

Veterans Review and Appeal Board

Representative: Angela Lin, BPA
Decision number: 100005425283
Decision type: Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Hearing Date: 18 September 2024

The Entitlement Appeal Panel decides:

CANCER OF THE LEFT TESTICLE

Entitlement granted in the amount of five-fifths for service in a Special Duty Service (Afghanistan and surrounding area) with effect from 1 September 2021.

Section 45, *Veterans Well-being Act*

Compensation is payable under subsection 51(1) of the Act, on the later of the first day of the month on which the application for compensation was made, or on the first day of the month that is three years before the date of this decision.

No entitlement granted for service in the Canadian Armed Forces (Regular Force).

Section 45, *Veterans Well-being Act*

Panel Members: J. A. Bouchard
Wilfred C. Jephson
Christopher J. McNeil

Christopher J. McNeil

DECISION

The Panel grants pain and suffering compensation in the amount of five-fifths for Canada of the Left Testicle under Section 45 of the *Veterans Well-being Act*, Special

Duty Area (SDA) (Afghanistan and surrounding area) service, effective 1 September 2021.¹

OVERVIEW

This matter has proceeded by written submission².

On 27 June 2019, the Veteran applied for entitlement for Cancer of the Left Testicle on the basis, in part, that while serving in Afghanistan, he was exposed to hazardous chemicals such as black mold, exhaust fumes from diesel equipment and generators, smoke from burn pits, and polycyclic aromatic hydrocarbons (PAHs). The Veteran was denied entitlement for Cancer of the Left Testicle in a Veterans Affairs Canada Disability Benefit Decision dated 22 April 2022. VAC denied entitlement on the basis that the evidence did not indicate that any service-related factors caused, contributed to, or aggravated the condition of Cancer of the Left Testicle.

In the 22 August 2023 Veterans Review and Appeal Board (VRAB) Entitlement Review decision, the Veteran also denied entitlement. The Review Panel concluded that the evidence did not include a credible medical opinion supporting entitlement. The Veteran now seeks an Appeal of this decision.

ANALYSIS

In determining whether entitlement will be granted, the Panel must ask three questions for which there must be an affirmative answer to all three:

1. Is there a valid, existing diagnosis of the claimed condition?
2. Does the claimed condition constitute a permanent disability?
3. Was the claimed condition caused, aggravated or contributed to by military service?

The diagnosis of the Veteran's condition and that it constitutes a permanent disability is not in dispute. The remaining question to be determined is whether a service relationship can be established for the claimed condition.

The Veteran asserts that he was exposed to harmful chemicals while serving in Afghanistan and surrounding area. Chemical exposure cases of this nature, require that three conditions be satisfied, namely:

- That the Veteran was exposed to the substance;
- That the substance entered his body in a sufficient quantity to be relevant in the causation of the disease; and

- That the substance was of a type and intensity that it caused the specific disease for which a Veteran is seeking entitlement.

In essence, the evidence must establish chemical exposure, the exposure must have been of a sufficiently large dose or amount to meaningfully increase the risk of a harmful effect, and the health effect in question must be scientifically associated with exposure to the substance. In this regard, the Veteran benefits from the presumption contained within paragraph 50(g) of the *Veterans Well-Being Regulations* which states:

50 For the purposes of subsection 45(1) of the Act, a member or veteran is presumed, in the absence of evidence to the contrary, to have established that an injury or disease is a service-related injury or disease, or a non-service-related injury or disease that was aggravated by service, if it is demonstrated that the injury or disease or its aggravation was incurred in the course of

...

(g) the performance by the member or veteran of any duties that exposed the member or veteran to an environmental hazard that might reasonably have caused the injury or disease or its aggravation.

This provision was considered in a previous decision of the Board. In VRAB decision 100004103277 (Re), 2020 CanLII 109423 (CA VRAB), <https://canlii.ca/t/jcwgp>. It states in part:

The Review Panel concurs that subsection 50(g) creates a rebuttable presumption which facilitates claims related to hazardous materials or environments. However, the presumption only crystallizes once it is shown that duties exposed the member or veteran to an environmental hazard that might reasonably have caused the claimed condition. The Review Panel finds that mere presence is not sufficient to trigger the presumption; nevertheless, the Panel is mindful that the provisions of subsection 50(g) of the VWBR must be given meaning. The Advocate invested considerable effort in making submissions regarding the interpretation of the latter portion of the provision and what is meant by, the Review Panel is mindful that the test of “might reasonably have caused” does not require that the Applicant meet the same onus of proof required for claims that are not subject to this presumption. However, the Applicant must establish a basis for triggering the presumption. The first part of the test is determining if the Applicant was exposed to Agent Orange, Purple or White, or other hazardous herbicides.

Turning to the case in hand, the Veteran’s claim is based on daily exposure to chemicals from burn pits during two of his tours to SDA (Afghanistan), and also to black

mold in his second tour in that SDA. The focus on Appeal was on the exposure to burn pits while serving in Afghanistan.

Exposure

It is not disputed that the Veteran served in SDA Afghanistan and surrounding area including tours in 2007/08 and 2009/10. At the Review hearing, the Veteran provided the following statement in part:

I am writing to provide an impact statement regarding my diagnosis case of testicular cancer in 2019 which I strongly believe is because of my service during multiple tours of duty in Afghanistan. My name is (*the Veteran*), and I am a Canadian veteran who served in the Provincial Reconstruction Team (PRT) at Camp [...], Kandahar City, during my first tour, and at Kandahar Airfield during my second tour.

During my first tour with the Provincial Reconstruction Team at Camp [...], I was consistently exposed to various hazardous conditions that could potentially have contributed to health issues, including testicular cancer. This exposure included inhaling smoke from burning garbage, explosions, and damaged structures such as buildings and vehicles including unknown substances and chemicals. The exposure to these harmful substances occurred daily for an extended period of six months....

On my second tour at Kandahar Airfield, I was also consistently exposed to the same materials daily as noted above. However, I encountered another potentially hazardous environment. I was exposed to black mold for approximately three months of my tour before I was relocated. This mold was present in the living quarters where I slept and resided during the duration of my stay. The prolonged exposure to black mold, a known environmental risk factor for various health conditions, including potential carcinogenic effects, raises my concerns about its possible contribution to an increased risk of my testicular cancer.

The Veteran's testimony at the Review hearing was recorded, in part, as follows:

- at Camp [...], the smoke was really noticeable in the evenings when it would cool off. The smoke would stay low and would roll over the camp;
- he saw burn pits which happened daily and there was one that was fairly close by. He does not know what was being burned. He breathed in the smoke daily and had no mask;

- he had trouble breathing when he was in Afghanistan, but nothing where he had to go to the Medical Inspection Room or try to get out of his duties;

...

- at Camp [...], there would be improvised explosive device strikes and until it was done. The smoke would roll over the camp. There was smoke over the camp every day he was there.

In 2022, in the PACT Act³, the United States established a presumption of exposure to hazardous substances and a presumption of a medical nexus for specified conditions. It established that if you served in the Vietnam War, the Gulf War, Iraq, Afghanistan, or any other combat zone after 9/11 it is presumed that you would have been exposed to specific toxins and hazards including burn pits, sand and dust, particulates, oil well or sulfur fires, chemicals, radiation, warfare agents, depleted uranium, herbicides, and other occupational hazards. The US Department of Veterans Affairs describes burn pits as follows⁴:

Open Burn Pits – What Was Burned

Waste products commonly disposed of in open burn pits include:

- Chemicals, paint, medical and human waste
- Metal and aluminum cans
- Munitions and unexploded ordnance
- Petroleum and lubricant products
- Plastics, rubber, wood, and food waste

Exposure to smoke created by burning these materials may cause irritation and burning of eyes or throat, coughing, breathing difficulties, skin itching or rashes. Many of these conditions are temporary and resolve on their own when the exposure ends. However, if you were closer to burn pit smoke or were exposed for longer periods of time, you may be at greater risk for longer-term health conditions.

The Veteran served approximately 16 months in Afghanistan between November 2007 and June 2010, and he indicated that he was in close proximity to burn pits which burned daily, and he breathed in the smoke daily. He had trouble breathing when he was in Afghanistan but did not report it and simply carried on. If the Veteran had served in the US military, he would have met the presumption of hazardous exposure contained in the *PACT Act*. While this is not determinative in the Canadian context, it is reasonable to assume that, while serving in Afghanistan, Canadian soldiers would have also been exposed to toxic smoke associated to burn pits.

The Panel is satisfied, given the evidence above, that a reasonable inference can be drawn that the Veteran would have been similarly exposed to the toxic smoke of burn pits while serving in Afghanistan consistent with exposure to an environmental hazard contemplated by paragraph 50(g) of the *Veterans Well-Being Regulations*.

Might reasonably have caused the claimed condition

As noted above, the *PACT Act* includes a list of illnesses/medical conditions in which it assumes an association with exposure to burn pits for disability benefit purposes. Reproductive cancer of any type is included in the list.

In support of entitlement, the Veteran submitted a 21 April 2024 medical report from Dr. Mandy Liedeman. It states in part:

I am writing in response to the disability application of the gentleman above. I was quite surprised to see the Department of Veterans Affairs, Canada, rejected his claim concerning the link between his testicular cancer and his tours specifically at Camp [...], Kandahar, Afghanistan, 2007 and 2009. It is now well known that this base was one of the locations where large military burn pits were located. I have a special interest in the link of toxic exposure to air and soil near burn pits and the presence of secondary illness, including testicular cancer.

I made a thorough review of (the Veteran's) medical file and all other documentation related to his claim and denial. I have also read the letter and evidence submitted to you from Nurse Practitioner— I agree with Lisa Chapman (NP) about the causal effect of burn pit chemicals and (the Veteran's) testicular cancer. Just to review with you, military burn pits have been used for years as a method of rapidly disposing of solid waste in an open pit. This includes but is not limited to, garbage, plastics, wood, metal, paints, solvents, munitions, medical and human waste and e-waste. The resulting chemicals include dioxins, polycyclic aromatic hydrocarbons, volatile organic compounds, carbon monoxide, hexachlorobenzene, and ash.

This is what was circulating in the air continuously at many military bases in Afghanistan. As (the Veteran) describes there was visible smoke in the air continuously. In addition, two of his fellow soldiers, who were exposed to the same environment have developed testicular cancer, do you think this is a coincidence?

I want to address the statement that (the Veteran) did not complain of symptoms and did not seek medical help concerning his testicular health during the time he was stationed in Afghanistan. One would not expect any symptoms during his early exposure to the carcinogens. It would take

time for the malignant growth to develop, thus one would only become symptomatic when the cancer is of a significant size. It is quite reasonable for this process to take 10 years.

Furthermore, the Occupational Safety and Health Administration (USA) has set a limit of 0.2 mg of PAH's per cubic meter of air (0.2mg/m³). As expected, there were no air quality regulations in Afghanistan during the time period (the Veteran) was deployed to Kandahar.

In fact, in the U.S., the VA Will now process disability compensation since the PACT Act:

In August of 2022, Congress passed the PACT Act, a new law that expanded VA health care and benefits for veterans exposed to burn pits and other toxic substances. This included an expansion of the types of cancers that are now presumed to be service-connected disabilities. These cancers include:

- **Brain cancer, including glioblastoma**
- **Gastrointestinal cancer of any type**
- **Head or neck cancer of any type**
- **Kidney cancer**
- **Lymphatic cancer of any type**
- **Lymphoma of any type**
- **Melanoma**
- **Pancreatic cancer**
- **Reproductive cancer of any type * such as testicular cancer**
- **Respiratory (breathing-related) cancer of any type**

There are many studies that have demonstrated the link between these chemicals and testicular cancer.

The Appeal Panel finds the Dr. Liedeman's opinion to be persuasive, in particular, given the US Military Treatment of the claimed condition in similar circumstances. Dr. Liedeman has carefully reviewed the medical history, the Veteran's exposure to burn pits while in Afghanistan and available medical literature. She concluded that there was a link between burn pit chemicals and testicular cancer. Accordingly, the Appeal Panel will resolve any doubt in this regard in the Veteran's favour.

CONCLUSION

The evidence demonstrates that the Veteran was exposed to an environmental hazard - burn pit chemicals - while serving in Afghanistan. The Appeal Panel accepts that exposure to burn pit smoke is associated with the development of the claimed condition

of Cancer of the Left Testicle. This evidence has not been contradicted by evidence to the contrary. In the circumstances, the presumption in paragraph 50(g) of the *Veterans Well-Being Regulations* has been met and entitlement should follow for SDA Afghanistan and surrounding area service, effective 1 September 2021.

The Panel finds that the Veteran's claimed condition of Cancer of the Left Testicle did not arise out of service in the Regular Force, under Section 45 of the *Veterans Well-being Act*.

Applicable Statutes:

Veterans Well-being Act, [S.C. 2005, c.21.]

Section 45

Section 51

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

Section 3

Section 25

Section 39

Exhibits:

EA-Ex-A1: Dr. Liedeman's medical opinion dated 21 April 2024 (three pages).

EA-Ex-A2: Veteran's statement (undated, uploaded on 11 August 2023) (two pages).

¹ Pursuant to subsection 51(1) of the *Veterans Well-being Act*, which allows for retroactivity from the later of the first day of the month in which the application is made or the day that is three years before the first day of the month in which compensation is granted.

² Pursuant to subsection 28(1) of the *Veterans Review and Appeal Board Act*.

³ H.R.3967 - Honoring our PACT Act of 2022 - 117th Congress (2021-2022)

⁴ <https://www.publichealth.va.gov/exposures/burnpits/index.asp>