Federal Court  Cour fédérale

Date: 20090610

Docket: T-1539-07

Citation: 2009 FC 626

Ottawa, Ontario, June 10, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CYRIL EUGENE MCLEAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an application for judicial review of the Veterans Review and Appeal Board's (VRAB) decision holding that the Applicant, a retired RCMP officer, was not pensionable under section 32 of the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11.

II. BACKGROUND

[2] The Applicant, a former member of the RCMP, served with the force from April 14, 1970 to July 8, 1998, at which time he retired with the rank of Inspector.

[3] The Applicant served in detachments in several small towns in Saskatchewan for most of the 1970s, then at the national RCMP headquarters in Ottawa and in various overseas postings until his retirement. There is evidence that the Applicant suffered knee pain from the time of his training at the beginning of his career, but at the time of his admission to the RCMP, he was in good health and there is no serious claim that those knee injuries form part of his pension appeal.

[4] In the mid-1970s the Applicant was involved in a serious motor vehicle accident while on duty, wherein he severely banged his knees. Further, during the first decade of his RCMP service, he was in physically demanding situations, in isolated detachments where there was minimal staff on hand.

[5] In a medical report of August 10, 1976, the Applicant was said to have experienced a “snap” in his knee and pain when bending over to pick up some garbage on his way home from the detachment. The Applicant signed a statement on August 24, 1976 that his knee had mended properly.

[6] Mr. McLean first applied for a disability pension in May 2005 at which time he claimed damage to both his right and left knee and a number of other injuries or disabilities, the bulk of which he has since withdrawn. The Applicant’s claim was supported with letters from several

RCMP contemporaries attesting to the nature of the work, the motor vehicle accident, and the fact that the Applicant had complained of knee problems during his service time.

[7] The Minister's decision of January 26, 2006 denied the disability entitlement on the basis that there was no evidence of ongoing complaints with regards to the left knee, no evidence that the injury sustained in August 1976 was related to service, and that the diagnosis provided was a provisional diagnosis. It is not clear from the record as to the basis upon which the medical opinion was considered provisional.

[8] The Applicant had a hearing before a Panel of the VRAB on July 14, 2006 for a review of the Minister's decision. At that time there was before the Panel evidence from the Applicant's current doctor that the injuries which the Applicant now had were consistent with chronic recurrent injuries sustained by law enforcement personnel (letter of February 22, 2006, Certified Tribunal Record, page 63). That evidence was elaborated on further by a letter from the doctor of June 12, 2006 confirming the legitimacy of Mr. McLean's claim and referring to confirmatory evidence of damage through an MRI. The Panel denied the pension claim on the basis that there was no documented evidence to support the contention that the complaints were attributed to RCMP service.

[9] The Panel's decision was reviewed by the Appeal Board which issued the decision that is the matter of this judicial review. The Appeal Board denied the review, noting that there was no report on injuries to support the proposition that the Applicant suffered a serious injury to his left

knee due to service-related activities. The Appeal Board noted the Applicant's 1977 diagnosis of chondromalacia patellae, and that he sustained an injury in 1976 while walking home from work.

[10] The Appeal Board went on to note that there was no continuity of complaints from the late 1970s to 2005, that there were no eyewitnesses to the motor vehicle accident, and that there is overall insufficient evidence that injury occurred during service-related activities. Further, the Appeal Board stated that the x-rays do not support the findings of trauma.

[11] Finally, the Appeal Board noted that:

> Dr. Hansen does not address the minimal findings on the x-ray in the late post-discharge period. He states that the Review Panel's denial of pension entitlement is "erroneous and unsupported", but does not speak to the lack of continuity of complaint, substantiation of a service relationship, nor the natural aging process associated with osteoarthritis.

[12] The Applicant lists several alleged flaws in the Appeal Board's decision, the issue raised is essentially:

> Was the Appeal Board's determination that the Applicant was not eligible for disability benefits based on his knee injuries reasonable?

III. ANALYSIS

[13] In *Wannamaker v. Canada (Attorney General)*, 2007 FCA 126, the Court of Appeal held that the issue of whether a particular injury arose out of service is to be reviewed on a standard of

reasonableness. A number of other issues were to be decided on the standard of patent unreasonableness.

[14] While the *Wannamaker* decision was pre-*Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9), the Court of Appeal's conclusion that the standard of reasonableness applies to the matter of injuries arising out of service (more properly described as injuries arising from RCMP service) is still applicable. This Court followed this standard of reasonableness in *Macdonald v. Canada (Attorney General)*, 2008 FC 796.

[15] The Applicant argues that the Appeal Board erred in determining that there was a lack of documentary evidence, especially given that there were no adverse credibility findings, that there was no requirement for continuity of complaints; that evidence of a motor vehicle accident ought not to be discounted because there were no eyewitnesses; and that weight ought to be given to Dr. Hansen's medical opinion.

[16] The Respondent places great emphasis on the *Wannamaker* decision. However, that decision supports a denial of benefits decision where the only evidence of injury came from Wannamaker himself and where the VARB did not find his evidence reliable. There is no such adverse credibility finding in the present case.

[17] The Appeal Board's finding that there was no continuity of complaints from the late 1970s to 2005 is problematic. That finding played a central role in the Appeal Board's decision, as it is

also referred to in the Appeal Board's comments on Dr. Hansen's opinion - in that the Appeal Board suggested it was a deficiency that the medical opinion failed to address the lack of continuity of complaint.

[18] The Respondent recognized the problem in the Appeal Board's decision of the reliance on lack of continuity of complaints and described it as a "perhaps imperfect" finding. The Respondent then valiantly attempted to recast the finding as one going to whether the injury was service-related.

[19] To the extent that lack of continuity of complaint could be relevant, it is more logically connected to whether the injury occurred in the first place and not to whether the injury was service-related.

[20] The Board ignored the type of work performed by the Applicant in wrestling assailants, breaking up bar fights, and the day-to-day "on the ground" work of a police officer in remote locations and often alone.

[21] The Board also discounted the Applicant's evidence of his car accident injury to his knee. The Board's rationale was that the evidence from RCMP colleagues could only have significance if they had been eyewitnesses to the accident. The Board gave no regard to the policing conditions in rural Saskatchewan in the 1970s where officers often worked alone.

[22] The Board's conclusion in this regard is contrary to subsection 39*(c)* of the *Veterans Review and Appeal Board Act*:

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 :
…	…
(*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.

[23] To the extent that the Board was weighing the absence of a formal report of injury against evidence of letters attesting to the crash, of trauma to the knee, and of the RCMP culture against taking time off in a small detachment, the Board did not apply and did not consider the application of s. 39(b) of the Act. S. 39*(b)* reads:

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 :
…	…
(*b*) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances;	*b*) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;

[24] The Appeal Board made no adverse credibility finding, yet it discounted critical evidence as if it had. Therefore, its conclusions on the evidence were unreasonable.

[25] The Respondent did not obtain, nor was it required to obtain, an independent medical opinion. However, unlike *Wannamaker*, there was relatively contemporaneous medical evidence in 1977 which identified a knee injury (chondromalacia) and made a tentative conclusion that the Applicant's meniscus may not be torn. There was no final conclusion as to whether the meniscus was in fact torn.

[26] For the Board to then question Dr. Hansen's reliance in 2005 on MRI evidence rather than the minimal findings of the 1977 x-rays and to conclude that chondromalacia, which an expert attributes to RCMP service, is not pensionable because it worsens with age is as unreasonable as the other findings previously referred to.

IV. CONCLUSION

[27] Therefore, the Appeal Board's decision is reviewable and should be quashed. However, the Court will not make its own award. The matter will be referred back to a new panel for an assessment and determination of pension entitlement in whole or in part. The Applicant shall have his costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the Appeal Board's decision is quashed. The matter is referred back to a new panel for an assessment and determination of pension entitlement in whole or in part. The Applicant shall have his costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1539-07
STYLE OF CAUSE:	CYRIL EUGENE MCLEAN and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	December 11, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan, J.
DATED:	June 10, 2009

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