Veterans Review
and Appeal Board Canada

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Tribunal des
anciens combattants Canada

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Charlottetown (Î.-P.-É)
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Protected information

Applicant's name	HO file Number
Representative Charles J. Keliher, BPA	Decision Number 100002178120
Decision type Federal Court Order to Rehear - Reconsideration of Entitlement Appeal	Service Number
Location of hearing Charlottetown, Prince Edward Island	Date 13 November 2014

The Entitlement Reconsideration Panel decides:

ADENOCARCINOMA OF THE PROSTATE (OPERATED)

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

Entitlement effective 13 November 2011 (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*

Before:	Thomas W. Jarmyn	Presiding Member
	B.T. LeBlanc	Member
	Pierre Desjardins	Member

Reasons delivered by: Original signed by:

Thomas W. Jarmyn

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INTRODUCTION

This is a Reconsideration hearing, pursuant to a Federal Court decision dated 17 October 2014, of an Entitlement Appeal decision dated 11 August 2009. That decision affirmed the Entitlement Review Panel decision dated 25 September 2008, which denied entitlement under Subsection 21(2) of the *Pension Act*, with respect to the claimed condition of Adenocarcinoma of the Prostate (Operated).

A previous panel of the Veterans Review and Appeal Board (the Board) has reconsidered this application on the merits. It affirmed the 2009 Entitlement Appeal decision in Reconsideration decisions dated 29 March 2010 and 11 September 2013, respectively.

EVIDENCE AND ARGUMENT

The Application for reconsideration was made on the ground that the new evidence submitted by the Appellant supported the conclusion that his prostate cancer is attributable to his exposure to Agent Orange during his service at CFB Gagetown in 1967.

The essence of the argument made by the Advocate was that the Appellant was serving at CFB Gagetown in June and July of 1967. During that period he was exposed to Agent Orange either as a result of direct spraying or through military exercises carried out in areas which had been sprayed. This was an exposure to an environmental hazard that engaged the presumption associated with Paragraph 21(3)(g) of the *Pension Act*. The condition of Adenocarcinoma of the Prostate is one of a series of conditions that Veterans Affairs Canada has accepted as being presumptively caused by military service where an applicant can show exposure to Agent Orange during military service. As a result, the Appellant should be granted entitlement with respect to the claimed condition.

The Advocate argued that the evidence of the Appellant and the new evidence of his colleagues that were submitted are clear evidence of exposure to Agent Orange. He submitted that the prior Panel was incorrect, that evidence of exposure was clearly accepted at Federal Court by Justice de Montigny, and to use the Furlong Report as a basis to find the evidence of the Appellant and other witnesses not to be credible was not justified and was found by the Court to be improper.

The Advocate argued that, if the Panel found that entitlement was merited, it should award maximum retroactivity under the provisions of Section 39 of the *Pension Act*. His submission was that the additional two years of retroactivity was justified under Subsection 39(2) of the *Pension Act* because of the administrative delay beyond the Appellant's control as a result of time spent in relation to the two Federal Court applications and related decisions.

The common elements of the statements placed before the Panel are that the Appellant was:

- sprayed with Agent Orange;
- in the training area that was sprayed with Agent Orange immediately after spraying;
- exposed to Agent Orange; and
- with colleagues who were also sprayed with Agent Orange, and

some of whom have received entitlement in relation to this exposure.

The Furlong Report is unrebutted evidence of both the size of the base, the training area, and the spray areas. The Furlong Report1 states that:

- CFB Gagetown is 110,000 hectares[2].
- The training area is 30,000 hectares.
- Eighty-three acres were used for Agent Orange spray tests in 1966 and 1967.
- Spraying of Agent Orange was carried out from 21 to 24 June 1967.

Agent Orange spraying was carried out by helicopters operating at an altitude of approximately 50 feet. Dr. Furlong also noted that from 1956 to 2004, the entirety of CFB Gagetown training area and surroundings were sprayed with various registered defoliants (whose health effects are well known) in order to assist with range and training safety. Based upon his review of records from this period, Dr. Furlong determined that there were a number of categories of servicemen who were exposed to Agent Orange. The Appellant was not among one of those categories, and his unit was not identified by Dr. Furlong as being exposed to Agent Orange.

Dr. Furlong's report also set out the parameters of exposure that might cause damage to health. His scientific conclusions, which are not contradicted in any way, were that:

- There might have been elevated exposure to Agent Orange if an individual was less than 800 metres down-wind from a sprayed area.
- The dissipation rate of the Agent Orange solution used for testing in 1966 and 1967 is such that only individuals who were allowed access to the area sprayed with Agent Orange during, immediately after, or within 24 hours of spraying would be subject to potential risk of incurring negative health effects.

ANALYSIS

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;
> *(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.

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 applicants/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 applicant/appellant if it finds that it is not credible, even if it is not contradicted.[3]

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

1. Is there a valid, existing diagnosis of the claimed condition?
2. Does the claimed condition constitute a permanent disability?
3. Was the claimed condition cased, aggravated, or contributed to by military service?

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.

This case has a unique history. It has been the subject of two Federal Court orders directing the Board to reconsider it. The Board refused the first reconsideration application and was then directed by Justice Strickland to consider the new evidence and determine the application on its merits. In the second reconsideration application, the Board determined that the new statements were not credible because they were inconsistent with the Furlong Report. Justice de Montigny found that it was impermissible to rely upon a document composed 40 years after the fact to determine that witnesses were not credible and directed the Board to carry out this reconsideration. Justice de Montigny concluded that entitlement should be granted unless it could be determined there was some restriction upon the Appellant that prevented his entry into the Agent Orange spray area.

Previous Appeal Panels have accepted the diagnosis of the claimed condition and that it constitutes a permanent disability. This Panel will not disturb those findings. The Panel also accepts the argument that if exposure to Agent Orange is established then the claimed condition is subject to the departmental presumption of entitlement with respect to the Institute of Medicine (IOM) “top two” list of diseases. The question then is whether, taking into account the benefit of the doubt, the Appellant has established that he was exposed to Agent Orange during his military service.

The Panel rejects the argument that the Appellant need only show that he was posted to CFB Gagetown in 1967 in order to establish exposure to Agent Orange. The spray area was a very small percentage of the CFB Gagetown training area.

The Panel finds that in order to establish exposure to Agent Orange, an applying party must provide credible evidence that he was in a sprayed area either during the period in which the Agent Orange was sprayed, or up to 24 hours after spraying was completed. According to the Furlong Report, this is the period in which Agent Orange was present in the spray area at levels which would have been hazardous to the health of anyone who was in the test area. With respect to 1967, therefore, in order to engage the presumption associated with Paragraph 21(3)(g) of the *Pension Act*, an applying party must provide credible evidence that he was in the area sprayed with Agent Orange between 21 June 1967 and 26 June 1967.

If the Appellant had been a member of one of the categories of servicemen or a member of a unit that Dr. Furlong had identified as being exposed to Agent Orange, the Panel would have found the Paragraph 21(3)(g) presumption had been engaged. However, the Furlong Report is not the final answer on the issue of exposure. The Panel would normally then consider the evidence of the Appellant and his witnesses to determine

whether it, on a balance of probabilities, established exposure to Agent Orange.

In assessing the statements entered by the Appellant and others in support of his application, the Panel must question whether the person making the statement had the necessary knowledge to make the statement. The Panel acknowledges that one of the common elements between all of the statements is that the Appellant and other soldiers were sprayed with various solutions. However, this does not establish exposure to Agent Orange. The evidence is clear that liquid defoliants that do not cause health risks have been sprayed on and around CFB Gagetown by military and civilian authorities for more than 50 years.

Where the maker of statement says “I was sprayed with Agent Orange”, the question the Panel asks is “How does that person know they were sprayed with Agent Orange and not some other harmless defoliant or spray?” The Panel is not aware of any physical characteristic of Agent Orange that would allow a person to distinguish it from any other spray. The Panel has also not been provided with any basis upon which the authors of the statements would know whether Agent Orange was being sprayed upon them. Without this sort of information, a statement which says “I was sprayed with Agent Orange” is not credible.

The Panel also notes that the Appellant has said, in a statement from January 2010 (SOC p. 175), that “. . . I am unable to provide evidence of my **direct** exposure to the agent. . . .” (*bolding included in original*). He further states that his claim is based upon his training in or near areas in which Agent Orange was deployed.

Without direct credible evidence of exposure to Agent Orange, the question before the Panel then becomes whether the evidence before it supports the conclusion, on a balance of probabilities, that the Appellant was in the area that was sprayed with Agent Orange between 21 June 1967 and 26 June 1967. If the answer to this question is “yes”, then presumption associated with Paragraph 21(3)(g) is engaged. In answering this question, the Panel first of all notes that a major military exercise is not a camping trip where participants can wander freely through the woods. It is a controlled evolution of manoeuvre and live fire where military tactics are exercised. Records exist of hazard areas and of unit movement. The Furlong Report does not record the presence of the Appellant’s unit in the spray area.

The only statement which speaks to the relative location of the Appellant and the Agent Orange is the statement of LCol (retired) dated 9 March 2012 (SOC p. 226). The LCol does not speak of the relative position of the Appellant’s unit vis-à-vis the 1967 Agent Orange testing site even though a map of this site (set out as part of the entire CFB Gagetown training area) was included in the Furlong Report. In order for the Panel to find that this statement established the presence of the Appellant’s unit in the spray area, it would have expected a statement that at least referred to the specific testing site and the relative position of the Appellant’s unit rather than a statement which asked the Panel to draw an inference from unspecified knowledge.

The Panel also notes that it would have at least been possible to determine from unit records which exercise area the Appellant’s unit was operating in. For example, if the Appellant’s unit was in the eastern most part of the exercise area during the relevant period it would have been approximately eight kilometres away from the testing site and beyond any exposure to

Agent Orange. Exercise operating orders, movement logs, and after-action reports would all have included information that would have been useful in establishing the relative position of the Appellant's unit vis-à-vis the spray area. The Appellant has not provided any evidence of this sort.

The Panel also notes that the Appellant's Unit Employment Record (SOC p. 14) records him as being on 23 days of annual leave starting on 5 June 1967. This supports the conclusion that he was not in or proximate to the spraying area during the time that Agent Orange would have presented a risk to health as found in the Furlong Report.

Normally the Panel would have found that the statements provided by the Appellant are not credible because the person making the statement does not have direct knowledge of the facts included or does not specify the basis of his knowledge of the hearsay contained in them. While the makers of the statements are sincere in the belief of the truth of the statements, they are not credible as they have no identifiable basis of knowledge of the facts contained in the statements. Further, to the extent that they maintain that the Appellant suffered direct exposure to Agent Orange, they contradict the Appellant's claim as he is not maintaining that he experienced direct exposure.

If the evidence demonstrated that the Appellant was in the test area during the period from 21 to 26 June 1967, the Panel would find that the conditions to engage the presumption included in Paragraph 21(3)(g) of the *Pension Act* had been established. Further, given the benefit of the doubt, if the Appellant had established that he was within 800 metres of the test site (the possible drift range established by Dr. Furlong) during the period from 21 to 26 June 1967, it would have found that the presumption should be applied. However, those facts are not present in this case.

However, as previously mentioned, this case has a unique judicial history. The Federal Court, in its decision of October 2014, has directed the Panel to apply a different test than that which would normally be applied. In paragraph 53 of its decision, it finds that there is no evidence that the Appellant was restricted from entering the spray site and that, without such evidence, the benefit of the doubt should be given to the Appellant. The Board was then directed to reconsider the Appellant's case on this basis.

The Panel would ordinarily have determined that the Appellant had not satisfied his burden of proving, having been given the full benefit of the doubt, ". . . on a balance of probabilities the facts required to establish entitlement to a pension."[3] However, the Federal Court has given direction that this case should be determined based upon whether there was evidence that the Appellant was restricted from entering the spray site. This Panel does not find evidence of any such restriction. When this unique test is applied, for the purposes of this case only, the Panel therefore awards full entitlement with respect to the claimed condition of Adenocarcinoma of the Prostate (Operated).

ORDER

The Panel awards entitlement to a disability pension, under Subsection 21(2) of the *Pension Act* with respect to the claimed condition of Adenocarcinoma of the Prostate (Operated).

EFFECTIVE DATE

The Appellant first applied for pension entitlement for the condition of Adenocarcinoma of the Prostate (Operated) more than three years prior to the date of this decision. This Panel will award retroactivity effective 13 November 2011, 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 does exceed three years from the date of this decision, and there is evidence to substantiate an award of pension under subsection 39(2) of the *Pension Act*.

Applicable Statues:

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 32
Section 39

Attachments:

R4-Attach-M1: *King v. Canada (Attorney General)*, 2000 CanLII 14974 (FC) (16 pages).

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1. At pages 2 and 12
2. One hectare contains 2.471 acres.
3. *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.