

██████████ ██████████ ██████████
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: ██████████ (deceased)

Service Number and Rank: ██████████

Address: ██████████

Grounds of appeal: Appeal against decision of the Review Officer to decline to accept his claimed condition as being service related
And to decline a lump sum payment for a terminal condition

Held: Commenced at Wellington on 20 June 2019, concluded on the papers on 9 October 2019

The Appellant's estate was represented by Mr Richard Terrill
The Respondent, Veterans' Affairs New Zealand (VANZ), was represented by Mr Graeme Astle, with Ms Anne-Marie Tribe in attendance

Publication: Pursuant to the powers vested in it by section 238(3) of the Veterans' Support Act, the Board, on its own initiative makes an order prohibiting the publication of the name, service number, rank, address, War Pension Number and other specific identifiers of the Appellant.

Outcome: Appeal resolved

DECISION

This is an appeal by ██████████ (the **Appellant**) against the decision of the Review Officer (**RO**) dated 18 November 2018 to uphold the Decision Officer's (**DO's**) decision of 31 July 2018 declining to accept the Appellant's condition of malignant neoplasm of the oesophagus.

The RO also declined a lump sum payment for a terminal condition.

Qualifying service

The Appellant had qualifying operational service and qualifying (non-operational) service under the Veterans' Support Act 2014. He is recorded as having served in the Royal New Zealand Infantry Regiment and the New Zealand Special Air Service.

The Appellant's qualifying service was:

22 January 1963 to 10 March 1965 Qualifying Routine (non-operational)

11 March 1965 to 1 October 1966 Indonesian Confrontation in Borneo

2 October 1966 to 10 November 1967 Qualifying Routine (non-operational)

11 November 1967 to 13 May 1968 Viet Nam War

14 May 1968 to 9 December 1969 Qualifying Routine (non-operational)

10 December 1969 to 14 December 1970 Viet Nam War

15 December 1970 to 31 March 1974 Qualifying Routine (non-operational)

23 December 1979 to 5 March 1980 Rhodesia (Commonwealth Monitoring Force)

The Board thanks ██████'s whānau for his service.

Decision Officer's decision

On 31 July 2018, the DO declined to accept the Appellant's condition of malignant neoplasm of the oesophagus as service-related under the Veterans' Support Act 2014 (the Act). The reason given by the DO was that:

██████ has stated on his previous application for a disablement pension that he neither smoked nor drank during his service with the New Zealand Army. Having ruled out consumption of tobacco products and alcohol as service-related factors for the development of Malignant Neoplasm of the Oesophagus ██████ does not meet any of the factors that would allow for the condition of Malignant Neoplasm of the Oesophagus to be accepted as service related.

On 18 September 2018 VANZ advised ██████ of its decision to decline a lump sum payment for a terminal condition under the Act.

The Appellant's review application

On 27 September 2018 VANZ received the Appellant's application for a review of the DO's decision completed by his advocate at the time, Mr Gavin Nicol.

He also filed an application for a lump sum payment for a terminal condition, with a medical certificate from Dr Peter Fleischl confirming his "carcinoma of the oesophagus".

Review Officer's decision

On 18 November 2018 the RO confirmed the decisions to decline malignant neoplasm of the oesophagus as service-related and to decline a lump sum payment for a terminal condition under the Act were correct. The reason given by the RO was:

██████'s Oesophageal Cancer did not present before or during qualifying operational service, and cannot be presumed to have been as a result of, or aggravated by, the performance of qualifying operational service under section 19 of the Veterans' Support Act.

██████ passes away

Sadly, on 28 February 2019 the Appellant passed away. The Appeal Board offers its sincere condolences to ██████'s whānau.

Appeal

Mr Nicol filed written submissions on behalf of the Appellant's Estate on 18 April 2019. Subsequently, Mr Terrill took over the conduct of the appeal for the Appellant. The Board heard submissions from Mr Terrill, and from Mr Astle for VANZ, at a hearing on 20 June 2019. The hearing was adjourned part heard to enable the parties to provide additional information, including medical evidence, to assist the Board reach a decision.

New medical evidence alters VANZ approach

VANZ reviewed the new medical evidence and identified that a CT scan taken on 27 December 2018 identified a new nodule on one of ██████'s lungs. This resulted in VANZ changing its approach to this appeal.

VANZ accepts that lung cancer is a presumptive condition for veterans such as ██████ who have served in Vietnam. If ██████ had applied to have this condition covered, it would have been accepted as being service-related without any requirement to establish a causal link to his military service.

VANZ also acknowledges that veterans who are accepted with a diagnosis of lung cancer are generally increased to the maximum rate of disablement pension. ██████ was receiving 73 percent of the maximum rate prior to his passing.

VANZ accepts that, once a service-related condition is deemed by a suitable qualified medical practitioner to be likely to cause death within 12 months, it is considered terminal. The veteran can then apply for a terminal lump sum equal to the aggregate of the disablement pension

payable at the maximum rate for a 12-month period. The regular pension payments are ceased at that time and are recommenced if the veteran survives the 12-month period.

However, under section 48(1) of the Act, a veteran must apply for a condition to be covered, before there can be an entitlement to a disablement pension.

VANZ invited the Appeal Board to consider directing VANZ to proceed as if an application form had been completed by ██████, without the need to adhere to section 48(1)(a). VANZ also invited the Appeal Board to consider whether ██████'s lung cancer should be deemed terminal and, if so, instruct VANZ to proceed accordingly.

Our decision

The Appeal Board decided as follows and communicated this decision to VANZ by letter:

- (a) VANZ should consider this matter as if ██████ had applied for a disablement pension, and a terminal lump sum. This is because the substantial justice and merits of his claim, rather than strict compliance with the requirement to complete an application form, governs, under section 10 of the Act.
- (b) The medical member of the Appeal Board considers that the new diagnosis of lung cancer could have been terminal. The Board therefore considers that it is an available conclusion that ██████'s lung cancer diagnosis could be deemed terminal. The Appeal Board, however, leaves it to VANZ to decide whether ██████'s lung cancer was likely to cause his death within 12 months of the date of diagnosis, whether alone or in conjunction with his other conditions. This is because this is a new claim for VANZ to consider.

Disposal of appeal

Following its receipt of the Appeal Board's decision, on 10 September 2019 VANZ:

- (a) Accepted the diagnosis of lung cancer as an application for a disablement pension on that basis;
- (b) Accepted ██████'s lung cancer as a conclusively presumed service-related condition which qualifies as a terminal medical condition under the Act; and therefore;

- (c) Paid [REDACTED]'s Estate a lump sum equivalent to 12 months' disablement pension at the maximum rate under sections 53 and 54 of the Act.

The parties agree that this decision resolves the appeal.

The appeal is resolved.



Ms Raewyn Anderson, Chairperson



Dr Chris Holdaway, Member



Mr Christopher Griggs, Member

23 October 2019