourably on the application for an Attendance Allowance under Subsection 38(1) of the *Pension Act* stating in part that:

> While it is noted that you suffer from a number of medical conditions (pensioned and non-pensioned), which results in your being dependent in your activities of daily living, it has been noted by VAC interdisciplinary team that provincial home care services which would be able to meet your personal care needs as well as VIP personal care that could be used to top up provincial home care services are not utilized.
>
> As per VAC policy - Veterans Health Care Regulations, Part II, Veterans Independence Program 3.1.15(4) - Continuation of VIP at home. Provincial home care with VAC VIP - personal care benefit as an additional support has to be in place before AA is considered.

The Panel notes that this decision was signed by a Case Manager.

PRELIMINARY MATTERS

The Advocate advised that the Applicant wished to have his case heard via teleconference and *in absentia* (ER-S1).

ISSUE

The issue to be determined, is the Minister's decision in keeping with the legislation and regulations under Subsection 38(1) of the *Pension Act*?

EVIDENCE AND ARGUMENT

The Advocate submitted that the Minister's decision does not respect the provisions of the *Pension Act* and Regulations, and the Veterans Affairs Canada (VAC) Policy on the Veterans Health Care Regulations, Part II (Veterans Independence Program, 3.1. 15(4)).

The Panel reviewed the Area Counsellor Client Centered Assessment dated 5 December 2011 and accepted that the Applicant is totally disabled because of pension and non-pensioned conditions. He noted that it is well documented in the assessment that he is totally dependent.

The Advocate reviewed ER-Attach-S1 which concerned the "Veterans Independence Program," and as stipulated in the Minister's decision, it is indicated in Article 15(4) that:

> (4) Subject to section 33.1, overseas service veterans eligible for intermediate care or chronic care in a departmental facility or in a contract bed pursuant to subsection 21(1) are also eligible to receive the veterans independence program services referred to in paragraphs 19(a), (b) and (d), to the extent that those services are not available to them as an insured service under a provincial health care system. . . .

The Advocate argued that what is there is stipulated for the Veterans Independence Program and this Policy does not make any reference to the fact that the same condition applies to an Attendance Allowance.

The Pensions Advocate argued that an Attendance Allowance is a different program and the only stipulation in reference to this program is in the Pension Act where Article 38(1) stipulates:

> 38. (1) A member of the forces who has been awarded a pension or compensation or both, is totally disabled, whether by reason of military service or not, and is in need of attendance shall, on application, in addition to the pension or compensation, or pension and compensation, be awarded an attendance allowance at a rate determined by the Minister in accordance with the minimum and maximum rates set out in Schedule III.

The Advocate argued that the family wants to keep the Veteran at home and he mentioned, when questioned by the Panel, that he is not sure who is paying for the Care Provider mentioned in the assessment.

The Advocate finally argued that he has not seen any regulations to support the Minister's Decision.

DECISION

After having reviewed all of the evidence, the Panel cannot find that the evidence reasonably supports the Minister's Decision to refuse Attendance Allowance in this case.

The issue in this case is whether it was reasonable on the facts of this case for the Department to conclude that VIP and provincial home care services could meet the Veterans's need for attendance, under subsection 38(1) of the *Pension Act*.

The legal issue in this case is whether the factors of this case show that the Veteran is "in need of attendance" in accordance with the meaning of that term in section 38 of the *Pension Act*. Section 38 of

the Act stipulates that the "need for attendance" is one of the criteria for granting an Attendance Allowance, but it does not define what is required in order to establish a "need for attendance." The more specific issue in this case is what services or forms of support are to be taken into account in determining whether the "need" referred to in section 38 is satisfied by existing or potential sources of care or support available to the Veteran?

It should first be noted that section 38 of the Act does not make the provision of Attendance contingent or conditional on the availability or use of other programs or services. As well, it does not link entitlement to Attendance Allowance to the use of services under the VIP Program.

Article 38 of the Veterans Affairs Canada Pension Policy Manual is relevant to this case as it provides that the Guidelines in Chapter 5 of the Table of Disabilities are to be used in determining when a Veteran is "in need of attendance" within section 38 of the *Pension Act*. These define "*in need of attendance*" as:

> the need for assistance or supervision of another individual with feeding, bathing, dressing, toileting, mobility or medication administration, that is not already being met by benefits, services or care provided to the client by VAC pursuant to veterans' legislation or any other program, including but not limited to federal, provincial, municipal or community programs, whereby the benefits services or care is provided at no expense to the client.

In making its decision, the Department did not appear to consider the actual words of the section 38 of the *Pension Act* or the Department's own policy on section 38. Attendance Allowance and VIP are distinctive programs, with their own distinctive legislative authorities. Decisions on Attendance Allowance must be made using the criteria contained in the Attendance Allowance provisions of the legislation in section 38 of the *Pension Act*. It is also noted that attendance allowance is a statutory "award" under the definition of "award" provided in section 3 of the *Pension Act*, whereas the VIP program is a contribution program that is provided by Regulation, under the *Veterans Health Care Regulations*. Since Attendance Allowance is governed by section 38 of the *Pension Act*, there is no question that the provisions of section 38 of the Act and policies made pursuant to that provision should prevail over the provisions of the Veterans Health Care Regulations and VIP policies.

The Panel is satisfied that the Veteran's need for attendance under section 38 of the Act is clearly established in this case. The evidence before the Panel, including the Area Counsellor's Assessment, and as well as Client notes in the CSDN indicate that the Veteran cannot speak on his own behalf. He is totally disabled by dementia, Parkinson's disease and serious mobility issues caused by musculoskeletal conditions. The Area Counsellor's Assessment also reports that the Veteran requires many fits and medical aids, and needs total care. The Veteran's condition is sufficiently serious that long term care was recommended by provincial Home Care personnel who were involved in his case.

The Department appears to agree that the Veteran requires total care and is in need of attendance. In fact, the Department has recently paid for significant modifications to the home under the VIP program. Although the Department is willing to pay for significant and costly improvements and modifications to the Veterans' home to keep him there it has nevertheless refused to award Attendance Allowance to the Veteran because the Department has concluded that the Veterans' need for attendance could potentially be adequately met by a combination of VIP and Provincial Home Care Services. The Department 's decision cites VIP Program Policy 3.1.15(4) as authority for its decision.

The Panel concludes that the Department's decision in this case is not in accordance with the words of section 38 or with the Department's policy under section 38. It is reasonable for VAC to consider the support and care that is provided by various sources - such as the VIP program and provincial services - when determining whether a Veteran is actually "in need of attendance." However, it is not reasonable to create an absolute or binding requirement that the Veteran must use these other programs first in order to be considered for Attendance Allowance.

The Department's application of the Attendance Allowance Policy is not consistent with the words of section 38 of the Act or with the policy itself. The Panel notes that the Department's policy refers to a "need. . .[which] **is not already being met** by benefits from any other program, including but not limited to federal, provincial, municipal..." The Department's policy appears to be concerned with whether the need for attendance is actually being met, rather than with whether it could be met.

The Department has failed to give due consideration to the specific facts of this case in refusing to award Attendance Allowance on the basis that Home Care services offered by the province *could* meet the Veteran's needs. The Department has not considered that the Veteran is not actually receiving Home

Care and therefore his needs are not being met. It has also failed to consider that the reason for this is that Provincial Home Care has already been tired, but ceased after serious difficulties ensued. The evidence strongly suggests that the Provincial Home Care Program did not in fact appear to be capable of meeting the Veteran's needs.

In any event, the Panel finds that the facts of this case do not reasonably support the conclusion that the Veteran's need for Attendance Allowance is already being met by Provincial Home Care within the words of the Policy Guidelines under section 38. It is clear from the evidence on the CSDN that Provincial Home Care was once involved in the Veteran's care but these services were suspended after serious difficulties ensued when Provincial Home Care staff were subject to physical and verbal abuse in the Veteran's home, apparently due to the Veteran's dementia. As a result of this situation, Home Care withdrew its services. Although VAC intervened to reconcile the conflict between Home Care and the Veteran's family to which the Provincial Home Care subsequently agreed to reinstate their services, the Veterans family did not wish to accept the resumption of Home Care's services.

The evidence on file and the Advocate's submissions at the Review Hearing confirm that the family are currently paying a Personal Care Worker $4000.00 per month to provide the care that the Veteran requires. Not only does the evidence here strongly suggested that Provincial Home Care would not appear to be capable of meeting the Veteran's needs, but it also shows that the family is out of pocket $4000.00 per month to meet the Veteran's need for attendance.

The Panel is satisfied that the facts of the case establish that the Veteran has a bona fide need for attendance which is not already being met through the provision of other services or programs. The Veteran is therefore entitled to an Attendance Allowance under section 38 of the *Pension Act*.

EFFECTIVE DATE

The Panel rules the award for the Attendance Allowance and to let the Department determine a rate, pursuant to Subsection 38 (1) of the *Pension Act*.

Applicable Statutes:

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

Section 38

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

Exhibit:

ER-S1:	Consent and Waiver for Teleconference Hearing or *In Absentia hearing* received 8 March 2012 signed by the Applicant's Power of Attorney (one page).

Attachments:

ER-Attach-S1:	Veterans Health Care Regulations - Part ll - Veterans Independence Program Eligibility printed on 19 March 2012 (two pages);
ER-Attach-S2:	*Pension Act* - Subsection 38(1) - Attendance Allowance (three pages); and

ER-Attach-S3: Five Year Authority To Release Personal Information form signed by the Applicant dated 10 May 2010 (one page).

Date Modified: 2013-03-11