Federal Court  Cour fédérale

**Date: 20091210**

**Docket: T-1792-08**

**Citation: 2009 FC 1254**

**Ottawa, Ontario, December 10, 2009**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**GREGORY ALLAN MACDONALD**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review in respect of a Reconsideration of Entitlement Appeal decision (the decision) of the Veterans Review and Appeal Board (the Board) dated September 18, 2008. In the decision, the Board upheld its findings of November 21, 2007, to grant the Applicant a four-fifths pension entitlement for his internal derangement of the right knee (the right knee injury) and granted two additional years of pension under subsection 39(2) of the *Pension Act*, R.S., 1985, c. P-6, for his varicose veins and right knee injuries.

[2] For the reasons set out below the appeal is dismissed.

## I. Background

[3] The Applicant was a member of the Canadian Forces until 1975. He injured his right knee twice in 1968 during the course of his military duties, resulting in the right knee and varicose veins injuries. In 1998, the Applicant made an application for a disability pension related to, *inter alia*, these injuries. In 1999, the Applicant's knee "gave out" when he was jogging and again when he was golfing.

[4] This is the third time the Applicant has been to Federal Court to judicially review a Board decision related to these injuries (see *MacDonald v. Canada (Attorney General)*, 2003 FC 1263, 241 F.T.R. 308, per Justice François Lemieux and *MacDonald v. Canada (Attorney General)*, 2007 FC 809, 332 F.T.R. 169, per Justice Elizabeth Heneghan). The Applicant was successful on both prior occasions and the matters were sent back for re-consideration. In 2007, Justice Heneghan found that the Board had erred by ignoring section 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, which provides that any doubt relating to the credibility of the evidence is to be resolved in the Applicant's favour. Justice Heneghan also found that the Board had erred by rejecting the Applicant's pension claim with respect to his varicose veins condition.

[5] On November 21, 2007, after the matter was re-heard by a new Board as an Entitlement Reconsideration Appeal, the Applicant was granted the full-entitlement (five-fifths) for his varicose veins condition and four-fifths entitlement for his right knee injury (the 2007 decision). The Board

stated that they withheld one-fifth pension entitlement for the part of the disability attributable to post service activities such as jogging and golfing. Both entitlements were made retroactive to November 21, 2004. This represented the full period of possible retroactivity under subsection 39 (1) of the *Pension Act*. Not satisfied, the Applicant requested a Reconsideration of this Entitlement Appeal. It is this reconsideration decision that is currently under review.

A. *The Board's Decision of September 18, 2008*

[6] In the Reconsideration of Entitlement Appeal decision, the Board upheld its 2007 findings to grant the Applicant a four-fifths pension entitlement for his right knee injury. In addition, they granted two additional years of pension under subsection 39(2) of the *Pension Act* for the varicose veins and right knee injuries.

[7] Subsection 32(1) of the *Veterans Review and Appeal Board Act* provides that an appeal panel may reconsider a decision made by it under subsection 29(1) and may either confirm, amend, or rescind the decision if it determines that an error was made with respect to any finding of fact, the interpretation of any law, or if new evidence is presented to the appeal panel. As is the case here, if the Applicant requests the reconsideration, they have the onus of persuading the panel that there are grounds to reconsider the case.

[8] The Applicant raised two grounds for reconsideration. On the first ground, the right knee injury, the Applicant argued that in the 2007 decision the Board erred in making a medical finding

in deciding that his right knee condition was aggravated by his activities after leaving the Military in 1975. The Board determined that the Applicant had not established that reconsideration of the 2007 decision with respect to the amount of pension entitlement for the right knee injury was warranted. The Board stated that in granting the four-fifths pension entitlement in 2007, it had not discounted a report by the Applicant's orthopaedic surgeon, as suggested by the Applicant, but had accepted and weighed the report.

[9] In the decision under review, the Board upheld the 2007 decision and stated at page 4, paragraph 3:

> In granting four-fifths pension entitlement the Board did not discount the report of Dr. Wiltshire, as suggested by the Appellant, but accepted the report and weighed it. Dr. Wiltshire was not wholly conclusive on this issue of causation. There were clearly acute symptoms that occurred while jogging in May 1999, and it is logical to therefore conclude that some injury occurred at the time. As referred to above, Dr. Wiltshire suggests that some of the meniscus damage possibly occurred after the second surgery.

[10] On the second issue, retroactivity, the Board determined that this was a case where the delays in the matter, the difficulty beyond the Applicant's control in obtaining documentation, and the two Federal Court hearings, resulted in significant delays that were not wholly within the Applicant's control. Therefore, they applied subsection 39(2) of the *Pension Act*, thereby granting the additional two years pension available under this subsection for the right knee and varicose veins injuries.

B. *The Medical Evidence*

[11] Justice Heneghan outlined the facts and litigation history of the Applicant's pension application for these injuries in paragraphs 3-42 of her decision and I refer and incorporate this discussion into these reasons.

[12] Of particular relevance to the case at bar is the evidence of Dr. Wiltshire, the Applicant's orthopaedic surgeon. Dr. Wiltshire provided three reports related to the right knee injury, the most recent and extensive being the opinion dated May 31, 2005. Justice Heneghan set out this opinion at paragraph 33 of her decision. In the May 2005 report, Dr. Wiltshire stated that while his arthroscopic findings in 1999 did not disclose any evidence of meniscal damage, it was possible that he had missed the tear of the meniscus. Dr. Wiltshire also wrote that he agreed with another doctor who provided evidence for the Board, Dr. Stanish, that medial right-sided knee discomfort and pathology is very common in males over 40.

[13] At some point, a portion of the Applicant's medical records from 1968 went missing. The Respondent has not directly addressed this issue. Justice Heneghan discussed the missing records at paragraphs 72-75 of her reasons. However, the matter of the missing records, and any argument related to their loss, is not relevant to the decision currently under review. The missing records were an important element for the determination of causation of the initial injury sustained in 1968. This initial injury has been established. The decision currently under review is with regard to the extent,

if any, to which stress and injury to the right knee over the intervening 30 years has contributed and/or worsened the injury caused in 1968 to disentitle the Applicant to a full disability pension.

C. *Section 39 of the Pension Act*

[14] Section 39 of the *Pension Act* provides the effective date from which a disability pension is payable. Section 39 is set out thus:

| Date from which disability pension payable: | Date à partir de laquelle est payable une pension d'invalidité: |
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| 39. (1) A pension awarded for disability shall be made payable from the later of | 39. (1) Le paiement d'une pension accordée pour invalidité prend effet à partir de celle des dates suivantes qui est postérieure à l'autre: |
| (a) the day on which application therefore was first made, and | a) la date à laquelle une demande à cette fin a été présentée en premier lieu; |
| (b) a day three years prior to the day on which the pension was awarded to the pensioner. | b) une date précédant de trois ans la date à laquelle la pension a été accordée au pensionné. |
| Additional award: | Compensation supplémentaire: |
| (2) Notwithstanding subsection (1), where a pension is awarded for a disability and the Minister or, in the case of a review or an appeal under the Veterans Review and Appeal Board Act, the Veterans Review and Appeal Board is of the opinion that the pension should be | (2) Malgré le paragraphe (1), lorsqu'il est d'avis que, en raison soit de retards dans l'obtention des dossiers militaires ou autres, soit d'autres difficultés administratives indépendantes de la volonté du demandeur, la pension devrait être accordée à |

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| awarded from a day earlier than the day prescribed by subsection (1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension. | partir d'une date antérieure, le ministre ou le Tribunal, dans le cadre d'une demande de révision ou d'un appel prévus par la Loi sur le Tribunal des anciens combattants (révision et appel), peut accorder au pensionné une compensation supplémentaire dont le montant ne dépasse pas celui de deux années de pension. |

[15] Therefore, the Board gave the Applicant the full, allowable retroactive payment period allowed under section 39.

D. *The Constitutional Challenge*

[16] The Applicant questions the constitutional validity, application and effect of section 39 of the *Pension Act* (the Constitutional question). He has filed a Notice of Constitutional Question and complied with section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and section 69 of the *Federal Court Rules*, SOR/98-106.

[17] Essentially, the Applicant argues that section 39 has prevented him from receiving approximately four years of pension. He originally applied to the Department of Veterans Affairs for a pension for the right knee and varicose veins injuries on November 24, 1998. The request was

initially denied on December 24, 1999, and finally allowed in 2007. However, by operation of subsection 39(1), his entitlement can only be retroactive to November 21, 2004. The Board did grant him an extra two years under subsection 39(2), but this still leaves approximately four years not covered.

[18] The Applicant argues that he was forced to have the decisions reviewed by the Federal Court twice to achieve the pension he deserved in 1998 and that the missing medical records caused much of the delay. Therefore, he should be in the same position as those who were granted their pensions when they initially applied for them.

[19] At the hearing before the Board, the Applicant conceded that the law as set out in section 39 is clear that the Board is limited to granting retroactively of three years from the date of the hearing and an additional two years where unusual circumstances beyond the control of the Applicant warrant it.

## II. Standard of Review

[20] The applicable standard of review for reconsideration decisions by the Board is reasonableness (*Rioux v. Canada (Attorney General)*, 2008 FC 991, [2008] F.C.J. No. 1231 at paragraph 17; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

## III. Issues

[21] There are three issues to be considered in this matter:

(a) Can the Federal Court make a finding on the Applicant's argument that section 39 of the *Pension Act* violates the section 15 right to equality under the *Charter of Rights and Freedoms* when the Board, whose decision is under judicial review, did not determine this issue?

(b) If the answer to issue one is positive, does section 39 of the *Pension Act* violate subsection 15(1) of the *Charter* and is not a reasonable limitation?

(c) Was the Board reasonable in upholding its findings of November 21, 2007, to grant the Applicant a four-fifths pension for the right knee injury?

[22] I will now consider these issues.

### A. *Can the Federal Court Make a Finding on the Applicant's Argument that Section 39 of the Pension Act Violates the Section 15 Right to Equality Under the Charter When the Board, Whose Decision is Under Judicial Review, Did Not Determine this Issue?*

[23] It is clear that the Constitutional question raised by the Applicant was discussed with the Board (see page 2, paragraph 4 of the decision). However, as reported in the decision, the Applicant did not file a formal complaint or challenge with the required notification of the *Charter* question

prior to the hearing before the Board. The Board also noted at page 3, paragraph 2 that the Applicant stated he did not expect the Board to rule on whether his rights under the *Charter* had been violated. The Board did not so rule.

[24] Prior to the hearing, I invited the parties to submit additional argument on the issue of the Federal Court's ability to make a finding that section 39 of the *Pension Act* violates section 15 of the *Charter of Rights and Freedoms* if the Board did not determine the issue. The Applicant provided further written material and both parties made oral submissions at the hearing.

[25] The Applicant argued that he did raise the Constitutional question with the Board, that the Board's silence on the issue must be seen as a denial of the Applicant's position that subsection 39(1) contravenes the *Charter*, and that it would be wrong, in his opinion, for federal boards to make rulings on constitutional questions that are outside of their acknowledged areas of expertise.

[26] The Applicant states that the Constitutional question was raised with the Board. However, he did not file the appropriate forms and dropped this issue at the hearing before the Board. I cannot accept the Applicant's position that by not directly deciding an issue, in his words "staying silent", then the Board is making a decision.

[27] It is also clear that administrative tribunals do have the jurisdiction to apply the *Charter*. This jurisdiction was discussed in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003]

2 S.C.R. 504, 2003 SCC 54, where Justice Gonthier set out a four part test to be used when assessing the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny (see paragraph 48). The test can be summarized as follows:

1. Determine whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision;
2. Explicit or implied jurisdiction must be found in the terms of the statutory grant of authority;
3. If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*; and
4. The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption.

[28] In this case, the impugned provision is section 39 of the *Pension Act*. Sections 16 and 18 of the *Veterans Review and Appeal Board Act* set out the powers of the Board with regard to the *Pension Act*. In these sections, the Board has been granted the explicit and exclusive jurisdiction to decide questions of law arising under the *Pension Act*. Therefore, the Board has jurisdiction to decide questions of law arising under a legislative provision and the Board's power is presumed to include the jurisdiction to determine the constitutional validity of section 39 under the *Charter*. It is up to the Applicant, as the party that would allege that the Board lacks jurisdiction, to rebut this presumption. I do not find that this presumption has been rebutted.

[29] Having found that the Board had jurisdiction to hear the Constitutional question, I now find that I am unable to address the Applicant's Constitutional question at this time. Judicial review proceedings are limited in scope and not trial *de novo* proceedings. As set out by Justice Rothstein in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135, 1999 F.C.J. No. 1192 (F.C.A.) at paragraph 15, the purpose of a judicial review is the review of decisions. Therefore, barring exceptional circumstances such as bias or jurisdiction (none of which are raised in this case), the reviewing Court is bound by and limited to "the record that was before the judge or Board." (*see Bekker v. Canada*, 2004 F.C.A. 186, 323 N.R. 195 at paragraph 11, where the Court considered if it should hear a *Charter* challenge raised only at the Court of Appeal).

[30] Recently Justice Layden-Stevenson addressed the issue of whether to hear a *Charter* argument not heard by the previous decision maker. In *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 268, [2009] F.C.J. No. 1152, Justice Layden-Stevenson, for the Court, did not entertain a constitutional challenge to the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27 that was not raised before the Federal Court. Justice Layden-Stevenson based on the fact that to do so would deprive the Court of Appeal from the benefit of the application judge's reasons and analysis on the arguments. While this decision is with regard to the Federal Court, its rationale is applicable in this case.

[31] As the Board did not decide the Constitutional question raised by the Applicant in this matter, I cannot consider it under this judicial review application.

[32] Based on my conclusion in issue (a) there is no need to consider issue (b).

### C. *Was the Board Reasonable in Upholding its Findings of November 21, 2007 to Grant the Applicant a Four-Fifths Pension for the Right Knee Injury?*

[33] The Applicant argues that the decision not to grant him full pension entitlement for his right knee injury is arbitrary and not based on the evidence. He argues that in concluding that some of the injury was caused by his post-military activity, the Board came to a medical opinion that is outside their area of expertise.

[34] The Respondent argues that the Board relied on the medical findings of Dr. Wiltshire, the Applicant's doctor. According to the Respondent, the Board weighed the evidence of Dr. Wiltshire and determined that it was not conclusive of the causation of the right knee injury for three reasons: the acute symptoms occurred in 1999 while the Applicant was jogging, that Dr. Wiltshire opined that a meniscal tear could have happened after the second arthroscopy, and that Dr. Wiltshire stated it is only possible that the tear in the meniscus occurred in 1968.

[35] Decisions of the Appeal Panel are final and binding (see section 31 of the *Veterans Review and Appeal Board Act*). However, subsection 32(1) of the *Veterans Review and Appeal Board Act* authorizes the Board to reconsider a previous decision if it determines that an error was made with respect to any finding of fact, the interpretation of any law, or if new evidence is presented to the appeal panel.

[36] It is clear that the Board is not to make medical findings on its own as it has no inherent medical expertise (see *MacDonald*, above, per Justice Lemieux). In determining whether to re-hear the matter, the Board reviewed the Applicant's submissions, all previous decisions, and the evidence. The Board paid particular attention to the medical opinion of Dr. Wiltshire. As set out by the Respondent, the Board relied on this medical opinion to support the conclusion that some of the injury to the right knee was attributable to events of the intervening 30 years.

[37] *Dunsmuir*, above, teaches us that reasonableness is a deferential standard concerned with the existence of justification, transparency and intelligibility within the decision-making process and that "reasonable" decisions will fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law.

[38] For these reasons, the Board's decision was reasonable.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

1. this application for judicial review is dismissed; and

2. there is no Order as to costs.

" D. G. Near "
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | **T-1792-08** |
| **STYLE OF CAUSE:** | **MACDONALD**<br>**v.**<br>**THE ATTORNEY GENERAL OF CANADA** |
| **PLACE OF HEARING:** | **OTTAWA** |
| **DATE OF HEARING:** | **NOVEMBER 16, 2009** |
| **REASONS FOR JUDGMENT AND JUDGMENT BY:** | **NEAR J.** |
| **DATED:** | **DECEMBER 10, 2009** |

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