[redacted]
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Martin James KNIGHT-WILLIS

Service Number and Rank: 42207 Captain, New Zealand Army

Address: [redacted]

Grounds of appeal: Appeal against the 11 September 2020 decision of the Review Officer to uphold the 24 September 2019 decision of the Decision Officer to cease the temporary disablement pension and award a permanent disablement pension of 5% for Prostate Cancer, effective from 24 September 2019, cease the temporary disablement pension and award a permanent disablement pension of 20% for Ischaemic Heart Disease, effective from 24 September 2019, and award a total combined whole-person impairment recalculation of 60%.

Held: commenced at Wellington on 13 August 2021, concluded 17 August 2021

Parties:
The Appellant, Captain (Retd) Martin Knight-Willis MC, represented by Chris Penk MP and Ross Miller. RNZRSA represented by Richard Terrill.

The Respondent, Veterans' Affairs New Zealand, represented by Ms Anne-Marie Tribe, Manager Decisions and Entitlements (written submission only), Dr Mike O'Reilly, Principal Clinical Advisor, Ms Tracy Lamb, Assistant Director Legal Services, Ms Marti Eller, Deputy Head of Veterans' Affairs.

Outcome: Confirms Review Officer's decision

Summary of reasons for decision:

There is legal authority to reduce the Appellant's disablement pension. Before a temporary disablement pension can be made permanent under section 49(4)(c) of the Veterans' Support Act 2014, the veteran's disablement must be reassessed. Pension rates are explicitly linked to the level of disablement.

No evidence was produced to show that the reassessment of the Appellant's disablement was incorrect. The decision to reduce his disablement pension was not inconsistent with the Act's purpose.

The purpose of a disablement pension is to compensate a veteran for pain and suffering and lack of enjoyment of life. The Act requires that pension levels are indexed to the veteran's assessed level of impairment. There is no ability to take into account that a veteran may have acted in reliance on the level of temporary disablement pension.

The law and the facts are clear. Benevolence does not prevent a reduction in pension.

DECISION

This is an appeal by Captain (Retd) Martin Knight-Willis MC against the 11 September 2020 decision of the Review Officer to uphold the 24 September 2019 decision of the Decision Officer to cease the temporary disablement pension and award a permanent disablement pension of 5% for Prostate Cancer, effective from 24 September 2019, cease the temporary disablement pension and award a permanent disablement pension of 20% for Ischaemic Heart Disease, effective from 24 September 2019, and award a total combined whole-person impairment recalculation of 60%.

Background

Qualifying service

The Appellant served in the New Zealand Army between 5 January 1966 and 6 August 1971 and between 30 October 1978 and 23 May 1979. He has qualifying routine service during the period 5 January 1966 to 6 August 1971 and qualifying operational service in the Indonesian Confrontation from 8 June 1966 to 16 December 1966 as well as in the Vietnam War from 15 November 1969 to 19 May 1970.

The Appeal Board thanks the Appellant for his service. It takes note of the fact that he is a holder of the Military Cross, which was awarded only to Army subalterns and warrant officers who displayed particular courage or devotion to duty while on active service.

War Pensions Act 1954

The Appellant was in receipt of a war disablement pension of 70% under the War Pensions Act 1954 (**WPA**).

Viet Nam Veterans Annual Medical Assessment including an application for a disablement pension under the Veterans' Support Act 2014

On 28 July 2016, the Respondent received the Appellant's Annual Medical Assessment (**Annual Medical**), which included an application for a disablement pension under the Veteran's Support Act 2014 (**VSA**) for the conditions of Prostate Cancer and Ischaemic Heart Disease. General Practitioner Chris Calcott described the Ischaemic Heart Disease as "3 vessel disease awaits CABG[1]" and the current treatment was that the Appellant "uses GTN[2] when walking uphill". He noted that the "two new diagnoses… have increased his background anxieties."

Decision Officer decision

On 19 October 2016 the Decision Officer accepted the Appellant's Prostrate Cancer and Ischaemic Heart Disease as service-related under the VSA. Both are presumed conditions for Vietnam veterans under regulation 13 of the Veterans' Support Regulations 2014 (**VSR**).

Consultant Cardiologist Jim Stewart confirmed the diagnosis of Ischaemic Heart Disease in his report of 18 July 2016. The Ischaemic Heart Disease condition was assessed at 50% whole

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[1] Coronary artery bypass graft surgery.
[2] Glyceryl trinitrate spray, which widens blood vessels and reduces chest pain.

person impairment, temporary. The percentage was determined according to page 178 table 6 Class 4 of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 4th edition (**AMA 4**).

Urologist Vincent Chong confirmed the diagnosis of Prostate Cancer in his report dated 3 May 2016. Prostate Cancer was assessed at 5% whole person impairment, temporary. The percentage was determined according to page 259 Class 1 of the AMA 4.

The Appellant's total combined whole person impairment (**WPI**) was calculated at 75%. It was based on:

- Prostate Cancer 5%, temporary
- Ischaemic Heart Disease, 50% , temporary
- Hearing loss, 7%, permanent
- Tinnitus, 5%, permanent
- Cervical spondylosis, 10%, permanent
- Post-traumatic stress disorder, 35%, permanent

Heart bypass surgery

On 16 November 2016 the Appellant had quadruple coronary artery bypass surgery.

A note from Cardiology Registrar Nasir Khan dated 2 February 2017 refers to the Appellant: feeling better and walking almost 2.5 kilometres with minimal shortness of breath. The Appellant denied having any chest pain or leg swelling. His remaining symptom was reported to be postural hypotension.

Viet Nam Veterans Annual Medical

On 22 August 2017 Dr Calcott completed an Annual Medical noting:

> Ischaemic Heart disease – still gets occasional Angina since CABG 16/11/16. Cholesterol now well controlled. Likely to always have occasional esp. with maximal exertion.
>
> Prostatic Cancer – Grade Group 1 Carcinoma on 4 monthly PSA checks. Consultant to review Feb 18.

Medical evidence

An MRI scan of the Appellant's pelvis on 5 July 2016 for prostate cancer staging was conducted. Consultant Radiologist Kathy Wyant noted the presence of a "suspicious lesion consistent with neoplasm", i.e. prostate cancer.

On 14 March 2018 Urology Consultant Jonathon Masters described the Appellant's diagnosis in 2016 as:

> Gleason 3 + 3, ISUP Grade Group 1 adenocarcinoma of the prostate occupying less than 5% of one core.

He noted that the Appellant's PSA "remains rock steady over the last year about 8.2". He concluded:

> In reality it is highly unlikely that a small focus of a well differentiated prostate cancer is ever going to impact on his life expectancy...

Cardiologist Marcus Lee wrote on 22 August 2019 in part:

> I was a bit surprised to see Martin in clinic. He had bypass surgery in 2016 and a repeat echocardiogram was performed in 2017. He has remained extremely well since then. He has no issue with chest pains or breathlessness and continues to live life quite well. His main issues include old injuries from his days with the New Zealand SAS as a paratrooper, and his level of fitness at baseline was probably significantly higher than the average 75 year old.
>
> His medications appear appropriate. He is on Aspirin and Atorvastatin….
>
> His ECG today is very satisfactory. He is in sinus rhythm. There is evidence of Q waves in 3 and AVF. His blood pressure is also very satisfactory at 132/75.
>
> I am pleased with his progress. He does not require ongoing Cardiology follow up and I have therefore discharged him back to your care.

Decision Officer's decision

On 24 September 2019 the Decision Officer decided to change the Appellant's 5% temporary disablement pension for Prostate Cancer to a permanent pension of 5%, on the basis of Dr Masters' 14 March 2018 report and the Appellant's PSA results from 6 August 2019 and 21 August 2019. The percentage was determined according to page 259 Class 1 of the AMA 4.

The Decision Officer decided to change the Appellant's 50% temporary disablement pension for Ischaemic Heart Disease to a permanent pension of 20%, on the basis of Dr Lee's 22 August 2019 report that his condition was stable. The percentage was determined according to page 178 table 6 Class 2 of the AMA 4.

The Appellant's total combined WPI therefore reduced to 60%, based on:

- Prostate Cancer, 5%, permanent
- Ischaemic Heart Disease condition, 20%, permanent
- Hearing loss, 7%, permanent
- Tinnitus, 5%, permanent
- Cervical Spondylosis, 10%, permanent
- Post-traumatic Stress Disorder, 35%, permanent

On 4 December 2019 the Respondent informed the Appellant of its decision to:

- Cease his temporary disablement pension for Prostate Cancer and award a permanent disablement pension of 5%.

- Cease his temporary disablement pension for Ischaemic Heart Disease and award a permanent disablement pension of 20%.

The letter explained that the Appellant's rate of payment for disablement pension is based on his combined WPI rate, which had been assessed at 60%. The effect of that decision was that his disablement pension would reduce to $433.26 per fortnight.

Review lodged

On 7 May 2020 the Appellant applied for a review of the decision to "reduce my whole person impairment rate from 70% to 60% and reduce the quantum of my pension". The basis of his review was that the decision was *ultra vires* because section 49(4) of the VSA provides that a temporary pension can either be cancelled, continued as a temporary pension or made permanent. There is no provision for a temporary pension to be made permanent at a reduced level.

Review Officer's decision

On 11 September 2020 the Review Officer upheld the Decision Officer's decision. In summary, her grounds for that decision were as follows:

- The process for assessing war disablement pensions under the WPA was different to what now applies under the VSA.
- The reassessment of the Appellant's WPI was consistent with AMA 4.
- Temporary disablement pensions are granted under the VSA in circumstances where an injury or illness has not stabilised. A permanent disablement pension is granted when an injury or illness has stabilised, for example by improving as a consequence of treatment, rehabilitation or natural healing.
- Section 52 of the VSA authorises the Respondent to reassess the disablement of a veteran when that veteran's disablement pension is made permanent.
- Regulation 17 of the VSR prescribes that a veteran's disablement pension must be paid at the rate which corresponds with that veteran's assessed WPI.

The Respondent advised the Appellant of that decision on 24 September 2020.

Appeal lodged

The Appellant appealed that decision, seeking reinstatement of his pension to the level it was prior to the reassessment. In summary, his grounds were as follows:

- The legal basis for reducing the rate of payment of his pension under the VSA was "tenuous at best".
- Neither the impairment percentage assessed for Prostate Cancer and Ischaemic Heart Disease nor the consequent WPI should have been reduced.
- The Appellant had budgeted in reliance on the level of pension he was receiving prior to December 2019.
- The principle of benevolence provided for in the VA ought to be applied to his situation.

He provided more detail including the following:

> I am a veteran of the Vietnam War, having served there in 1969. I had served in Borneo in 1966, as a member of the NZSAS.
>
> I have served my country in the face of considerable danger, difficulty and distress. I served willingly but, at the same time, did so under the belief that my service and sacrifice would be honoured by the New Zealand government.
>
> More particularly, I believed that a moral and legal obligation existed – in the nature of a covenant – that in my twilight years following the conclusion of my service I would not be left to suffer the consequences of having served without reasonable recognition of that.
>
> The consequences of my service to the New Zealand government are detailed elsewhere in this application. These are not trivial.
>
> More importantly, however, in the context of the reduction of my entitlements for such service it is worth noting that my medical situation (including in relation to those suffered as a result of my service) is hardly improving. Indeed the opposite is true, which is not only the case according to my lived experience but also given the nature of these conditions.
>
> These conditions remain well capable of causing my death earlier than would otherwise have been the case – at which point no reassessment of my case would be meaningful – notwithstanding any fluctuations in their apparent severity in the meantime.
>
> **Implications:**
>
> The reduction of my pension from the pre-December 2019 Pension Level not only resulted in that obvious reduction of my income from that source but also had implications for the travel allowance I had previously been entitled to receive. Simply stated, I no longer qualify for that allowance as a result of the pension level reduction so there has been a double adverse effect on my situation accordingly.

The hearing

Appellant's case

Mr Knight-Willis' evidence

In summary, the Appellant said:

- Ischaemic Heart Disease is a degenerative disease. The symptoms were treated by the bypass surgery, but eventually the condition will kill him. After 10 years post-surgery "there are no guarantees."
- At present his prostate appears to be stable, but he is worried about his cancer metastasizing in the future.
- The 15-minute appointment with Dr Lee was the first time he had ever seen him. He objects strongly to being described by him as being "extremely well".
- He feels very vulnerable; physically, mentally and socially. He is 75 years old, has two grandchildren with special needs and a daughter who has had lifelong problems from a head injury as a result of a hit-and-run when she was 19. He has Hearing loss, Tinnitus, Cervical Spondylitis, Ischaemic Heart Disease, Prostate Cancer (which currently is not giving him any symptoms) and a couple of other conditions. He has just

been diagnosed as being Hypothyroid and has just been referred to a specialist for a growth just over his left ear, to eliminate Melanoma.

- Post-traumatic Stress Disorder has been his constant companion for decades. He also regularly suffers from anxiety and depression and sleeplessness and never more so than the last 18 months.
- He takes Atorvastatin, Omeprazole, low-dose Aspirin, Citalopram, and Levothyroxine. He uses a Nitro lingual spray a couple of times a week when needed for chest pain and shortness of breath when exercising. Since about 2018 he has to slow and catch his breath walking up steps. He does not have a referral to a Cardiologist for follow up.
- The uncertain security of his current tenancy and rent rises worry him. He lives alone. He no longer qualifies for the travel concession payment. Affordability of travel to visit and support his daughter is a concern.
- Medical specialists do not acknowledge the compounding effect illnesses have on each other. Each person is unique. The "one size fits all" approach of the WPI assessment used by the Respondent can lead to over-rigid application of the VSA, to the detriment of veterans. He finds the process of begging for justice utterly exhausting.
- His other income is from New Zealand Superannuation and the Disability Pension, which is not means tested. He did not wish to provide any other financial information or information in support of his reliance argument.
- He wants his lived experience to be taken into account.
- Every case is a special case to be judged on its merits, including his case. He is not saying a pension can never be reduced consistent with the principle of benevolence.

Submissions made by Mr Miller

Mr Miller made the following main points in written and oral submissions:

- The Respondent has not acted benevolently in changing the Appellant's temporary pension to a permanent pension at a reduced rate, when he is a vulnerable person with PTSD assessed at 35% and is living alone in rented accommodation. The change has resulted in a reduction of $2370 per annum or $45.46 per week and a loss of entitlement to the Veterans' Travel Concession payment.
- The Appellant has relied on the temporary pension level. The reliance argument is not novel in terms of administrative law and social security statutory entitlements
- Section 10 is quite different to comparable provisions of the Social Security Act 2018 and is intended to confer an advantage to veterans not available to the community at large.
- A 2010 Law Commission Report recommended "The new legislation should include beneficial evidential provisions that adopt the same level of benevolence towards veterans' claims as those in the War Pensions Act 1954". Benevolence is a legal requirement under section 10 of the VSA.

- Lord Neuberger's discussion in the House of Lords judgment *Holmes-Moorhouse v London Borough of Richmond upon Thames* [2009] UKHL about what constituted a benevolent approach, is the basis of the language in section 10. holding at [50] that:

> … a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision.

- The Respondent had acted *ultra vires* by failing to exercise benevolence in its decision to make the Appellant's temporary pension permanent at a reduced rate. A benevolent approach would be to "grandfather" the quantum until "time and tide caught up" and allow the Appellant to maintain his entitlement to the Veterans' Travel Concession payment.

- The Appellant was not challenging the Review Officer's decision on medical grounds, except to note that the Appellant still suffers breathlessness and takes medication for Angina, which is at variance with what Dr Lee said on 22 August 2019.

- The Respondent had attempted to "straight-jacket" benevolence by tying it to technical documents such as the Australian Statement of Principles and the AMA 4, rather than treating it as an overarching requirement mandated by legislation. That is contrary to the House of Lords dicta.

- The decision to reduce the Appellant's pension has resulted in real hardship for him and has taken its toll. This decision would be a seminal judgement impacting on the entire veteran community.

Mr Miller submitted that the Hon Dr Shane Reti MP's opinion was that "Martin will die from one of those diseases and will die with one of those diseases".

Submissions made by Mr Chris Penk MP

Mr Penk made the following main points in written and oral submissions:

Legal error

- The purported legal basis for the pension reduction was section 49 of the VSA, so the decision is *ultra vires*. Section 49 only allows for a temporary pension to be made permanent or to be cancelled or to remain temporary; there is no provision within that for a reduction in the level of a pension. The decision should be reversed and made again on the proper basis under section 52.

- Section 52 only applies to a veteran who is already receiving a permanent disablement pension. Therefore, section 49 has been the basis for the reassessment and the reduction of the pension level cannot have taken place legally.

- Where section 49 and 52 are in conflict, any ambiguity should be resolved by reference to Parliament's intent, the benevolent approach, or a combination of those.

- Regulation 17 of the VSR cannot shed light on the meaning of section 49. Regulation 17 relates to section 56. Section 49 is outside the scope of regulation 17.

Factual basis and inconsistency with the purpose of the VSA

- Ischaemic Heart Disease and cancer are terminal conditions. A pension should never be reduced for terminal conditions. Benevolence should be extended to whether the Appellant can prove his condition is terminal.
- A pension should never be reduced for incurable conditions that result in a shorter life expectancy. The Appellant might be relatively well at the moment, but he may die sooner than would otherwise have been the case.

Reliance

- The unpredictability of pension level reductions is unfairly prejudicial to the veteran. Veterans must be able to make decisions on the basis of the level of their pension.
- Parliament would not have intended that a vulnerable person who has served their country should be placed in a situation of further vulnerability by the "pernicious" nature of their pension being moved up or down.

Primary basis of appeal: Benevolence

- The Appellant seeks the application of section 49 of the VSA such that his benefit is not reduced.
- The Appellant served his country, conducting long range reconnaissance with the NZSAS in Borneo and as an infantry platoon commander in the Vietnam War, where he was wounded in action. He believed his service and sacrifice would be honoured by the New Zealand government. The consequences of the Appellant's service are "not trivial" and may cause an early death.
- The pension reduction has resulted in a "double adverse effect" because the Appellant no longer qualifies for a travel allowance.
- Exercising benevolence is a clear statutory requirement. It mandates those applying the provisions of the VSA to do so in a manner that reflects the debt owed by New Zealand to veterans.
- Parliament intended this provision to have an effect consistent with the ordinary and natural meaning of its words.
- The exceptional nature of the provision is intended to confer a benefit that is not available to those seeking consideration elsewhere on the statute book. For example, the Select Committee report made in relation to the Bill that became the VSA stated that:

  > [t]he bill would also ensure that support provided for veterans in New Zealand was consistent with the Accident Compensation scheme, and extend more benevolence to veterans than they would be entitled to under ACC.[3]

- The reason for requiring veterans' claims to be determined in this benevolent manner is stated explicitly. "Substantial justice" is to be afforded to those who have been "placed in harm's way in the service of New Zealand".

[3] Available at: https://www.parliament.nz/resource/enNZ/50DBSCH_SCR6157_1/a2636e5b24fc5eaad42a9d24ada12c42ce88733d.

- Because section 49 does not allow the pension reduction, the benefit of any doubt should be afforded to the Appellant and his pension level restored.
- Further guidance as to the meaning and effect of the benevolence provision is in section 3 of the VSA. Providing for the Appellant's needs should dictate our understanding of the benevolence provision. Parliament could not have intended to remove a reasonable level of certainty from a veteran in vulnerable economic – as well as medical – circumstances by reducing their pension.
- The concept of benevolence does not relate to the possibility of people in hardship. Financial circumstances are not particularly relevant. It is clear from the parliamentary debates at the time and indeed the language of the VSA that the benevolent approach to claims is not founded upon some more general notion of social justice. It is specifically in relation to the fact of a veteran having served their country.
- The benevolence provision must be read as protecting against unexpected interpretations of its terms (for example, those in section 49) against the best interests of the veteran concerned.

RSA submissions

Mr Terrill made the following main points:

- There was also a benevolence clause in the WPA and it has never been tested at law to see what it actually means.
- The dictionary definition of benevolence, means compassion, well-meaning and kindness. That has not been applied to the Appellant.
- The VSA needs rewriting because it is really not fit for purpose.

The Respondent's case

Dr O'Reilly's evidence

In summary Dr O'Reilly said:

- There is a misconception with regard to WPI and permanence. WPI is fluid and flexible, and is assessed at a moment in time. It is not fixed. Permanence just implies a condition has been stable for a period of two years.
- Section 52 allows for the reassessment of a permanent WPI, with either a significant change in the WPI (an increase in 10%) or after two years of the assessment being made permanent, or of the first allocation of the WPI.
- The assessment of the Appellant's WPI was done on the basis of the clinical opinion from a Cardiologist. It may be superficial, but the Respondent has to take it at face value. At the moment the Appellant sits at the lower end of a Class 2 impairment associated with Ischaemic Heart Disease (with no symptoms of breathlessness or chest pains) with a 10 to 29% range of WPI. The Appellant has recovered from a coronary artery bypass grafting, he is at 20% at the moment. To go to a Class 3 impairment, which would be an increase of 10%, he would need to have symptoms which require "drugs to prevent frequent angina or to remain free of symptoms and

signs of congestive heart failure but may develop angina pectoris[4] with moderately heavy physical exertion".

- The information provided at the hearing is not specific enough for the Appellant to move up an impairment level. The Respondent would need more evidence from his medical practitioner and/or another cardiology assessment of symptoms suggesting an increase in impairment. For the impairment to reach the level of 30%, an increase of 10% from where it is currently, the Appellant's symptoms would need to include breathlessness at the top of the stairs requiring medication with Glyceryl Trinitrate. That would not lift it to 50%. A 50% impairment would indicate significant impact on functional capability.

- The concept of grandfathering (leaving a pension at a temporary impairment level until time and tide allow the current impairment to catch up), is not workable because we cannot assume that that is going to occur for any particular individual. If that were the approach, the Respondent might "have to pull back" from awarding a temporary pension, with the result that a veteran might have to wait quite a period of time before getting a permanent pension. Such an approach would be to the disadvantage of veterans.

- Dr O'Reilly accepted the information provided by the Appellant at the hearing which suggested that his symptoms are worse, but the information the Respondent had at the time of making its decision suggested that he was actually very well. There was no indication from any of the information provided that either his Prostate Cancer or Ischaemic Heart Disease were deteriorating or likely to deteriorate in the future.

- There is no medical information that either of the conditions are terminal. Dr Masters' evidence is that the Appellant has a well-contained, very small prostate cancer that is unlikely to result in a decrease in his life expectancy. It is not terminal. A terminal condition is one where there is an expected loss of life within 12 months of the diagnosis.

- Dr O'Reilly acknowledged that chronic conditions, such as Ischaemic Heart Disease, do shorten life expectancy in the same way that chronic diseases such as diabetes or addiction to tobacco can, but he those conditions are not terminal in the sense that death is imminent or likely in the near future.

- If mortality were imminent, even outside of the 12 month period, then the Respondent would alter the way it managed the individual's case. The Respondent would focus on providing resources to the individual to maximise what it could accomplish for that person in that time. And if it was terminal within a 12 month period, the individual would be eligible for terminal benefits for any accepted condition.

- The change from a temporary to a permanent disablement pension was made in 2019. By virtue of the passage of time, the Appellant's psychological and physical conditions could be reassessed now and in fact this should be done regardless of the outcome of the appeal.

[4] Chest pain

Ms Eller's evidence

In summary, Ms Eller said that, if a veteran was in severe financial hardship, the Respondent would work hard at case management to ensure that the veteran was supported by the relevant Government agencies. Benevolence is reflected by looking at the whole person and considering what other support the Respondent can connect veterans to.

Submissions by Ms Lamb

In summary Ms Lamb made the following main points:

Section 49 of the VSA

- The Appellant's temporary pension was made permanent pursuant to section 49(4)(c), "because the condition causing the disablement has stabilised or reached its final state". Section 49 contemplates a reduction in pension, although Ms Lamb conceded the provision is not as clear as it could be.
- Sections 49 and 52 are supplemented by regulation 17 of the VSR. Regulation 17 is the legal authority for the rate of the disablement pension payable being determined according to the veteran's WPI. It imposes a legal obligation on the Respondent, which "has to determine" the rate payable in accordance with the WPI calculation under regulation 17(3). The determination can either lead to no change or an increase or a decrease in the rate of the pension payable, as the total WPI increases or decreases; regulation 17(1)).
- The change in impairment is a medical fact and the Respondent is guided by independent specialist medical opinion as well as the AMA 4.
- The Appellant is neither challenging the medical evidence supporting the total combined WPI as reassessed in 2019 nor offering new medical evidence.
- The decision letter of 24 September 2019 correctly applies the AMA 4 assessments and WPI calculation required by regulation 17(3) and is based on the medical evidence of specialists, which confirmed that both conditions had stabilised. In relation to Ischaemic Heart Disease this followed bypass surgery in 2016.
- The review decision of 11 September 2020 was correct and comprehensive in setting out the history of the conditions, the Respondent's view of the legislation, its assessment of the Appellant's total WPI and the reasons for that.
- The Respondent must work within the confines of the VSA and the VSR. It has a legal duty to pay disablement pension according to the total WPI, as calculated under the AMA 4. It cannot pay a veteran at the same level she or he was receiving prior to reassessment indefinitely.
- While the Respondent appreciates the Appellant is in a vulnerable position financially and socially and has a variety of medical conditions, including PTSD, a veteran's financial and social circumstances are not relevant to the rate of payment of the disablement pension. If Parliament had intended a veteran's financial circumstances to be taken into account on the award or payment of a disablement pension, it would have explicitly provided for a needs assessment or abatement.

Reduction of WPI not consistent with the purpose of the VSA

- The effect of section 47(1) is that the assessment of WPI required by regulation 17 and the disablement provisions of the VSA apply to all injuries, illnesses or conditions that the Respondent accepts as service-related.
- All medical conditions may fluctuate medically and the disablement provisions apply irrespective of whether a condition is viewed medically as 'temporary' or 'permanent'.
- The legislation does not contain any exclusions for particular classes of conditions.
- The purpose provision of the VSA is general and does not affect the interpretation of the disablement provisions or the VSR, which are detailed and specific as to the legal duties of the Respondent and the procedure it must follow.
- The policy behind the purpose provision does not support the argument contended for in this appeal. The purpose provision has to be interpreted in a purposive way. The VSA is broken into two broad Schemes with separate entitlements and their own criteria and processes. The legislation instead explicitly contemplates the determination of the rate of pension according to the WPI calculated according to AMA 4. As a result of that calculation the pension rates may reduce, increase or end depending on the impairment.

Reliance

- The purpose of a disablement pension is to compensate the veteran for the pain and suffering and lack of enjoyment of life that results from the injury or illness. It is not income compensation per se. The disablement pension entitlement arises if a veteran "suffers disablement as a consequence of a service-related injury or illness".
- Income compensation is dealt with by way of other entitlements under the VSA. If the veteran is of working age and is unable to work, she or he may be entitled to Weekly Income Compensation or Weekly Compensation. If the veteran is of NZ Superannuation qualification age, income compensation is afforded either by way of the Veteran's Pension or NZ Superannuation.
- The reliance argument is novel in terms of administrative law and social security statutory entitlements, which include the VSA. It is not supported in law or by the policy underlying the VSA. In support of this argument, Ms Lamb drew the Appeal Board's attention to a report of the Law Commission.

Benevolence

- The principle of benevolence is given effect through:
    - The application of sections 3 and 10 of the VSA.
    - The use of evidence-based neutral tools such as Statements of Principles, which embody the latest best practice in terms of knowledge of medical conditions.
    - The use of statutory evidential presumptions in relation to conditions being service–related.
    - The WPI concept and the use of AMA 4.

- These instruments provide for the best decisions based on medical evidence and avoid the risk of bias or inconsistency occurring. Allied with these tools and provisions is a benevolent approach taken by staff, whereby evidence provided by a veteran is believed unless there is contradictory evidence.
- The Fairness Principle is achieved by having compensatory payments in the form of the disablement pension for the effects on a veteran's quality of life caused by injury or disease attributable to service.
- The Equality Principle ensures through the use of the statutory evidential provisions and tools that there is equal treatment of equal claims and decision-making is clear and transparent.
- The Affordability Principle ensures that the scheme of the VSA as a whole is affordable. The Affordability Principle does not equate to providing veterans with higher benefits than they are entitled to under the VSA. The Public Finance Act 1989 imposes expectations on the Respondent to protect Crown revenue and incur expenditure in a responsible manner.

Procedure

The Appeal Board was invited by Mr Miller to consider the content and accuracy of parliamentary questions and answers regarding sections 49 and 52 of the VSA. Those are not matters for this tribunal.[5]

As we observed in *Warner v Veterans' Affairs New Zealand*,[6] the Court of Appeal has cast doubt on whether non-parliamentary materials are of much value in the interpretive process, expressing as they do the intent of the Executive rather than Parliament.[7] Therefore we have not taken into account the Law Commission report which was referred to us by both parties.

Analysis

The issue before the Appeal Board is whether the Respondent was entitled to reduce the Appellant's disablement pension when he was reassessed under section 49(4) of the VSA.

The Appellant was in receipt of a temporary disablement pension based on a WPI of 75% for conditions including Prostate Cancer (5%) and Ischaemic Heart Disease (50%).

On 24 September 2019 the Decision Officer made the following decisions, which took effect on that day:

(a) Prostate Cancer. To cease the temporary disablement pension for this and award an equivalent permanent disablement pension based on 5% impairment.

(b) Ischaemic Heart Disease. To cease the temporary disablement pension for this and award a permanent disablement pension based on a reduced impairment of 20%.

As a consequence, the Decision Officer decided that the Appellant's total combined WPI was 60%. The decision did not explicitly rely on any particular provision of the VSA. Another effect

[5] Parliamentary Privilege Act 2014 ss 10 and 11.
[6] Decision 2020-9, 3 September 2021
[7] *Skycity Auckland Ltd v Gambling Commission* [2008] 2 NZLR 182 (CA).

of that decision was that the Appellant lost his entitlement to a Veterans' Travel Concession payment.[8] The decision was not notified to the Appellant until 4 December 2019.

On 11 September 2020 the Review Officer upheld the Decision Officer's decision. The Review Officer cited an opinion of the Respondent's Team Leader Strategic Policy and referred to section 49 and 52 of the VSA, together with regulation 17 of the VSR.

The Appellant has appealed and is seeking the reinstatement of his pension to the level it was prior to December 2019. The appeal raises legal issues about the interpretation of the VSA, including the benevolence principle and the purpose of the disablement pension. The Appeal Board has carefully considered each of the four grounds of appeal the Appellant and his advocates raised. We note that the appeal is not based on medical grounds; it was not suggested to us that the revised WPI was incorrect in terms of AMA 4 at the time it was decided upon in September 2019. Dr O'Reilly observed that the Appellant was eligible to be and should be reassessed again under section 52 regardless of the outcome of the appeal. It is the Appeal Board's expectation that the reassessment will have taken place before the end of the year given the Appellant's evidence about his current symptoms including shortness of breath when exercising.

Power to reduce a temporary pension when it is made permanent

As his first ground of appeal, the Appellant submitted that the Respondent lacks the power under the VSA to reduce the rate of a temporary pension when it is made permanent.

It is common ground that the Appellant's disablement pension was converted from a temporary pension into a permanent pension pursuant to section 49(4)(c) of the VSA. Under section 49(1), there is a presumption that every disablement pension will be temporary when first awarded. This is based on the reality that a veteran's conditions may be unstable or capable of treatment.[9]

If a disablement pension is temporary, section 49(3) requires the Respondent to advise the veteran of the date on which his or her disablement will be reassessed. Section 49(4) provides that, on or before this date, the Respondent:

> …must reassess the veteran's disablement to determine whether—
>
> (a) the veteran's disablement pension should be cancelled because the veteran is no longer suffering from a medical condition that entitles him or her to receive a disablement pension; or
>
> (b) the veteran's temporary disablement pension should continue because the medical condition that entitles the veteran to receive a disablement pension has not stabilised or reached its final state; or
>
> (c) the veteran's temporary disablement pension should be made permanent because the condition causing the veteran's disablement has stabilised or reached its final state.

In short, the Respondent *must reassess the veteran's disablement* [emphasis added] and then has three options:

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[8] To be eligible for a Full Travel Concession the veteran must be in receipt of a temporary Disablement Pension under the VSA of 75% WPI or more which has been granted at that rate continuously over the last three years.

[9] Section 49(2) authorises the awarding of a permanent pension if the condition is stable or unlikely to improve.

(a) Cancel the temporary pension; or

(b) Continue the temporary pension; or

(c) Make the temporary pension permanent.

The primary issue in this appeal is whether it is implicit in section 49 that the Respondent can reduce the level of a permanent pension which is awarded in lieu of a temporary pension. The same question could arise in respect of a temporary pension which is continued following a reassessment, although that is not the issue in this appeal.

Any provision in an enactment must be interpreted in the light of its context and the purpose of the enactment as a whole.[10] The Appellant points to section 52 of the VSA in aid of his submission that there is no power to change a temporary pension which is made permanent under section 49(4)(c). Section 52 provides:

> (1) VANZ may, from time to time, reassess the disablement of a veteran who is receiving a permanent disablement pension.
>
> (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.

We find the Appellant's reliance on section 52 to be misplaced. That is because section 52 is a stand-alone power for the Respondent to reassess the disablement of a veteran in the prescribed circumstances. It is distinct from section 49(4), which is a separate power to reassess the veteran's disablement on or before the date notified to the veteran under section 49(3). It is apparent in both sections 49 and 52 of the VSA that "disablement" and "whole-person impairment" are used interchangeably. The Appeal Board considers that those terms are synonymous.

It follows that, on or before the date notified under section 49(3), the Respondent *must* reassess the WPI of a veteran receiving a temporary pension. The Respondent has an additional power to do that again in the circumstances prescribed under section 52 once the pension becomes permanent. We find that there is no inconsistency between sections 49 and 52.

Neither section 49 nor section 52 deal with the question of what rate of payment is applicable, once the WPI has been reassessed. That is provided for in regulation 17 of the VSR.[11] That regulation prescribes in part that:

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[10] Interpretation Act 1999 s 5(1).

[11] These regulations were made under section 265 of the VSA, in accordance with section 56 of the VSA.

(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).

It follows that, subject to what we said in *Warner* in respect of pensions transferred from the WPA, the Respondent is obliged to pay the veteran any disablement pension at the rate prescribed for his or her WPI. Section 49 mandates the reassessment of that WPI as a precursor to any decision to make a temporary pension permanent. That is what happened in the Appellant's case. The decision was therefore lawful.

This ground of appeal is not successful.

Factual basis of the decision and inconsistency with the Act's purpose

The Appellant's second ground of appeal is that it is inconsistent with the purpose of the VSA to reduce an assessment of disablement (or WPI) for conditions such as Ischaemic Heart Disease and Prostate Cancer, which never fully recede.

The purpose of the VSA is provided for in section 3(1):

> The purpose of this Act 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 and support for eligible spouses, partners, children, and dependants of veterans with service-related injuries or illnesses and for other persons who provide non-professional support to those veterans.

The reassessment of the Appellant's disablement under section 49 of the VSA resulted in the reduction of his WPI from 75% to 60%, principally on the basis that his Ischaemic Heart Disease had stabilised at a lower level post-surgery. We observe that medical interventions such as surgery are always intended to deliver an improved health outcome for patients, so a reduction in WPI would be expected.

However, the Applicant submitted that Ischaemic Heart Disease and Prostate Cancer are terminal conditions (or at best incurable conditions) so it is unreasonable for there to be a change from a temporary to a permanent pension at a lower rate. Benevolence should be extended in determining whether the Appellant's condition is terminal.

The Respondent submitted that there is no medical evidence that either of the Appellant's conditions are terminal.

Terminal medical conditions are explicitly provided for by sections 53 and 54 of the VSA. A terminal medical condition is "an advanced progressive disease likely to cause death within the 12-month period…".[12]

In relation to the Appellant's Prostate Cancer, we accept the evidence from Dr Masters, produced by Dr O'Reilly, that:

[12] VSA s 53(7).

> In reality it is highly unlikely that a small focus of a well differentiated prostate cancer is ever going to impact on his life expectancy...

Dr O'Reilly has acknowledged that a chronic condition such as Ischaemic Heart Disease does shorten the life expectancy of the veteran, but the condition is not terminal as that term is defined for the purposes of the relevant provision in the VSA. We accept that evidence also.

The evidence from the Hon Dr Shane Reti MP, presented through Mr Miller, is not evidence of the diagnosis of a terminal condition. It is therefore of no assistance to the Appeal Board in deciding this appeal.

Whilst we appreciate the effect on the Appellant of his service-related health conditions, we find on the evidence available to us that the Appellant's medical conditions are not terminal.

Should any of the Appellant's service-related conditions become terminal, then the VSA provides for a lump sum to be payable (section 53) and for a Disablement Pension to be paid at the maximum rate (section 54). This is an example of the benevolence available under the VSA.

We also find that there is no basis in law for the submission that the reduction of the Appellant's WPI under section 49 was inconsistent with the purpose provided for in section 3(1) of the VSA. Section 3(1) simply provides that there shall be entitlements and support for eligible veterans and their families. It is left to other parts of the VSA and the regulations made under that Act to set out the detail as to what that support and entitlements consist of. As we have said, section 49 obliged the Respondent to reassess the Appellant's WPI. Regulation 17(3) of the VSR[13] required that reassessment to be conducted in accordance with the AMA 4. It is not capable of dispute that that is what happened in the Appellant's case. There are limits to benevolence, as we indicate below. It does not empower the Respondent (or this Appeal Board) to depart from the clear terms of the VSA in a manner which undermines the statutory scheme.

The Appeal Board does not accept the submission that the quantum of the Appellant's pension should be grandfathered until time and tide caught up and his level of impairment returned to 75%, enabling him to retain his travel concession. There is no provision for this in the VSA. The Appeal Board accepts Dr O'Reilly's evidence that that is not a workable solution, because it cannot be assumed that the Appellant's (or any other individual's) impairment will ever return to that level.

The ground of appeal is not successful.

Reliance

The Appellant's third ground of appeal was that Parliament would not have intended that a vulnerable veteran should be placed in a situation of further vulnerability by virtue of his or her pension rate being reduced, in circumstances where the veteran relied on their pension.

While the Appeal Board has considerable empathy for the Appellant in his post separation situation, we do not accept that argument. The purpose of a disablement pension is to compensate a veteran for pain and suffering and lack of enjoyment of life resulting from his or her service-related condition. It is not income compensation *per se*. As we have indicated in this decision and others, the VSA specifically anticipates that disablement pension levels can

[13] Made pursuant to section 269(2) of the VSA.

increase or decrease. Entitlements such as disablement pensions are condition related, not related to a veteran's personal financial circumstances.

The Appeal Board accepts that it is unfortunate that the Appellant has also lost his travel concession payment as a result of the reduction in his level of pension. However, this ground of appeal can only be interpreted as a submission that the receipt of a particular rate of pension by a veteran gives rise to a substantive legitimate expectation that that rate will not be reduced, notwithstanding the statutory scheme of the VSA which requires that the pension be indexed to the veteran's assessed WPI. Such a submission runs counter to the law concerning substantive legitimate expectations, as explained by the Court of Appeal in *Green v Racing Integrity Unit Ltd*:[14]

> Such a remedy may properly be awarded in some limited circumstances, given that the principle of legitimate expectation holds public authorities to their undertakings, and it is conceivable that an authority might have undertaken to bring about some substantive result. However, we reiterate this Court's recent observation that "relief in the form of a substantive outcome is rarely, if ever, granted." Partly it will be rare because, as we have already noted, an undertaking cannot be implemented where it would interfere with a public authority's statutory duty, or where there is a satisfactory reason not to implement it. To uphold an expectation of a course of conduct regardless of these well established limits "would be to usurp the function of the person or body carrying out the relevant public function."

This ground of appeal is therefore not successful.

Benevolence

The Appellant's fourth ground of appeal is that the principle of benevolence, enshrined in section 10(b)(iii) of the VSA, means that:

> …the benefit of any doubt – noting the various other key arguments detailed above – should be afforded in my case and my pension restored to the pre-December 2019 Pension Level.

The Appeal Board accepts that the Appellant's submission as to the impact of the principle of benevolence derives support from the other provisions of section 10, which provide as follows:

> Every person who performs any function or exercises any power under this Act must do so—
>
> (a) in acknowledgement, on behalf of the community, of the responsibility for the injury, illness, or death of veterans as a result of them being placed in harm's way in the service of New Zealand; and
>
> (b) in accordance with the following principles:
>
> (i) the principle of providing fair entitlements to veterans and other claimants:
>
> (ii) the principle of promoting equal treatment of equal claims:
>
> (iii) the principle of taking a benevolent approach to claims:
>
> (iv) the principle of determining claims—
>
> (A) in accordance with substantial justice and the merits of the claim; and
>
> (B) not in accordance with any technicalities, legal forms, or legal rules of evidence.

[14] [2014] NZAR 623 at [40]. Footnotes in the judgment omitted.

The Appellant and RSA submitted that the meaning of benevolence had not previously been considered by the Appeal Board. The Appeal Board always has regard to all of the principles in section 10(b) and the overarching benevolent intent of the VSA. Other appeals have been allowed where the Respondent has misinterpreted the law or taken a less than benevolent approach to how the law and evidence should be interpreted, for example in considering whether the factors in a SoP had been met.

If there were a doubt about the proper application of the law to the facts of this appeal, the Appeal Board would afford the benefit of that doubt to the Appellant. However, for the reasons stated above, both the law and the facts are clear.

Furthermore, the Appellant has not called any evidence to substantiate a submission that the application of the VSA and the VSR to his situation results in a particular injustice to him, as compared with all other veterans whose cases must be determined under the same law. While we have great respect for the service and sacrifice of the Appellant, it does not differentiate his situation from that of many of the veterans who come before this Appeal Board with claims based on qualifying operational service. As well as taking a benevolent approach to claims, the Respondent has an explicit obligation under section 10(b)(ii) to treat all such claims even-handedly, after taking into account each individual's particular circumstances. The Appeal Board is satisfied that the Respondent has done that.

This ground of appeal is not successful.

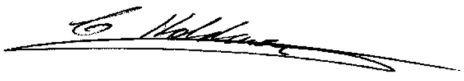
Outcome

Acting under section 237(1)(a) of the Veterans' Support Act 2014, the Appeal Board confirms the Review Officer's decision to uphold the 24 September 2019 decision of the Decision Officer to cease the temporary disablement pension and award a permanent disablement pension of 5% for Prostate Cancer, effective from 24 September 2019, cease the temporary disablement pension and award a permanent disablement pension of 20% for Ischaemic Heart Disease, effective from 24 September 2019, and award a total combined whole-person impairment recalculation of 60%.

Ms Raewyn Anderson, Chairperson

Mr Christopher Griggs, Member

Dr Deborah Read, Member



Dr Chris Holdaway, Member

Date: 28 October 2021