Federal Court  Cour fédérale

Date: 20090909

Docket: T-1923-08

Citation: 2009 FC 884

Ottawa, Ontario, September 9, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

DAVID MURRAY

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, dated October 22, 2008, denying the applicant's disability pension claim on the basis that the applicant's toe injury did not arise out of, nor was it directly connected to, his service in the Royal Canadian Mounted Police (RCMP) within the meaning of subsection 21(2) of the *Pension Act*, R.S., 1985, c. P-6.

FACTS

[2] The applicant served with the RCMP from April 12, 1972 to April 27, 2005.

[3] On September 19, 1972, the applicant sustained an injury to the first toe of his right foot when he stubbed it on a bed frame in the RCMP dormitory. The applicant states that he was accidentally struck in the face during a "ground fighting" training exercise earlier in the day and suffered a nosebleed as a result. His nose began bleeding again after "lights out" in the RCMP dormitory and the applicant stubbed his toe while running to the restroom in the dark. The applicant was a recruit in training at the RCMP Depot in Regina, Saskatchewan, at the time of this injury.

[4] The applicant's injury was examined on September 20, 1972. The x-ray did not show any fracture or abnormality. The applicant completed an Injury Statement form indicating that the accident had occurred off-duty and that he had fully recovered from the injury. He completed another form on September 28, 1972, that stated that his injury was of a trivial nature and was unlikely to cause any permanent ill-effects.

[5] Thirty-two years later, on December 17, 2004, the applicant submitted a disability claim to the Minister of Veterans Affairs for degenerative arthritis in the metatarsal phalangeal joint of the first toe of his right foot.

[6] On May 16, 2005, the Minister denied the applicant's pension claim, finding that the applicant injured his toe while off duty and that full recovery had been indicated. The applicant

appealed to the Veterans Review and Appeal Board Entitlement Review Panel (Review Panel). In a decision dated March 1, 2006, the Review Panel affirmed the Minister's decision on the basis that the applicant had been off duty at the time of the injury and that the medical report stating that the applicant's disability was a result of his toe injury was based on the applicant's recollection.

[7] The applicant then appealed to the Veterans Review and Appeal Board (Appeal Board). The Appeal Board affirmed the decision of the Review Panel on October 22, 2008. The applicant seeks judicial review of this decision.

Decision under review

[8] The Appeal Board reviewed the medical evidence and, in contrast to the Review Panel and the Minister, found that the applicant's condition was "most likely" a result of the applicant's injury on September 19, 1972.

[9] In considering whether the applicant's injury arose out of, or was directly connected with, his service in the RCMP, the Appeal Board considered the following factors:

1. the direct cause of the injury;
2. the activity the applicant was engaged in at the time of the injury;
3. the applicant's duty status at the time of the injury;
4. whether the RCMP was exercising control over the applicant at the time of the injury;
5. where the injury occurred;
6. whether the applicant was in uniform at the time of the injury; and

> 7. whether there were any other facts that would assist the Board in determining whether the applicant's injury arose out of, or directly in connection with, his RCMP service.

[10] The Board concluded that the injury had not been sustained as a result of or in connection with the applicant's RCMP service. The Board stated at page 4 of the decision (Application Record, p. 14):

> The direct cause of the Appellant's injury was striking his foot on a bed while running. The activity he was engaged in was rushing to the bathroom to attend to a nosebleed. The Board finds the activity in which the Appellant was engaged and the actual mechanism of injury were not connected to RCMP service. This sort of mishap can happen to anyone, at any time, and in any place. Hitting one's toe on the leg of a bed has nothing to do with RCMP service. [Underlining added by the Court.]

[11] The applicant had submitted evidence to the Appeal Board supporting his contention that, as a recruit, he was effectively "on duty" at all times. The Board stated:

> Duty status is important, but is not necessarily determinative of whether the accident arose out of RCMP service. It is one factor to be considered. Even where an Appellant is clearly "on duty," in that he or she is at the worksite and their shift has commenced, it is not *necessarily* the case that an accident therefore arose out of such service.

[12] The Board found that the RCMP was exercising substantial control over the applicant at the time of the accident, as he was in the dormitory and was subject to inspection and a call to duty at any time. However, the Appeal Board found that this was an insufficient basis for finding that the accident arose out of service. The Board noted that the applicant was not in uniform at the time of the injury.

[13] The Appeal Board cited the decision of this Court in *King v. Canada (Veterans Review and Appeal Board)* (2001), 205 F.T.R. 204, wherein Justice Nadon stated at para. 67 that the phrase "directly connected" required that the Board consider the "strength of the causal connection between the injury and the applicant's military service." The Appeal Board concluded at page 6:

> The Board finds the Appellant was not performing service-related duties at the time of the injury. Even if one accepts Mr. Lagasse's position that recruits were always "on duty", the Board cannot find that the Appellant was discharging any aspect of his duty as a peace officer (or recruit) at the time of the accident
> ….
> The Board also notes that while the location of the accident was clearly under RCMP control, there were no factors that made the dormitory materially different from any other ordinary place. The likelihood of the injury, in the Board's view, was not increased or lowered by this particular location.
>
> Accordingly, the Board finds the Appellant's RCMP service was not the cause of the injury which led to the claimed disability. [Underlining added by the Court.]

RELEVANT LEGISLATION

[14] Section 21(2) of the *Pension Act*, R.S.C. 1983, c. P-6, sets out the circumstances under which a disability resulting from an injury sustained during military or peace time service is pensionable:

(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,	(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*) where a member of the forces suffers disability resulting from an injury or disease or an aggravation	*a*) des pensions sont, sur demande, accordées aux membres des forces ou à

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;	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;

[Underlining by the Court.]

[15] The *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11, provides in section 32 that a pension shall be granted to an RCMP officer in accordance with the *Pension Act* who has suffered a disability where the injury or aggravation thereof "arose out of, or was directly connected with, his service in the Force (the RCMP Police Force)."

[16] The *Veterans Review and Appeal Board Act* (S.C. 1995, c. 18) provides:

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.

[17] Under this section, the Appeal Board must "liberally construe and interpret" the pension legislation so that RCMP members and members of the Canadian Department of National Defence are properly awarded pensions for disability arising from their service to Canada.

[18] Section 39 of the *Veterans Review and Appeal Board Act* provides:

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.

[19] Under section 39, the Appeal Board must draw every reasonable inference in favour of the pension applicant, accept the applicant's uncontradicted but credible evidence, and resolve in favour of the pension applicant any doubt, in the weighing of the evidence, as to whether the applicant has established his case for a pension.

ISSUES

[20] There is one issue before the Court:

1) Whether the Appeal Board erred in concluding that the applicant's injury did not arise from or was not directly connected to his service.

STANDARD OF REVIEW

[21] This Court has determined that decisions of the Appeal Board relating to disability pension claims are generally reviewed on a standard of reasonableness: *Goldsworthy v. Canada (A.G.)*, 2008 FC 380, 166 A.C.W.S. (3d) 485, per Snider J. at paras. 10-14; *Wannamaker v. Canada (A.G.)* 2007 FCA 126, 361 N.R. 266, per Sharlow J.A. at paras. 12-13. In *Wannamaker*, the Federal Court of Appeal found at para. 12 that the Board's determination as to whether an applicant's injury arose out of service is a question of mixed fact and law subject to a reasonableness standard of review. The Federal Court of Appeal also found that whether the Board assessed the evidence in accordance with the *Veterans Review and Appeal Board Act* is a question of mixed fact and law and should be reviewed on a reasonableness standard.

[22] In determining whether the Officer's findings were reasonable, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1 at para.47).

Issue: <u>Whether the Appeal Board erred in finding that the applicant's injury did not arise out of, nor was it related to, his RCMP service</u>

[23] The Court has concluded that the Appeal Board decision must be set aside and sent back to another panel of the Appeal Board for redetermination. The three reasons for this conclusion are:

1. The Board did not provide a sufficient analysis of the lack of causal connection between the injury to the toe and the applicant's nosebleed, which did arise from the applicant's RCMP service;

2. There were alleged factors which made the RCMP dormitory materially different from the ordinary place where the applicant would sleep and that the Appeal Board's decision did not discuss these factors; and

3. The Appeal Board's decision may not have complied with its statutory obligation to resolve in favour of the applicant any doubt in the weighing of the evidence.

1. <u>The Board did not provide sufficient analysis of the lack of causal connection between the injury to the toe and the applicant's nosebleed, which did arise from the applicant's RCMP service</u>

[24] The Board stated at page 4 of its decision that:

> "the activity he was engaged in was rushing to the bathroom to attend to a nosebleed".
>
> The Board implicitly accepted that this nosebleed was directly related to the injury which the applicant suffered earlier in the day during the "ground fighting" training exercise. The Board's conclusion at page 4 that "the Board finds the activity in which the applicant was engaged (i.e. rushing to the bathroom to attend to a nosebleed)… was not connected to RCMP service" was not reasonably open to the Board without an analysis of the causal connection, or lack thereof, between the injury (to the toe) and the applicant's RCMP service, i.e. the nosebleed which arose from the applicant's "ground fighting" training exercise earlier in the day.

It was reasonably open to the Board to find that the stubbing of the toe is too remote from the nosebleed, i.e. the nosebleed did not cause the stubbing of the toe. The stubbing was caused by Mr. Murray's failure to take adequate care in going to the washroom. However, the Board did not provide sufficient reasons to explain why it did not consider there was a causal connection.

2. <u>There were alleged factors which made the RCMP dormitory materially different from the ordinary place where the applicant would sleep and that the Appeal Board's decision did not discuss these factors</u>

[25] The Court finds that the Board's conclusion at page 6 in its decision that: "… while the location of the accident was clearly under RCMP control, there were no factors that made the dormitory materially different from any ordinary place. The likelihood of the injury, in the Board's view, was not increased or lowered by this particular location." This conclusion does not analyze a number of alleged material facts in the evidence which the duty to provide sufficient reasons require. The alleged factors are:

(a) There were approximately 60 beds and 60 RCMP recruits in the dormitory at the time the nosebleed re-occurred and the applicant had to rush to the bathroom to attend to the nosebleed;

(b) In the dormitory, the applicant was not allowed to turn on any lights. Accordingly, the applicant was rushing to the bathroom in total darkness;

(c) The applicant testified that he had to run between two rows of 60 bunk beds and had to move a distance of about 60 feet to the bathroom in the dark; and

(d) The applicant was in a constant state of anxiety and fear that he would soil, with the blood from his nose, either his bedding or the floor in the dormitory. Part of the RCMP recruit training was an insistence that the dormitory area be kept spotlessly clean.

It was reasonably open to the Board to find that the stubbing of the toe was not caused by the conditions in the dormitory. Once again, the Board did not provide sufficient reasons to explain why the factors raised by Mr. Murray did not substantially contribute to the injury.

3. The Appeal Board's decision may not have complied with its statutory obligation to resolve in favour of the applicant any doubt in the weighing of the evidence.

[26] In the Board's decision at page 6, the Board held:

> ... The Board bears in mind that the governing legislation must be construed broadly, and that any reasonable inference should be drawn from the evidence in favour of claimants.

[27] In the case at bar, there is evidence which allegedly could be construed both ways. The Board's decision may not be reasonable in that it did not liberally construe and interpret the legislation providing for compensation for injury arising out of or directly connected to the applicant's service in the RCMP, and may not have drawn from the circumstances of the case and the evidence every reasonable inference in favour of the applicant or resolve in favour of the applicant any doubt in the weighing of the evidence as to whether the applicant has established a case. These are statutory obligations of the Board under sections 3 and 39 of the *Veterans Review and Appeal Board Act*.

[28] If the Board had provided sufficient reasons for the first two issues, then the Court would not have any question as to whether Mr. Murray was accorded the benefit of the doubt as required by the legislation. Without sufficient reasons, the Court is left in doubt with respect to this issue.

CONCLUSION

[29] After a new hearing before a different panel of the Board, the Board is at liberty to find that the stubbing of the toe did not arise or is not connected with Mr. Murray's service with the RCMP. It is also reasonably open to the Board to find that the injury did. That is not a decision for the Court. The function of the Court is to review the decision to ensure that it is in accordance with the law. For the above reasons, the Court finds that this decision has failed with respect to three issues and accordingly the decision must be set aside.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review of the decision of the Veterans Review and Appeal Board dated October 22, 2008 is set aside and this matter is referred back to another panel of the Veterans Review and Appeal Board for a new hearing and redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Vancouver, BC
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