

Date: 20090320

Docket: T-1491-08

Citation: 2009 FC 298

Ottawa, Ontario, March 20, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

TOLSON CLARKE

Applicant

and

**VETERANS REVIEW AND APPEAL BOARD,
ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Sergeant Tolson Clarke, served in the Canadian Forces Regular Force from March 13, 1970 to May 15, 1995. He has served with the Reserve Force since June 7, 2001. In October of 2005, Sergeant Clarke applied for a disability pension in respect of lumbar disc disease and mechanical low back pain.

[2] That application was initially denied. However, a Review Panel of the Veterans Review and Appeal Board (Review Panel) granted Sergeant Clarke a one-fifth pension entitlement for lumbar disc disease arising out of his service in the Regular Force. No entitlement was granted for his service in the Reserve Force. Sergeant Clarke appealed that decision to an Entitlement Review Panel of the Veterans Review and Appeal Board (Appeal Board). The Appeal Board confirmed the conclusion of the Review Panel. Sergeant Clarke brings this application for judicial review of that decision.

The Decisions of the Review Panel and the Appeal Board

Review Panel

[3] The Review Panel determined that Sergeant Clarke had established, on a balance of probabilities, that his military service, and in particular an injury sustained while playing volleyball in the military in 1979, partially contributed to the development of his lumbar disc disease.

[4] The Review Panel disagreed with Sergeant Clarke's contention that the degenerative lumbar disc disease was due solely to the volleyball injury. In this regard, the Review Panel noted that this injury was followed by a series of non-military duty related injuries that occurred throughout Sergeant Clarke's career. After describing numerous non-service related injuries, the Review Panel found a February 1995 injury sustained while Sergeant Clarke was shovelling snow to be "the most significant injury." The February 1995 incident had resulted in pain at the L4-5 level of the lumbar spine.

[5] The Review Panel went on to observe that the next complaint of back pain appeared in an Emergency Report prepared in October of 2002. Sergeant Clarke had twisted his back while remodelling his kitchen. A physiotherapy report prepared at the time noted that the involved areas of the lumbar spine were likely at the L4-5 and L5-S1 levels.

[6] The Review Panel then considered an incident which occurred in August of 2005, while Sergeant Clarke was on Reserve service. Based in part on an August 18, 2005 CF 98 Report that stated "He moved from one chair to another and at that time felt a sharp pain in his back" and a November 9, 2005 MRI Report, the Review Panel concluded that, given the time involved, the August 5, 2005 injury was a manifestation of Sergeant Clarke's low back pathology rather than a cause of the pathology.

[7] With respect to the mechanical low back pain condition, the Review Panel doubted whether Sergeant Clarke's back pain was mechanical in nature (as opposed to being related to his degenerative lumbar spine condition). The Review Panel found that the preponderance of the evidence suggested that Sergeant Clarke's low back symptoms were related to the extensive pathology identified in the November 2005 MRI report. The Review Panel noted the opinion of a physiotherapist from October of 2005 to the effect that Sergeant Clarke's symptoms and findings suggested a derangement of a low intervertebral disc of the L5 lumbar.

[8] The Review Panel awarded retroactive entitlement to October 21, 2005, the day Sergeant Clarke first applied for a disability pension for lumbar disc disease.

Appeal Board

[9] As noted above, the Appeal Board confirmed the decision of the Review Panel.

[10] At the outset of its reasons, the Appeal Board stated that in arriving at its decision it had carefully reviewed all the evidence, medical records, and submissions, and had complied with the statutory obligation to resolve any doubt in the weighing of evidence in favour of Sergeant Clarke (as required by sections 3 and 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (Act)).

[11] The Appeal Board recognized that Sergeant Clarke was diagnosed with lumbar disc disease. It referred to the MRI report of November 2005 that found Sergeant Clarke to have:

[...] moderate-sized left paracentral disc herniation at L4-5 on the left. There is a relatively large extruded fragment extending inferiorly with nerve root compromise involving principally the L5 nerve root on the left.

[12] The Appeal Board also recognized that Sergeant Clarke attributed his condition to an injury suffered in 1979 or 1980 while playing military-sanctioned volleyball.

[13] The Appeal Board referred to what the Entitlement Guidelines (Medical Guidelines) state about lumbar disc disease and noted that the natural history of the progressive degenerative changes in the disc must be taken into account when determining what fraction of the disability could reasonably be attributed directly to service.

[14] The Appeal Board concluded, as the Review Panel had, that Sergeant Clarke “had numerous other non-service related injuries to his back, and from which it is reasonably inferred, have contributed to [Mr. Clarke]’s condition in a substantive fashion.”

[15] The Appeal Board accepted that Sergeant Clarke’s initial volleyball injury partially contributed to the development of his lumbar disc disease “and the Review Panel has correctly identified the contribution of this incident to the Appellant’s development of lumbar disc disease as a minor aggravation attracting one-fifth pension entitlement”.

[16] The Appeal Board determined that considering Sergeant Clarke’s numerous non-service related back injuries, the aging process of lumbar disc disease and its natural progression, the Review Panel had correctly withheld a four-fifths pension entitlement.

The Alleged Errors

[17] Sergeant Clarke argues that the decision not to grant entitlement for service in the Reserve Force was wrong. In support of this contention, he points to the positive results he had on medical examinations and fitness tests between the time he enrolled in the Reserve Force and August of 2005. Sergeant Clarke contends that he suffered a back/nerve injury on August 5, 2005 when he picked up a file while doing a rotational twisting through his lower back. This caused an immediate and sharp pain.

[18] Sergeant Clarke acknowledges that he had numerous back complaints while in the Regular Force, but he submits each of those complaints were resolved with rest or medication.

[19] In conclusion, Sergeant Clarke argues that the injuries of “moderate left side glide (foot drag) restrictions with pain” and “considerable Modic changes as well as a small sequestered fragment behind the L-5 (causing permanent numbness in my left calf leg, foot, toes and frequent leg cramps)” did not result from the February 1995 shovelling incident (as found by the Appeal Board), but instead occurred in August of 2005 while he was a member of the Reserve Force. Sergeant Clarke submits that the incident of February 1995 was resolved in short order as evidenced by a Medical Inspection Room report dated March 31, 1995 that stated “PT. Is doing well – no recent pain – progressed to a full (unreadable) routine.”

[20] Sergeant Clarke therefore argues that he is entitled to a full pension in respect of lumbar disc disease.

The Issues

[21] In my view, the issues raised by Sergeant Clarke are as follows:

- 1) What is the applicable standard of review?
- 2) Did the Appeal Board err by failing to award any pension entitlement to Sergeant Clarke for his Reserve service based upon the incident of August 5, 2005?
- 3) Did the Appeal Board err by failing to properly apply section 39 of the Act?

Standard of Review

[22] I am required to consider whether the existing jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to the decision of the Appeal Board. See: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraphs 57 and 62. In my view, it has.

[23] The first asserted error puts in issue whether the Appeal Board erred by not awarding any pension entitlement to Sergeant Clarke for his Reserve service. The second asserted error requires consideration of whether the Appeal Board properly applied section 39 of the Act.

[24] In *Wannamaker v. Canada (Attorney General)* (2007), 361 N.R. 266 at paragraphs 12-13, the Federal Court of Appeal concluded that questions of mixed fact and law such as whether a particular injury arose out of service, and whether section 39 of the Act was properly applied, were questions properly assessed on the standard of reasonableness.

[25] On the basis of this jurisprudence, I am satisfied that the decision of the Appeal Board should be reviewed against the standard of reasonableness in respect of both asserted errors. See also: *Goldsworthy v. Canada (Attorney General)*, [2008] F.C.J. No. 540 at paragraphs 10-14 (F.C.) and *Macdonald v. Canada (Attorney General)* (2008), 330 F.T.R. 261 at paragraphs 13-15 (F.C.).

[26] Review on the reasonableness standard requires an inquiry into the qualities that make a decision reasonable. These include the process of articulating the reasons and the outcome. On judicial review, reasonableness is largely concerned with the existence of justification, transparency

and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. See: *Dunsmuir*, paragraph 47.

Application of the Standard of Review

Did the Appeal Board err by failing to award any pension entitlement to Sergeant Clarke for his Reserve service based upon the incident of August 5, 2005?

[27] I begin by observing that Sergeant Clarke bore the onus of establishing, on a balance of probabilities, that the condition diagnosed in the November 2005 MRI report resulted from "an injury [...] or an aggravation thereof that arose out of or was directly connected with [...] military service". See: paragraph 21(2)(a) of the *Pension Act*, R.S.C. 1985, c. P-6. Subsection 21(2) of the *Pension Act* is set out in the appendix to these reasons.

[28] The Entitlement Eligibility Guidelines (Medical Guidelines) applied by the Appeal Board instructed that lumbar disc disease is fundamentally a natural degenerative condition associated with the aging process. In a portion referred to by the Appeal Board in its reasons, the Medical Guidelines state:

The relative importance of degenerative change and injury causing clinical disability varies with age and with individual factors. In a small percentage of cases, perhaps 5% of persons under 55 years of age, a severe injury could be held totally responsible for the disability

(regardless of the presence of pre-existing degenerative changes). It has been estimated that 75% of people in the older age group have some low back disability due to disc instability resulting from normal degenerative changes.

De Palma and Rothman, in their book "The Intravertebral Disc", outline the relationship between degenerative changes and trauma in [the] following manner:

"Disc degeneration is not usually due to one insult, but rather to the combined ravages of the biochemical and mechanical changes of ageing, associated with longstanding mechanical stress. A history of injury which may have precipitated a low back syndrome may often be elicited, but this injury has played an incidental role in what is truly a chronic degenerative process."

It is thus apparent that the natural history of the progressive degenerative changes in the discs must be taken into account in determining what fraction of the disability can reasonably be attributed directly to service. Service factors may cause aggravation (permanent worsening) of the degenerative process. The degree of aggravation is expressed in fifths.

[29] The key medical evidence about the state of Sergeant Clarke's disability after the August 2005 incident is the November 2005 MRI report that found a disc herniation at L4-5.

[30] The medical evidence before the Appeal Board included the following:

- An emergency report, prepared on February 13, 1995, recorded that Sergeant Clarke had hurt his back while shovelling snow. The doctor observed some soreness on palpation at the L4-L5 level. An x-ray report at the time found a "possible slight retrolisthesis of L4 relative to L5." A retrolisthesis is a displacement of a vertebral body with respect to an adjacent vertebra.

- Sergeant Clarke's "Medical Examination for Release" completed on April 25, 1995 (as Sergeant Clarke was leaving the Regular Forces) listed degenerative disc disease of the lumbosacral spine as a current disease or injury.
- After the October 2002 injury, received while renovating his kitchen, Sergeant Clarke's physiotherapist reported, in November of 2002, that the areas of the spine involved were probably "the facet joints at L4/5, L5/S1."

[31] Sergeant Clarke brought forward no medical evidence that the disc herniation was caused by, or aggravated by, his actions while on Reserve duty on August 5, 2005.

[32] The Appeal Board accepted the finding of the Review Panel that the pain and subsequent symptoms Sergeant Clarke suffered on August 5, 2005 were a manifestation of the herniated disc condition and not a cause of that condition. This conclusion was based upon the Medical Guidelines and the pre-existing evidence of degenerative disc disease contained in the February 13, 1995 emergency report and the November 2002 physiotherapy report. While neither the Review Panel nor the Appeal Board mentioned the Medical Examination for Release document, it too supports the conclusion that Sergeant Clarke suffered from degenerative disc disease as early as 1995. There was no medical evidence to contradict this evidence or the conclusion of the Appeal Board.

[33] The reasons of the Appeal Board are intelligible and are justified by the evidence before it. The decision falls within a range of possible, acceptable outcomes (that is, outcomes that are acceptable in the sense that they are defensible on the basis of the facts and the law).

[34] While fully sympathetic to Sergeant Clarke's situation, and fully cognizant that his credibility was in no way impugned by the Appeal Board, I can see no basis at law on which I can interfere with the finding of the Appeal Board that the August 5, 2005 incident did not cause or aggravate Sergeant Clarke's lumbar condition.

Did the Appeal Board err by failing to properly apply section 39 of the Act?

[35] Section 39 of the Act (which is set out in the appendix to these reasons) required the Appeal Board to:

- a. Draw, from all of the circumstances of the case and all the evidence presented to it, every reasonable inference in favour of Sergeant Clarke.
- b. Accept any uncontradicted evidence presented to it by Sergeant Clarke that it considered to be credible in the circumstances.
- c. Resolve in favour of Sergeant Clarke any doubt, in the weighing of evidence, as to whether Sergeant Clarke had established a case.

[36] I can see no reasonable, favourable inference that the Appeal Board could have drawn, but failed to draw. The fact that Sergeant Clarke was from time to time symptom-free was anecdotal evidence that would not, by itself, support an inference that contradicted the objective evidence that

the Appeal Board relied upon. The record before me contains no medical evidence to contradict the medical evidence discussed above.

[37] Similarly, Sergeant Clarke's evidence of being symptom-free, and his evidence that the February 1995 injury resolved in short order, was belied by the February 1995 x-ray report and by the April 1995 diagnosis of degenerative disc disease of the lumbosacral spine. Thus, I can see no error in failing to accept uncontradicted evidence presented by Sergeant Clarke.

[38] Finally, I see no failure to resolve doubt about the August 5, 2005 incident in Sergeant Clarke's favour as required by subsection 39(c) of the Act. There was insufficient evidence in support of Sergeant Clarke's submission to warrant application of subsection 39(c). See: *Elliot v. Canada (Attorney General)* (2003), 307 N.R. 344 at paragraphs 41-42 (F.C.A.).

Conclusion

[39] For these reasons, the application for judicial review will be dismissed.

[40] In the circumstances, counsel for the Attorney General did not press a claim for costs, and no costs are awarded.

[41] As I advised Sergeant Clarke during the hearing, it is possible that he may have a right to apply, on new evidence, to the Veterans Review and Appeal Board for reconsideration of its decision. This was a matter he was to discuss with counsel for the Attorney General. If such a right

exists, and Sergeant Clarke wishes to pursue it, Sergeant Clarke should attempt to obtain medical evidence that supports his view that he incurred an injury while performing service in the Reserve Force.

[42] The Court appreciates counsel's assurance that she would explain to Sergeant Clarke any right to apply for reconsideration.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed, without costs.

“Eleanor R. Dawson”

Judge

APPENDIX

Subsection 21(2) of the *Pension Act* and section 39 of the *Veterans Review and Appeal Board Act* read as follows:

21(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,
 (a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;
 (b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;
 (c) where a member of the forces is in receipt of an additional pension under paragraph (a), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner dies, except where an award is payable under subsection 34(8),

21(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :
 a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;
 b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;
 c) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa a), du paragraphe (5) ou de l'article 36 continue d'être versée pendant l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui il

the additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in respect of another spouse or common-law partner is awarded to the member commencing during that period, until the date that it so commences; and

(d) where, in respect of a survivor who was living with the member of the forces at the time of that member's death,

(i) the pension payable under paragraph (b) is less than

(ii) the aggregate of the basic pension and the additional pension for a spouse or common-law partner payable to the member under paragraph (a), subsection (5) or section 36 at the time of the member's death,

a pension equal to the amount described in subparagraph (ii) shall be paid to the survivor in lieu of the pension payable under paragraph (b) for a period of one year commencing on the effective date of award as provided in section 56 (except that the words "from the day following the date of death" in subparagraph 56(1)(a)(i) shall be read as "from the first day of the month following the month of the member's death"), and thereafter a pension shall be paid to the survivor in

cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

d) d'une part, une pension égale à la somme visée au sous-alinéa (ii) est payée au survivant qui vivait avec le membre des forces au moment du décès au lieu de la pension visée à l'alinéa b) pendant une période d'un an à compter de la date depuis laquelle une pension est payable aux termes de l'article 56 — sauf que pour l'application du présent alinéa, la mention « si elle est postérieure, la date du lendemain du décès » à l'alinéa 56(1)a) doit s'interpréter comme signifiant « s'il est postérieur, le premier jour du mois suivant celui au cours duquel est survenu le décès » — d'autre part, après cette année, la pension payée au survivant l'est conformément aux taux prévus à l'annexe II, lorsque, à l'égard de celui-ci, le premier des montants suivants est inférieur au second:

(i) la pension payable en application de l'alinéa b),

(ii) la somme de la pension de base et de la pension supplémentaire pour un époux ou conjoint de fait qui, à son décès, est payable au membre en application de l'alinéa a), du paragraphe (5) ou de l'article 36.

accordance with the rates set out in Schedule II.

[...]

39 In all proceedings under this Act, the Board shall

- (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;
- (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
- (c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

[..]

39 Le Tribunal applique, à l'égard du demandeur ou de l'appellant, les règles suivantes en matière de preuve :

- a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
- b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
- c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1491-08

STYLE OF CAUSE: TOLSON CLARKE v.
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ATTORNEY GENERAL OF CANADA

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