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Report of the Veterans Ombudsman
December 2011

Veterans' Right to Know Reasons for Decisions A Matter of Procedural Fairness

Examination of the adequacy of information in decision letters from Veterans Affairs Canada

Canada

OFFICE OF THE VETERANS OMBUDSMAN

P.O. Box 18, Station B

Ottawa, Ontario K1P 6C3

Calls within Canada (Toll-free): 1-877-330-4343

Calls from outside Canada (Collect): 1-902-626-2919

Email: info@ombudsman-veterans.gc.ca

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December 20, 2011

The Honourable Steven Blaney, P.C., M.P.
Minister of Veterans Affairs
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister:

I am pleased to submit to you the report *Veterans' Right to Know Reasons for Decisions: A Matter of Procedural Fairness*. The report contains the results of our examination of letters issued by Veterans Affairs Canada to inform applicants of its decisions pertaining to their application for disability pensions or disability awards.

Providing reasons in decision letters is fundamental to procedural fairness and is a statutory requirement under both the *Pension Act* and the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

Veterans have a right to know why and how decisions that affect them are made by the Department. Our review uncovered a pattern of letters that provided information to applicants about decisions made, the legislation, policies or evidence considered, without providing an adequate explanation of how the decisions were made.

The failure to provide reasons for decisions, a denial of procedural fairness first brought to the Department's attention by the Auditor General of Canada in 1998, is at odds with the commitment to fairness and respect for Veterans guaranteed by the *Veterans Bill of Rights*.

The resulting lack of procedural fairness to Veterans is of great concern to me. I look forward to discussing my recommendations to remedy this situation at your earliest convenience.

Yours sincerely,

Guy Parent
Veterans Ombudsman

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THE MANDATE OF THE VETERANS OMBUDSMAN

The Office of the Veterans Ombudsman, created by Order in Council,¹ works to ensure that Veterans, serving members of the Canadian Forces and the Royal Canadian Mounted Police, and other clients of Veterans Affairs Canada are treated respectfully, in accordance with the *Veterans Bill of Rights*, and receive the services and benefits that they require in a fair, timely and efficient manner.

The Office addresses complaints, emerging and systemic issues related to programs and services provided or administered by the Department of Veterans Affairs, as well as systemic issues related to the Veterans Review and Appeal Board.

The Veterans Ombudsman is an independent and impartial officer who is committed to ensuring that Veterans and other clients of Veterans Affairs Canada are treated fairly. The Ombudsman measures fairness in terms of *adequacy* (Are the right programs and services in place to meet the needs?), *sufficiency* (Are the right programs and services sufficiently resourced?), and *accessibility* (Are eligibility criteria creating unfair barriers, and can the benefits and services provided by Veterans Affairs Canada be accessed quickly and easily?).

VETERANS BILL OF RIGHTS

The *Veterans Bill of Rights* applies to all clients of Veterans Affairs.

You have the right to:

- Be treated with respect, dignity, fairness and courtesy.
- Take part in discussions that involve you and your family.
- Have someone with you for support when you deal with Veterans Affairs.
- Receive clear, easy-to-understand information about programs and services, in English or French, as set out in the *Official Languages Act*.
- Have your privacy protected as set out in the *Privacy Act*.
- Receive benefits and services as set out in published service standards and to know your appeal rights.
- You have the right to make a complaint and have the matter looked into if you feel that any of your rights have not been upheld.

¹ Order in Council P.C. 2007-530, April 3, 2007.

REPORT SUMMARY

The report, *Veterans' Right to Know Reasons for Decisions: A Matter of Procedural Fairness*, contains the results of the Veterans Ombudsman's examination of letters issued by Veterans Affairs Canada to inform applicants of its decisions pertaining to their application for disability pensions or disability awards.

The purpose of the review was to determine whether the Department has adequate policies and procedures in place to ensure procedural fairness by providing adequate reasons for assessment decisions. A set of guidelines applicable to procedural fairness in public sector decision-making as it relates to providing reasons for decisions was used to assess the adequacy of information contained in the Department's letters informing applicants of its assessment decisions. A random sample of 213 decision letters sent out between 2001 and 2010 were examined as part of this review.

Veterans, in common with all Canadians, have a right to procedural fairness from public decision-makers. The obligation to provide adequate reasons for decisions that affect them has been well established in administrative law in Canada and abroad. It is even more important to fulfill that obligation where it is an explicit legal requirement, as is the case with assessment decisions made by Veterans Affairs Canada under both the *Pension Act* and the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

Veterans have a right to know why and how decisions that affect them are made by the Department. The review uncovered a pattern of letters that provided information to applicants about decisions made, the legislation, policies or evidence considered, without providing an adequate explanation of how the decisions were made:

- 15 percent of letters reviewed simply stated the assessment result.
- 65 percent of letters provided minimal explanation by informing applicants of the assessment result and providing references to governing legislation, assessment tools and supporting documents.
- 20 percent of letters provided detailed information on legislation, assessment tools and supporting documents that would likely enable the recipients of these letters to infer to some extent how the decision was arrived at.

In applying the guidelines established for this review, the Ombudsman found that all the letters examined failed a test of adequacy in the reasons given for the decisions. *Providing information to support a decision* is fundamentally different to *providing a reason for a decision*. This difference seems not to be understood by the Department as all letters examined did not apply any analysis to the information they contained to clearly explain the decisions. It is equally clear from the review, that corrective measures are needed to improve the process used by the Department to generate decision letters.

The failure to provide reasons for decisions, a denial of procedural fairness first brought to the Department's attention by the Auditor General of Canada in 1998, is at odds with the commitment to fairness and respect for Veterans guaranteed by the *Veterans Bill of Rights*.

The resulting lack of procedural fairness to Veterans is of great concern to the Veterans Ombudsman:

Veterans have a right to know why and how decisions are made. The letters concern monetary entitlements that have a direct impact on Veterans' quality of life. Veterans need assurances that their applications for disability benefits have been fully and fairly considered. A detailed decision letter is the essential source of that information.

It troubles me to think that many Veterans may be wrongly assessed and do not pursue the matter further because the letter did not reveal where the Department's decision might have been flawed. It is equally unacceptable for Veterans to exercise their appeal rights without having been provided with a clear explanation of the decisions.

VETERANS OMBUDSMAN'S RECOMMENDATIONS

For Veterans Affairs Canada to improve the mechanisms by which disability benefit assessment letters are generated to make sure essential information is captured for inclusion in letters. This information should be presented in a form that is understandable and is in relation to the decision made. An explanation of how this information has been used to arrive at the decision is required. The Department should also ensure that a notice of the right to appeal is contained in every disability benefit decision letter.

For reasons for decisions to be written in plain language. Any legal, medical, or administrative terms used should be explained. A separate brochure or other companion piece would serve this purpose and could be included with decision letters.

For procedure manuals and training modules to be examined to ensure that adjudicators are aware of the minimum information to be provided in letters and what is needed to substantiate the reasons for their decisions.

For quality assurance procedures to be put in place to ensure decision letters fully comply with standards for adequacy of reasons for decisions.

DISABILITY BENEFITS FOR VETERANS

Veterans who suffer a medical disability related to their service may qualify for disability benefits from Veterans Affairs Canada. The majority of these disability benefits are provided under one of two legislative authorities.² The first is the *Pension Act*,³ which prescribes long term monthly pension benefits.⁴ The second is the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*,⁵ also referred to as the New Veterans Charter, which provides lump sum disability awards. This discussion concerns disability pensions and disability awards under these two legislative authorities. For ease of reference, both pensions and awards are referred to as disability benefits.

THE APPLICATION PROCESS

Veterans who believe they qualify for disability benefits obtain them by submitting an application to Veterans Affairs Canada with supporting service and medical information. Several aspects of the application process are relevant here.

- First, Veterans Affairs Canada typically stipulates that if supporting service and/or medical information is held in government repositories, it is the Department that will recover the information and not the applicant. Depending on whether the member is still-serving or released and for how long, these files are normally recovered from the Canadian Forces or Library and Archives Canada and are delivered directly to the Department. The applicant is not provided a copy of these documents for review.
- Second, if information from service records does not establish the diagnosis of the claimed condition and evidence of service relationship, applicants must provide additional information to support their claim.
- Third, applicants are required to complete questionnaires relating to the effect of their condition on their physical and mental well-being. The questions in these questionnaires require a subjective assessment on the part of applicants about the impact of their condition on different aspects of their daily life.

² Exceptions include disability benefits for the RCMP that are administered by Veterans Affairs Canada, but provided under separate legislative authority.

³ *Pension Act* (R.S.C., 1985, c. P-6).

⁴ Under the *Pension Act*, a one-time lump sum payment is awarded if the rate of pension payable is between 1% and 4%.

⁵ *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (S.C. 2005, c. 21).

In summary, information supporting an application for disability benefits will be delivered to the Department from multiple sources, may be extensive, and may form a complex chronology of events. Because of these factors, applicants may not be aware of all the information that the Department might examine when it processes their claim. Applicants will probably be aware of more recent information that they supplied but they may not know what is in older files obtained by Veterans Affairs Canada from other sources. As well, they may not be aware of, or be able to interpret information supplied by medical practitioners.

THE ADJUDICATION PROCESS

Once all information related to the application is received, Veterans Affairs Canada processes applications for disability benefits in two stages. The first stage determines entitlement, by establishing that there is a relationship between a medical condition and the Veteran's service. If the Department finds that no such relationship exists, the application is denied on those grounds and the application process is terminated.⁶

If the Department finds that such a relationship does exist, it will determine the extent to which the disability was caused, or aggravated by the applicant's service. This is expressed as partial or full entitlement on a fifths scale, from 1/5 to 5/5.

Once entitlement is established, adjudication proceeds to the second, or assessment stage. This process measures the impact of the disability on the Veteran's overall physical and/or mental function and quality of life. This is expressed on a percentage scale, from 0 to 100 percent.⁷

Finally, the rate of disability benefit payable is obtained by multiplying the entitlement figure, expressed in fifths, by the assessment figure, expressed as a percent.⁷

The entitlement stage is a relatively straightforward exercise that can be understood more easily than the assessment stage, as it concerns only the relationship between service and the disability that underlies the claim for a disability benefit. While the adjudication of what level of fifths applies does require some analysis, this follows well established practice based on clear guidelines.

The assessment stage, by contrast, relies on complex analytic processes and mechanisms. A key part of this processing is that in evaluating the percentage amounts, the Department uses a schedule known as the Table of Disabilities,⁸ which is based on a concept of medical impairment based on a per-condition methodology. The Table of Disabilities also interrelates with other tables pertaining to other aspects of disability such as quality of life. The complexity of these tables and the specialized knowledge underlying them requires a trained administrator to both interpret and use.

⁶ Subject to appeal rights. In case of appeal at this stage, the entitlement decision is the one challenged.

⁷ The Department's Web site amply explains the complexities of this procedure, identically used for disability awards or disability pensions.

⁸ The Table of Disabilities was developed to comply with subsection 35(2) of the *Pension Act* and subsection 51(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

Finally, the assessment stage may be performed again if the applicant submits new information after first assessment (for example, updated medical information confirming a worsening of a condition), or if an appeal of the original assessment causes a re-examination to be performed. For the purposes of this review, assessment means both the assessment and reassessment processes as these are identical.

NOTIFICATION OF DECISION

Once both stages of the application process have been completed, Veterans Affairs Canada issues a decision letter to applicants informing them of the disability benefit, if any, for which they qualify. The decision letter is a regulatory requirement under the two Acts under discussion here.

Section 5 of the *Award Regulations*⁹, issued pursuant to the *Pension Act*, states:

Every decision of the Minister with respect to an award under the Act shall contain reasons for that decision.

And;

Section 64 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*¹⁰ states:

A decision of the Minister with respect to an award under Part 3 of the Act shall contain the reasons for the decision.

THE APPEAL PROCESS

There are a number of appeal levels available if applicants are not satisfied with their disability benefit decisions. Section 82 of the *Pension Act*, Section 84 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* and Section 68 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations* allow Veterans Affairs Canada to confirm, amend or rescind a departmental decision if an error with respect to any finding of fact or interpretation of any law has occurred or, on application, if new evidence is presented. In these cases, applicants may request a review, known as a Departmental Review, to examine such evidence as part of a formal review process.

In addition, the Veterans Review and Appeal Board provides an independent appeal process if applicants are not satisfied with a disability benefit decision made by the Department. The Board provides two levels of redress: a Review Hearing and a subsequent Appeal Hearing. At both levels, applicants can bring forward new evidence, be represented at no cost and present arguments in support of their applications. The Review Hearing is an informal session that provides applicants and their families with their first and only opportunity to

⁹ *Award Regulations* (SOR/96-66).

¹⁰ *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations* (SOR/2006-50).

appear in person and testify about the facts of their case. If applicants are not satisfied with the Review decision, they can request an Appeal Hearing. No oral testimony is heard but it is an additional opportunity for the representatives to present documented evidence and legal arguments on behalf of their clients.

Where a Veteran has completed both Board review and appeal processes,¹¹ he or she may then apply to the Federal Court (formerly the Federal Court of Canada Trial Division) for a judicial review of the case. If the Court determines that the Board has made an error of law or an unreasonable error of fact, the Court can set aside the decision and order the Board to hold a new hearing to reconsider the case. Finally, if the Veteran is not satisfied with the Court's review hearing decision, he or she may apply to the Federal Court of Appeal to overturn the decision of the Federal Court. Ultimately, the Veteran may seek leave to appeal to the Supreme Court of Canada if dissatisfied with a decision of the Federal Court of Appeal.

THE IMPORTANCE OF THE DECISION LETTER

Veterans applying for disability benefits under the two legislative authorities cited earlier have a statutory right to have reasons given for disability benefit decisions. A relevant question is what reasons should Veterans be given in discharging these statutory rights? The best way to open this discussion is to examine what information Veterans would need and why they would need it.

The complexity of the adjudication process for disability benefits and methodology used means that there can be no intuitive understanding on the part of the Veteran as to how his or her application was processed. As noted above, Veterans will first of all not know what files were reviewed by Veterans Affairs Canada, and second, will almost certainly not be familiar with the use of such tools as the Table of Disabilities. Explaining what evidence was considered and how such tools were used to arrive at a decision is vital if Veterans are to understand decisions and how they were made.

This understanding is important not only to satisfy a legislative requirement, but even more important if applicants are dissatisfied with the Department's decisions and choose to challenge them by exercising their appeal rights. The appeal processes available in case of objection are formal, time-consuming, inconvenient, often intimidating to Veterans, and may be very costly. Before considering whether an appeal is possible or might be successful, claimants need to know the basis upon which the disability benefit decision was made. Knowing the reasons for decisions is critical to making an informed decision about proceeding to the appeal level. A detailed decision letter is the essential source of that information.

¹¹ Another option is an application for reconsideration based on an error in fact or law, or new evidence, described in Section 32 of the *Veterans Review and Appeal Board Act* (S.C. 1995, c. 18)

Since the Ombudsman's Office began receiving complaints in 2008, many of them have concerned disability benefit decisions from Veterans Affairs Canada. The majority of these have concerned the assessment stage of the adjudication process. As a first step in determining how best to help these Veterans, the Office reviewed the decision letters they received from the Department.¹² In the course of doing so, we noticed that in many cases the reasons given for decisions were vague, unclear or not understandable. In some cases, reasons were absent altogether. This made helping Veterans understand decisions difficult or impossible.

Giving reasons for decisions is fundamental to procedural fairness and, as noted earlier, it is a statutory requirement under both the *Pension Act* and the New Veterans Charter. The Ombudsman is committed to upholding Veterans' rights and to their fair treatment. The absence of reasons, or inadequately explained reasons in disability benefit decision letters undermines Veterans' rights and is not fair treatment.

The Ombudsman is not the first to recognize this problem and to recommend to Veterans Affairs Canada that it be addressed. As far back as 1998, the Auditor General of Canada reported:¹³

We noted that the Department does not have a written rationale for the level of assessment determined for individual claims, such as the relevant information that was reviewed, the key factors analyzed or the degree of consideration given the various factors in rendering an assessment decision. Such documentation would facilitate review and would be useful in determining trends in decisions overturned on review and appeal. Decisions rendered by Veterans Affairs Canada are communicated to applicants in decision letters. These letters do not provide any explanation for the assessment of the level of disability (Section 23.61).

The Department should document the reasons for assessment decisions and provide these reasons to applicants (Section 23.63).

The Department's response to this audit indicated that new procedures, including reliance on a Table of Disabilities, should resolve the failure identified.¹⁴ Yet, in a 2004–2005 departmental

¹² These decisions were from first assessments and reassessments ordered after successful Veterans Review and Appeal Board hearings.

¹³ 1998 December Report of the Auditor General of Canada.

¹⁴ op. cit., the response follows section 23.63 of the Auditor General's report.

evaluation of the disability pension program, the same problems were again identified. Specifically, the report noted the following deficiencies:¹⁵

- *Overly-complex wording in decision letters*
- *Lack of reason(s) for decision poorly articulated or missing from decision*
- *No evidence of quality control related to readability, grammar, and/or accuracy*
- *Quoting legislation (in the decision letter) without explanation*
- *Paragraph referring to the availability of BPA (Bureau of Pensions Advocates) missing from decision letters*
- *Right to appeal paragraph missing from decision letters*
- *An effective date of decision missing from decision letters*

Despite mention in this same section of the 2004–2005 evaluation report that the Department intended to correct these deficiencies, reference to the same problems was made as recently as August 2010 in a later departmental evaluation of the disability pension and award programs.¹⁶ The 2010 evaluation team noted:

... according to many pension staff, once a decision is rendered, clients do not seem to understand their decision letters as (Veterans Affairs Canada) frequently receives calls from clients seeking clarification. One interviewee indicated that the decision letters, for both pensions and awards, can be difficult even for staff to understand. This is especially problematic given the importance of information that decision letters contain, such as entitlement to treatment benefits and the availability of reimbursement of costs related to financial counseling [sic].¹⁷

These findings, consistent from 1998 to 2010, correspond to what the Ombudsman has observed in addressing complaints from Veterans.

The Ombudsman notified the Department in October 2010 of his intention to investigate broad issues of procedural fairness related to the adjudication process. As the adequacy of reasons for decisions is one cornerstone of procedural fairness, which appeared to be an issue with the Department, the Ombudsman decided to narrow the scope of the review to disability benefit decision letters.

¹⁵ Veterans Affairs Canada, Volume II of the Disability Pension Program Evaluation, section 2.1.1.

¹⁶ Veterans Affairs Canada, Evaluation of Disability Pensions and Awards, August 2010.

¹⁷ Ibid, section 4.4.1.

THE PURPOSE OF THE REVIEW

This report focuses on disability benefit decision letters issued by Veterans Affairs Canada as part of its statutory obligation to provide reasons for its decisions to applicants. Since many complaints received by the Ombudsman's Office concern the assessment stage of the disability benefit adjudication process, we restricted our enquiry to decision letters issued once this stage was complete.

The purpose of the review was to determine whether the Department has adequate policies, procedures, and practices in place to ensure procedural fairness by providing adequate reasons for assessment decisions. To provide a framework for this review, we used a set of guidelines applicable to procedural fairness in public sector decision-making as it relates to providing reasons for decisions. The Department's letters informing applicants of its assessment decisions were then evaluated against these guidelines.

METHODOLOGY

CASE REVIEW

Veterans Affairs Canada and the Ombudsman's Office agreed that a statistically valid sample would include clients who had gone through some, or all of the review or appeal levels within the Department and the Veterans Review and Appeal Board. This assured that the sample contained only clients who were dissatisfied with the Department's initial decision and had exercised their appeal rights. This allowed us to focus on decision letters that Veterans would have relied on to make a decision to appeal.

To manage the sample size, client files were narrowed to the top five medical conditions¹⁸ between 2001¹⁹ and 2010. This produced a subset of 18,697 client files. The Department proposed and the Ombudsman agreed that a statistically valid sample of this subset would be selected for the Ombudsman's review. This resulted in the random selection of 376 decision letters, calculated to have a 95 percent level of confidence.

The sample contained decision letters for both the entitlement as well as the assessment stages of adjudication. As we limited our review to assessment decisions, we eliminated 162 letters from the sample that concerned entitlement decisions only. Of the remaining 214 decision letters, one had been issued by the Veterans Review and Appeal Board. We excluded this letter as the scope of our review was decision letters issued by the Department. The remaining 213 decision letters were examined as part of this review.

¹⁸ The conditions were hearing loss, tinnitus, lumbar disc disease, internal derangement of the knee and post-traumatic stress disorder.

¹⁹ The date from which decision letters were stored in electronic format.

LITERATURE REVIEW

Our literature review included topics concerning:

- The common law and jurisprudence applicable to administrative decisions and decision-making in Canada
- Principles of procedural fairness
- Procedural fairness in public sector decision-making
- Best practices for administrative tribunals
- Reports published by Veterans Affairs Canada and other organizations

A partial list of the literature reviewed appears in the References section of this report.

PROCEDURAL FAIRNESS GUIDELINES

Based on our literature review, a set of guidelines for administrative decision-makers in giving reasons for their decisions was identified and used to assess the adequacy of decision letters provided by Veterans Affairs Canada.

THE OBLIGATION OF PUBLIC BODIES TO PROVIDE REASONS FOR DECISIONS

Procedural fairness generally incorporates the rules of natural justice, which include the right to be heard, the right to an impartial decision, and the right of persons to be informed of the reasons underlying decisions made by decision-makers on their behalf. As the issue at hand concerns reasons for decisions,²⁰ this discussion is limited to that element of procedural fairness.

In the case of applications for disability benefits under the *Pension Act* and the New Veterans Charter, there is an explicit, legislated obligation for the Minister to provide reasons for decisions. If no reasons are given, it is a straightforward matter to conclude that the decisions issued simply fail to comply with statutory requirements.

A more difficult question arises where a decision contains reasons in the form of information pertaining to the matter that was adjudicated but is not clear or cannot be easily interpreted. In these cases, a judgement needed to be made about whether the reasons provided met some test of adequacy. For guidance, we reviewed sources in jurisprudence and administrative law that examined the principle of adequacy of reasons for decisions.

²⁰ In this discussion, “reasons” is intended to mean formal, written explanations.

THE ADEQUACY OF REASONS FOR DECISIONS

Tests for the adequacy of reasons often rely on jurisprudence and turn on principles of law. The Supreme Court of Canada *Baker* case²¹ is widely considered to be a landmark case on the subject of procedural fairness in administrative law, including the principle of adequacy of reasons. In its 1999 decision in *Baker*, the Court found that:

Reasons ... allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given.

The *Baker* case involved a decision of a federal administrative tribunal – a quasi-judicial body – and the Court’s judgement concerned reasons for decisions in a judicial setting. Other work in the field of administrative law has also been done to provide similar guidance to statutory decision-makers. Statutory decision-makers apply laws and policies for governments and make decisions every day for individual cases, such as the disability benefit decisions under review. Giving good reasons for those decisions not only satisfies a legal requirement to do so, but also conveys other benefits such as better quality in decision-making, increased transparency and trust in the administrative process concerned, reduced oversight by review and appeal boards and Ombudsman Offices, and facilitating the exercise of any review and appeal rights.

PROCEDURAL FAIRNESS GUIDELINES FOR REASONS FOR DECISIONS

The circumstances in which reasons must be given at the administrative level vary widely. It is difficult, therefore, to come up with a precise formula for suitable reasons that will fit all public bodies. Nevertheless, jurisprudence and the experience of public decision-making bodies in Canada and abroad, have offered a set of general, easily understood principles for reasons for decisions that can be used by public administrators to develop standards and processes suitable to their own situation.

The British Columbia Ministry of the Attorney General has done excellent work in the field of reasons for decisions, and has published a discussion paper on the subject.²² The Ministry found that the following requirements ought to be met when considering a set of standards for adequate reasons for decisions:

- set out the decision-maker’s findings of fact
- set out the principal evidence on which the findings of fact are based
- address the major points in issue

²¹ *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

²² British Columbia Ministry of Attorney General, *Statutory Decision-makers and the Obligation to Give Reasons for Decisions, a Discussion Paper*, 2008.

- reflect the consideration of the main factors relevant to the decision
- set out the law, regulation or policy relied on to reach the decision
- set out the reasoning process followed by the decision-maker

Based on our literature review, we considered that these were good tests for adequacy of reasons in the decision letters that we examined. These standards were therefore used as benchmarks against which we assessed the Department's decision letters.

FINDINGS AND ANALYSIS

INVESTIGATION RESULTS

Based on the guidelines for the adequacy of reasons for decisions described above, the 213 decision letters from Veterans Affairs Canada that we examined were placed in one of three categories. A sample letter from each category may be found in the Appendix.

As well, we analyzed the date ranges for the letters to see if any pattern emerged, such as more letters with similar deficiencies in one period compared to others, or similar deficiencies across the sample period.

Our categorization and analysis provided the following results:

- **NO REASONS GIVEN (31 decision letters):** the letters simply stated the assessment result for the condition in reference. We also included in this category letters that contained some additional information, usually one or two details, as well as generic references such as to appeal rights. The majority of these letters dated from 2001 to 2007.
- **MINIMAL EXPLANATION GIVEN (139 decision letters):** the letters provided some information such as the governing legislation, reference to the Table of Disabilities and supporting documents, but did not tie any of this information together. The letters were generally vague or obscure. The majority of these letters dated from 2007 to 2010.
- **SUBSTANTIAL EXPLANATION GIVEN (43 decision letters):** the letters provided detailed information on governing legislation, reference to the Table of Disabilities and other supporting documents, and provided details on what the assessment meant in terms of result. While information was plentiful, the letters did not tie this information together and were occasionally vague or obscure. The majority of these letters dated from 2007 to 2010.

A summary of our categorization and the date range into which 90 percent of letters in each category fell is shown in the Figure 1.

FIGURE 1

Category	Number of letters	%	90% date range*
No reasons given	31	15	2002–2007
Minimal explanation given	139	65	2007–2010
Extensive explanation given	43	20	2007–2010
Total	213	100	

* The date range into which 90 percent of letters in each category falls.

ANALYSIS

Adequacy of reasons for decisions

We found first of all, that 31 letters in the sample failed to provide any reasons for the decision communicated. The only conclusion possible with respect to these decision letters is that they are not compliant with legislative requirements and were deficient. The Ombudsman deems that this is unacceptable given statutory obligations for the Minister of Veterans Affairs to provide reasons for disability benefit decisions.

We note however, that decision letters in this category represented a small percentage (15%) of the overall sample. As almost all of these letters were issued no later than 2007, this practice appears to have been corrected, at least based on the sample reviewed. While the small percentage involved and the fact that the practice seems to have ceased may be encouraging, this would have been cold comfort to the Veterans in receipt of these letters who were left with no explanation as to how the decision was made.

The remaining decision letters in the other two categories did contain some or plentiful information concerning the evidence reviewed by the adjudicator. In applying the guidelines established for this review, the Ombudsman nevertheless found that all these letters still failed a test of adequacy in the reasons given for the decisions. The remainder of this analysis concerns these decision letters.

The Department’s process to communicate decisions

Based on this review, the Ombudsman concludes that the persistence of inadequate disability assessment decisions letters is caused by (a) flaws in the process used to generate a decision letter once the adjudication process is completed, and (b) a misconception within the Department of what constitutes adequate reasons for adjudicators’ decisions.

(a) Flaws in the process to generate decision letters

The Department's 2004–2005 Disability Pension Program Evaluation report described the process used at the time to generate decision letters.²³ From this description, the process appeared to be the following: the adjudicator completes a disability benefit assessment; a software program generates a decision letter from a standard template; one or more macros populate the template with different pieces of case information from one or more files; generic text (right to appeal, availability of free legal and other services in case of dispute) is added. The decision letter is printed as generated by the template and sent to the applicant.

Considerable defects in this process were brought to the Department's attention in the 2004–2005 evaluation report. Yet, eight years²⁴ after this practice was first documented and brought to the Department's attention, all the decision letters we examined appear to have been generated by the same or a similar process, and are deficient in giving reasons for decisions.

Given the failure of most of the decision letters we reviewed to provide more than minimal information, we must conclude that quality assurance has also been absent from this process. Quality control is standard, best practice in any production process as it identifies deficiencies and enables measures to be brought to bear to correct those deficiencies.

The Ombudsman would strongly recommend that the Department follow the advice of its own evaluators to the effect that action needs to be taken to resolve defects in the decision letter production process.

(b) Misconception regarding adequate reasons for decisions

Review of all decision letters in the sample leads the Ombudsman to conclude that a fundamental misconception exists within Veterans Affairs Canada as to what constitutes adequate reasons for a disability benefit assessment decision. The letters we reviewed suggest that reliance is being placed entirely on listing evidence considered, making specific reference to the Table of Disabilities, and using boilerplate text citing legislation, appeal rights, and other standard references.

Providing such information, if complete, can help the recipient of the letter infer to some extent how the decision was arrived at. Indeed, the letters that contained substantial information (20%) did establish what probably led to the decision with some confidence. However, *providing information to support a decision* is fundamentally different to *providing a reason for a decision*. The Ombudsman believes that this difference is not understood by the Department nor is it applied in the drafting of letters.

It is not sufficient for decision-makers simply to outline applicable statutory provisions and the evidence and arguments, and then to state their conclusions. Good reasons for decisions do require the listing of evidence considered in rendering a decision but that does not reveal the rationale for the decision. For each conclusion of fact, law and policy relevant to

²³ Volume II, section 2.1.1.

²⁴ The observation in question was made at a focus group session of departmental adjudicators in October 2003. This observation was published in the 2004–2005 evaluation report in reference.

the decision, the reasons should establish a rational connection between the evidence presented and the conclusions reached by the decision-maker. The decision and the reasons supporting it must then be communicated clearly.

A clear, concise, cogent explanation of the analysis performed in the assessment should be provided in the decision letter. This will support why a disability benefit assessment is denied, stays the same, or increases by comparing it to the qualifiers that are required to award an assessment and noting which qualifiers were or were not met. For example, a summary describing how the evaluation of medical information is combined with a quality of life rating would serve to make this procedure understood, as mere reference to the Table of Disabilities and Quality of Life tables are not helpful in this regard. Copies of the tables used with the decision should also be provided for the applicant's reference.

No such explanation was evident in any of the 213 letters we reviewed. The failure to provide such an explanation in decision letters violates the principle of procedural fairness.

We note that in most of the decision letters examined, appeal rights were outlined. In some letters, they were not. If there are statutory appeal rights, as is the case for disability benefits, departmental decision-makers are acting in an administratively fair manner when they outline those appeal rights. The failure to provide this notice in all decision letters violates the principle of procedural fairness.

GOOD REASONS BENEFIT ALL PARTIES

VETERANS' RIGHT TO PROCEDURAL FAIRNESS

In this review, the statutory obligations requiring the Department to provide reasons for decisions have been cited. An analysis of a sample of decision letters has conclusively demonstrated that these are not adequate to discharge that requirement. This constitutes a denial of procedural fairness to Veterans, which the Ombudsman must emphatically state is not an acceptable outcome.

Veterans would be much more apt to accept even adverse decisions if decision letters were brought up to the standards we recommend the Department adopt. Veterans would at least recognize that their application for disability benefits had been fully and fairly adjudicated and that the decision reached was based on identifiable legislation, policy, and program criteria. If appeal rights are exercised in case of dissatisfaction, the Veteran and his or her representatives will exercise those rights based on a sound understanding of the issue.

The Ombudsman notes as well that ensuring procedural fairness does not solely concern adherence to abstract principles of justice or of rights. Justice must not only be done, it must be seen to be done. The decision letters in question concern monetary entitlements to which eligible Veterans have a right. Where these benefits are wrongly denied, or awarded in lesser amounts than what applicants are entitled to, there is a denial of a right that has a direct and negative impact on Veterans' quality of life.

In the case of disability benefit decisions, the magnitude of financial loss to Veterans whose decision letters we examined for this review, might have been extensive. The Ombudsman can only wonder, with concern, how many Veterans were wrongly assessed for their disability benefits and did not pursue the matter further as the decision letter did not reveal where the decision might have been flawed. Where Veterans did exercise their appeal rights, how much anxiety, time and expense might have been spared them if a defect in their assessment was obvious from the decision letter and the grounds for appeal were clearly evident.

These are some of the costs of a denial of procedural fairness to Veterans that are not acceptable to the Ombudsman.

GOOD REASONS BENEFIT THE PUBLIC DECISION-MAKER

Benefits from giving good reasons would also accrue to the Department as public decision-makers. Giving adequate reasons helps affected persons ensure that their concerns were heard and considered by the decision-maker. If better reasons are given for initial decisions, the result will probably be that fewer decisions are overturned on review and that fewer reviews will be requested. Final decisions will be made faster, with less time and resources spent on complex review proceedings.

The time and resources consumed can be substantial. Where review proceedings at the Federal Court determine that inadequate reasons were given at lower decision levels, appeals may be successful solely on the grounds of denial of procedural fairness.²⁵ In these cases, time and resources consumed are simply wasted as the merits of the response were no clearer to the appeal tribunal or Court than they were to the applicant.

The Department and the Veterans Review and Appeal Board, both of which deal with appeals of disability benefit decisions, may well consider the savings in costs and time that can accrue from a small investment in drafting adequate decisions. Not only will review hearings stand on clearer grounds, but where decision reasons are clear and understandable, it is likely that some decisions may not have been appealed. Substantial time, effort and expense are then avoided by both parties.

²⁵ See for example *Marshall Johnston v. the Attorney General of Canada*, Federal Court, T-543-09, March 30, 2010. Justice O'Keefe, presiding, found for plaintiff as defendant had provided inadequate reasons for its decision at the preceding Veteran Review and Appeal Board Appeal hearing. On that ground alone, the case was sent back for a new hearing before a new board.

CONCLUSION AND RECOMMENDATIONS

Veterans, in common with all Canadians, have a right to procedural fairness from public decision-makers. The obligation to provide adequate reasons for decisions that affect them has been well established in administrative law in Canada and abroad. It is even more important to fulfill that obligation where it is an explicit legal requirement, as is the case with assessment decisions made by Veterans Affairs Canada.

The Ombudsman notes with concern that the Department's failure to do so is a long standing deficiency. We find this inconsistent with the commitment to fairness and respect for Veterans guaranteed by the *Veterans Bill of Rights*. The Ombudsman also finds that not providing adequate reasons for disability benefit assessment decisions is a denial of procedural fairness to Veterans.

RECOMMENDATION 1

For Veterans Affairs Canada to improve the mechanisms by which disability benefit assessment letters are generated to make sure essential information is captured for inclusion in letters. This information should be presented in a form that is understandable and is in relation to the decision made. An explanation of how this information has been used to arrive at the decision is required. The Department should also ensure that a notice of the right to appeal is contained in every disability benefit decision letter.

RECOMMENDATION 2

For reasons for decisions to be written in plain language. Any legal, medical, or administrative terms used should be explained. A separate brochure or other companion piece would serve this purpose and could be included with decision letters.

RECOMMENDATION 3

For procedure manuals and training modules to be examined to ensure that adjudicators are aware of the minimum information to be provided in letters and what is needed to substantiate the reasons for their decisions.

RECOMMENDATION 4

For quality assurance procedures to be put in place to ensure decision letters fully comply with standards for adequacy of reasons for decisions.

REFERENCES

LEGISLATION AND REGULATIONS

Pension Act, R.S.C., 1985.

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

Canadian Forces Members and Veterans Re-establishment and Compensation Regulations (SOR/2006-50).

CASES

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

Marshall Johnston v. the Attorney General of Canada, Federal Court, T-543-09, March 30, 2010.

SECONDARY SOURCES

British Columbia Ministry of Attorney General. *Giving Reasons for Decisions: A Guide To Best Practices For Statutory Decision-Makers*.

—. *Statutory Decision-makers and the Obligation to Give Reasons for Decisions, a Discussion Paper*, 2008.

Clayton Utz. *Good Decision-Making for Government: Reasons for Decision*. Canberra, 2006.

Edmund E. Tobin. "Reasons for Decisions". Paper presented at the 18th Annual Conference of the Council of Canadian Administrative Tribunals (CCAT). Ontario, 2002.

APPENDIX – SAMPLE DECISION LETTERS

CATEGORY 1 – NO REASONS GIVEN (2009 letter)

Veterans Affairs Canada has ruled on the assessment of the condition for which you have entitlement as follows:

With respect to the condition of Post Traumatic Stress Disorder, the Department finds that your disability arising from this condition is correctly assessed at 40%, and has not deteriorated beyond the assessment previously awarded.

If future medical examinations show a worsening of this condition, we would be pleased to review your case again.

The following reports were submitted for assessment purposes:

- Report from Dr.--: [DATE]

Quality of Life Questionnaire: [DATE]

You may ask the Department to review this decision if you have new evidence or, if you do not agree with the Department's decision, you may appeal to the Veterans Review and Appeal Board. The Bureau of Pensions Advocates would be pleased to advise you, free of charge, as to possible options for proceeding. You may also contact a representative of a Veterans' organization or, at your expense, any other representative of your choice.

If you have any questions, please contact Veterans Affairs Canada, toll-free, at 1-866-522-2122.

CATEGORY 2 – MINIMAL EXPLANATION GIVEN (2009 letter)

Tinnitus is assessed at 11%. This assessment is effective [DATE] under Section 48 of the Canadian Forces Members and Veterans Re-establishment and Compensation Act (CFMVRCA).

Under the 2006 Table of Disabilities, an assessment takes into account medical impairment, which is the extent of your disability and its effect on your quality of life.

- Your medical impairment rating is 10.
- Your Quality of Life rating is 1.

Together, these ratings result in an assessment of 11%.

The following reports were submitted for assessment purposes:

- Audiologist's Report dated [DATE].

CATEGORY 3 – SUBSTANTIAL INFORMATION GIVEN (2009 letter)

Veterans Affairs Canada has ruled on the assessment of the condition for which you have entitlement as follows:

With respect to the condition of Degenerative Disc Disease Lumbar Spine, the Department finds that your disability arising from this condition is correctly assessed at 15% and has not deteriorated beyond the assessment previously disability benefited.

In the determination of this assessment, the full extent of the disability has been considered and evaluated, with the highest applicable Table of Disabilities criteria selected.

Based on the 2006 edition of the Table of Disabilities, Table 17.19, the criteria of “Loss of up to 1/2 range of motion; or Intermittent Sciatica” has been met. Based on Tables 2.1 and 2.2 it is established that the effects on your activities of independent living, recreational/community activities and personal relationships have been moderately affected.

You are currently assessed at 15% for your pensioned condition of Degenerative Disc Disease Lumbar Spine. As this assessment is currently higher than what would be provided based on the revised criteria, your assessment will remain unchanged. In addition, this assessment of 15% is now grand fathered and cannot be decreased.

Should there be a future worsening of this condition, substantiated by medical documentation; the Department would be pleased to review your assessment at that time.

The following reports were submitted for assessment purposes:

- Medical Questionnaire: [DATE]
- Quality of Life (QOL): [DATE]

