Veterans Review and Appeal Board Canada
Tribunal des anciens combattants (révision et appel) Canada
Canada

# 2015-305

Representative: Steven Woodman, Bureau of Pensions Advocates
Decision No: 100002385305
Decision Type: Federal Court Order to Rehear Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 8 July 2015

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**The Entitlement Appeal Panel decides:**

**MAJOR DEPRESSION**

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

Entitlement effective 8 July 2012 (three years prior to the date of award).
Subsection 39(1), *Pension Act*

Pay an additional award in an amount equal to 24 months of pension.
Subsection 39(2), *Pension Act*

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| **Before:** | Thomas W. Jarmyn | Presiding Member |
| | B.T. LeBlanc | Member |
| | Brent Taylor | Member |

**Reasons delivered by:** _____
Thomas W. Jarmyn

## INTRODUCTION

This is an Appeal Hearing pursuant to a Federal Court of Appeal Order dated 5 May 2015, which directed the Veterans Review and Appeal Board (VRAB) to re-determine the Appellant's application for entitlement under subsection 21(2) of the *Pension Act* for the claimed condition of major depression.

## HISTORY

Entitlement for the claimed condition was initially denied by the Minister in a decision dated 10 July 2007. VRAB affirmed that decision in an Entitlement Review Decision dated 17 June 2008 and an Entitlement Appeal Decision dated 23 August 2012. Those decisions were upheld by the Federal Court by an order dated 31 March 2014.

The Federal Court of Appeal directed that VRAB re-determine the Appellant's case based upon a test for service connection that asks whether there is a significant causal connection between the Appellant's Regular Force service and the claimed condition of major depression.

## EVIDENCE AND ARGUMENT

In deciding this application, the Panel has considered the Statement of Case (SOC) and the Advocate's oral argument. The SOC includes the Advocate's written argument dated 30 June 2015 (SOC, page 269) and five attachments (Federal Court of Appeal Decisions of *Cole, Newman*, and *Matusiak*, and Federal Court Decisions of *Cormier* and *Dugré*). During the course of the Hearing, the Advocate also provided the Panel with a copy of the Federal Court Decision in the matter of *John Doe v. Canada (Attorney General)*, 2004 FC 451.

The Advocate's argument will not be repeated here in its entirety. The essence of the Advocate's argument is that military service was a significant factor in the causation of the claimed condition. He submitted that there is a presumption of fitness upon enrolment and, therefore, the Panel must conclude that the major depression condition which arose during military service was caused by that service.

The Advocate argued that there were a number of incidents in the Appellant's military career in the 1990s that caused her depression. He acknowledged that there were some non service events, but that the Appellant would have been capable of managing those if she had not been suffering the depression caused by her military service. Alternatively, he submitted that it is not possible to separate the military and non military factors and therefore the Panel should award full pension entitlement for the claimed condition.

No arguments were made with respect to the effective date of pension entitlement.

## ANALYSIS/REASONS

The Panel has reviewed all of the evidence and has also taken into consideration the Advocate's submissions. In doing so, the Panel has applied the requirements of section 39 of the Veterans Review and Appeal Board Act. This section requires the Panel 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;
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> (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
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> (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.

This means that in weighing the evidence before it, the Panel will look at it in the best light possible and resolve doubt so that it benefits the Appellant. The Federal Court has confirmed, though, that this law does not relieve appellants of the burden of proving the facts needed in their cases to link the claimed condition to service. The Panel does not have to accept all evidence presented by an appellant if it finds that it is not credible, even if it is not contradicted.[1]

In determining whether pension entitlement will be granted, the Panel must answer the following questions:

1. Has the veteran established that she has the claimed condition (an injury or disease or an aggravation thereof)?
2. Does the claimed condition constitute a permanent disability?
3. Does the claimed condition arise out of, or, is it directly connected with, service as a member of the forces?

The Panel acknowledges that the Federal Court of Appeal added a fourth element to the test by asking the question 'whether the Veteran's disability resulted from a military service-related condition'. In the Panel's experience, if the claimed condition is disabling and arises out of or is directly connected with service then the disability always results from a military service related condition. The extent that other non-service conditions contribute to symptoms associated with the claimed condition is a matter of assessment, not entitlement, and is dealt with through the application of the partially contributing tables.

If the answer to any of these three questions is "No" then the Panel must conclude that the Appellant has not met the burden of showing that entitlement should be granted.

The most recent evidence of the existence of the claimed condition is contained in the report of Dr. Sharon Francis Harrison dated 19 December 2011 (SOC, pages 183–189). Dr. Harrison describes the Appellant as, ".

. . an individual vulnerable to recurrent episodes of depression due to her psychological background and family history of depression. . . .” (SOC, page 189). The entirety of Dr. Harrison’s report describes episodes of depression from which there is a recovery. She does not describe any treatment after 2007 although there is mention in the report (SOC, page 187) that the criteria for major depression were met in 2010.

Ordinarily the Panel would expect to see a clear diagnosis of a permanent condition that is close in time to the hearing of the case. However, the fact is that the Appellant has pursued judicial review at the Federal Court and Federal Court of Appeal. This demonstrates that this condition is a matter of ongoing concern to the Appellant. Therefore, in giving the Appellant the fullest benefit of the doubt, the Panel finds that there is a valid diagnosis of the claimed condition of major depression, that it is a permanent condition, and that it constitutes a disability.[2]

The question then is the relationship to service of the claimed condition. The Panel finds, for the reasons noted below, that there is credible medical evidence that military service has contributed to the onset of and/or has aggravated the claimed condition.

The Panel notes that the first report on the file comes from Dr. Heather Nogrady dated 29 October 1999 (SOC, pages 12–13). That report describes a requirement for counselling that is almost entirely associated with personal events. After focusing on marital difficulties and the challenges of family life there is one reference to a conflict with a superior that was extremely stressful (SOC, page 13).

The report of Dr. T. Girvin dated 6 September 2000 (SOC, pages 17–22) still describes a significant association between the depression and non-service factors. It notes depressive episodes that go back to age 12 and a series of personal events. However, it also notes that the ‘nadir in her mood’ was associated with several grievances on the go from her previous employment in Trenton (SOC, page 18).

Although later reports attribute difficulties in this period to workplace conflict, the reports prepared in 1999 and 2000 suggest that there is a significant association with family problems that pre-date the development of military workplace issues.

There are many medical reports in the file. Dr. Harrison’s report from December 2011 represents the most comprehensive summary. This Panel disagrees with previous Appeal Panel’s assessment of the report of Dr. Harrison. This report is based upon a history provided by the Appellant, a review of the Appellant’s medical file, and assessments carried out by Dr. Harrison. Dr. Harrison’s opinion is based upon the totality of this information. While there are documents before the Panel that were not considered by Dr. Harrison, those documents are consistent with Dr. Harrison’s opinion. The Panel therefore finds that Dr. Harrison’s opinion is credible medical evidence and the conclusions contained in it should be given significant weight in determining service relationship and entitlement.

The section of Dr. Harrison’s report entitled “Conclusions and Recommendations” (SOC, page 187–189) is instructive, and notes as follows:

> . . . There is a positive family history of depression in [the Appellant’s] mother. Psychodynamically, the issues for [the Appellant] in her family were summarized by Dr. Kelly and further explored and elaborated by Dr. O’Connor. This leaves little room for doubt that [the Appellant] has long standing psychological issues that contribute to her difficulties with mood and maladaptive coping. . . .
>
> Family and couple issues are also referred to through out [the Appellant’s] consultations with mental health professionals. . . . Although they certainly contribute to the overall picture, [the Appellant’s] depressive symptoms do not seem as reactive to issues in her family or marriage. Further, the episodes from her childhood remain unclear in terms of severity. . . . Looking at the pattern of [the Appellant’s] episodes of depression, it is clear that issues related to her employment with the Canadian Forces **exacerbate** her symptoms. . . .
>
> . . . (After describing a series of military events) The unfortunate make up of her personality and vulnerability of her mood lead her to more serious episodes of depression than would be the norm for her situation. . . .
>
> In conclusion, [the Appellant] is an individual vulnerable to recurrent episodes of depression due to her psychological background and family history of depression. . . . I believe it must be seen that these events in her military service contributed to her depression along with her predisposing

> maladaptive personality and the vulnerability of her mood.
> [*Information in brackets added*] [*Emphasis added*]

Dr. Harrison's report is consistent with, and builds upon, the report of Dr. Kelly dated 28 July 2004 (SOC, page 52). Dr. Kelly's report and the prior consultation reports (SOC, pages 31–51) describe a history of psychological difficulties that pre-date military service (both of depressive episodes and a family history of depression). In addition to relating the condition to events prior to military service it is also associated with both military (primarily around three unjustly, according to the Appellant, cancelled deployments) and non military events (marital discord, difficulties with her daughter, termination of a pregnancy, and being turned down for law school).

The medical evidence consistently relates the claimed condition to three sources—events in the Appellant's childhood, events in her military career, and events in her personal life. These reports are medical evidence that is clear, credible and uncontradicted.

The question then is the degree of entitlement that should be awarded. The Advocate submitted that the presumption of fitness on enrolment means that the Panel should disregard events which occurred prior to enrolment. He submitted that it is impossible to separate out the degree of causation attributable to military and non military events that occurred after enrolment and, therefore, full entitlement should be granted. He also argued that but for the events of military service, the Appellant would have been able to cope with the non military events.

As the Federal Court of Appeal noted at paragraph 99 of *Cole v. Canada (Attorney General)*, 2015 FCA 119, the determination of causation is precisely the function assigned to VRAB. It is the Panel's obligation to assess the evidence and make the findings necessary to make determinations with respect to the issue of causation.

The Panel finds that there is no evidence that supports the Advocate's argument that, but for events of military service, the Appellant would have been able to cope with personal stressors. Dr. Harrison's opinion uses the word "exacerbate" when she describes the effect of military events upon the Appellant. Her conclusion uses the word "contributes" and describes how the Appellant was predisposed to suffer from depression. The medical evidence describes a history of depressive episodes that goes back to age 12, well prior to joining the military.

The Federal Court of Appeal's analysis, while silent on degree, clearly supports the conclusion that service and non-service factors contributed to causation of the claimed condition. This is consistent with the medical evidence before this Panel. The early medical evidence refers largely to non-service factors when it discusses causation. Later opinions, for example Dr. Harrison's opinion, give more weight to service factors but still give dominant weight to non-service factors. On this basis the Panel finds that the events in service contributed to the onset of the claimed condition of major depression and therefore two-fifths entitlement is appropriate. The Panel withholds three-fifths entitlement in reflection of the degree to which non-service factors contributed to the onset of the claimed condition.

If the Panel is incorrect in this analysis, it would also have awarded two-fifths entitlement on the alternative basis of aggravation of a pre-existing psychological condition.

According to subsections 21(9) and 21(10) of the *Pension Act*, and Sections 51 and 52 of the C*anadian Forces Members and Veterans Re-establishment and Compensation Regulations*, a member is presumed to be fit upon enrolment unless, among other items, the evidence establishes beyond a reasonable doubt that the condition existed prior to enrolment. In this case, a history of difficulties prior to enrolment was provided to two different psychiatrists. The histories provided to both psychiatrists are complete and consistent with each other. The history forms the basis of the opinion of Dr. Harrison that the Appellant has "longstanding psychological issues". The Panel therefore finds, beyond a reasonable doubt, that the Appellant has longstanding psychological issues and a predisposing maladaptive personality attributable to events that occurred prior to enrolment in the military.

The Panel finds that events that occurred as part of her military service aggravated (exacerbated) the Appellant's longstanding psychological issues. The Panel also finds that there were non-military events that occurred at the same time and that also aggravated these psychological issues. The Panel therefore finds, as an alternative analysis, that it is appropriate to award two fifths pension entitlement with respect to the

claimed condition. This reflects the degree to which events related to military service exacerbated the symptoms associated with the claimed condition. The Panel withholds three fifths pension entitlement in relation to events which occurred prior to service and, most significantly, the wide range of personal non service events, disappointments, and difficulties experienced by the Appellant.

As no arguments were made with respect to the effective date of entitlement, the Panel finds that it is appropriate to make entitlement effective three years prior to the date of this decision. However, in consideration of time spent in Federal Court the Panel awards a further award under subsection 39(2) of two years pension entitlement.

## DECISION

The Panel grants two fifths pension entitlement under subsection 21(2) of the *Pension Act* for the claimed condition of major depression as it relates to the Appellant's Regular Force service.

## EFFECTIVE DATE OF RETROACTIVITY

The Appellant first applied for pension entitlement for the condition of Major Depression more than three years prior to this decision. Her Appeal of the Review level decision was filed on 12 July 2012. A decision denying the Appeal was rendered on 23 August 2012. If the Court of Appeal's analysis had been applied at that time then the decision would have been effective on 23 August 2009. Despite the fact that no argument was made with respect to the application of subsection 39(2), the Panel makes an additional award equal to two years pension in recognition of the time spent prosecuting the claim before Federal Court.

This Board will award retroactivity effective 8 July 2012 pursuant to subsection 39(1) of the *Pension Act*, which allows for retroactivity from the later of the day on which application is first made or a day three years prior to the day on which pension is awarded. The application date for pension entitlement exceeds three years from the date of this decision. The Panel makes an additional award of two years pension under subsection 39(2) 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 2
Subsection 21(2)
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

**Attachments:**

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| EA-Attach-C1: | the Federal Court of Appeal Decision of *Cole v. Canada (Attorney General)*, 2015 FCA 119, dated 5 May 2015 (42 pages); |
| EA-Attach-C2: | the Federal Court of Appeal Decision of *Newman v. Canada (Attorney General)*, 2014 FCA 218, dated 30September 2014 (13 pages); |
| EA-Attach-C3: | the Federal Court Decision of *Matusiak v. Canada (Attorney General)*, 2006 FC 646, dated 29 May 2006 (17 pages); |
| EA-Attach-C4: | the Federal Court Decision of *Cormier v. Canada (Attorney General)*, 2006 FC 118, dated 2 February 2006 (five pages); |
| EA-Attach-C5: | the Federal Court Decision of *Dugré v. Canada (Attorney General)*, 2008 FC 682, dated 28 May 2008 (23 pages); and |
| EA-Attach-C6: | the Federal Court Decision of *John Doe v. Canada (Attorney General)*, 2004 FC 451 (10 pages). |

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1. *MacDonald v. Canada (Attorney General)* 1999, 164 F.T.R 42 at paragraphs 22 & 29; *Canada (Attorney General) v. Wannamaker* 2007 FCA 126 at paragraphs 5 & 6; *Rioux v. Canada (Attorney General)* 2008 FC 991 at paragraph 32.
2. Defined in section 3 of the *Pension Act* as "the loss or lessening of the power to will and to do any normal mental or physical act."

Date Modified: 2015-08-05