Veterans' Entitlements Appeal Board

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War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Gary John (Gus) WARNER

Service Number and Rank: N18596 Able Cook, Royal New Zealand Navy

Address: 27 Springfield Road, Bedfordale, Perth, Western Australia

Grounds of appeal: Appeal against the 1 September 2020 decision of the Review Officer to uphold the 31 October 2019 decision of the Decision Officer to decline to increase the impairment percentage for the service-related condition of Lumbar Spondylosis.

Held: commenced at Wellington on 11 June 2021, concluded on the papers 27 August 2021.

Parties:
The Appellant, Mr Gus Warner by phone
The Respondent, Veterans' Affairs New Zealand, represented by Ms Anne-Marie Tribe, Manager Decisions and Entitlements, Dr Mike O'Reilly, Review Officer and Ms Tracy Lamb, Assistant Director Legal Services

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Outcome: Confirm Review Officer's decision

Summary of reasons for decision:

The Appellant has cover for Lumbar Spondylosis. The medical evidence shows that the Appellant's percentage of impairment for Lumbar Spondylosis has been correctly reassessed under the Veterans' Support Act 2014. The Appellant is not therefore entitled to an increase in his level of impairment for Lumbar Spondylosis.

The Appellant transitioned from receiving a war disablement pension under the War Pensions Act 1954, to receiving a disablement pension under the Veterans' Support Act 2014. The Appellant's rate of payment of his pension was grandparented under clause 6(3) of Part 1 of Schedule 1 to the Veterans' Support Act 2014 to protect the rate of payment he was receiving on 6 December 2014, as a statutory minimum.

Upon reassessment of the Appellant's impairment for Lumbar Spondylosis under the Veterans' Support Act 2014, Veterans' Affairs was entitled to reduce his rate of pension, provided it remained at a level not below the grandparented rate. However, acting benevolently, it has decided not to do so.

DECISION

This is an appeal by Gary John (Gus) WARNER (the Appellant) against the 1 September 2020 decision of the Review Officer to uphold the 31 October 2019 decision of the Decision Officer to decline to increase the impairment percentage awarded for the service-related condition of Lumbar Spondylosis.

Background

Qualifying service

The Appellant served in the Royal New Zealand Navy between 9 September 1965 and 24 May 1975. He has qualifying routine service during the period 9 September 1965 and 31 March 1974.

The Appeal Board thanks the Appellant for his service.

Back injuries

In 1967 Mr Warner was asleep on board HMNZS *Taranaki* during a typhoon. He was thrown from the top bunk and landed on his back on an inspection hatch. A few months later Mr Warner was loading food on board the ship when he was struck on the back by an 80-90 pound bag of potatoes dropped from a height of approximately 4 metres. Following both incidents he suffered bruising and discomfort for weeks.

In 1968 Mr Warner was operating a potato peeler machine when he received an electric shock. He was thrown across the room hitting his lower back on a steel bench.

In 1972 Mr Warner injured his back in a motorcycle accident whilst on duty, returning to his base at Fort Dorset. He hit strainer posts and came off his motorbike. He was unable to work for several days and underwent intensive physiotherapy.

Mr Warner has lived in Australia for most of the period since 1978.

On 18 July 2007 Mr Warner had L3-S1 fusion surgery. He was left with residual neural foraminal compromise (a pinched nerve in his back) which causes him pain and numb legs.

War Pensions Act 1954

In September 1994, Mr Warner's application for Lumbar Spondylosis was accepted as being service related under the War Pensions Act 1954 (**the WPA**).

On 29 August 1995 Orthopaedic Surgeon Peter Anderson assessed Mr Warner's impairment at 50%.

Following a review on 3 July 2000 Mr Warner's percentage impairment for Lumbar Spondylosis was increased from 50% to 55%.

On 5 September 2014 Mr Warner applied for a reassessment of his Lumbar Spondylosis impairment.

On 5 November 2014 Orthopaedic Surgeon Andrew Meighan assessed Mr Warner as having a 37% impairment. He examined Mr Warner, reviewed an MRI scan taken in 2012 and made his assessment with reference to the "Guide to the Evaluation of Permanent Impairment ANA (sic) 5th Edition". Mr Meighan noted that Mr Warner was suffering significantly with pain and therefore he considered the 55% impairment previously awarded to be reasonable.

The War Pensions Claims Panel made a decision on 27 November 2014. On 12 December 2014 Veterans' Affairs wrote to Mr Warner advising of the Panel's decision declining to increase the impairment rate for Lumbar Spondylosis.[1] Under the WPA Mr Warner was in receipt of an 80 % disablement pension for service-related conditions of Sensorineural Deafness, Tinnitus and Lumbar Spondylosis. He was receiving $175.69 per week.[2]

Application for new conditions and reassessment of accepted conditions under the Veterans' Support Act

On 28 August 2019 Veterans' Affairs received Mr Warner's application for reassessment of his Lumbar Spondylosis impairment. He felt his Lumbar Spondylosis condition had deteriorated since his latest assessment. He noted that his legs were numb all the time, and he had hypersensitive constant pain and nerve damage. He also made a new claim for Depression, Prostate Cancer and Respiratory issues. This application triggered his transfer to a Disablement Pension under the Veterans' Support Act 2014 (**VSA**).

Decision Officer's decisions

On 21 October 2019 the Decision Officer accepted the condition of depression, redefined as Alcohol Use Disorder with Amnesic Disorder.

On 31 October 2019 the Decision Officer declined a Disablement Pension for Prostate Cancer and declined to increase the impairment for Lumbar Spondylosis on the basis that reports from Neurosurgeon Soni Narula did not show Mr Warner's impairment had increased. The decision records that Mr Warner's total combined whole person Impairment (**WPI**) was 76% and comprised of Lumbar Spondylosis 55%, Sensorineural Deafness 15%, Tinnitus 15% and Alcohol Use Disorder with Amnesic Disorder 43%.

Transfer from a War Disablement Pension under the WPA to a Disablement Pension under the VSA notified to Mr Warner

On 15 November 2019 Veterans' Affairs sent two letters to Mr Warner. The first of these advised that his application for new conditions and a reassessment of his Lumbar Spondylosis had resulted in him being transferred to a disablement pension under the VSA. He was advised that he had been granted a permanent Disablement Pension for Alcohol Use Disorder with Amnesic Disorder at 43% level of impairment. He was advised that the "Rate of payment for Disablement Pension is based on your combined whole person impairment rate. This is assessed at 76%."

[1] The claim was determined under the War Pensions Act 1954 as the War Pensions Claims Panel decision was made prior to the Veterans' Support Act coming into force on 7 December 2014.
[2] VANZ letter dated 12 December 2014

The first letter indicated that decisions had not been made about his prostate cancer, dental condition, respiratory issue and assessment of his accepted condition of Lumbar Spondylosis.

Decision Officer's decision advised to Mr Warner

However, in the second letter sent to Mr Warner on 15 November 2019, Veterans' Affairs advised Mr Warner of the outcome of the Decision Officer's 31 October 2019 decision that he had been declined an increase in his impairment for Lumbar Spondylosis.

Review lodged

On 18 March 2020 Veterans' Affairs received Mr Warner's application for review. Relevantly for this appeal he reviewed the aspect of that decision declining an increase in his impairment for Lumbar Spondylosis. He wrote:

> Unable to exercise. Pain increase, no social life. Lack of enjoyment of life, lumbar injections every other week. Can't use stairs, ramps etc. No sport, gardening.

Dr Cheesman's impairment assessment of Lumbar Spondylosis

On 3 August 2020 Veterans' Affairs asked Occupational Physician Ben Cheesman to undertake an independent paper-based impairment assessment of Mr Warner's Lumbar Spondylosis.

The email to Dr Cheesman noted that Mr Warner had an 80% WPI for the following accepted service-related conditions: Lumbar Spondylosis 55%, Sensorineural Deafness 15%, Tinnitus 15% and Alcohol Use Disorder with Amnesic Disorder 43%.

Dr Cheesman's undated opinion was that Mr Meighan's assessment was not correct because he used the 5th edition of the AMA Guides (rather than the 4th edition), the tool was not used correctly and the rating was upgraded with no rationale as to why.

Dr Cheesman considered medical information provided by Mr Warner's General Practitioner, James Watson, including the reports from Mr Narula. He concluded:

> The correct rating based on the available information for the lumbar spondylosis and associated surgery, using the AMA 4 method is DRE cat 4 = 20% whole person impairment.

Dr Cheesman also commented on what would be required for the impairment to increase from 20%; advising there would have to be objective loss of function in the lower limbs, with loss of reflexes or changes shown on nerve conduction studies. He advised that there would also be an increase in impairment rate if there was damage to the cauda equina with associated bladder and bowel involvement requiring an assistive device.

Review Officer's Decision

On 1 September 2020, the Review Officer upheld the decision of the Decision Officer to award 55% permanent pension for the accepted condition of Lumbar Spondylosis.

The Review Officer found the original calculation of Mr Warner's impairment for Lumbar Spondylosis was flawed and Dr Cheesman's recalculation at 20% was correct. He wrote:

> Mr Warner's total WPI inclusive of all accepted conditions is currently 80%. The impairment associated with Lumbar Spondylosis makes up a significant proportion of this total impairment. A decrease in the WPI associated with Lumbar Spondylosis would likely have a significant impact on the total WPI and hence Mr Warner's disablement pension.
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> One of the fundamental principles of the Veterans' Support Act 2014 is the requirement to promote equal treatment of equal claims. The AMA are standardised and validated tools for determining uniform assessments of impairment associated with illness or injury. On principle, it would seem that the error in initial assessment of impairment has advantaged Mr Warner, however the corresponding principle within the legislation requiring an element of benevolence in managing veterans' claims would argue against reversing the decision as it would place an undue burden on Mr Warner to do so.
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> I believe the potential harm done to Mr Warner in reducing his WPI and our obligation to treat veteran claims benevolently outweighs any argument to principle in this case.

On 3 September 2020 Veterans' Affairs communicated the decision to Mr Warner that his review had been unsuccessful; the Review Officer had maintained the WPI associated with Lumbar Spondylosis at 55%. The decision states that "… your total combined whole person percentage for your accepted disabilities remains at 80%".

Appeal lodged

On 14 September 2020 Mr Warner appealed the Review Officer's 1 September 2020 decision on the basis that he has "acute, severe, debilitating pain never ending". His grounds for appeal were:

> Despite surgeries of different types, loss of business, nerves reduced, hundreds of pain injections.
>
> No one has ever called at my residence. They have no idea of my daily struggles.
>
> I've gone from owning my own business, pizza takeaways, chicken burgers, salads, etc. At work early one morning my back went into spasms, ended on the floor couldn't move had to go to Darwin for scans etc. Had to sell the business cheap and move to Perth for more treatment. Ended up having major op in 2007. My pain attacks eased but still not. Can't do any gardening of any sort.
>
> I don't have life; I have an existence.

Hearing

In considering this appeal, the Board has had specific regard to all the principles specified in section 10(b) of the VSA, and the overarching benevolent intent of that Act.

The purpose of the VSA contained in section 3 is to provide for:

(a) the rehabilitation of and support for veterans who, as a result of being placed in harm's way in the service of New Zealand, have been injured or become ill; and

(b) entitlements for eligible veterans who suffer service-related injuries or illnesses; and

(c) entitlements for eligible spouses, partners, and dependants of severely impaired or deceased veterans.

Section 49(1) of the VSA provides that:

> A disablement pension is temporary unless VANZ, when notifying a veteran that his or her application for a disablement pension has been accepted, notifies the veteran that his or her disablement pension is permanent.

Under section 52(1) of the VSA, Veterans' Affairs may reassess the disablement of a veteran who is receiving a permanent disablement pension. However, this power is qualified by subsections (2) to (4) of that section, as follows:

(2) A reassessment under subsection (1) must not be undertaken earlier than 2 years—

(a) after the veteran's disablement pension became permanent; or

(b) after the veteran's last whole-person impairment assessment.

(3) However, a reassessment may be undertaken earlier if—

(a) the veteran provides medical evidence to the satisfaction of VANZ that the veteran's disablement has increased significantly; or

(b) VANZ considers that the veteran's disablement has changed significantly

(4) For the purposes of subsection (3), a change in disablement is significant if the change in whole-person impairment is 10% or more.

The method for assessing impairment is described in the spinal section of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, Fourth Edition (**AMA 4**). The descriptions of impairment in relation to each of the eight levels for lumbosacral impairment are outlined on pages 102 and 103 of the AMA 4.

Impairment is defined in the AMA 4 as a "deviation from normal in a body part or organ system and its functioning". Whereas "disability" is defined as "an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment."

Section 56 provides that the rates of disablement pension are set by regulations.

Regulation 17 of the Veterans' Support Regulations 2014 (**the VSR**) prescribes as follows:

17 Rate of disablement pension

(1) The rate of a veteran's disablement pension payable under section 56 of the Act is to be determined according to the level of the veteran's whole-person impairment.

(2) The rates of the disablement pension are set out in Schedule 2.

(3) A veteran's level of whole-person impairment in the first column of Schedule 2 is to be determined in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (4th ed).

(4) To avoid doubt, the level of whole-person impairment of a veteran who is applying for a disablement pension under clause 6(2) of Schedule 1 of the Act is to be assessed in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment (4th ed).

Clause 6 of Part 1 Schedule 1 of the VSA (**the transitional provisions**), states:

6 War disablement pension

(1) A veteran who is receiving a war disablement pension under Part 2 of the War Pensions Act 1954 immediately before the commencement of Part 3 of this Act is entitled to continue receiving the pension as if it were payable under Part 3 of this Act.

(2) A veteran to whom subclause (1) applies may apply for a disablement pension under Part 3 of this Act and is entitled to receive a disablement pension in respect of any injury or illness for which a war disablement pension was granted to the veteran under Part 2 of the War Pensions Act 1954.

(3) 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.

(4) For the purposes of this clause, the application for, and grant of, a disablement pension is to be treated as an application for, and grant of, a temporary disablement pension if, before the commencement of Part 3 of this Act, the veteran was receiving in relation to the same disablement both a permanent and temporary disablement pension.

(5) VANZ must assess, in accordance with regulations made under section 265, the degree of whole-person impairment of a veteran who applies under subclause (2).

(6) However, to avoid doubt, a veteran retains his or her entitlement to receive a disablement pension under Part 3 even though an assessment under subclause (5) indicates that the veteran's degree of whole-person impairment would not make the veteran eligible for a disablement pension under Part 3.

(7) Subclause (2) does not preclude a rate of payment being adjusted if the rate of payment a veteran was receiving immediately before the commencement of Part 3 of this Act—

(a) was not a rate of payment to which the veteran was entitled under the War Pensions Act 1954; or

(b) is no longer a rate of payment to which the veteran is entitled under this Act.

Summary of the Appellant's case

In summary the Appellant made the following main points in his oral submissions:

- He disputed the impairment rating and wanted an increase to his disablement pension because his condition has worsened; he is in more pain and cannot do as much.
- He enjoyed his life in the Navy.
- He described the accidents that caused his back injuries.
- His pain began started in the late 1970's when he was at Fort Dorset. It has got steadily worse.
- He can no longer enjoy hunting, golf, bowls, darts, pool or gardening. He has trouble with activities such as walking, getting in and out of a car, getting up and down steps, putting socks on and tying laces up. He does not have a life; he has an existence.
- He is no longer able to take prescription medicine such as morphine or have cortisone injections for his pain due to the side effects. He does not want another referral to a pain clinic.
- He has prostate cancer and now has a catheter. His bowels are not affected by his cancer or back problems.
- He has not been treated for depression caused by his experiences in the Navy such as being overcome by diesel fumes on board a ship.
- His assessment with Dr Meighan was only 7 minutes long.
- He did not feel that Veterans' Affairs had listened to him before today.

Summary of the Respondent's case

Dr O'Reilly made the following main points in his evidence:

- Under the WPA, the assessment of impairment was subjective. Under the VSA it is objective; impairment must be assessed according to the AMA 4. There are different levels of impairment given to veterans under the WPA and the VSA, who have the same problems. The legislation recognises that unfairness, by providing that a transitioned veteran's level of impairment cannot be decreased on reassessment under the VSA. So Veterans' Affairs will never reduce the amount a veteran receives if it reassesses a veteran's impairment.
- Under the AMA 4 impairment of 100% is death. 95 to 100 % is near death, 5 to 10 % is minimal impact and 10 to 15 % is minor impact.
- There are 8 categories of lumbosacral impairment under the AMA 4. The maximum for lumbosacral impairment is 75%. The medical evidence shows that Mr Warner has preserved reflexes and power and no bladder or bowel symptoms so he does not come within a higher category of lumbosacral impairment than category DRE IV.
- Veterans' Affairs will work with Mr Warner's case manager to see if any help can be offered for his depression.

In summary Ms Tribe made the following main points in oral and written submissions:

- Veterans' Affairs acknowledges that Mr Warner is significantly impacted by his Lumbar Spondylosis and that impact has increased since the impairment rate of 55% was awarded.
- The way impairment was assessed in the past is different to the way it is assessed now. The 55% impairment awarded in 1994 and 2000 was overstated. The AMA 4 must be used under the VSA.
- Even though the impact on Mr Warner has increased over time, Dr Cheesman's assessment using the AMA4 shows that his impairment resulting from Lumbar Spondylosis is not more than 55%, and is in fact only 20%. Veterans' Affairs cannot award a higher impairment unless there is medical evidence for that.
- The Decision Officer's decision to decline to increase the impairment rate for Lumbar Spondylosis, which was upheld by the Review Officer, was correct.

Procedure

The Appeal Board adjourned the hearing to seek additional submissions from the parties on the impact of the transitional provisions of the VSA, following Dr O'Reilly's statement that Veterans' Affairs could not legally reduce a transitioned veteran's rate of disablement pension if they were reassessed under the VSA.

The Appellant Mr Warner did not provide any additional submissions.

Respondent's further submissions

Ms Lamb made the following main points in written submissions:

- If a veteran remains on a war disablement pension under the WPA, the rate of their pension remains the same.
- If the veteran applies for, and transitions to the disablement pension under the VSA and applies for a new condition to be added to their pension, or a review of a condition, the effect of clause 6(3) of the transitional provisions is to preserve the rate of payment of their pension while the application is received and assessed under section 49(1) of the VSA.
- The rate of disablement pension is only preserved until there is a reassessment under section 49(2) or section 52(1) and the WPI on reassessment either increases or decreases.
- It is therefore lawful for Veterans' Affairs to reduce a veteran's disablement pension where a veteran has applied for a disablement pension under the VSA and a reassessment shows the payment rate of the pension is greater than a veteran is entitled to. That is the effect of clause 6(7) of the transitional provisions and regulation 17 of the VSR and is line with the Government policy underpinning the transitional provisions. A disablement pension can also reduce on reassessment if the WPI reduces.

- Veterans' Affairs policy that a disablement pension rate must be no less than the veteran was receiving on the war disablement pension, is incorrect, as it is in part based on a misreading of clauses 6(3) and 6(6) of the transitional provisions.

- The main goal of the transitional provisions was to ensure that the problems with the setting of impairment levels under the WPA were corrected when a veteran transitioned to a disablement pension and the WPI model. The intent was to ensure that all veterans receiving impairment entitlements under the VSA had their impairment level determined in a fair and consistent way irrespective of what injury or illness (or combination of various injuries and illnesses) they had. The intent of the transitional clauses was that the simple transition from an impairment level set under the WPA to the whole-person impairment model should not result in a reduction in the rate at which the veteran's disablement pension is paid compared to the rate at which the veteran's war disablement pension was paid. However, the transitional provisions were not intended to maintain a higher payment rate if it was found either an error had been made in the rate the war disablement pension had been granted under the WPA or that the veteran's level of impairment had reduced from when it was last assessed. Clause 6(7) was included specifically for this purpose. This was consistent with the principles of the VSA promoting equal treatment of equal claims and providing fair entitlements.

Ms Lamb drew the Board's attention to the Government's response to a Law Commission report on the WPA, which noted the Commission's recommendation that:

> To ensure veterans currently in receipt of impairment compensation are not disadvantaged, the current Disablement Pensions would be grandparented and the new assessment process would only be applied to new claims and reviews.

Ms Lamb also drew the Board's attention to the following excerpts from the Regulatory Impact Statement which was attached to 2012 Cabinet papers concerning, we assume, the introduction of the VSA as a Bill:

> 28. It is proposed that the current 160% scale for Disablement Pensions, where the level of Disablement Pension is based on the cumulative assessment of each disability, be replaced with a 100% scale calculated on whole of person impairment. This would ensure that the level of pension paid reflects the level of impairment. To ensure veterans currently on a Disablement Pension are not disadvantaged, the current Disablement Pensions would be grandparented and the new assessment process would only be applied to new claims and reviews.
>
> …
>
> 59. On implementation, veterans with service from 1 April 1974 will be grandparented using the transition arrangements set out in Cabinet Paper B - Eligibility. As the intent in Scheme One would be to translate the current 160% scale to a 100% scale, the veterans in Scheme One would have their current pension entitlements grandparented until such time as they chose to review their level of pension. *They would then be assessed under the new criteria, with the proviso that no one will have their payments reduced.*

Ms Lamb also referred to the drafting instructions for the VSA:

> Grand-parenting provisions
>
> 231. To ensure that the new legislation does not make current recipients of the War Disablement Pension worse off, the new legislation should grand-parent their current rates of pension. The proposed 'whole of body impairment assessment' should only apply to new claims and reviews. This means that veterans already receiving a War Disablement Pension will only have their pension rate recalculated if they seek a review of their pension rate. *If their pension rate decreases once their whole of body impairment rating is determined (which is likely to occur), their current rate of payment will be grand-parented to ensure they are not disadvantaged. The rate of payment to veterans in this situation will not increase until the new impairment rating applicable to them increases to a level exceeding the grand-parented rate of payment.* [Emphasis added.]

Ms Lamb further submitted as follows:

- When Mr Warner applied for and transitioned to a disablement pension, he was in receipt of an 80% war disablement pension. He is currently receiving an 80% disablement pension which is paid at a rate of $292.08. When Mr Warner transferred from a war disablement pension to a disablement pension, the Decision Officer knew that the 55% level granted was not correct based on the AMA assessment done at the time, but it was accepted anyway. This resulted in Mr Warner receiving an inflated weekly pension as the WPI under the WPA was not correct and thus also the rate of payment was incorrect.
- Mr Warner has now been re-assessed and his total WPI has reduced to 65%.[3]
- The Review Officer's decision has corrected the original error and is correct in terms of clause 6(7) of the transitional provisions, regulation 17 of the VSR and section 56 of the VSA. The payment rate for a 65% disablement pension is $198.62. Under the VSA Mr Warner is entitled to this amount as reflecting his current impairment. Though this is more than what he was receiving on his original war disablement pension before Part 3 came into force, it is $100 less in weekly pension payments than he currently receives.

Head of Veterans' Affairs, Ms McKenzie, provided a letter dated 14 July 2021 outlining Veterans' Affairs position on the law and operational policy. In summary she made the following points:

- Veterans' Affairs does not intend to reduce the compensation being paid to Mr Warner relying on current policy. Should the Board determine that Mr Warner was not entitled to the amount of his current pension under the VSA, Veterans' Affairs will not be seeking to recover any monies previously paid to him to which he was not entitled.
- The VSA brought greatly increased rigour and consistency to this process. Veterans' Affairs has on reflection, loosely referred to previous decisions under the WPA as wrong, where it would be reasonable to say that they were not wrong, but arrived at using a different approach, which has now been superseded.

[3] Letter from Veterans' Affairs dated 27 August 2021 confirms Mr Warner's WPI has remained at 80% and not reduced to 65%

- Veterans' Affairs must, on reassessment of a veteran's illness or injury, recalculate a veteran's WPI based on any changes to the impairment level of each condition reassessed. The WPI rate will likely then differ from the rate of disablement determined under the WPA. However, clause 6(3) of the transitional provisions ensures that a veteran does not get reduced pension payments from that received under the WPA simply because they have moved from one method of calculation to another. Veterans' Affairs can however amend compensation rates if it is found an error has been made in the rate granted under the WPA, or if the veteran is receiving an amount he is not entitled to under the VSA or if the veteran's condition has improved (and thus impairment has reduced) or it changes from when it was last assessed. A veteran's health is not static. While the grand-parenting applies in respect of an *unchanged* condition on initial application for, and transfer to, the Disablement Pension, clause 6(7)(b) qualifies subclause 6(3) in allowing for pension adjustment if assessment indicates an improvement or worsening of the impairment.

- Dr O'Reilly was thus incorrect to say that it would not be lawful for Veterans' Affairs to reduce the Disablement Pension despite the fact that the reassessment of Mr Warner's impairment discloses that he has been paid at a higher rate than the rate which equates to his current impairment rating under the VSA.

- If Veterans' Affairs found a calculation to be in error, or Mr Warner's condition improved, it would be obliged to reduce his compensation. However, in 2015, when the operational policy for the disablement pension was being drafted, it stipulated a veteran transferring from a war disablement pension to a disablement pension would not receive pension payments at a rate less than that at which their war disablement pension was paid. The advice, given at the time the policy was prepared, acknowledged that the two systems of assessment could not readily be compared, nor translation made.

- The current impairment rate has been set correctly now. It was also set lawfully in the past.

The Appeal Board adjourned the hearing further to seek clarification from Veterans' Affairs about when Mr Warner transferred to a disablement pension and the reference at paragraph 39 of Ms Lamb's submission to the statement that "Mr Warner has now been reassessed and his whole person impairment has reduced to a 65% disablement pension".

A letter to Mr Warner dated 15 November 2019 advised of the pension transfer. The Board reminds parties of the importance of all relevant information being provided to parties 10 working days prior to the hearing in accordance with regulation 51 of the VSR.

A letter from Veterans' Affairs dated 27 August 2021 confirmed that "*If* the 20% impairment rate stated by Dr Cheesman for Mr Warner's back condition was combined with his remaining accepted conditions (rather than the 55% previously assessed) it would result in a combined WPI of 65%" [emphasis added].

Analysis

Mr Warner has appealed against the 1 September 2020 decision of the Review Officer to uphold the 31 October 2019 decision of the Decision Officer to decline to increase his impairment percentage for Lumbar Spondylosis after reassessment under the VSA.

The Appeal Board accepts that Mr Warner lives with significant pain and is impacted by his injuries. We also accept that this impact has increased over time to the point where he is significantly restricted in what he can do.

Has Mr Warner's level of impairment for Lumbar Spondylosis been correctly reassessed under the VSA?

The first issue for the Board to determine is whether Mr Warner's level of impairment for Lumbar Spondylosis has been correctly reassessed under the VSA.

Mr Warner's level of impairment for Lumbar Spondylosis had previously been assessed under the WPA at 55%. Mr Meighan made a subjective assessment using the Fifth Edition of the AMA Guides (**the AMA 5**).

Mr Warner then transitioned to a disablement pension under the VSA at 76%. The condition of Lumbar Spondylosis was transitioned at 55% impairment.

Mr Warner's impairment for Lumbar Spondylosis has then been re-assessed under the VSA at 20% impairment.

The Board has considered whether the medical basis for the assessment of his impairment for Lumbar Spondylosis is correct.

The way impairment is assessed under the VSA is different from the way it was assessed under the WPA. Under the WPA it was a subjective medical assessment and a veteran could be assessed as having up to 160% impairment. The assessment under the VSA is now objective with a medical practitioner assessing a veteran's impairment under the AMA 4. The maximum combined WPI is 100%. The WPI is calculated by combining (not adding) the impairment percentages of the individual conditions using the Combined Values Charts in the AMA 4.

Dr Cheesman is a specialist occupational assessor and experienced, trained impairment assessor. He assessed Mr Warner's impairment for Lumbar Spondylosis at 20%. The Appeal Board notes that, out of necessity, the assessment was conducted on the papers, because Mr Warner lives in Australia. The Appeal Board considered Mr Warner's evidence and the medical evidence available in order to determine whether Dr Cheesman's assessment of a 20% impairment for Lumbar Spondylosis was reliable. Mr Warner's evidence is that he has no bladder or bowel symptoms caused by his back injuries. The medical evidence from Dr Nalu is that he has no power or reflex issues. Pain is not separately rated under the AMA 4. The Appeal Board concludes that DRE IV is the correct category of impairment for Mr Warner's Lumbar Spondylosis. While the Board accepts Mr Warner's evidence that he lives with significant pain and is impacted by his injuries, we are not persuaded that he comes within a higher level of impairment than DRE IV.

The Board therefore finds that Veterans' Affairs has correctly reassessed Mr Warner's level of impairment for Lumbar Spondylosis at 20 %. His appeal is unsuccessful.

What rate of disablement pension is Mr Warner entitled to under the VSA following reassessment?

While the Review Officer's decision concerned the level of impairment for one of Mr Warner's service-related conditions, that decision impacts the rate of disablement pension to which he is now entitled because the impairment rates for each condition are combined to result in a combined WPI.

Mr Warner transitioned from receiving a war disablement pension under the WPA to receiving a disablement pension under the VSA. We find that, on the day before Part 3 of the VSA came into force (6 December 2014), his rate of pension was $175.69 per week based on an 80% level of impairment.[4]

Mr Warner appears to have been translated to a 76% disablement pension. His weekly rate of pay was $240.83. After his new condition of alcohol use disorder was accepted he moved back to an 80% disablement pension. He has now been reassessed for one of his service-related conditions; Lumbar Spondylosis. He has been reassessed under section 52 of the VSA at 20% impairment, down from 55%. If the 20% impairment rate for Lumbar Spondylosis was combined with the impairment rate for Mr Warner's other accepted conditions, that would result in a combined WPI of 65%.The Review Officer's decision states that he decided not to reduce Mr Warner's WPI because the harm in doing so outweighed the benefit. The effect of that decision is that Mr Warner's rate of disablement pension has not been reduced to 65%. Mr Warner in fact currently receives an 80% Disablement Pension for a number of accepted service-related conditions, including Sensorineural Deafness, Tinnitus, Alcohol Use Disorder with Amnesic Disorder, Lumbar Spondylosis, and Morbid Obesity.

In the course of the hearing Dr O'Reilly (who was the Review Officer in this case) said that it would not be lawful for Veterans' Affairs to reduce the rate of disablement pension of a veteran on reassessment under the VSA. The NZDF's Assistant Director Legal Services, Ms Lamb, and the Head of Veterans' Affairs did not accept that. The transitional provisions are not easy to interpret, so the Appeal Board makes no criticism of any of the stakeholders for this inconsistency.

In the course of considering the legal position, the Appeal Board has examined the impact of the transitional provisions in Part 1 of Schedule 1 to the VSA, as well as sections 3, 10, 49, 52 and 56 of the VSA.

In construing the transitional provisions we have considered the text in light of its purpose. In *Skycity Auckland Ltd v Gambling Commission*[5], the Court of Appeal cast doubt on whether non-parliamentary materials such as Cabinet papers and drafting instructions are of much value in the interpretive process, expressing as they do the intent of the Executive rather than Parliament. We have therefore set aside the references to Cabinet papers and drafting instructions which were put before us. While the VSR were made contemporaneously with the enactment of the VSA and may therefore be used with caution as an aid to the construction of the VSA if any of its provisions are ambiguous,[6] we consider the meaning of the Act to be

[4] Veterans' Affairs letter to Mr Warner dated 12 December 2014.
[5] [2008] 2 NZLR 182 (CA) at 193-194; see also *Accident Compensation Corporation v Ng* [2020] 2 NZLR 683 (CA) at [44].
[6] *Interfreight Ltd v Police* [1997] 3 NZLR 688 (CA) at 692.

clear in the light of its context and purpose, so this is not a proper case to draw on subordinate legislation.

We note that the legislation refers to a level of “impairment”, which is defined in the Act as “a loss or abnormality of psychological, physiological, or anatomical function or structure” and a “rate of payment” which has its ordinary meaning of a dollar amount. The rate at which a disablement pension is paid is determined according to the level of a veteran’s WPI. We are guided by the purpose of the Act which is, relevantly, to provide entitlements for eligible veterans who suffer service-related injuries or illnesses. We also note the submission made by Veterans’ Affairs that the intent of the transitional provisions was that the simple transition from an impairment level set under the WPA to the WPI model under the VSA should not result in a reduction in the rate at which the veteran's disablement pension is paid compared to the rate at which their war disablement pension was paid.

Under clause 6(2), a veteran who was receiving a war disablement pension under the WPA may apply to “translate” that pension into a disablement pension under the VSA. This right is qualified by clause 6(7). The rate of payment for a pension which has been “translated” under clause 6(2) may be adjusted if the rate the veteran is receiving when “translated” is:

a) A rate to which the veteran was not entitled under the WPA; or

b) A rate to which the veteran is no longer entitled under the VSA.

We find that clause 6(7)(a) gives Veterans’ Affairs discretion to adjust the rate of payment of a pension when a pension is translated if there has been some error and it is not a rate that the veteran was entitled to under the WPA. For example if there had been a calculation error or a technical error such as the assessment of a veteran for a non-service related condition. There is no evidence that there was an error in the rate of payment Mr Warner was receiving under the WPA. Veterans’ Affairs accepts that.

We find that clause 6(7)(b) gives Veterans' Affairs discretion to adjust the rate of payment of a pension if that is no longer the rate to which the veteran is entitled under the VSA after they have been reassessed. For example, if the medical evidence on reassessment under section 52 showed a veteran’s health condition had deteriorated, resulting in an assessment of a higher level of impairment, or improved, resulting in a lower level of impairment.

However, clause 6(3) provides that, having determined what the veteran’s disablement pension should be under clause 6(2), with any adjustments arising from the operation of clause 6(7), the rate at which that pension is paid must not be less than the war disablement pension which the veteran was receiving on 6 December 2014. While clause 6(7) explicitly qualifies clause 6(2), it does not qualify clause 6(3). If Parliament had intended it to do so, we would have expected clause 6(7) to provide that “subclauses (2) and (3) do not preclude…” It does not. The effect of this is that, where a veteran’s pension is translated from the WPA to the VSA Scheme One, the veteran’s rate of payment under the WPA on 6 December 2014 is a statutory minimum, below which the veteran’s pension may not be reduced under any circumstances.

Conclusion

In August 2020, Veterans’ Affairs reassessed Mr Warner’s Lumbar Spondylosis as it was entitled to do under section 52 of the VSA. If the reduced impairment of 20% for Lumbar Spondylosis had been combined with the impairment rates for his other accepted conditions, Mr Warner would have had a combined WPI of 65%. We accept the evidence of Veterans’

Affairs that the disablement pension to which Mr Warner would be entitled for this reassessed combined WPI is $198.62 per week. By the time that reassessment was made, Mr Warner was receiving substantially more than that and he continues to do so. We have found that, as at 6 December 2014, Mr Warner was receiving a war disablement pension under the WPA of $175.69 per week. It follows from our reasoning above that Veterans' Affairs was entitled to reduce his rate of pension to $198.62 per week, as that exceeds the grandparented statutory minimum. However, Veterans' Affairs has exercised benevolence to not reduce Mr Warner's pension in this case. In her letter of 14 July 2021, the Head of Veterans' Affairs advised the Board that Veterans' Affairs would not be reducing the rate of Mr Warner's pension and would not be seeking to be recover any monies previously paid to him to which he was not entitled. That representation is binding on Veterans' Affairs[7].

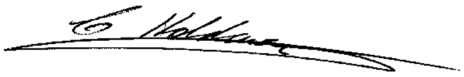
Outcome

The Appeal Board confirms the Review Officer's decision to decline to increase the impairment percentage awarded for Lumbar Spondylosis pursuant to section 237(1)(a) of the VSA.

Ms Raewyn Anderson, Chairperson

Mr Christopher Griggs, Member

Dr Deborah Read, Member



Dr Chris Holdaway, Member

Date: 3 September 2021

[7] *Carrell v Carrell* [1975] 2 NZLR 441 at 445.