ADVOCACY, ENTITLEMENTS AND SUPPORT SPOT[1]

INTRODUCTION

This quarter, I'd like to return again to the case study approach. What follows is mythical but based on someone's actual experiences.

CASE STUDY

Background

The Second Reading of the *Veterans' Entitlements Bill* emphasised that the intent of the legislation was beneficial. This intent has been re-emphasised by the case law. In this case, a Veterans' Review Board hearing as to whether the appellant was entitled to the Special Rate (TPI), the Senior Member stated the Board's awareness of the beneficial intent of the Act. He also stated that it must satisfy the full intent of the relevant provisions in the Act. As we will see, the Advocate must ensure every element of each provision is closed off.

Situation

Steve had joined the RAAF as a Electrical Fitter in 1967. Following RSTT he served in squadrons equipped with Mirage and F111C aircraft, as well as being posted to the Aircraft Depots. He was an excellent tradesman and was promoted to Warrant Officer before being offered a commission in 1987. He resigned in 1993 after six years service as an Engineering Officer. He then entered the civilian workforce in military aircraft engineering and maintenance scheduling positions.

Throughout Steve's trade career, he had spent extended periods on the flight-line, inevitably, he contracted skin cancers and suffered from sensorineural hearing loss and severe tinnitus. As he had spent very significant periods of time squatting on and under aircraft refueling, and removing and reinstalling heavy aircraft electrical components he had arthritic knees and spondylosis of the lumbar spine.

At the time he was commissioned, while not obese, Steve had become quite overweight. At his pre-commissioning medical the MO advised that he must lose weight for the sake of his future health. The MO entered in Steve's service medical record his BMI (body mass index) and the prescription of at least three thirty-minute periods of jogging per week. Also recognising that his physical appearance was not a good image, Steve started to run and exercise regularly. In eighteen months or so, he had carved off all excess weight. He was enjoying jogging so much that he began to train for marathons. By the time he was in his mid forties he was running three or more marathons a year.

Steve's post-service employment returned him to the type of work of his earlier years as an electrical fitter. He was again climbing onto and moving around fighter aircraft in major servicing and squatting, lifting and craning to remove and install aircraft electrical equipment. Before he left the RAAF, his knees and back were already "playing up". The treatment they were now receiving exacerbated the musculo-skeletal conditions. Steve began taking increasingly powerful analgaesics and visited a chiropractor regularly. Eventually, he reached the stage at which he had to advise his employer he could no longer continue the physical work they required him to do.

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[1] This article was prepared by R.N. (Dick) Kelloway, VP AES, NSW-ACT Chair of TIP, practicing advocate and pension officer for RAAFA, the RSL and APPVA.

His value to his employer was so high that they offered him project-scheduling work, which involved mainly work at a computer terminal. In preparation for his approaching retirement, although still employed as a project scheduling capacity, Steve and his wife re-settled to a coastal location. Again, his employer was reluctant to lose Steve's skills and continued employment on a contract basis, working from home. This proved to be ideal for Steve. His pain was now so severe that analgaesics were not working and he had to get up continually from the computer terminal to seek relief through movement. As he was at home, he had complete freedom when to work, as long as he met his contractual milestones.

In 2002, although still being offered lucrative work contracts, Steve's conditions were so severe that he could no longer work productively. He was 62 years of age. From time to time he saw computer-based, home-work opportunities in the local papers, but did not apply for them as he was nit sure he could meet the associated contract milestones. He remained as active as his conditions would permit, however, and took up volunteer work at the local golf course as its secretary-treasurer, and played golf – sometimes up to three times per week. He took strong analgaesics before he played and suffered badly afterwards, but needed the companionship and getting out of the house.

Claims and Appeals

Steve asked around the local ESOs and identified an ex-RAAF pension officer-advocate who was happy to help him get his claims together. His claims for arthritis of the knees and spondylosis of the lumbar spine were successful; however, the Delegate decided on the medical evidence provided by Steve's GP that the level of disability was nowhere near as severe as in reality it was. When the GP's medical impairment assessments were received through FOI action, Steve and his advocate could see that the assessments were incomplete and misleading. With his advocate's support, Steve appealed the Delegate's decision, submitting a request for an independent s31 Review and, if that was not successful, appeal to the Veterans' Review Board.

To secure more comprehensive medical support, Steve's advocate prepared a letter to the GP in which he included extracts from tables in GARP. The advocate was very careful to include in the letter recognition of both his and the GP's ethical obligations. Deliberately, he advices that he was not trying to lead the GP to a decision and, mindfully, included the range of descriptors that appeared to straddle Steve's description of his symptoms. The GP was provided with the range of information and GARP wording that would enable him to specifically identify the descriptors that matched Steve's symptoms. The GP categorically refused to accept Steve's requests for appointments.

The advocate recommended that Steve seek an appointment with a GP in a town about an hour's drive away who had many ex-ADF service personnel on his books and had completed many DVA medical impairment assessments. The GP was prepared to see Steve and to provide a written report that was based on the wording in GARP that most accurately described the severity of Steve's conditions. The advocate submitted the new report to the independent Departmental review; however, the s31 Delegate decided not to intervene, leaving the disability pension at 70% of the general rate. The matter therefore passed to the Review Board.

In preparation for the Board, Steve sought further medical opinions on each of his conditions from medical specialist. These reports, along with a comprehensive submission, were lodged with the VRB.

Legislative Provisions

The VEA provisions related to the Special Rate of Pension (aka Totally and Permanently Incapacitated) are to be found in s24.

In summary, s24(1) requires that a person must satisfy the following provisions to be determined TPI. He/she must have:

- lodged the claim for the condition(s) before turning 65;
- have a level of disability of at least 70%; and
- an accepted incapacity that, alone, prevents more than 8 hours remunerative work per week and, because of the incapacity alone, has caused a loss of income.

S24(2), the so-called "ameliorating provision" requires alternatively that the veteran will not be regarded as having lost income if he/she:

- has some other incapacity that might be preventing remunerative employment; and
- has been genuinely seeking, and would be continuing to seek, remunerative work, were an incapacity not the substantial cause of the inability to work.

Outcomes

The VRB determined that Steve was not entitled to be determined TPI. Board Members' findings focused on the following relationships between the facts of Steve's case and the provisions in s24:

- the disparity between the original GP's and the second GP's medical assessments was so great that the second GP was deemed to have been overly generous;
- under questioning, Steve responded truthfully that he had changed GPs for routine consultations but had not returned to the GP one hour's drive away since getting that GP's report;
- from their research, Members were aware that Steve had been diagnosed with an eye condition (pterygium) and a torn calf (gastrocnemius) muscle, and that his claim under VEA for these conditions had been rejected (his service medical records showed the conditions had been diagnosed before the start date for the VEA);
- under questioning, Steve advised that his calf muscle "played up" and caused him to limp from time to time;
- Steve's contract employment before he finally ceased work had been sessional and there had been periods of several months during which he had not been earning income; and
- under questioning, Steve admitted forthrightly that while he had looked at the possibilities of work after he retired from his project scheduling employment he had not followed through.

Comparing the Board's written determination with facts and the legislation, the following deductions can be made:

- in light of the written and verbal evidence, the Board appeared to have attached less weight to the specialists' medical evidence than to their decision that the second GP's report was generous;
- Steve's volunteer work at the golf club and his playing golf up to three times a week appear to have supported a decision that his medical conditions were not as bad as the second GP reported;

- the sessional nature of Steve's contract work did not convince the Board that he had not been earning income because of his accepted conditions alone;
- Steve's unsuccessful claims for pterygium and a torn gastrocnemius muscle were deemed to have been influential in his inability to work;
- when considered in light of his unsuccessful claims for pterygium and a torn gastrocnemius muscle, Steve's not having applied for any of the employment opportunities he saw in the local newspapers was deemed to have denied him consideration under the ameliorative provisions of s24(2).0

The Way Forward

Steve has decided not to take the matter to the Administrative Appeals Tribunal. Instead, he has decided that he will apply for an increase in his disability pension on the grounds that his musculo-skeletal conditions have deteriorated since his initial claim. He is hopeful that, given the severity of his conditions now, he may be determined at 100% of the general rate and therefore entitled to a Gold Card. He recognises that his service medical records do not provide evidence of pterygium or ongoing problems with his gastrocnemius muscle during his period of service under the VEA. His only recourse there is to seek compensation under SRCA.

INVITATION

If you have any queries or comments on any AES matter, I'd like to hear from you either through Lance Halvorson, the Wings Editor, or direct to me at: <richard.kelloway@bigpond.com>

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