Federal Court  Cour fédérale

Date: 20130502

Docket: T-1683-12

Citation: 2013FC460

Ottawa, Ontario, May 2, 2013

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

JAMES QUANN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Veterans Review and Appeal Board of Canada dated 8 August 2012, wherein that Board confirmed the decision of the Entitlement Appeal Panel dated 15 September 2011, and denied pension entitlement to the Applicant in respect of injury sustained to his left knee.

[2] For the reasons that follow, I find that the Application is allowed. The matter will be sent back to the Board for redetermination by a different Panel.

[3] The Applicant is a veteran of the Canadian Armed Forces. He served twenty-one (21) years in the navy from March 21, 1984 until February 20, 2005, including three months of service in early 1991 in the Persian Gulf. He was a Naval Communications Officer with duties that included significant periods of time at sea where he was required to climb masts and stairs, sometimes carrying heavy objects. In addition, the Applicant participated in fitness programmes and sports approved by the Armed Forces.

[4] In 1998, while serving with the navy, the Applicant suffered an injury to his right knee while playing volleyball. This injury required surgery and rehabilitation. The Applicant receives continuing compensation for this injury.

[5] The Applicant is now seeking a disability pension in respect of his left knee. The Applicant asserts that his left knee began to trouble him since about the time of the injury to his right knee. There is a "Sick Parade" docket entry dated November 23, 1998, recording pain in the right knee, as well as the left knee.

[6] A record in respect of a medical condition in the Applicant's left knee is found in the "Sick Parade" docket dated January 7, 2004, which states, in part:

> *(Lt) knee discomfort…twisted while playing (with) kids (+) discomfort, swelling, to (?) base at this time, Type I*
>
> . . .
>
> *Pain last pm 9/10 this am 7/10, ice/heat applied constantly throughout night, unable to sleep, taken Advil relief, wt bearing (?)*

pain, antibiotics, slowly, knee gave out while walking, once last pm, does not lock up, etc.

[7] A Triage Note in the Applicant's record, dated January 21, 2005, contains the following note portions of which cannot be deciphered:

Triage Note:

43 yr old male in c/o left knee pain that over last 10 days has become ↑ more uncomfortable – (...) cc: 43 yr old presents c̄ left knee pain x 2-3 months but increased pain x 2 weeks.

(...): Ø (...) of left knee injury or trauma, not urgently playing a lot of sports. Had meniscus tear a few yrs ago on Rt knee & scope & states pain feels similar now in Lt knee. Feels pain at the end of the day from being on it all day. Tried Motrin but to no avail. Pt in the process of release and forgot to mention knee pain upon medical.

DE: Lt knee – Ø pain on palpation of patella tendon until Pt extends foot. Slight crepitus noted on (...) - ext & flexion. Ø pain on palpation of lat & med (...) regions. States pain feels like it's behind patella when walking. Equal blat reflexes Lt & Rt leg, equal blat pedal pulses. Ø radiating pain, Ø swelling lmp: bursitis, Patella removal syndrome? Lt knee

Plan: Refer to mo
As above – Ø (...) (...) giving way

[8] In August 2005, the Applicant's left knee was operated upon to repair what has been described as a bucket handle tear of his left lateral meniscus. Dr. Connelly, the surgeon who performed the operation, made the following Report of Operation on July 28, 2005:

Operation: Arthroscopy – left knee, left lateral meniscectomy

Procedure: (July 28, 2005) This man injured his knee some time ago. He has pain, catching and locking in the knee with tenderness in the lateral joint line and he was admitted for arthroscopy.

> *Under general anesthesia and tourniquet control, the left knee was prepped with Bridine and draped. There was no ligamentous instability. Stab incision was made above Gerdy's tubercle. The arthroscope was introduced. There was an insignificant amount of joint fluid. The knee was inflated with saline. Suprapatellar pouch was normal. Patellofemoral joint was essentially normal. The medial compartment showed some grade I-II degeneration in the medial femoral condyle. The meniscus was intact. The anterior cruciate was intact. Laterally there was a bucket-handle tear of the lateral meniscus which was displaced and there was a radial spit in most of the meniscus and a lot of shredding which precluded any thoughts of surgical repair. Using the motorized shaver and hand instruments through an anteromedial and anterolateral portals, the unstable meniscal cartilage was debrided from the lateral compartment. The knee was irrigated and drained. The stab incisions were closed with steri-strips. Sterile compression dressing was applied. On release of the tourniquet there was good return of blood supply to the foot. There were no breaks in technique or interoperative complications. Sponge and instrument…*

[9] On August 25, 2005, Dr. Connelly made a Report of a follow-up inspection:

> *Mr. Quann was seen following an arthroscopic debridement and excision of the bucket handle tear of his left lateral meniscus in his left knee. He still has a fair bit of pain, but he has full range of motion. He is going to carry on now with his therapy and I will see him again as necessary. He is more than likely to get arthritis in his knee in the long term.*

[10] In applying for disability compensation respecting his left knee, the Applicant made the following statement as to how the condition of his left knee related to his military service:

> *My left knee was injured during my time at sea including the Persian Gulf. The effect of a moving ship and the constant travel up and down ladders caused my knees to ache all the time. I also was involved in numerous sporting activities (organized) such as volleyball, hockey, baseball, etc. We also had to exercise at sea in*

> *order to maintain the physical condition that was expected of a military member. I spent an average of 18 hrs a day on my feet when at sea.*

[11] On May 15, 2007, the Applicant's general practitioner, Dr. Killeen, wrote a letter to Veterans Affairs Canada stating:

> *With reference to your note of April 26, 2007 regarding the above patient, I reviewed the notes which you sent me. I also reviewed the notes from Dr. Peter Connelly, orthopedical surgeon who did an arthroscopic debridement of Mr. Quann's knee on August 24, 2005.*
>
> *This patient has a history of an injury to his knee the date of which I am not certain. He had a bucket handle tear of his left lateral meniscus in his left knee. This was repaired by Dr. Connelly. On reviewing his history this kind of injury can occur virtually at any time but is often seen with sports injuries and also seen when climbing up and down ladders. Usually there is an injury involved and the patient is usually aware of it and then the tear extends. So it is possible that the injury could have been caused or aggravated by his duties.*

[12] Dr. Connelly, the surgeon who performed the operation on the Applicant's left knee, wrote to the District Pensions Advocate on September 10, 2008, stating:

> *Thank you for your letter of August 18th, 2008 requesting further information on Jamie Quann. You obviously have the information I have created on him so I will attempt to answer your questions.*
>
> *He told me on July 26, 2005 that his left knee had been painful for two years and was getting worse. There was no history of injury. It had caused decreased weight-bearing, locking, clunking, swelling and aching with decreased strength and pain with ladders. When his bucket tear occurred I have no idea. I apologize for the typographical errors in the operative report. The lateral meniscus bucket handle tear was displaced and there was a radial split in most of the meniscus. The severity of meniscal damage is significant if*

there is a bucket handle tear although this can happen with a twisting injury and with squatting of kneeling. The radial split is just an aggravation of the above. This injury could have occurred at the time of his serving in the military, particularly at sea. Once the injury occurred it could certainly be aggravated by physical activities such as standing on a heaving deck, climbing ladders and squatting.

I hope this is the information you require.

[13] On March 24, 2010, Dr. Connelly wrote to Dr. Killeen, stating:

Jamie was last seen in 2005 when I scoped his left knee for bucket-handle tear. I received a letter from Susan E. Ruttan, District Pensions Advocate in Victoria in August 2008 to which I responded. She addressed the question at the time whether there was some relationship between his old injury to his right knee and the more recent injury to the left. There certainly could be a relationship after one is injured at sea and he does state that his knees were bothering him before he ever had any surgery on the right.

Both knees are painful at this time with swelling and giving way on the right. Unfortunately he has not had any x-rays so I have ordered some today. When I scoped his left knee nearly 5 years ago, there was some early degeneration in the medial compartment. This probably has advanced since that time and I expect he has more arthritis in his right knee as well.

There is tenderness in the lateral joint line of the right knee and in the medial joint line to the left. There is pain on forced extension and manipulation but no instability. There is normal neurovascular supply to the legs. Squatting and kneeling are difficult and there is crepitus and pain with those activities. He has had to give up his hockey and baseball.

With a history of pain in both knees before any surgery, his occupation could certainly have led to the above-noted injuries. There is no way to prove that his symptoms on the left are compensatory in nature from the damage to the right, but this is a fairly common finding. The injury to his left knee also occurred during his Service time, so likely is pensionable as well as the right.

[14] In December 2008, the Applicant applied for a pension in relation to osteoarthritis of his left knee. In June 2010, he also applied for a pension in relation to osteoarthritis of his left knee as a consequence of service-related internal derangement of the right knee. On October 16, 2009, Veterans Affairs Canada denied the first application; and on June 10, 2010, it denied the second application.

[15] The Applicant appealed both decisions to the Entitlement Review Panel which, on January 5, 2011, affirmed the decisions of Veterans Affairs Canada. The Applicant appealed this decision to the Entitlement Appeal Panel. That Panel, on September 15, 2011, affirmed the previous decision of the Review Panel. On November 25, 2011, the Applicant applied for reconsideration of the Appeal Panel's decision to a Reconsideration Panel.

[16] On August 10, 2012, the Reconsideration Panel delivered its decision, which upheld the previous decisions to deny a disability pension in respect of the Applicant's left knee. This is the decision at issue.

[17] The Reconsideration Panel reviewed the previous decisions and referred, in particular, to portions of Dr. Killeen's letter dated 15 May 2007, and Dr. Connelly's letter dated 10 September 2010. In respect of those letters, the Panel wrote:

> *In evaluating the credibility of medical evidence, the Panel examines three important factors with the first being the qualifications of the medical expert. Second, the Panel examines whether or not the information the expert had access to in arriving at an opinion was reasonably accurate and complete. Third, the Panel assesses the credibility of the opinion. The assessment would normally be based*

on the Panel's view of whether or not the expert's conclusion appears to flow logically from the facts, whether or not the expert explored all the relevant factors, and whether or not the opinion could be said to reflect the general medical consensus as established through scientific study of the relevant condition.

The opinion, which need not be lengthy, will likely be considered credible if it has three features: the facts or history are accurate and complete, that it, they are the same facts that are apparent from the other evidence; the conclusion makes sense in that it flows logically from the facts; and, the expert provides a reasonable explanation of how he or she has drawn the conclusion from the facts.

In addition, the opinion, when presented as evidence, should be accompanied by any correspondence or communication by which the opinion was elicited.

The Panel will assess the credibility of the two medical opinions, beginning with that of Dr. Killeen, dated 15 May 2007. The Panel notes that the opinion, in the form of a brief letter, is in response to a request from D. hart of the Bureau of Pensions Advocates. In her letter of 26 April 2007, Ms. Hart indicates that she is enclosing personnel records and a statement of work. She does not indicate that she is enclosing any information regarding the Appellant's medical history. Dr. Killeen's letter indicates that he reviewed notes sent by Ms. Hart, as well as notes from the Orthopaedic Surgeon, Dr. Connelly, who did an arthroscopic debridement of the Appellant's left knee on 24 August 2005. He states:

> *….This patient has a history of an injury to his knee the date of which I am not certain. He had a bucket handle tear of his left lateral meniscus in his left knee. This was repaired by Dr. Connelly….*

Dr. Killeen goes on to say, "it is possible that the injury could have been caused or aggravated by his duties."

The Panel does not find Dr. Killeen's opinion to be sufficient to sway the benefit of doubt in the Appellant's favour for the following reasons:

- *the Panel does not question Dr. Killeen's knowledge of the Appellant's general condition, but there is no evidence to suggest that he is a specialist in the field of orthopaedic surgery;*

- *Dr. Killeen did not apparently have access to the Appellant's complete service medical history, and so his conclusion of a possible connection to military service may not be based on all of the facts; and*

- *Dr. Killeen's opinion raises only the possibility that the claimed condition was caused or aggravated by military service.*

Regarding the 10 September 2008 medical opinion offered by Dr. Connelly, the Panel acknowledges that he is an Orthopaedic Surgeon, and therefore fully qualified to offer an opinion on what may have caused the injury, a bucket-handle tear of the left lateral meniscus of the left knee. Dr. Connelly states in his brief letter to the District Pensions Advocate that there is no history of injury. He states that he has no idea when the tear occurred, although the damage was significant. He states the tear "can happen with a twisting injury and with squatting and kneeling." As stated in the Advocate's submission, Dr. Connelly offers the opinion that the injury could have occurred during service, particularly at sea.

The Panel does not find Dr. Connelly's opinion to be sufficient to sway the benefit of doubt in the Appellant's favour for the following reasons:

- *the statement that the osteoarthritis left knee is attributable to military service is not supported by any persuasive analysis or, in other words, it does not flow logically from the facts; and*

- *Dr. Connelly, like Dr. Killeen, raises only the possibility of a connection between the claimed condition and military service.*

Finally, taken as a whole, the evidence does not establish that the cumulative joint trauma criteria contained in the Entitlement Eligibility Guidelines were met. As stated in the Review Panel's decision, the evidence does not establish that, in the course of the Appellant's fitness activities and normal duties on ship and while ashore, there was sufficient cumulative joint trauma to meet the guidelines.

The Panel confirms the decision of the Entitlement Appeal Panel decision dated 15 September 2011 and denies pension entitlement.

[18] The Panel made no reference to the "Sick Parade" entries, nor to the Appellant's statement made in his application for disability, nor to Dr. Connelly's two reports, nor his letter of March 24, 2010, nor to the Sick Parade reports and Triage Report.

AGREED AND UNCONTESTED FACTS

[19] From the memorandum of argument filed by the parties and the submissions of Counsel at the hearing, the following facts are, I determine, not in dispute:

- The Applicant served with the Canadian Armed Forces from March 21, 1984 until February 20, 1985;

- the Applicant served in the navy, spending a substantial period at sea, where he was required to climb stairs and masts, sometimes carrying loads;

- the Applicant sustained an injury to his right knee in 1999, for which he is being compensated;

- in late 2004, outside the scope of his military duties, the Applicant injured his left knee while playing "with kids";

- the Applicant's left knee was operated upon in July 2005, after he had left the Armed Forces; and

- the Applicant suffers osteoarthritis in his left knee and will do so for the rest of his life.

ISSUES

[20] The Applicant states that there are three issues; the Respondent states that there are only two - the first two below. The three issues are:

1. What is the appropriate standard of review?

2. Was the decision of August 10, 2012 wrong having regard to the appropriate standard of review?

3. Did the Panel assess the evidence properly having regard to section 39 of the *Veterans Review and Appeal Board Act*?

1. What is the appropriate standard of review?

[21] Both parties agree that the standard of review is reasonableness. However, where the Board has made an error of law, the standard must be correctness.

2. <u>Was the decision of August 10, 2012 wrong having regard to the appropriate standard of review?</u>

[22] The question to be answered is simple:

> Was the injury to the Applicant's left knee caused by or aggravated by his duties while with the Armed Forces, in which case, he should be compensated; or was it caused by his activity outside the scope of his duties; namely, while playing "with kids", in which case it is not compensable.

[23] The evidence in this regard consists of:

- Sick Parade and Triage reports in the 1998 – 1999 period, in which pain and swelling to the left knee is reported;

- the letter of the Applicant's General Practitioner, Dr. Killeen, which states:

> *"It is possible that the injury could have been caused by or aggravated by his duties"*

- the September 10, 2008 letter of the operating surgeon, Dr. Connelly, which states, *inter alia*:

> *"He told me on July 26, 2005 that his left knee had been painful for two years and was getting worse. There was no history of injury. …*

> *The injury could have occurred at the time of his serving in the military, particularly at sea. Once the injury occurred, it could certainly be aggravated by physical activities such as standing on a heaving deck, climbing ladders, and squatting*."

- The March 24, 2010 letter from Dr. Connelly stating, *inter alia*:

> "*With a history of pain in both knees before any surgery, his occupation could certainly have led to the above-noted injuries. There is no way to prove that his symptoms on the left are compensatory in nature from the damage to the right, but this is a fairly common finding."*

[24] There is no evidence which challenges the opinions of Dr. Killeen or Dr. Connelly. The Armed Forces could have examined the Applicant's knee, and his medical records. They did not. In other words, the opinions of Drs. Killeen and Connelly are uncontradicted.

[25] What are those opinions? Dr. Killeen says that it is "*possible* that the injury *could have* been caused or aggravated by his duties". Dr. Connelly says that "his occupation *could* certainly have led" to the Applicant's injuries. Neither opinion is positive in saying that the Applicant's occupation did lead to the injury; only that it *could* or *possibly could* have led to the injury.

[26] Turning to what the Board said about this evidence, it treated the evidence as a matter of "credibility". Its opinion starts at page 9 by saying:

> *"In evaluating the credibility of medical evidence…"*

and later on page 9:

> *"The Panel will assess the credibility of the two medical opinions."*

[27] At page 10, the Board says in respect of the evidence of Drs. Killeen and Connelly that it is not:

> *"…sufficient to sway the benefit of doubt."*

[28] The Board has confused credibility with sufficiency. Credibility is whether the evidence is to be believed. Dr. Black's Law Dictionary , 8th ed, says:

> *"**Credibility,** n. The quality that makes something (as a witness or some evidence) worthy of belief."*

[29] There is nothing in the record that would lead a Court, or should have led the Board, to doubt the *credibility* of Dr. Killeen or Dr. Connelly. They are to be believed when they say that the injury *could* have been or *possibly* was caused by his military service.

[30] The question is whether their opinions that it was "*possible"* that the injury "*could have"* been caused or aggravated during the Applicant's period of service *sufficient* to sustain a claim for compensation.

[31] In an ordinary Court of law, that Court would have concluded that this evidence, while credible, was insufficient to sustain a claim. However, the circumstances here are changed by the provisions of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18. In particular, I refer to sections 3 and 39 (a), (b) and (c):

3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	*3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.*
. . .	. . .
39. In all proceedings under this Act, the Board shall	*39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :*
(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;	*a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;*

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	*b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;*
(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.	*c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.*

[32] The Federal Court of Appeal in *Wannamaker v Canada (Attorney General)*, 2007 FCA 126 provided instruction as to how section 39 was to be applied in assessing such evidence. Sharlow JA (for the Court) wrote at paragraphs 5 and 6:

> *5 Section 39 ensures that the evidence in support of a pension application is considered in the best light possible. However, section 39 does not relieve the pension applicant of the burden of proving on a balance of probabilities the facts required to establish entitlement to a pension: Wood v. Canada (Attorney General) (2001), 199 F.T.R. 133 (F.C.T.D.), Cundell v. Canada (Attorney General) (2000), 180 F.T.R. 193 (F.C.T.D).*
>
> *6 Nor does section 39 require the Board to accept all evidence presented by the applicant. The Board is not obliged to accept evidence presented by the applicant if the Board finds that evidence not to be credible, even if the evidence is not contradicted, although the Board may be obliged to explain why it finds evidence not to be credible: MacDonald v. Canada (Attorney General) (1999), 164 F.T.R. 42 at paragraphs 22 and 29. Evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove.*

[33] Thus, while discussing the obligation to consider whether evidence is credible, the Court instructs the Board that evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove. The issue then becomes whether it is sufficient.

[34] Here, the question is whether the injury to the Applicant's left knee was caused by or aggravated during his military service. The evidence is that it is *possible* that it *could* have been. Is that sufficient?

[35] Justice Bedard of this Court recently decided the case of *Leroux v Canada (Attorney General)*, 2012 FC 869, where she discussed the burden of proof in cases such as this. She wrote at paragraph 48:

> *48 There was no challenge that the burden of proof is on the applicant. The case law of this Court has established that to meet his burden, the applicant was to show that the military service was the main cause of his injury or disease and he was to establish this causal link. (King v Canada (Veterans Review and Appeal Board), 2001 FCT 535 at para 65, 205 FTR 204 [King]; Leclerc v Canada (Attorney General) (1996), 126 FTR 94 at paras 18-21, 70 A.C.W.S. (3d) 916 (FCTD); Boisvert, supra at para 26).*

[36] In that case, she had very positive evidence from the Applicant's orthopaedic surgeon. At paragraph 60 she wrote:

> *60. Moreover, Dr. Leroux issued an unequivocal opinion about the causal link between the applicant's condition and the duties he performed. He indicated that repetitive strain would have aggravated the applicant's two conditions.*

[37] Instead of "would", we have in the present case, "could". Thus, I must turn to the third issue.

3. Did the Panel assess the evidence properly having regard to section 39 of the *Veterans Review and Appeal Board Act*?

[38] Section 39 of the *Veterans Review and Appeal Board Act* has been set out in full earlier in these Reasons. In brief, it requires the Board to:

a) draw all reasonable inferences in favour of the applicant;

b) accept any uncontradicted evidence that it considers to be credible; and

c) resolve any doubt, in favour of the applicant, in verifying the evidence.

[39] In the present case, there is no reason to doubt the credibility of the evidence of Dr. Killeen or Dr. Connelly. Each stated the basis for their opinions, each were careful in stating that the injury *"could" "possibly"* have been caused by or aggravated by the Applicant's military service.

[40] There is, therefore, an element of doubt. Given the lack of any evidence to the contrary, and given that the Armed Forces chose not to examine the Applicant or bring forward any evidence of their own, subsection 39 (c) of the *Act* requires that such doubt must be resolved in favour of the Applicant.

[41] The Board's decision was not reasonable in that it resolved the doubt against the Applicant instead of in favour of the Applicant. The matter must be sent back for redetermination by a different Panel.

[42] The Applicant has asked for costs to cover disbursements, estimated at $500.00, which I will award.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is allowed;

2. The matter is returned for redetermination by a differently constituted Panel; and

3. The Applicant is entitled to costs in the sum of $500.00.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1683-12
STYLE OF CAUSE:	JAMES QUANN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	April 30, 2013
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