

Veterans Review  
and Appeal Board Canada

Tribunal des  
anciens combattants Canad

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**PROTECTED**  
**FILE NUMBER: 4438933**

Decision No. – N. decision  
**100001662300**

MR PHILLIP M RYAN  
314-1117 RIDGEWAY AV  
COQUITLAM BC V3J 1S8

Dear Mr. Ryan:

August 12, 2011

Re: Notice of Decision

The Veterans Review and Appeal Board has made a ruling with respect to your application. Please consult the enclosed decision document for a detailed explanation.

A copy of your decision has been made available to your representative. If you have any questions concerning the decision or your appeal rights, please contact the Bureau of Pensions Advocates at 1-877-228-2250.

Yours truly,

K. Rowell  
Director, Corporate Operations

KR / mdb  
Enclosure

Protected information

Applicant's name	Head Office file number
Ryan, Phillip Melvin	4438933
Representative – Bureau of Pensions Advocates	Decision number
Janet Ellis	100001662300
Location of hearing	Date of hearing
Vancouver, British Columbia	5 July 2011

The Entitlement Review Panel decides:

SPONDYLOSIS LUMBAR SPINE

No entitlement granted for service in the Canadian Forces.  
Section 45, Canadian Forces Members and Veterans Re-  
Establishment and Compensation Act.

Before:                      W.F. Watson    Presiding & Writing Member  
                                    Ellen Riley     Member

Original signed by:

Reasons delivered by: \_\_\_\_\_  
                                    W.F. Watson

APPEAL RIGHTS

If you are dissatisfied with this decision you may appeal it to an Appeal Panel of the Veterans Review and Appeal board, which may affirm, vary or reverse the decision.

In pursuing this right of appeal, you may be represented, free of charge, by the Bureau of Pensions Advocates or a service bureau of Veterans' organization or at your expense by any other representative.

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## INTRODUCTION

The Applicant brings forward on review the Veterans Affairs Canada Official Decision dated 24 February 2011 which denied him entitlement to a disability award for the claimed condition of spondylosis of the lumbar spine.

It was appreciated by the minister that the Applicant claimed his condition developed as a result of a parachute jumps and/or that he was run over by a mortar toboggan.

The Decision shows the key evidence considered including a Report on Injuries from January 1978, a Medical Attendance Report from January 1978, the Medical Board Proceedings from October 1978, an MRI from October 2008, the Witness Statements, and the Medical Questionnaire from January 2011.

It was accepted in a Report on Injuries, that the Applicant fell through ice and suffered frost bite to this feet, but it was found that there was no mention of back injury, that the only injury regarding the Applicant's back was that he had a sore back in January 1978. It was determined that the Applicant returned back to service and he was identified as being without problems on discharge. It was noted that the Applicant was diagnosed in 2008 with degenerative disc disease and the Applicant was indicated as having had four back injuries in the 1982 to 1988 period with his employment with Canada Post.

## ISSUE(S)

The issue before the panel is to determine if the Applicant's claimed condition of spondylosis lumbar spine arose out of, was directly connected with or was permanently worsened by the Applicant's military service between 1975 and 1979.

## EVIDENCE AND ARGUMENT

In an Outpatient Department Clinic Note dated 14 May 2010, it is identified that the Applicant has multi level foraminal stenoses as revealed in an MRI of the Applicant's cervical, thoracic and lumbar spine. The report indicates the most severely affected levels are C4-5 and C5-6. Within the patient's lumbar spine there was notable disc bulging at L2-3 and L3-4 and bilateral foraminal narrowing and perhaps compression of the L4 nerve root bilaterally.

Dr. Viem Nguyen, author of the Outpatient Department Clinic Note indicates that the patient asked for clarification on his opinion as to

whether or not landing on his head as part of his duties as a paratrooper a number of years ago may have been a contributing factor to his current clinical presentation involving his neck pain. Dr. Nguyen responded that given the suspected force incurred in landing on his head when parachuting, "I think it is feasible that the patient may have injured his neck originally at that time.

In a Consultation Report dated 8 April 2010, it is identified that the radiological information reveals the Applicant had a mild broad based disc protrusion at L2-3 and at L3-4 and the identification under "Comment is:

The subjective impression is that of a relatively congenitally narrow canal which is most narrowed at the level of C4-5 disc space ... however there is further narrowing at the L2-3 and L3-4 levels with possible compression of the descending L4 nerve root bilaterally at the L3-4 level subarticular recesses.

New information provided at ER-R1 by Dr. Andrew Sak Yu Lee dated 26 May 2011 indicates the Applicant underwent a medical procedure, speaking of the cervical spine. It is indicated that the author, Dr. Lee, reviewed the MRI for the L-spine from St. Paul Hospital which did show spondylosis and disc pathology without a frank disc herniation per se. It is identified that the Applicant has expressed concern and frustration with his claim to the Department. Dr. Lee states:

...It does appear to me that his cervical spine problems and likely lower back pain as well are causally relatedly to his bad parachute jump described previously.

[As transcribed]

At the outset of the hearing, the Advocate submitted that she was seeking full entitlement to a disability award for the claimed condition and would be basing her argument on the medical opinion of Dr. T.H. Stevenson as recorded in a Client Service Delivery Network note dated 20 January 2011, which stated that Senior District Medical Officer Dr. Stevenson has looked at the medical consultation with Dr. Lee and Dr. Nguyen, has considered the MRI report of abnormalities in the cervical area with finding in the L2-3 and L3-4 level of the lumbar spine, and following which Dr. Stevenson states in part.

My opinion is that both this veterans cervical spine and the lumbar spine findings on MR and the veterans symptoms are related directly or indirectly to his service injuries which induced a "hard parachute landing. ...

Further, the Advocate submitted that the report by the psychiatrist, Dr. D.G. Passey, as found on page 55 to 60 lends support to the Applicant's contention that it was his military service that is the cause of spondylosis of his lumbar spine, where Dr. Passey states:

... It makes perfect sense to me that Mr. Ryan's chronic pain and the cervical pathology would be at least partially due to his parachuting duties (he had at least 8 documented jumps including his indicated hard landing) and land borne duties with the Canadian Airborne Regiment.

The Advocate then led the Panel through the information on file, led the Applicant through his testimony and advanced argument on the Applicant's behalf.

The Advocate contended that the record reveals that the Applicant experienced two incidents of trauma which can easily be recognized as being responsible for the development of his condition. She submitted that in 1976, while serving with the Canadian Airborne in Edmonton, Alberta, the Applicant experienced a particularly hard landing following which he had pain in both his neck and back albeit the Applicant did not report he had been hurt. Secondly, the Advocate submitted that in January 1978, during an exercise as described by the Applicant, he was pinned when a mortar toboggan became loose and caught the Applicant with such force that he was bent over backwards and at which time he received both a neck and back injury, which is responsible for his condition.

In this regard, the Advocate referred the Panel to information on file from individuals, Warrant Officer S. Sproul who recalls the Applicant having a hard opening on a jump and a second incident pulling mortar toboggans and which is spoken of by Mr. Jamie Gates in a letter of support dated 15 May 2007 and which states:

... it sounds like Ryan got the worse of it... and now hearing of his unfortunate outcome, in my opinion Ryan is deserving of the finest medical treatment and continuing care that Canada can provide.

The Applicant testified before the Panel adding further detail to the information he supplied in support of his application.

The Applicant testified that he experienced a particularly bad parachute jump at which time he hit his head and also his back. The Applicant told the Panel there was no record made of this injury to his back at the time and also attributed the development of his condition to a second incident in 1978 where he was hit by a mortar toboggan at which time the toboggan went over top of him as he was standing.

The Applicant told the Panel that he was involved in four Worker's Compensation Board claims for back injuries while employed with Canada Post and that he also was involved in a motor vehicle accident in December 1988. With respect to the toboggan incident that Applicant told the Panel that he was able to continue on after being struck by the toboggan and that, as he recalls, he completed 19 hours of slogging through the snow afterwards.

### ANALYSIS/REASONS AND DECISION

To establish entitlement to a disability award under section 45 of the Canadian Forces Members and Veterans Re-establishment and Compensation Act, the Applicant must establish that he is suffering from a disability resulting from:

- a) a service related injury or disease: or
- b) a non-service related injury or disease that was aggravated by service.

The Panel recognized that the Federal Court of Appeal decision of Canada (Attorney General) V. Wannamaker 2007 FCA 126, and supported by the jurisprudence of MacDonald v. Canada (Attorney General) 2008 FC 796 and Goldsworthy v. Attorney General of Canada 2008 FC 380, identify that the onus is upon the Applicant to prove the facts required to establish entitlement to a disability award on the standard of a balance of probabilities.

The Panel is mindful that section 39 of the Veterans Review and Appeal Board Act directs that where there is doubt in the weighing of the evidence as to whether the Applicant has established a case, the Panel is to resolve any doubt in the weighing of that evidence in favor of the Applicant.

The Panel is also appreciative that subsection 39(a) of the Veterans Review and Appeal Board Act requires the Board to draw from all the circumstances of the case, and all the evidence presented to it, every reasonable inference in favor of the Applicant.

While the Panel is sympathetic to the Applicant's circumstances, the Panel nevertheless concludes that the Applicant has not proven the facts required to establish entitlement to a disability award for the condition of spondylosis of the lumbar spine on a balance of probability. Neither does the Panel reasonably infer from the evidence that disability award entitlement is warranted in this case.

As is well established in the jurisprudence, section 39 of the legislation does not dispense the need to prove facts. The courts have held that favourable inferences can only be drawn on the basis of established facts

Whereas in the case at bar, the Panel determines that it is being asked to presume an association exists between two incidents now recalled by the Applicant during his military service and from which he contends his condition has developed. From a careful analysis of the evidence and argument presented, the Panel concludes that sufficient objective evidence from which a causal connection can be recognized has not been led.

The Panel notes that in witness accounts of the Applicant's toboggan incident, particularly that shown on page 45 to 47, Colonel D.D. Marshall identifies the Applicant complained of a sore neck following the involvement with the toboggan, indicating that the Applicant was essentially run over by a winter crew toboggan with the weight in excess of 200 pounds. Colonel Marshall indicates that he did not see this particular incident but recalls being informed by one of the subordinates that the Applicant had hurt his neck in the collision.

Mr. Robert Greenwood, also writing in May 2007, indicates that Applicant was hit from behind, pushing him into the snow and running him over. Mr. Greenwood said the toboggan came to a stop after hitting the Applicant in the back of the head/neck area. After he was freed, the Applicant complained of a sore neck. Mr. Greenwood further indicates he does not know what extent the Applicant's injuries were.

A medical Report by Dr. W. Harry Fahrni dated 4 December 1992 identifies the Applicant states that on a brigade exercise in 1978, the Applicant described an involvement with an injury by a toboggan stating the Applicant was feeling quite severe back pain at the time and quite disabled for some time with his back problem. The Panel notes that this is in contradiction to the Applicant's testimony before the Panel that after being run over by the toboggan he slogged through the snow for 19 hours afterwards.

While the Panel appreciates that a significant injury is accepted by Veterans Affairs Canada as being a causative or aggravational factor in the development of several back conditions, when speaking of the associated condition of spondylosis, the Medical Guidelines identify that severe trauma to the lumbar spine is indicated as being a major high impact direct injury to the lumbar spine which produces immediate lumbar pain and precludes ambulation for a period of at least two weeks and is associated with other fractures and/or significant soft tissues injuries. The Panel notes that such a documented injury is not established in the evidence in the present case. It therefore does not conclude that the incident described by the Applicant caused his back injury such as would account for his development of spondylosis of the lumbar spine in the later years.



Neither does the Panel find evidence of the Applicant suffering a specific trauma to his back in the parachute landing described. The Panel, therefore, concludes that the Applicant has not established in the evidence that he did in fact suffer an injury to his back during his military service which can account for the development of his condition.

The Panel is also appreciative that spondylosis is identified in the Merck Manual as being a disorder in which the disc and vertebra degenerate usually affecting middle-age and older people and is associated with the ageing process. The Panel notes that the Applicant is diagnosed in 1992 as having the condition at which time he was 40 years of age and which the panel finds to be completely consistent with the ageing process.

The Panel is also aware that as advanced by the Advocate, medical personnel have come forward offering supportive opinions that the Applicant's condition is in fact related to his military service. The Panel finds that these opinions are not based on an accurate history or contemporaneous accounts at the time of the injuries contended by the Applicant. The Panel is unable to ascertain how the medical personnel have arrived at their conclusion and none of these opinions set out the mechanism and means by which the Applicant's medical difficulty can be seen to have arisen out of or is in connection with his military service. The Panel has not been presented with information on enquiries made nor has it been shown tests and findings or data upon which the opinions were based or arrived at. Therefore, the theory and methodology is not disclosed. Neither do these opinions account for obvious alternate explanations such as are embodied in the consensus of general medical opinions as found in the Guidelines, in particular, the ageing process. As follows, the Panel concludes that the Applicant has not established in the evidence how the medical difficulty from which he now suffers arose out of or was in connection with his military service.

The Panel concludes that a causal linkage has not been established in the evidence and neither can one be reasonably inferred from the evidence and argument presented.

Accordingly, the Panel rules to confirm the Veterans Affairs Canada Official Decision dated 24 February 2011 which denied the Applicants entitlement to a disability award for the claimed condition of spondylosis lumbar spine.

Applicable Statutes:

Canadian Forces Members and Veterans Re-establishment and Compensation Act, [S.C. 2005, c.21.]

Section 45

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Veterans Review and Appeal Board Act, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3<sup>rd</sup> Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3

Section 25

Section 39

Exhibit:

ER-R1: A Medical Report from Neurosurgeon Dr. Andrew Sak Yu Lee  
Dated 26 May 2011 (two pages).

