



2012-456

Representative: Jacquie El-Chammas

Decision No: 100001779456

Decision Type: Federal Court Order to Rehear - Entitlement Appeal

Location of Hearing: Charlottetown, Prince Edward Island

Date of Decision: 9 August 2012

The Entitlement Appeal Panel decides:

MULTIPLE SCLEROSIS

No entitlement granted for the disability as it is not a consequence of the pensioned condition of post traumatic stress disorder.

Subsection 21(5), *Pension Act*

Before:	Brent Taylor	Presiding Member
	Roger B. Langille	Member
	John Morrison	Member

Reasons delivered by: _____
Brent Taylor

INTRODUCTION

This matter was remitted back to this Panel of the Board by the Hon. Mr. Justice Beaudry of the Federal Court of Canada, on the motion of and with the consent of the Attorney General of Canada and the Appellant.

PRELIMINARY MATTERS

Pursuant to subsection 28(1) of the *Veterans Review and Appeal Board Act*, the Appellant has chosen to have his hearing held by written submission.

ISSUE

This Entitlement Appeal Panel must determine whether any or all of the Appellant's diagnosed Multiple Sclerosis (MS) is consequential to his already partially pensioned Post Traumatic Stress Disorder (PTSD).

EVIDENCE AND ARGUMENT

This decision relates to a pension claim for MS that was made by the Appellant under subsection 21(5) of the *Pension Act*, on the basis that his MS had developed because of, or had been aggravated by, stress from his partially pensioned condition of post traumatic stress disorder.

The history of the Appellant's pension claims for MS is complex, as there have been two other pension claims related to multiple sclerosis, and a number of decisions from Veterans Affairs Canada (VAC) and from the

Veterans Review and Appeal Board (VRAB), relating to each claim. The Appellant had previously claimed for a pension under subsection 21(2) of the Pension Act, because he believed that his MS arose out of or was directly connected with his military service. That claim was denied by Veterans Affairs Canada (the Department), and that denial of entitlement was affirmed by both Review and Appeal levels of this Board.

The Appellant also made a claim for post traumatic stress disorder, based on the argument that the Canadian Forces had mismanaged the Appellant's medical treatment between 1998 and 2000, and that this mismanagement had delayed the diagnosis of the Appellant's MS, which in turn had caused or aggravated his PTSD. When this claim was heard before a Review Panel of this Board in April of 2004, the Review Panel accepted that there had been a four-month delay in 2000 in performing the MRI that was required in order to diagnose the Appellant's MS. The Review Panel awarded the Appellant a partial pension for PTSD of one fifth because it accepted that the delay in performing the MRI had caused the Appellant additional stress, and that this stress was a factor that had exacerbated or aggravated his PTSD.

After the Appellant received the one-fifth pension for PTSD, he then reapplied for entitlement for his MS under subsection 21(5) of the *Pension Act*, claiming that it had been aggravated by, or developed as a consequence of stress from his partially pensioned condition of PTSD. This pension claim, under subsection 21(5) of the *Pension Act*, is the matter which is now before this Appeal Panel.

The Appellant's application for a pension under subsection 21(5) of the *Pension Act* was denied in a first level decision from the Department on 12 July 2005. The Department's decision went before a Review Panel of this Board on 25 January 2006, and that was followed by an appeal decision by a different VRAB Panel on 19 December 2007. This Panel heard the Appellant's claim for consequential entitlement for his MS on 13 July 2010, after the 2007 Appeal Panel's decision was set aside by the Federal Court. After the hearing, the Panel ruled to affirm the 2006 Review level's denial of entitlement. Our decision was also taken on judicial review, and now has been returned to this Panel with specific instructions from the Court, as follows:

- a. The Board shall seek independent medical advice, pursuant to s. 38 of the Veterans Review and Appeal Board Act, with respect to the following issues:
 - i. What are the known causes of multiple sclerosis;
 - ii. What are the known effects of post-traumatic stress disorder on multiple sclerosis;
 - iii. Were the symptoms experienced by Mr. Patterson in 1998 an early manifestation of his multiple sclerosis;
 - iv. Whether the symptoms or effects of Mr. Patterson's psychiatric disability of post traumatic stress disorder could have caused the onset of Patterson's multiple sclerosis, or caused a permanent or chronic worsening of the nature or extent of his symptoms from multiple sclerosis?;
 - v. Whether the symptoms or effects of Mr. Patterson's psychiatric disability of post traumatic stress disorder could have contributed to the onset of Patterson's multiple sclerosis, or contributed to a permanent or chronic worsening of the nature or extent of his symptoms from multiple sclerosis?;
 - vi. Whether current medical consensus could support the conclusion that there is a co morbid relationship or other form of medical relationship between multiple sclerosis and the psychiatric symptoms or effects which are part of Mr. Patterson's post traumatic stress disorder diagnosis, and if so what is the nature of that relationship?
- b. The Applicant shall be entitled to file further and/or updated medical records with the Board, all of which shall be provided to the independent medical examiner;
- c. After receipt of the independent medical examiner's report, the Applicant shall be entitled to file reply medical evidence if necessary;
- d. The Applicant shall be afforded the opportunity to make submissions on all aspects related to the pension application, including on the independent medical examiner's report and/or the evidence of the Applicant;

- e. The Board shall re-evaluate its decision in light of the new evidence obtained from the Applicant and the independent medical examiner;
- f. The Board shall consider and weigh all of the evidence adduced by the Applicant and the independent medical examiner in accordance with its statutory obligations under s. 39 of the *Act*.

Following receipt of the direction from the Court, the Board – with the consent of the Appellant – selected Dr. Virender Bhan of Halifax, Nova Scotia, to provide the independent medical report to the Appellant and the Board.

On 21 November 2011, Dr. Bhan's report (Rehearing EA-P1) was received by the Board and, shortly thereafter, was provided to the Appellant. Time was given for him to file any additional information he chose. In submissions filed on 14 February 2012 (Rehearing EA-Attach-P2), counsel for the Appellant wrote that he had attempted to "retain a medical expert on a pro bono basis" to review the report but was unable to do so.

The Appellant's counsel acknowledged Dr. Bhan's point that "stress is barely mentioned, mainly because the studies are inconclusive," and therefore requested, in the event the Panel did not find in favour of entitlement, that it be left to the Appellant – at some future date if the "science was to change" – to file an application for reconsideration with the Board.

No additional medical evidence or argument was filed by the Appellant after the release of the report of Dr. Bhan. No in-person appearance was requested, and the hearing was held with the Panel considering all of the written material that has become part of the file.

Believing the procedural and other instructions of the Court have been followed, the Panel went on to determine the case anew.

ANALYSIS AND REASONS

The Panel has fully read and fully considered the report of Dr. Bhan, and also read the background material (medical studies and articles) that he filed with it. Based on his answers to the questions, which were given independently under the provisions of section 38 of the *Veterans Review and Appeal Board Act*, the Panel concludes there is no demonstrated causal or contributory relationship between the Appellant's already-pensioned PTSD and his MS.

Consequential claims are made under subsection 21(5) of the *Pension Act*, which reads:

(5) In addition to any pension awarded under subsection (1) or (2), a member of the forces who

(a) is eligible for a pension under paragraph (1)(a) or (2)(a) or this subsection in respect of an injury or disease or an aggravation thereof, or has suffered an injury or disease or an aggravation thereof that would be pensionable under that provision if it had resulted in a disability, and

(b) is suffering an additional disability that is in whole or in part a consequence of the injury or disease or the aggravation referred to in paragraph (a)

shall, on application, be awarded a pension in accordance with the rates for basic and additional pension set out in Schedule I in respect of that part of the additional disability that is a consequence of that injury or disease or aggravation thereof.

This issue in this decision centers on whether the Appellant's MS is "in whole or in part a consequence of" his PTSD.

Our decision has been reached fully mindful of the Board's directions from Parliament as contained in section 39 of the *Veterans Review and Appeal Board Act*, which tells us to:

(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.

The Courts have regularly been called upon to help interpret the standard and burden of proof as informed by the above passages. Most recently, in the case of *Carnegie v. Canada (Attorney General)*, 2012 FC 93, Mr. Justice Near wrote as he began his analysis:

. . . [24] As a preliminary matter, I must address submissions related to the standard of proof required at the Board in light of sections 3 (the obligation of liberal interpretation) and 39 (the distinct rules of evidence in the Applicant's favour) of the *VRAB Act*.

[25] While the Applicant relies on *John Doe v Canada (Attorney General)*, 2004 FC 451, [2004] FCJ no 555 at para 36 in his written submissions to suggest that a standard of proof lower than the balance of probabilities could be applied, this is no longer the prevailing approach. In *Wannamaker*, above at paras 5-6, the Federal Court of Appeal stated that while section 39 ensured evidence is "considered in the best light possible" it does not relieve the applicant of the burden of "proving on a balance of probabilities the facts required to establish entitlement to a pension." Moreover, the Board is not required to automatically accept all evidence presented by the applicant. . . .

The Panel, therefore, considered whether sufficient facts were established on a balance of probabilities in this case, to establish a causal, or a partial and contributory connection between the Appellant's PTSD and his MS. In doing so, the Panel took into account its obligation to draw every favourable inference that could reasonably be supported by the facts and the circumstances of the Appellant's case. The Panel also took into account its obligation to resolve doubt in the Appellant's favour when weighing all of the evidence as to whether he has established his case.

One of the issues on which the Panel has re-evaluated its conclusions, based on the opinion of Dr. Bhan, is whether the symptoms that the Appellant experienced in 1998 – which were identified in the earlier decision as the 1998 "mystery illness" – were the first manifestation of his MS. This question was relevant – and continues to be relevant – to the issue of whether the timing of the onset, development or progression of the Appellant's MS would be potentially consistent with causation or aggravation by PTSD. The Panel makes detailed comments on this issue later in the decision.

A key issue in this appeal continues to be which disease or disability – PTSD or MS – arose first, and which disability was responsible for producing or aggravating the other. However, the Appeal Panel now has a credible medical opinion from Dr. Bhan which directly addresses the issue of whether the symptoms in 1998 were a manifestation of the Appellant's MS.

PTSD and MS

Dr. Bhan has satisfactorily answered all of the six questions, in the view of the Panel, and has done so with a relatively high degree of precision.

The first three questions contained in the Court's order relate in general terms to the causation of MS and its possible relationship to PTSD, as well as the 1998 "mystery illness" that afflicted the Appellant.

In brief, Dr. Bhan outlined his responses on the known causes of MS, and the known effects of PTSD on patients with MS. As for the third question, on the 1998 illness, Dr. Bhan concluded it was unlikely the Appellant's symptoms at that time were indications of incipient MS.

The remaining three questions: iv, v, and vi, are more directly related to the decision facing this Panel.

On the fourth question, whether the symptoms or effects of the Appellant's PTSD could have caused the onset of his MS, or **caused** a permanent or chronic worsening of the nature or extent of his symptoms from MS, Dr. Bhan writes at page 17 of his report:

. . . In the Appellant's case case, it is the combination of Caucasian race, born and raised in Canada, high titer of Epstein-Barr virus antibodies in the serum and smoking that (in combination) would be the lead environmental causative agents. Almost certainly he has genetic predisposition (as most patients do), even though there is no family history of MS. As such I conclude that post-traumatic

stress disorder or stress otherwise would be a highly unlikely factor in the causation of the Appellant's multiple sclerosis.

Similarly if one looks at the factors that are associated with permanent or chronic worsening of multiple sclerosis, these include male gender, older age onset (over 40), presents of comorbidities (smoking) and high number of relapses in the first one to two years (it seems that he had four to five relapses within a year). In my opinion, these would be the likely factors to contribute to the cause of progression of multiple sclerosis and once again PTSD and stress would be highly unlikely causative factors. . . .

On the fifth question, whether the symptoms of the Appellant's PTSD could have contributed to the onset of his MS, or **contributed** to a permanent or chronic worsening of the nature or extent of his symptoms from MS, Dr. Bhan writes:

. . . Once again as to PTSD or stress of any kind contributing to the onset of multiple sclerosis, I would have to say that this would be a **minor possible contributing factor** (as evidence by the literature above). There are more likely factors operational here – as cited above.

As to stress of PTSD contributing to permanent or chronic worsening of the nature of multiple sclerosis, the answer is still the same i.e. **possibly a very minor contributory role**. However, when one considers some of the symptoms of multiple sclerosis, I do feel that stress, PTSD, and multiple sclerosis can all cause "some similar symptoms" and this is discussed in detail below (under question 6) . . .

From its reading of the above, the Panel concludes that Dr. Bhan's opinion is that there are other known factors more likely operating to contribute to the Appellant's MS than any part of his PTSD. He also concludes that although PTSD does not cause or contribute to the worsening of MS, it does produce similar symptoms to MS.

This is discussed in his analysis of the sixth and final question, whether current medical consensus could support the conclusion that there is a medical relationship between MS and the psychiatric symptoms or effects which are part of the Appellant's PTSD diagnosis, and if so what is the nature of that relationship. On this question, Dr. Bhan writes at page 18 of his report:

. . . Given the known neurobiology and pathogenesis of MS (where lesions can affect various parts of the brain), it is clear that MS can cause many of the symptoms that are seen in PTSD. However, PTSD by itself, does not cause the symptoms of MS.

As you can see, the **"neuropsychiatric symptoms" as described above, are likely to be more prevalent and more severe in this gentleman**. It will be very difficult for the Appellant and his caregivers (neurologists, psychologists, psychiatrists and others) to tease out the contributing factors for these particular symptoms. For example if the issue is cognitive impairment, is it mostly based on poor attention span, thought intrusions, severe mood changes and therefore the major contributing factor would be PTSD or is it mainly driven by actual multiple sclerosis pathology (lesions) affecting areas of the brain that control mood, anxiety, attention span and memory. Sometimes neuropsychological testing may be necessary to get a better understanding of these issues. I suspect that he will need ongoing assessments and follow up with psychologist, perhaps even a psychiatrist and finally the neurologist as well. To avoid miscommunications the family doctor should be kept informed of all the therapeutic plans as implemented by various consultants. . . .

Dr. Bhan concludes his report as follows:

. . . I have tried to be as objective as possible in rendering the above opinions. Unfortunately in a disease like multiple sclerosis and especially in the area of "stress and MS", where the literature is conflicting, it is very difficult to offer absolutely conclusive statements. . . .

Summary

As the Panel sees it, Dr. Bhan's analysis of the medical literature does not support the conclusion that PTSD or stress would be the sole or entire cause of MS, nor does it support the conclusion that

stress from the Appellant's PTSD has in some way contributed to the onset, progression, or permanent worsening of the symptoms and disability from the MS.

On a balance of probabilities, the Panel must conclude that the most likely cause of or contributor to the Appellant's MS originates in the known risk factors as outlined by Dr. Bhan, and initially claimed by the Appellant himself. There is no measurable support for the theory that in the Appellant's case his PTSD caused or permanently worsened his MS. Paragraph 39(c) of the *Veterans Review and Appeal Board Act* calls for any reasonable doubt about these points to be resolved in favour of an Appellant's claim; however, the Panel finds it has no doubt about these relationships that can reasonably be resolved in his favour.

The PTSD award in 2004

This 21(5) consequential claim is founded upon the existing 21(2) pension for PTSD for which the Appellant holds one-fifth entitlement.

The Panel has strictly confined itself, when making this decision, to the matter of whether PTSD has caused or permanently aggravated the Appellant's MS. That said, given the remarks of Dr. Bhan on the quality of the medical care given to the Appellant in the 1998 to 2000 period, the Panel will now briefly comment on the underlying pension for PTSD, on which this claim for entitlement is based.

A Review Panel of this Board, sitting in 2004, awarded the Appellant that one-fifth entitlement for PTSD; concluding that a report by Dr. Somers (Psychologist, PhD) attributed part of the disability to delays by physicians in the diagnosis and treatment of his early illnesses, as well as a four month delay in securing a magnetic resonance imaging (MRI) examination following a recommendation from a German neurologist. Although it was not among the series of questions put to Dr. Bhan as part of the Court's directions, he has volunteered comment on the medical care offered to the Appellant during that period of time, and noted that the average time for a MS diagnosis is 6 to 12 months. In the Appellant's case he was diagnosed within four months, back in 2000. Dr. Bhan, after reviewing all of the medical history, writes at page 10 of his report:

. . . In summary, I feel that all his assessments were done in a timely or even expedited manner. This includes seeing a neurologist on the day of referral (in Germany), neurologist in Canada (within two week of the original assessment). The follow up assessments (September 21, October 11, October 30, December 14, 2000) were all done within a timely manner. . . . [As transcribed]

However, the 2004 Review Panel accepted and concluded that there were delays in the provision of medical tests for MS, that were contributory to the Appellant's development of PTSD. Impliedly, the 2004 Panel attributed those delays (to the degree of one fifth) to negligence on the part of the Canadian Forces medical system because negligence in the provision of medical treatment is required in order to establish pension entitlement.

In the 20 April 2004 decision, that Panel justified its award of one-fifth entitlement as follows:

. . . This Board notes that nowhere does anyone explain medically what role, if any, the multiple sclerosis played in relation to the Applicant's post traumatic stress disorder. The Board agrees to award one-fifth entitlement for the claimed condition based on Dr. Somers' medical comment that the inconsistency in physicians contributed to the delays in treatment for the claimed condition. Also, the Board noted that it took four months from the time the neurologist in Germany recommended an MRI for the Applicant up until the time that he actually was slated for same. The Board withholds four-fifths entitlement as it agrees that there was certainly no evidence of a lack of treatment as no stone was left unturned in trying to find the cause of the Applicant's symptomology.

The Board agrees without a medical explanation as to how the lack of control and lack of information is linked to the claimed condition. It also notes that it is not sure if any attending physician, including the specialists, could provide information but agrees that certainly many specialists were sought in relation to finding an answer for the Applicant. The Board also notes that the Armed Forces, while being in control of the Applicant's

medical treatment, certainly sent the Applicant to as many specialists as possible to try to find an answer for his symptomology. The Board also notes that while Mr. Arbuthnott stated that there was a lack of information provided to the Applicant, the Board has not been provided with any documentation that this information was available and withheld from the Applicant.

As previously stated, the Board will award one-fifth entitlement because of the medical comment from Dr. Somers and the documentation provided which confirmed that the Applicant did not have the MRI in Germany as specified by the attending German neurologist and it was four months before he was returned to Canada and had the MRI. As previously stated, the Board will withhold four-fifths entitlement as it lacks a clear medical explanation as to whether in fact the Armed Forces medical personnel could provide information to the Applicant and whether the diagnosis of multiple sclerosis following the MRI has any linkage whatsoever to the claimed condition. As the date of application was 5 September 2002, that will be the date of retroactivity in relation to the partially pensioned condition. . . .

This Panel notes that the Review Panel in 2004 commented throughout its decision that many of the facts of the claim were not clear from the evidence that was presented to it at that time. Nevertheless, the Review Panel tried to draw whatever favourable inferences that it could from the evidence before it. To this end, it is clear that the Review Panel's decision to award the Appellant a partial pension for PTSD was based on a key **inference** that there had been an undue delay in securing a diagnostic MRI in 2000. It is also clear that the evidence which is now before the Board in this appeal would not support that particular finding. In fact, as has been pointed out previously, there was an additional MRI in the summer of 2000 about which the Review Panel knew nothing.

Also, Dr. Bhan's review and opinion on the facts relating to the diagnosis of MS would not support the inference that the diagnostic MRI was delayed, or that the diagnosis of MS in 2000 was not timely. His evidence confirms that the level of medical care provided to the Appellant in 2000 by military medical authorities and other medical professionals who were retained to provide care to the Appellant, met the requisite standard of care for the treatment and diagnosis of MS. It would be difficult to support the fundamental inference that was drawn by the Review Panel in 2004, in the face of the evidence that is now before the Board.

The purpose of the consequential pension provision is to provide a means for concluding that an ancillary disability should be pensioned because it can be connected back to military service through a primary and originating disability. If the evidence before a Panel in a consequential claim cannot adequately support or sustain the conclusion that there is a connection between military service and the primary and originating disability, there would be no basis for entitlement under the 21(5) consequential provision either.

Notwithstanding the foregoing comments on the merits of the original PTSD entitlement in 2004, the Panel has nevertheless fully considered the question which is now before it, which is whether stress from PTSD could be a factor that would impact MS in terms of the onset, or the progression of the disease, or that could aggravate the degree of permanent disability experienced from MS.

Conclusion

The Panel finds that the opinion of Dr. Bhan credibly and objectively addressed all of the various medical issues that were identified in the Court Order and otherwise raised in this appeal. A careful review of the evidence of Dr. Bhan provides no basis upon which a consequential award for MS under subsection 21(5) of the *Pension Act* could be made. His opinion was based on a full review of the medical literature relating to research and studies into the question of whether there could be some causal link or relationship between stress and MS, based on the specific facts of this case. Dr. Bhan's opinion does not establish that there is a credible basis on which this Panel could conclude that the onset of, development of, or the progression of MS is caused or aggravated by stress.

Dr. Bhan's opinion indicates that both MS and PTSD cause similar symptoms of stress and anxiety. Thus, MS causes symptoms that are similar to those caused by PTSD. However, his opinion does not

ultimately indicate or establish that PTSD or stress causes, or contributes to MS. Dr. Bhan's opinion is credible in that it is based on and is consistent with the current medical literature on MS.

Dr. Bhan's opinion and analysis, along with all of the other evidence on the file, cannot reasonably support the conclusion that stress affects the onset of MS, the rate or progression of MS, or causes permanent worsening of the permanent disability from MS. As well, the evidence cannot reasonably support the conclusion that stress has aggravated the Appellant's MS because the facts that are proven in this case on a balance of probabilities indicate that there are a constellation of known risk factors for MS which are indicated and present in the Appellant's case, but which are not service-related. Also, the evidence does not establish on a balance of probabilities any facts that would lead to the conclusion that MS is caused by, triggered by, accelerated by, or permanently worsened by stress. Thus, the evidence in this case leaves this Panel with no resolvable doubt on the question of whether the Appellant's disability from MS, or some part of the Appellant's disability from MS, was caused or permanently worsened as a consequence of stress flowing from his PTSD.

DECISION

For the reasons above, the Entitlement Review decision of 25 January 2006 is affirmed.

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(5)
Section 39

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- Independent Medical Opinion from Dr. Virender Bhan dated 21 November 2011 with
P1: reference articles attached (98 pages)

Attachments:

Rehearing EA-Attach- *Patterson v. Canada (Attorney General)*, T 1495-10 dated 1 February 2011
P1: (three pages)
Rehearing EA-Attach- Appellant's written submission with accompanying letter dated 14 February
P2: 2012 (three pages)
Rehearing EA-Attach- Correspondence between the Appellant and the Board (16 pages)
P32:

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