



War Pensions Number

## VETERANS' ENTITLEMENTS APPEAL BOARD

Name: [REDACTED]

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Service Number and Rank: [REDACTED]

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Address: [REDACTED]

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**Grounds of appeal: Appeal against decision of the Review Officer relating to his Disablement Pension for his accepted conditions of Osteoarthritis Left Knee and Osteoarthritis Right Knee**

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**Held: at Wellington on 22 February 2018**

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### DECISION

1. This is an appeal by [REDACTED] (the **Appellant**) against the decision of the Review Officer (**RO**) dated 22 August 2016, firstly, to uphold the decision of the Decision Officer (**DO**) dated 7 June 2016 to cease the temporary pension previously awarded and retain the permanent pension of 15% for the accepted condition of Osteoarthritis Left Knee, and secondly, to cease the temporary pension of 5% awarded for Osteoarthritis Right Knee and increase the permanent pension awarded for Osteoarthritis Right Knee to 22%.
2. The Appellant did not attend the appeal hearing in person, but he was represented by his advocate, Mr Richard Terrill who spoke to written submissions on the Appellant's behalf. Veterans' Affairs New Zealand (**VANZ**) was represented by Mr Graeme Astle. Ms Ann-Marie Tribe of VANZ was in attendance.

#### ***Background to the appeal***

3. On 29 October 2015 the DO increased the percentage of Disablement Pension for Osteoarthritis Left Knee to 30% by "*retain[ing] the Appellant's 15% permanent Disablement Pension and add[ing] a 15% temporary Disablement Pension until 7 October 2016 or until specialist report is received whichever is soonest.*" The reason for her decision was: "*Medical findings show the accepted disability has deteriorated beyond the percentage previously awarded. Specialist report from Andrew MacDiarmid, Orthopaedic Surgeon, dated 17 August 2015 notes [REDACTED] has advanced osteoarthritis of both knees. This is likely to continue and he will probably need to consider knee joint replacements sometime in the near future...I would assess him as having a 30% loss of bodily function in the left leg.... He is not able to tolerate anti-inflammatories. I believe that his arthritis will progressively deteriorate. While knee joint replacements will help with his pain, it will still leave him with a disability.*' A Temporary Disablement Pension has been added as the disability has not stabilised or reached a final state...." On the same day, 29 October 2015 the DO similarly increased

the percentage of the Disablement Pension for Osteoarthritis Right Knee to 30% by “retain[ing] the Appellant’s 15% permanent Disablement Pension and add[ing] a 15% temporary Disablement Pension until 25 June 2016 or until specialist report is received whichever is soonest.” The reason for her decision was: “Medical findings show the accepted disability has deteriorated beyond the percentage previously awarded. Specialist report from Andrew MacDiarmid, Orthopaedic Surgeon, dated 17 August 2015 notes [REDACTED] has advanced osteoarthritis of both knees. This is likely to continue and he will probably need to consider knee joint replacements sometime in the near future...I would assess him as having a 30% loss of bodily function in the left leg.... He is not able to tolerate anti-inflammatories. I believe that his arthritis will progressively deteriorate. While knee joint replacements will help with his pain, it will still leave him with a disability.’ A Temporary Disablement Pension has been added as the disability has not stabilised or reached a final state...”

4. On 30 May 2016, on the basis of a further report from Mr MacDiarmid dated 10 May 2016, which had been requested by VANZ in relation to a reassessment of the level of disablement in each of the Appellant’s knees, the DO made the following decisions. With regard to the Reassessment of Osteoarthritis Left Knee, the DO determined to: “Remove temporary pension of 15% and retain permanent disablement pension of 15% for Osteoarthritis Left Knee in accordance with specialist report from Dr Andrew MacDiarmid, Orthopaedic Surgeon, dated 10 May 2016 and reference to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 4th edition (AMA Guides, 4th Edition). This percentage has been determined in accordance with page 78, table 41 of the AMA Guides, 4th edition.” With regard to the Reassessment of Osteoarthritis Right Knee, the DO determined to: “Decrease temporary pension of 15% to 5% and retain permanent disablement pension of 15% for Osteoarthritis Right Knee in accordance with specialist report from Dr Andrew MacDiarmid, Orthopaedic Surgeon, dated 10 May 2016 and reference to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 4th edition (AMA Guides, 4th Edition). This percentage has been determined in accordance with page 78, table 41 of the AMA Guides, 4th edition. Temporary pension for Osteoarthritis Right Knee awarded until 7 June 2017 or until report is received from specialist, whichever is soonest...”
5. On 22 August 2016 the RO upheld the DO’s decision of 7 June 2016 to cease the temporary pension previously awarded and retain the permanent pension of 15% for the accepted condition of Osteoarthritis Left Knee, but overturned the decision of 7 June 2016; ceasing the temporary pension of 5% awarded for Osteoarthritis Right Knee, and increasing the permanent pension awarded for Osteoarthritis Right Knee to 22%. In coming to her decision, the RO had regard to the information the Appellant had written in support of his review application received on 20 June 2016 and the reasons he gave for seeking a review of the decision. i.e. “LEFT KNEE. August 2015: Assessment by Orthopaedic Surgeon Mr A. MacDiarmid – assessed the knee as having 30% loss of function. VA awarded: Retain 15% permanent disability. Add 15% temporary disability pension. Temporary pension to be reviewed in a year. See Decision Officers report dated 4/11/15. Whole of Person Impairment Percentage 60%. May 2016: Temporary Pension reassessment by Orthopaedic Surgeon Mr A. MacDiarmid. Opinion: Retain 15% as no change since last August assessment. VA awarded: Retain 15% permanent disability but remove temporary pension of 15%. Combined Whole-Person Impairment assessed at 49%. Comment: How is it, when VA send me to a well-

known and qualified Orthopaedic Surgeon whose instructions (VA letter dated 7/4/2016) were to reassess the temporary pension, states there has been no change since last assessment in August 2015. So why has the 30% loss of function been reduced back to 15% permanently [sic] disability only? Whole-person impairment has reduced by 11% when there is no assessed improvement recorded! Again why give a temporary pension of 15% from 7/10/15 in the first instance, and now put my family in the stressful position we find ourselves whilst trying to enjoy what quality of life that we have left, by taking it away, the knees have not improved and they will only deteriorate. RIGHT KNEE. August 2015: Assessment by Orthopaedic Surgeon Mr A. MacDiarmid – assessed the knee as having 30% loss of function. VA awarded: Retain 15% permanent disability. Add 15% temporary disability pension. Temporary pension to be reviewed in a year. See Decision Officers report dated 4/11/15. Whole of Person Impairment Percentage 60%. May 2016: Temporary Pension reassessment by Orthopaedic Surgeon Mr A. MacDiarmid. Opinion: Assessed right knee as deteriorated by another 5% and would recommend that the right knee be assessed as a 20% disability. VA awarded: decrease temporary pension of 15% to 5% and retain permanent disability pension of 15%. Combined Whole-person Impairment assessed at 49%. Comment: Again I ask, how, when Mr MacDiarmid states there has been deterioration since last assessed August 2015 and recommended an assessed disability of 20%, VA's answer is stop 15% temporary pension and initiate a new 5% temporary pension effective 8/6/16 to be reviewed in one years' time. Mr MacDiarmid made the comment during May 16 reassessment that the knees will not improve but deteriorate. In light of what happened VA obviously do not agree with him. Overall Comment: After going over and over all the relevant documentation I have come to the conclusion that the opinion stated by Mr MacDiarmid for the reassessment of the temporary pensions due to expire, (letter dated 10 May 2016) is that VA have taken this as my total assessed disability for my knees, when again Mr MacDiarmid's opinion applied only to the reassessment of disabilities for temporary pensions as asked by VA, (Letter dated 7 April 2016). To support my conclusion the attached copy of page one of the decision officer's decision with highlighted points. In all correspondence since my first assessment in Aug 2015 Mr MacDiarmid has not been asked to comment on anything other than temporary pension. Again, I ask why has my temporary pension been reduced....PS I would also like to add that I phoned my case manager on 30 May 2016 to ensure that Mr MacDiarmid was to reassess for a temporary pension and she assured me that was correct. Bottom line is Mr MacDiarmid reassessed my temporary disabilities for left knee as 15% and right knee at 20%. VA ignored this and took 15% away from each knee."

6. The RO also had regard to the letter dated 15 June 2016 from Mr MacDiarmid in which he wrote: "I have had an approach by [the Appellant] in regards to his Disablement Pension pointing out anomalies which are confusing both to him and to me. His initial assessment on 15.08.15 highlighted a significant advanced osteoarthritis of both knees, and assessment of 30% loss of function in the right knee and a 30% loss of function in the left knee. He however was awarded a 15% temporary loss of function in the left and right knees. I assume that the 15% is for whole person impairment rather than loss of limb function. I saw [the Appellant] again at your request on 10.05.16 for a reassessment of the situation on the basis that his changes were temporary. After further examination with [the Appellant] and review of his x-rays, I determined that the right knee had deteriorated by 5% of the whole body impairment which should give him a 20% impairment and that

*the left knee remain the same at 15% whole person impairment. [The Appellant's] knees are not stable, they are likely to continue to deteriorate and require joint replacement sometime in the future...*

7. The RO noted that the Appellant's conditions of Osteoarthritis Right Knee and Osteoarthritis Left Knee were accepted as service related in 2014 (Claims Panel decision dated 11 April 2014 under the War Pensions Act [1954]) and that a 15% permanent pension was awarded for Osteoarthritis Right Knee and 15% permanent pension was awarded for Osteoarthritis Left Knee *"based on medical examination and investigation findings (x-ray report dated 7 September 2010; examination findings and x-ray findings of 1 November 2013 noted in the report dated 16 January 2014 from Orthopaedic Surgeon Mr Bryan J Thorn).*" The RO further noted that the *"15% awarded for individual conditions transitioned to whole-person impairment percentages for the purposes of transferring to a Disablement Pension in May 2015."* She observed that Mr MacDiarmid had noted in his report dated 17 August 2015 the Appellant's *"relevant history and current symptoms"* and what he had written *"in respect of examination and investigation findings..."*, including Mr MacDiarmid's assessment *"I would assess [the Appellant] as having 30% loss of function in the right leg, and 30% loss of function in the left leg..."* The RO also had regard to the x-ray report dated 17 August 2017 relating to each of the Appellant's knees. Having noted the decision of the DO, *"to increase the percentage awarded for each of the Appellant's knees to 30%, comprising 15 % permanent pension and 15% temporary pension, noting that the temporary pension component had been added for each knee as the disability had not stabilised or reached a final state"*, the RO observed: *"It appears the 30% loss of function in each leg may have been misinterpreted as whole-person impairment."* The RO also had regard to the specialist assessment report dated 10 May 2016, in which Mr MacDiarmid, having reassessed the Appellant's knees, opined: *"There has been a deterioration in the right knee since last assessed. Based on his complaints and grievances I would assess his right knee as deteriorated by 5% and would recommend his right knee be assessed as a 20% disability and his left knee at 15%. Deterioration is anticipated over the next two or three years."*
8. Having noted, inter alia, that the Veterans' Entitlements Support Act 2014 (VSA) *"requires percentages awarded for accepted disabilities to be determined in terms of whole-person impairment, in accordance with the ....(AMA Guides).."*, and that permanent Disablement Pensions may be awarded under the VSA if VANZ *"considers on the basis of medical and other relevant evidence that (a) the veteran's condition is not likely to improve; or (b) the veteran's condition has stabilised or reached its final state"*, the RO observed that *"the information provided in Mr MacDiarmid's reports suggests progressive osteoarthritis affecting both knees"* and that *"there is the potential for the level of impairment to improve should the surgical option be taken – a successful knee joint replacement has the potential to reduce the whole-person impairment to 15%..."*, but that *"while surgery remains an option, Mr MacDiarmid has noted [the Appellant] prefers to continue with conservative treatment at this time rather than knee joint replacement surgery."* Noting further that *"Temporary Disablement Pensions require reassessment at planned intervals"*; that *"Permanent Disablement Pensions are not reassessed earlier than two years unless there is evidence of a significant change of whole-person impairment (10% or more)"* and that *"both Temporary and Permanent Disablement Pensions can be adjusted (up/down) to reflect current impairment i.e.*

*depending on whether the condition has improved or deteriorated”, the RO observed that “Mr MacDiarmid’s assessment report of 10 May 2016 notes a decrease in flexion of the right knee since assessment in August 2015, and increase in pain; otherwise examination findings were similar to those previously noted. X-ray findings show the right knee is worse than the left, consistent with examination findings. [The Appellant] is currently favouring conservative treatment rather than the surgical option to manage his osteoarthritis of both knees.”*

9. Having considered *“the clinical examinations and x-ray findings provided in Mr MacDiarmid’s reports in relation to the recommendations in the AMA Guides”,* the RO *“concluded that the Arthritis Impairment Table 62 page 83, which uses x-ray findings, provides the highest estimate of impairment for each knee.”* The RO noted that *“the whole-person impairment estimate (for current total impairment of each knee) under the AMA Guides is: Osteoarthritis Right Knee 22% whole-person impairment (severe medial joint and mild patellofemoral joint arthritis); Osteoarthritis left Knee 11 % whole-person impairment (moderate medial joint and mild patellofemoral joint arthritis),”* and that this was *“similar to Mr MacDiarmid’s recommendations of 20% whole-person impairment for the current total impairment in respect of the right knee, and 15% whole-person impairment for the current whole-person impairment in respect of the left knee (the 30% previously recommended being in respect of loss of function rather than whole-person impairment).”* The RO, *“having considered the information available...determined to cease the temporary pension of 5% awarded for Osteoarthritis Right Knee, and increase the permanent pension awarded for Osteoarthritis Right Knee to 22%; and retain the 15% permanent pension awarded for Osteoarthritis left Knee.”* The RO further determined that *“these percentages represent the extent of current whole-person impairment for each knee, based on the clinical findings available”* and that *“the percentages are permanent given surgery is not indicated at present.”* The RO accordingly determined to uphold the DO’s decision of 7 June 2016 *“to cease the temporary pension previously awarded and retain the permanent pension of 15% for the accepted condition of Osteoarthritis Left Knee”,* and to overturn the DO’s decision of 7 June 2016, and to *“cease the temporary pension of 5% awarded for Osteoarthritis Right Knee, and increase the permanent pension awarded for Osteoarthritis Right Knee to 22%.”*

***Written submissions***

10. On 9 January 2016, the Appellant lodged an appeal against the decision of the RO, stating: *“How is it Veterans’ Affairs can make a decision to reduce my pension after they have acknowledged the fact that deterioration has occurred in both knees since last assessed in January 2014 (see letter from Veterans’ Affairs dated 4 November 2016 not attached) particularly page 1 last paragraph and page 2 – 2<sup>nd</sup> paragraph. My total combined whole-person impairment pension was recalculated from 60% down to 51% (letter dated 19 Sept 2016) from Veterans’ Affairs. Nowhere in Mr A. MacDiarmid’s (Orthopaedic Surgeon whom Veterans’ Affairs sent me to on several occasions) letters of 10 May 2016 and 15 June 2016 did he ever mention or state that my knees had improved, since his original assessment dated 17 August 2015. So where again is the justification for the reduction of the pension when my knees have clearly deteriorated not improved. See VSA 14 Schedule 1 clause Pt 2 6(3).”* In a submission dated 21 September 2017, Mr Terrill, on behalf of the Appellant, submitted: *“1. This appeal is NOT an appeal against a NRO decision. This appeal is*

related to the amount of Disablement Pension being paid to the appellant. 2. After transitioning to the Disablement Pension from the War Pension, the Appellant found himself financially worse off than if he had remained on the War Disablement Pension. 3. This matter was pointed out to Mr Astle (email attached) no action was taken. 4. Schedule 1 Part 2 section (3) states: 'However, the rate of payment to a Veteran under subclause (1) or (2) must not be less than the rate of payment that the veteran was entitled to receive immediately before the commencement of Part 3 of this Act. 5. We therefore contend that Veterans' Affairs have contravened the Act. 6. Further we contend that Veterans' Affairs must now increase the applicant's rate of pay and back pay him all the arrears.'

11. In his written response dated 5 December 2017, Mr Astle submitted that "there are three aspects to this appeal which require comment, namely the percentage of impairment awarded; secondly the change in pension payment resulting from the Decision Officer's and National Review Officer's decisions; and finally, during the process of considering [the Appellant's] applications he was transferred from a War Disablement Pension (WDP) to a Disablement Pension (DP) which has been raised as an issue in [the Appellant's] appeal submission." In order to clarify VANZ's position, Mr Astle set out "key events in chronological order" under both the War Pensions Act 1954 and the VSA:

**"War Pensions Act**

- 30 November 2010 – [Appellant] was declined an application for Osteoarthritis of both knees.
- 29 August 2013 – [Appellant's] application for reconsideration in relation to Osteoarthritis of both knees was declined.
- 1 April 2014 – Reconsideration of the application previously declined for disability of Osteoarthritis of both Knees was allowed.
- 11 April 2014 – War Pension Claims Panel accepted Osteoarthritis Left Knee and Osteoarthritis Right Knee and awarded a permanent WDP at 15% for each knee. This increased [the Appellant's] WDP total WPI to 45% (including other accepted conditions) and his fortnightly pension payment was increased to \$195.26 per fortnight back dated to 26 January 2014, being the date of Application for Review or Reconsideration.

**Veterans' Support Act**

- 10 June 2015 – [Appellant] lodged applications for new conditions including reassessment of Osteoarthritis of the Right Knee.
- 7 October 2015 – [Appellant] lodged an application for reassessment of Osteoarthritis of the Left Knee following receipt of the Orthopaedic Surgeon's earlier report relating to impairment of his Right Knee.
- 29 October 2015 – in dealing with [the Appellant's] applications the Decision Officer increased the rate of impairment for Osteoarthritis in each knee from 15% to 30%. This was on the basis that 15% for each knee remained on a permanent pension and the additional 15% for each knee was on a temporary pension. The temporary pension for each knee was added as the disability was deemed to have not stabilised or reached a final state. At the same time as the decision to add the temporary pensions for both knees, [the Appellant's] WDP was transferred to a DP under the [VSA].
- 4 November 2015 – [Appellant] was advised of the decision to grant additional percentage impairments for his knees along with the transfer to a Disablement Pension. His fortnightly pension increased to \$358.18 (which included the additional payment for the two temporary pensions granted in relation to the disability for his knees).
- 7 April 2016 – the temporary pensions were scheduled to expire on 25 June 2016 (Right knee) and 7 October 2016 (Left knee), and a further specialist report was requested from Mr MacDiarmid (Orthopaedic Surgeon) on 7 April 2016.
- 10 May 2016 – Mr MacDiarmid's report clarified the level of impairment of each knee. It is important to note that the earlier report of 17 August 2015 assessed 30% loss of function in each leg whereas his report of 10 May 2016 evaluated the level of impairment for each knee. Mr MacDiarmid assessed [the Appellant's] Right knee as having deteriorated by 5% and recommended a level of 20% disability. He further

*recommended the Left knee remain at a level of 15% disability and noted that further deterioration could be expected over the next 2-3 years.*

- *7 June 2016 – On receipt of Mr MacDiarmid’s report dated 10 May 2016, the Decision Officer removed the 15% temporary pension for the left knee and decreased the temporary pension for the Right knee to 5%. This resulted in [the Appellant’s] fortnightly pension being reduced to \$244.14.*
- *22 August 2016 – A Review of Decision application was received from [the Appellant]. The National Review Officer considered all the material provided including the percentages previously awarded for the accepted conditions/illnesses. This is a requirement under the [VSA] where Whole-Person-Impairment is determined in accordance with the.... (AMA Guides). In finalising the review, the National Review Officer determined that Osteoarthritis Right Knee should be increased to a rating of 22% whole person impairment (from 20%), and that this should be permanent (by removing the 5% temporary pension and increasing the permanent rating). In relation to Osteoarthritis Left Knee, the National Review Officer determined a rating of 11% permanent impairment, but chose to leave the rating at 15%. Overall this resulted in [the Appellant’s] fortnightly pension being increased to \$287.76.”*

12. Mr Astle challenged the Appellant’s view that “*after transitioning from WDP to a DP he found himself worse off than if he had remained on WDP under the War Pensions Act 1954*”, as not being “*an accurate reflection of what occurred.*” Mr Astle submitted that “*at the point of transferring to a DP under the [VSA] (in October 2015), [the Appellant’s] pension was increased to \$358.18 per fortnight. The amount payable resulted from a combination of existing approved conditions along with the approved temporary pensions for each knee and not solely from a straight transfer to a DP.*” He observed that “*in the letter sent to [the Appellant] on 4 November 2015 a detailed summary of the transfer, the accepted disabilities and the nature of the temporary pensions for each knee were outlined. The decisions relating to each knee specified the dates the temporary pensions were to run to and need to be further assessed by.*” Having noted that the RO had noted in her review findings that “*temporary disablement pensions require reassessment at planned intervals which can result in the impairment to be increased or decreased depending on whether the condition has deteriorated or improved*” and that “*this is outlined in more detail in section 49(3) and (4) of the [VSA]*”, Mr Astle observed that in the Appellant’s situation, “*following receipt of the specialist report, the level of impairment (not loss of function) for each knee was clarified and specified which resulted in the Decision Officer reducing the ratings for each knee with a subsequent pension payment reduction.*” He further observed that “*subsequently on reconsideration the National Review Officer increased the level of impairment for the Right Knee which resulted in an increase to [the Appellant’s] pension.*” After referring briefly to a report from Dr Cheesman, a consultant Occupational Physician (to which the Board had no regard, noting the objections of Mr Terrill to the effect that he had not seen the report and that therefore the Board should not consider it), Mr Astle noted that on 19 September 2016, the Appellant “*was advised following the review that his combined whole person impairment rating had been recalculated to 51% (up from 49% following the Decision Officer’s finding on 7 June 2016) and below 60% whole person impairment relating advised when [the Appellant] was granted the two temporary pensions for his knees.*” Mr Astle further submitted that the Appellant “*did not receive a reduced pension following his transfer to a DP for the reasons [outlined]*”, and that “*although he is receiving a lower pension currently, this is solely due to the [termination] of the temporary pensions initially granted for each knee which subsequently resulted in lower whole person impairment ratings following the most recent report from Mr MacDiarmid.*” Mr Astle observed that “*an option that could have been taken to save confusion would*

have been to undertake the transfer to DP as a separate process to establish the fortnightly pension payment and then subsequently finalise the reassessments of [the Appellant's] knees resulting in the temporary pensions and modified payment." Mr Astle concluded his submission by noting that on the basis of Dr Cheesman's report, VANZ "now believes that the whole person impairment ratings allocated to all of [the Appellant's] conditions are overstated, which indicates that he is receiving a higher fortnightly pension than he is perhaps entitled to", but that VANZ "accepts that if it has incorrectly calculated the whole person impairment ratings in relation to [the Appellant's] conditions on the higher side, that is no fault of [the Appellant] and [VANZ] does not propose to take any corrective action to change [the Appellant's] current fortnightly pension in line with the lower WPI rate."

13. In his written response dated 15 January 2018, Mr Terrill submitted: *"The submission from [VANZ] does not address the issue of this appeal. 1. There is no legal right for VANZ to transition an applicant from a WDP to a DP. It appears that this was a policy decision not backed up in law. Had [the Appellant] remained on the WDP we may not be having this appeal. 2. 14 November 2015. [The Appellant] received a WDP of \$353.18 per fortnight. Later, 7<sup>th</sup> June 2016 this was reduced to \$244.14 per fortnight. Thus leaving [the Appellant] financially disadvantaged. We feel that this may not have occurred had [the Appellant] remained on the WDP. 3. Veterans' Affairs' submission states a Dr Ben Cheesman was invited to review [the Appellant's] impairment rating. We have no proof of this occurring and [the Appellant] was not informed of this procedure. We believe this to be a breach of Claimant Rights Right 6. 4. The Orthopaedic Surgeon, Mr MacDiarmid, has stated that the condition in question will not improve, only worsen. Therefore it is not just that his income be reduced. 5. [The Appellant] has been penalised by this reduction of income. Therefore his dignity has been compromised. We feel that this is contrary to the principles stated in the Universal Declaration of Human Rights. 6 Remedy: We submit that the Veterans' Entitlements Appeals Board order the reinstatement of [the Appellant's] Pension payments of \$353.18 per fortnight and back pay arrears to 7<sup>th</sup> June 2016."*

#### ***The appeal hearing***

14. At the hearing of the appeal on 22 February 2018, Mr Terrill advised the Veterans' Entitlements Appeal Board (the **Board**) that the Appellant was not able to attend – that he was debilitated as a result of his disability and was not able to travel – and further, that he *"was not happy with the payment for his disability"*. Having reiterated his concerns expressed in his written submission dated 15 January 2018 (cited in full above), Mr Terrill concluded by submitting that the Appellant was a personal friend; that he had been *"treated badly as a Vietnam Vet with regard to his applications"* - that he was a *"right mess"*, and that he was *"deserving of better treatment."* He concluded his submissions by saying he believed that taking away the money from the Appellant had resulted in a loss of dignity.
15. Mr Astle also spoke to his written submission (dated 5 December 2017), suggesting that there were two separate issues for consideration: the transfer from a WDP to a DP, and the issue of whole-person impairment and temporary pensions. Mr Astle explained that many veterans applied to be transferred to a DP, and that where they did so, their existing entitlements would remain in force

until they received their additional entitlements. He further explained that in such circumstances, assessments relating to accepted conditions were re-rated to the new framework, to fit the whole-person impairment regime. Mr Astle emphasised that where a pension was less at the time of transfer, the pension was *"topped-up when they came across"*. If a veteran were going to be disadvantaged, the veteran had the option to stay on the WDP, thus ensuring that there was no disadvantage in transferring to the new regime. Mr Astle explained that in the case of the Appellant – he had transferred from the WDP to the DP regime when *"he applied for reassessment of one knee then the other"* (Osteoarthritis in each knee being accepted conditions). Mr Astle acknowledged that VANZ had not effectively explained what the transfer meant in dollar terms and what the value of the Appellant's pension was, but advised that the Appellant received a WDP of \$195.26 at the time of transfer, which was increased to \$353.18, and that he had never received less than that WDP amount of \$195.26 on transfer to the DP regime.

16. Mr Astle acknowledged that in this case *"the Decision Officer got it wrong"*, observing in passing that at the time that the Decision Officer made her decision, *"it was early in the life of the Veterans' Support Act."* He noted that the Appellant *"had come across [to the DP regime]" at 15% for each knee* and that the 30% loss of function referred to by Mr MacDiarmid in his report dated 10 May 2016 *"was not 30% whole-person impairment"* – that Mr MacDiarmid had in fact assessed the whole-person impairment of the Appellant's Right Knee at 20%, and the Appellant's Left Knee at 15%. This being so, Mr Astle submitted that the *"extra 15% whole-person impairment paid on a temporary basis was an error"*, and that the Appellant had in effect *"been overpaid for a finite period."* Mr Astle further submitted that the RO had *"tried to reflect what the correct outcome should be, changing the impairment rating for the Appellant's Right Knee to 22%."* Although reassessing the Appellant's Left Knee at 11%, in an exercise of benevolence, the RO retained the 15% whole-person impairment rating for the Appellant's Left Knee. Mr Astle also submitted that there were therefore *"two aspects of benevolence demonstrated"*: the first being the retention of the 15% whole person impairment for the Appellant's Left Knee; the second being *"that as a result of the Decision Officer's error, the Appellant for a period of time got more money than he should have, which was not being recovered by VANZ."* By way of observation and comment, Mr Astle noted that under the new legislation the award of a temporary pension should not be construed as providing a continuing pension – that the award of a temporary pension enables VANZ to get updated information with regard to loss of function and level of impairment. He observed that it was more common under the new regime to change pension payments because of the prospect of improved medical outcomes, noting that DP regime provided for reassessments after a two year period. In this regard he noted that the Appellant's knees were due for reassessment at the beginning of June 2018.

#### ***Appeals under the Veterans' Support Act (VSA)***

17. Under the VSA, a review decision may be appealed by the person who applied for the review or by VANZ. An appeal made to the Board is a *de novo* appeal, and the Board is not bound by any findings of fact made by the decision maker whose decision is the subject of the appeal. Appeals are required to be heard and determined without regard to legal or procedural technicalities. When hearing an appeal, the Board may, among other things, receive any evidence or information that, in its opinion, may assist it to determine the appeal, whether or not that evidence or information would be admissible in a court of law. The Board may determine an appeal without hearing oral evidence

from the Appellant. The Board is required, among other things, to comply with the principles of natural justice, and in accordance with the following principles: the principle of providing veterans, their spouses and partners, their children, and their dependants with fair entitlements; the principle of promoting equal treatment of equal claims; the principle of taking a benevolent approach to the claims; and the principle of determining claims in accordance with substantial justice and the merits of the claim, and not in accordance with any technicalities, legal forms, or legal rules of evidence. The Board, by majority vote, must confirm, modify or revoke the review decision, or make any other decision that is appropriate to the case. If the Board revokes the decision it is required to substitute its decision for that of the RO or require VANZ to make the decision again in accordance with directions it gives to VANZ.

#### ***The review decision***

18. The Board noted that on 22 August 2016 the RO had upheld the DO's decision of 7 June 2016 to cease the temporary pension previously awarded and to retain the permanent pension of 15% for the Appellant's accepted condition of Osteoarthritis Left Knee, and that the RO had overturned the DO's decision of 7 June 2016, ceased the temporary pension of 5% awarded for Osteoarthritis Right Knee, and increased the permanent pension awarded for Osteoarthritis Right Knee to 22%. Notwithstanding Mr Terrill's submission that *"this appeal is NOT an appeal against a NRO decision. This appeal is related to the amount of Disablement Pension being paid to the appellant"*, the Board observed that as the amount of Disablement Pension being paid to the Appellant had been determined on review by the RO, it was in fact the RO's review decision that was being appealed. The Board accordingly determined to consider the appeal on this basis.

#### ***The assessments***

19. The Board noted that the RO had (correctly in its view) identified the source of much of the confusion arising in this appeal, namely that the DO had misinterpreted Mr MacDiarmid's assessment (as advised in his letter dated 17 August 2015) that the Appellant had 30% loss of function in each leg as him having 30% whole-person impairment. This misunderstanding resulted in the DO's decision to add an additional 15% temporary Disablement Pension to the 15% permanent Disablement Pension awarded for each knee. This in turn led the Appellant being advised by letter dated 4 November 2015 that *"as a result of these determinations, your total Disablement Pension based on whole person impairment is now 60%"* and that *"your payments will be \$353.18 each fortnight."*
20. In line with the requirements of section 49(3) and (4) of the VSA, by letter dated 7 April 2016 VANZ requested, in effect, Mr MacDiarmid to reassess the Appellant's disabilities in both his Right Knee and his Left Knee. The Board observed that the wording of the letter, with reference being made to temporary pensions only, and no reference being made to permanent pensions to which the temporary pensions had been added, had led to further confusion, not only to the Appellant, but also to Mr MacDiarmid himself, as was evident in his letter to VANZ dated 15 June 2016. Notwithstanding this, however, the Board was of the view it was clear from Mr MacDiarmid's opinion, stated in his letter dated 10 May 2016, that he had actually reassessed the level of disability in each of the Appellant's knees, concluding: *"right knee has deteriorated by 5% and would*

*recommend that his right knee be assessed as a 20% disability and his left knee remain at 15%. Deterioration is anticipated over the next two or three years”* (this assessment being reiterated in his letter dated 15 June 2016.) The Board also observed that, having had regard to Mr MacDiarmid’s report dated 10 May 2016, the DO removed the temporary pension of 15% and retained the permanent disablement pension of 15% for the Appellant’s Osteoarthritis Left Knee, and decreased the temporary pension of 15% to 5% and retained the permanent pension of 15% for the Appellant’s Osteoarthritis Right Knee (*“the temporary pension being awarded until 7 June 2017 or until report is received from specialist, whichever is the sooner”*) – this resulting in the Appellant’s whole person impairment rate for all his conditions reducing from 60% to 49%, and his fortnightly Disablement Pension payment reducing from \$353.18 to \$244.14.

21. The Board noted that the RO had observed that Mr MacDiarmid’s assessment report of 10 May 2016 *“notes a decrease in flexion of the right knee since assessment in August 2015, and increase in pain”* but that *“otherwise examination findings were similar to those previously noted. X-ray findings show the right knee is worse than the left, consistent with examination findings. [The Appellant] is currently favouring conservative treatment rather than the surgical option to manage his osteoarthritis of both knees.”* The Board further noted that the RO, *“having considered the clinical examinations and x-ray findings provided in Mr MacDiarmid’s reports in relation to the recommendations of the AMA Guides...concluded that the Arthritis Impairment Table 62 page 83, which uses x-ray findings, provides the highest estimate of impairment for each knee”,* and that *“the whole-person impairment estimate (for current total impairment of each knee) under the AMA Guides is: Osteoarthritis Right Knee 22% whole-person impairment (severe medial joint and mild patellofemoral joint arthritis); Osteoarthritis Left Knee 11% whole-person impairment (moderate medial joint and mild patellofemoral joint arthritis).”* The Board observed, as did the RO, that this assessment was *“similar to Mr MacDiarmid’s recommendations of 20% whole-person impairment for the current total impairment in respect of the right knee, and 15% whole-person impairment for the current total impairment in respect of the left knee (the 30% previously recommended being in respect of loss of function rather than whole-person impairment.)”* Having considered the information available, the RO *“determined to cease the temporary pension of 5% awarded for Osteoarthritis Right Knee, and increase the permanent pension awarded for Osteoarthritis Right Knee to 22%; and retain the 15% permanent pension awarded for Osteoarthritis Left Knee”,* noting that *“these percentages represent the extent of current whole-person impairment for each knee, based on clinical findings available”,* and that *“the percentages are permanent given surgery is not indicated at present.”*

#### ***Disablement Pension***

22. The Board carefully considered Mr Terrill’s submissions with regard to the amount of the Disablement Pension being paid to the Appellant, and in particular whether the reduction in the payments made to him breached the requirements of the VSA. The Board also had close regard to the provisions of Part 2 (Transitional provisions) of Schedule 1 to the VSA. Having done so, the Board agreed with Mr Astle’s analysis of the situation. The Board noted that immediately prior to the Appellant’s temporary pensions being reassessed (as required under s49 of the VSA), he was in receipt of a WDP of \$195.26. After the reassessment had been carried out, he received a

Disablement Pension of \$353.18. At no time did the Appellant receive less than that WDP amount of \$195.26 on transfer to the DP regime. Accordingly, the Board did not concur with Mr Terrill's contention that VANZ had contravened the transitional provisions in Schedule 1, Part 2 section 6(3) of the VSA. The Board agreed with Mr Astle's submission that the Appellant's receiving a lower pension than the War Disablement Pension that he had previous received was "*solely due to the [termination] of the temporary pensions initially granted for each knee which subsequently resulted in lower whole person impairment ratings following the most recent report from Mr MacDiarmid.*"

**Appeal Board Decision**

23. Having had regard to all evidence before it, and having had specific regard to all the principles specified in s10(b) of the VSA and the overarching benevolent intent of the VSA, the Board determined that the RO decision was correct, and accordingly determined to **confirm** the decision of the RO dated 22 August 2016 "*to uphold the DO's decision of 7 June 2016 to cease the temporary pension previously awarded and retain the permanent pension of 15% for the accepted condition of Osteoarthritis Left Knee*" and "*to overturn the DO's decision of 7 June 2016; cease the temporary pension of 5% awarded for Osteoarthritis Right Knee, and increase the permanent pension for Osteoarthritis Right Knee to 22%.*" With regard to its consideration of section 10(b)(iii) of the VSA, the Board noted that owing to the DO's initial error in interpreting Mr MacDiarmid's specialist assessment report, the Appellant had received a Disablement Pension higher than that to which he was entitled, but that VANZ was not proposing to take "*any corrective action*" for that, or any other reason.

**Order relating to the publication of decision**

24. Pursuant to the powers vested in it by section 238 of the VSA, the Board, after consultation with Mr Terrill, makes an order prohibiting the publication of the name, service number, rank, address and War Pension Number of the Appellant.

**The appeal is dismissed.**



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Ms Rebecca Ewert, Chairperson



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Dr Chris Holdaway, Member



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Ms Raewyn Anderson, Member



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Dr Hillary Gray, Member

**20 March 2018**