Federal Court  Cour fédérale

Date: 20140604

Docket: T-876-13

Citation: 2014 FC 536

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 4, 2014

Present: The Honourable Mr. Justice Martineau

BETWEEN:

PIERRE BEAUDOIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of an appeal panel of the Veterans Review and Appeals Board (the Board), dated April 17, 2013, determining that the applicant is not eligible for a pension and disability benefits for cervical osteoarthritis (neck condition) and patello-femoral syndrome in the left knee (left knee condition) that he has suffered from for several years.

[2] The relevant facts are not really disputed by the parties. The applicant was a member of the Regular Forces from June 29, 1987, to August 29, 1991; of the Reserve Forces from May 31, 1994, to November 1, 1995; and again of the Regular Forces from August 15, 1997 to August 14, 2000.

[3] Pain in the left knee—not diagnosed as a compensable condition after his first release—allegedly appeared in 1990, while the applicant was a Vehicle Technician and a member of the tug-of-war team. In 1998, after he returned to regular service, the applicant felt pain in both knees during training in the battle school. On April 11, 2000, the applicant also injured his back. He was seen and treated at the time for these various conditions.

[4] Since 2007, the applicant has already been receiving a pension under subsection 21(2) of the *Pension Act*, RSC 1985, c P-6 (the Act), for his lumbar facet osteoarthritis (lumbar condition), but he also would like to receive a pension for his cervical osteoarthritis (neck condition), which is allegedly also be associated with his back injury of 2000, which the Department of Veterans Affairs (the Department) disputes. Although he was also awarded in 2009, under section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21, disability benefits for chondromalacia patella of his right knee (right knee condition) following his injury of 1998, the Department refused to do the same for the left knee condition.

[5] Before the appeal panel of the Board, the applicant filed as additional evidence an opinion of doctor Jean-Pierre Beaudoin, dated October 30, 2012, finding that [TRANSLATION]

"…these conditions, cervical osteoarthritis and patello-femoral syndrome in the left knee, are due to the requirements of his military service …". Despite this new evidence, the Board found that the two conditions that the applicant suffers from are not due or directly related to his service.

[6] Essentially, the applicant alleged that the Board erred in rejecting the opinion of doctor Beaudoin, which was not contradicted, and basing its reasoning on extrinsic materials or those that are not binding. I will not repeat here all the arguments raised in the applicant's memorandum that were repeated at the hearing by his counsel. Broadly speaking, the applicant claims today that by concentrating on the lack of reference to the [TRANSLATION] "cervical pain", the Board neglected to draw from the circumstances and the subsequent evidence the most favorable conclusion for the applicant. In the same way, the Board also disregarded the contemporaneous medical evidence regarding the pain in the left knee, which was perhaps less than the pain in the right knee, but was nevertheless present after the injury of 1998.

[7] It must be determined whether the conclusions of the appeal panel constitute a range of possible, acceptable outcomes which are defensible in respect of the facts and law since the standard of reasonableness applies in this case: *Boisvert v Canada (Attorney General)*, 2009 FC 735 at paragraph 35, FCJ No 1377 *et al*; and *Wannamaker v Canada (Attorney General)*, 2007 FCA 126, [2007] FCJ No 466 at paragraphs 12-13 (*Wannamaker*). Following my analysis of the evidence in the record and the applicable law, the arguments relating to the conclusions of the decision in this case appear to me to be unfounded. The impugned decision appears in all respects reasonable.

[8] Section 39 on the *Veterans Review and Appeal Board Act*, SC 1995, c 18 (VRAB Act), provides that

39. In all proceedings under this Act, the Board shall	39. The Board 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.

[9] As this regards the application of evidence rules listed in section 39 of the VRAB Act, in *Wannamaker*, the Federal Court of Appeal points out that this provision "ensures that the evidence in support of a pension application is considered in the best light possible" but that this "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" (at paragraph 5).

[10] Further, the Federal Court of Appeal also explains that:

> 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. (at paragraph 6)

[11] What was stated by Justice de Montigny in *Cole v Canada (Attorney General)*, 2014 FC 310 at paragraphs 34, 35 and 46, applies perfectly in the case under review:

> [34] It is clear that the disease or injury (or the aggravation thereof) need not be directly connected to the military service, as the connecting word "or" is used in paragraph 21(2)(a) to link "directly connected" with "arose out of". At the same time, it would clearly not be sufficient for a claimant to solely show that he or she was serving in the armed forces at the time, as it would presumably be if the claim was made pursuant to paragraph 21(1)(a). This is precisely the conclusion reached by the Federal Court of Appeal in *Canada (Attorney General) v. Frye*, 2005 FCA 264. In that case, the Court found that "... while it is not enough that the person was serving in the armed forces at the time, the causal nexus that a claimant must show between the death or injury and military service need be neither direct nor immediate" (at para 29). See also *Bradley v. Canada (Attorney General)*, 2011 FC 309; *Hall v. Canada (Attorney General)*, 2011 FC 1431.
>
> [35] In other words, I agree with the Applicant that paragraph 21(2)(a) does not require proof of a direct connection, but I disagree that some kind of causal connection would be sufficient or that military service was among the contributing causes to her disability. It seems to me that the words "arising out of" and the overall context of the statute call for something more than some nexus or causal connection, and require that the military service be the main or prevalent cause of the disease or injury, or at the very least a significant factor. Another way of putting it might be to say that the injury or disease would not have occurred but for the military service.
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> …

> [46] I agree with the Respondent that the weight to be given to the evidence must be left to the Board. Absent a palpable error in the assessment of the evidence or an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material before it" (*Federal Courts Act*, RSC 1985, c. F-7, paragraph 18.1(4)(d)), this Court should refrain from intervening even if it may have come to a different conclusion. In the case at bar, I have been unable to find such an error. There was ample evidence upon which the Appeal Board could find that the Applicant had not demonstrated a sufficient causal link between her condition and her military service. … [Emphasis in the original]

[12] The applicant does not dispute the fact that it is up to the Board to examine the plausibility of any medical evidence submitted to it. In this regard, the applicant did not show that the general criteria used by the Board to assess the credibility of a medical opinion are arbitrary or capricious. Rather, he chose to attack the Board's particular application of these criteria. In this case, the Board first notes that Dr. Beaudoin is not a specialist, but rather a family doctor. It set aside his opinion on the neck condition, finding that this situation does not flow logically from the facts and give his reasoning. That is indeed where the reviewing judge must show great deference and not substitute himself for the Board in the assessment of the evidence. I am satisfied in this case that the Board's findings rely on the evidence and are not arbitrary or capricious. From one perspective, the Board explained clearly and rationally why it set aside the opinion of Dr. Beaudoin, which it considered to be not credible. In passing, the applicant also submits that the Board erred in relying specifically on the *Entitlement Eligibility Guidelines*, the medical literature and the Department's medical guidelines on patellar femoral dysfunction. Their non binding nature is not an element that prevented the Board from taking it into account in assessing the evidence. I completely accept the arguments that the respondent presented in his written memorandum, which I will not repeat here, except to give a few explanations.

[13] First, the Board could reasonably conclude that the neck condition is not due or directly related to the applicant's service by supporting his reasoning on the fact that there is no evidence on the record of clear trauma to the cervical region or an injury to the lumbar region. Its conclusion that there is a lack of reference to the cervical pain relies on the medical evidence on the record, whether it relates to the diagnosis (lumbar strain) made on April 14, 2000, by the treating physician—consultations of May 26, 2000, and of June 14, 2000, of the emergency report of July 11, 2000, ([TRANSLATION] "upper back pain" and not "neck pain") and the medical examination by Dr. McCarron. Concerning the neck condition, the Board was certainly authorized to give preference to contemporaneous medical evidence, rather than to the subsequent opinion of Dr. Beaudoin who did not examine the applicant at the time and is not a specialist. Moreover, the medical literature confirmed the degenerative nature of osteoarthritis, as did the time elapsed between the incident of April 14, 2000, and the x-ray of July 11, 2000, showing mild spinal osteoarthritis in C6 and C7 vertebra is [TRANSLATION] "too short to draw a conclusion of a cause and effect relationship".

[14] Second, the Board could also reasonably conclude that the patello-femoral syndrome in the left knee is not due or directly related to the applicant's service. Further, the Board did not commit any reviewable error in considering that it must be accepted that the applicant injured his left knee in 1998 so as to conclude that there is a [TRANSLATION] "complete link" between the syndrome and the military service. The medical examination for the release dated July 19, 1991, refers to "Bilateral Patellofemoral Syndrome", but does not specifically refer to the left knee and only adds "still symtomatic (sic) of bilaterial patellofemoral pain improving slowly otherwises (sic) nil significant". The medical note dated June 19, 1991, also notes: "3 months … bilateral

knee pain LT slightly worse than right …". In particular, the Board could rely on the fact that, since the enrolment examination of March 17, 1997, did not make note of troubles with the applicant's left knee, the patello-femoral syndrome was resolved. Although the emergency report and the consultation report of August 27, 1998, indicate an [TRANSLATION] "external tibial torsion G > D", they concentrated almost entirely on the right knee. From another perspective, the Board instead observed that Dr. Hébert's report of August 17, 1998, noted pain in the right knee, while Dr. McCarron did not note any problem with the left knee. Moreover, the main reason for the consultation with Dr. Hébert was pain in the right knee. Further, according to the Department's guidelines on patellar femoral dysfunction, direct and severe trauma to the knee can cause the condition. However, there is no credible evidence on the record that the applicant experienced such trauma to the left knee during his service.

[15] For all these reasons, the application for judicial review must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the applicant's application for judicial review is dismissed.

"Luc Martineau"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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