Benefit of Doubt

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Purpose

The purpose of this policy is to provide direction to the adjudicator on the appropriate application of the benefit of doubt provisions under the *Pension Act* and the *Veterans Well-being Act* (VWA).

Policy

General

1. The function of an adjudicator is to perform an active inquiry into the basis of a claim for a disability benefit or other benefit pursuant to the *Pension Act* and *Veterans Well-being Act* ("the Acts"). This involves reviewing all evidence relating to the claim to determine its relevance and credibility, weighing the evidence and providing a fair and impartial written decision which includes reasons explaining how the decision was reached.
2. When carrying out their decision-making responsibilities, adjudicators must also adhere to the principles set out in the Acts. This includes drawing all reasonable and favourable inferences that can be drawn with respect to the applicant's case, as well as resolving any doubt as to whether a case (claim) has been established in favour of the applicant.

All the circumstances of the case and all the evidence

3. The adjudicator is to draw every reasonable inference that can be made in favour of an applicant and to do so by taking into consideration all of the circumstances of the case, as well as any evidence provided in support of an applicant's claim.

4. For purposes of this policy, “all the circumstances of the case” refers to any pertinent factors, events or conditions which affect an applicant’s particular case or situation and which should be taken into consideration when reaching conclusions concerning the applicant’s claim.
5. Evidence is any form of proof that is offered to substantiate a claim and/or to establish the existence or non-existence of any fact in dispute. Evidence may be documentary (written), parol (oral) or demonstrative (physical).
6. Only documentary and demonstrative evidence are taken into consideration during the first level of adjudication of a disability benefit. They may be described as follows:
    a. Documentary evidence. This type of evidence includes completed disability benefit application forms; military service records; medical/hospital reports; written opinions provided by “experts” such as medical specialists; published information such as books or articles contained in peer-reviewed journals; affidavits or statutory declarations made by an individual (such as the benefit applicant) who swears under oath, as to the truth of the information contained therein; as well as other forms of written correspondence including letters, unsworn statements or government reports; and
    b. Demonstrative evidence. This includes X-rays; photographs; drawings; maps; graphs; objects; or any other form of physical evidence that is submitted by either the applicant or which is obtained and/or used by the adjudicator to help prove or disprove a factual assertion being made by the applicant.
7. If an adjudicator uses any information (especially information that is not favourable to the applicant) which was not presented by the applicant or which is not contained in the applicant’s Veterans Affairs file or service documents, this must be disclosed to the applicant.

Relevant Evidence

8. Relevant evidence is evidence that relates to the central issue or issues to be resolved. Identifying relevant evidence requires logic and a review of all of the evidence.
9. The following questions may assist in identifying whether or not evidence is relevant for purposes of disability benefit claims:
    a. Does the evidence assist in substantiating (or refuting) a specific fact that the applicant is trying to establish?
    b. Does the evidence assist in establishing (or refuting) the main claim that the applicant is making?
10. If there is any doubt about the relevance of any particular piece of evidence, the general approach is to accept it for consideration.
11. The following is an example of the approach that would be taken to assessing the relevance of submitted evidence:
    a. Mr. X, a Korean War Veteran, submits an application for pension for hearing loss which he claims was brought on as a result of loud gun noises that he was subjected to while serving in Korea. Mr. X’s military service records provide documentation that establishes his military service. His service medical records also contain an enlistment medical report that states “Notes no ear trouble or deafness on enlistment. Hearing CV R & L 20. Eardrums intact,” as well as a medical report dated July 15, 1953, that pertains to a shrapnel wound that the Veteran received to his face on that same date.
    b. As additional information in support of his claim, Mr. X provides an audiogram report dated January 27, 2001; an audiogram report dated October 14, 2006; as well as a letter from an audiologist dated November 1, 2006, that states: “Pure tone air and bone conduction testing reveals a mild-to-moderate high frequency sensorineural hearing loss, worse in the right ear. Mr. X reports a longstanding hearing loss, worse in the right ear. He does have a history of loud gun noise exposure

while serving in Korea. He denies any tinnitus or middle ear history."

c. A determination will have to be made by the adjudicator as to whether the medical report pertaining to the facial wound is relevant to the hearing loss issue. It could be, especially if it indicates that the shrapnel injured an organ or body part that plays a role in the hearing function. But if this medical report provides sufficient information to enable the adjudicator to determine that the shrapnel wound injury is not relevant in any way to the hearing loss claim, the report should not be relied upon as a basis for granting the applicant entitlement to a disability pension for his hearing loss, if that is the decision reached with respect to the matter.

Drawing Reasonable Inferences

12. Drawing reasonable inferences is about reaching favourable conclusions in circumstances where the applicant has not actually provided evidence that directly substantiates his/her fact (or the claim that he/she is making), but has provided such sufficient other reliable evidence that the fact that the applicant wanted to establish can be “inferred” or “deducted” as a logical consequence of the evidence provided.
13. Inferences must be drawn from the relevant information that is before the adjudicator, as well as from the overall circumstances of the case.
14. The following is an example of how reasonable inference might be used:
    a. A Veteran of World War II is claiming a pension for osteoarthritis of his right knee due to an injury that he claims occurred as a result of falling off a Bren Gun carrier while under fire in France in 1944. In support of his claim, he provides the following.
        i. documentation to establish his military service during that time period;
        ii. an army medical report that indicates that his right knee was normal at the time of enlistment;
        iii. a military medical report dated August 10, 1944, which states, in part: "... [Veteran’s] right leg swollen today. Having difficulty walking due to pain, swelling. Says he fell from a Bren Gun yesterday while under heavy fire near Falaise and hurt his knee...";
        iv. a recent X-ray report from a radiologist which states that the applicant has severe osteoarthritis of the right knee;
        v. statements from the veteran’s wife of over 50 years and his two adult children which affirm that the Veteran has been complaining about pain in his right knee on a continuous basis for many years and that he has always related the pain back to an alleged wartime injury; and
        vi. a letter from an orthopaedic specialist stating that the Veteran does suffer from osteoarthritis of the right knee and that his condition could have been caused by trauma and/or the aging process.
    b. In this situation, the applicant has provided sufficient, reliable information to establish that he injured his right knee while he was engaged in military service and that he now suffers from a diagnosed disability known as osteoarthritis of the right knee. Although he has not provided evidence that clearly links the cause of his osteoarthritis to his wartime injury, he has, nevertheless, provided information to indicate that his current condition could have, at least in part, been caused by a traumatic injury to the knee.
    c. Since there is no available evidence to indicate that the Veteran applicant suffered any post-war traumatic injuries to his knee, in this instance, based on all of the evidence provided and all of the circumstances of the case, an inference can be drawn in favour of the applicant that his osteoarthritic condition is related to the knee injury received as a result of falling from the Bren Gun carrier.
15. Whether the inference(s) originally drawn will be displaced by the contradictory evidence is a matter that can only be determined by the “credibility” and “weight” attached to the contradictory evidence.
16. The drawing of “reasonable inferences” will often be necessary in those situations where the claimant has established that certain documentation that would substantiate the claim has been lost or destroyed, or was

not created due to war time conditions - e.g. during periods of detention as a prisoner of war.

17. It is important that the adjudicator distinguishes between drawing favourable inferences and reaching unfounded conclusions that are based purely on the absence of evidence that contradicts the claim being made. It is inappropriate to make presumptions in the absence of evidence that the claimant could be reasonably expected to produce.
18. Favourable inferences should be drawn in those situations where the applicant has fulfilled the requirement of providing such sufficient other reliable evidence that the most reasonable conclusion that can be reached by the adjudicator is that which the applicant is trying to establish.

Credible and Uncontradicted Evidence

19. The Acts compel the adjudicator to accept evidence that, in addition to being relevant, is both credible and uncontradicted. In effect, the adjudicator must assess the persuasiveness of all of the relevant evidence that is being considered in the determination of the claim.
20. Credible evidence refers to evidence that is believable. Evidence is not believable where other proven facts do not support the accuracy of the evidence, or where a reasonable person would conclude that the information provided by that evidence is impossible or untrue.
21. Some factors that an adjudicator might take into consideration when assessing the credibility of evidence, include:
    a. Overall accuracy of the evidence;
    b. Its consistency with other reliable evidence;
    c. The date of the evidence;
    d. Qualifications/expertise of the author of the evidence;
    e. Whether the author of the evidence has an interest in the outcome of the claim (goes to “weight");
    f. Whether the information provided in the evidence can be tested objectively against other facts known to be true;
    g. Whether the information contained in the evidence makes sense;
    h. In applicable situations, whether the documentary evidence fits with the physical evidence;
    i. Whether the time-lines add up; and
    j. Any prior inconsistent statements.
22. It is the evidence that must be credible. The credibility of the person submitting the evidence is not an issue. Even a generally non-credible person can produce or submit evidence that is credible.
23. “Uncontradicted evidence” means that there is no other evidence refuting the evidence presented. For example, there may be claims submitted where the only evidence is the applicant’s statement and a current medical diagnosis for the claimed disability.
24. The fact that there is no other evidence found in the service documents or nothing reported post-discharge to support or contradict the claim that the applicant is making does not mean that a pension (or benefit) must automatically be awarded to the applicant. Uncontradicted evidence must also be reviewed to see if it is relevant and credible in the circumstances. If the uncontradicted evidence is found to be credible but of no relevance to the issue being resolved, it should not be taken into consideration. If it is found to be relevant but not credible, it has minimal or no weight. Reasons for this lack of credibility must be given in the decision.
25. Uncontradicted medical opinions received as part of a disability pension claim must be reviewed for their credibility. A medical opinion, expressed in his/her field by a recognized specialist who has treated or examined the applicant, should be accepted unless it is obviously or admittedly based only on the history provided by the applicant, or is entirely speculative. On the other hand, individual opinion expressed by even a well qualified specialist is not generally accepted if it is contrary to the medical consensus of the recognized specialists in that field. Some additional factors that may be kept in mind when determining the

credibility and, thus admissibility, of medical opinions are:

a. Whether the medical report provides an accurate and complete "anamnesis" (i.e. a medical or psychiatric patient history);
b. Whether the opinion is based on medical history or the patient's account of past events;
c. Whether the opinions contained therein conflict with the Entitlement Eligibility Guidelines, the Medical Guidelines (for those conditions where no Entitlement Eligibility Guidelines exist), or the Table of Disabilities;
d. Whether the medical evidence is about the applicant or a 3rd party; and
e. Whether it is a diagnostic medical opinion or only a report detailing the applicant's current treatment regime.

Sexual Trauma

26. This section of the policy clarifies Veterans Affairs Canada's approach to adjudicating applications for disability benefits that involve claims of Sexual Trauma. Sexual Trauma includes incidents of sexual assault and/or sexual harassment. While additional elements will be needed to establish entitlement (e.g., the relationship to service), VAC will accept that an incident(s) of Sexual Trauma occurred as described in an applicant's credible statement, provided that it is not contradicted by other evidence. For further clarity:
    a. The occurrence of an incident(s) of Sexual Trauma may be established solely on the basis of an applicant's credible statement;
    b. The credibility of an applicant's statement will not be adversely impacted by the applicant's decision not to report the incident(s) of Sexual Trauma prior to applying for disability benefits; and
    c. An applicant will not be required to provide corroborating evidence to substantiate that the Sexual Trauma occurred as described in the applicant's statement, provided that it is not contradicted by other available evidence (for example, information contained in the applicant's service records).
27. For additional information on adjudicating applications for disability benefits that involve claims of Sexual Trauma, see the Compensation Principle Policy and the Insurance Principle Policy.

Resolving Doubt in Favour of an Applicant

28. The requirement to "resolve doubt in favour of an applicant" is to be applied throughout the decision-making process in the assessment or "weighing" of the evidence. This requirement is particularly important in those situations where the facts of a case are closely balanced and the adjudicator is having difficulty in deciding whether entitlement should be granted. It should never be used as a substitute for lack of evidence.
29. In general, the "weight" of an individual piece of evidence refers to the importance that is to be attached to it. When an adjudicator "weighs" evidence, he/she considers its relevance, its reliability (credibility) and the strength of the inferences that it gives rise to.
30. If - after weighing all of the evidence that is relevant and credible (including questionable and/or uncontradicted evidence) and having drawn all reasonable and favourable inferences that can be drawn from that evidence - the adjudicator is left with a clear "yes" or "no" answer as to whether the applicant's case has been established, a decision must be rendered in accordance with the facts as determined.
31. In those situations where the applicant has not clearly established his/her case but has provided sufficient credible evidence in support of the claim to create at least a reasonable doubt in the mind of the adjudicator as to the applicant's entitlement to the claim, that doubt must be resolved in favour of the applicant.

References

Pension Act, subsection 5(3)

Veterans Well-being Act, section 43

Entitlement Eligibility Guidelines

Medical Guidelines

Table of Disabilities

Disability Benefits in Respect of Wartime and Special Duty Service – The Insurance Principle

Disability Benefits in Respect of Peacetime Military Service - The Compensation Principle