Date: 20150428

Docket: T-2052-14

Citation: 2015 FC 540

Ottawa, Ontario, April 28, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ANTHONY MANUGE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application by Anthony Manuge challenging a decision by the Veteran Review and Appeal Board [Board] denying his claim to a disability pension in connection with a diagnosis of degenerative cervical disc disease.

I. **Background**

[2] Mr. Manuge served in the Canadian Forces [Reserves] from January 22, 1980 to May 6, 1981 and in the Regular Forces [hereafter CF] from May 7, 1981 to June 7, 1984 and, again, from November 23, 1984 to August 29, 1990. Mr. Manuge was an infantryman. For much of his military service, he drove armoured vehicles and engaged in a number of other physically demanding activities.

[3] In 1989 Mr. Manuge sought medical treatment for recurrent cervical pain. The medical records at the time gave a diagnosis of chronic cervical strain as manifested in intermittent pain for the previous 3 to 4 years. A physical examination note dated September 11, 1989 referred to a "cervical strain [suggestive of degenerative disc disease]" but an x-ray report from the same day failed to demonstrate any disc abnormalities. In 1990 a medical examination report prepared in connection with Mr. Manuge's release from service described a condition of "chronic cervical strain" and "frequent muscle spasm" dating back to 1987.

[4] In a relatively brief set of reasons, the Board awarded Mr. Manuge a partial disability pension in connection with a chronic injury to his shoulder. However, it denied his claim for an enhanced award in connection with cervical disc disease.

[5] The Board's decision must be read with reference to an earlier 2012 Entitlement Review Panel decision [Entitlement Decision]. The Board adopted by reference parts of this earlier decision in its analysis including a general affirmation of the Entitlement Decision in the Board's

conclusion. Both decisions include a finding that the evidence adduced by Mr. Manuge failed to establish a causal link between his 2010 diagnosis of degenerative cervical disc disease and his military service dating back some 20 years.

[6] The Entitlement decision makes this point in the following passage:

> The Panel does appreciate that the Applicant is sincere in his testimony. It accepts that he has identified a theory of causation. However, it is the Panel's conclusion that the Applicant has not brought forward sufficient evidence for the Panel to conclude, nor reasonably infer, that the Applicant's proposition is more than simply a possibility from which the Panel is being asked to presume that a causal link exists. The Panel recognizes that the jurisprudence of *Bourgeois v Attorney General of Canada* (23 May 2003) T-602-02 says that notwithstanding the duty to favourably interpret the circumstances and the evidence as foreseen in section 39 of the *Veterans Review and Appeal Board Act*, the Applicant is nonetheless obliged to produce evidence establishing a causal link and the Panel cannot presume such a link to exist.

[7] The Board came to the same conclusion as reflected in the following passages from its decision:

> The Board concurs with the notations in the Entitlement Review decision that indicates that degenerative disc disease is, for the most part, a result of normal age degeneration. The Board notes that the diagnosis of the claimed condition was when the Appellant was 47 years of age. Medical literature, including the Entitlement Eligibility Guidelines, the Medical Guidelines and the Orthopaedic Handbook authored by orthopaedic specialist Dr. Stanish clearly indicate that degeneration in human spinal discs begins early in life and becomes evident in the third and fourth decades. The Appellant was well into his fifth decade when there was evidence of degenerative change. The literature indicates that a specific severe injury to the cervical spine can accelerate the degeneration. The Board was not able to find any contemporaneous medical evidence of a severe specific service-related injury to the Appellant's cervical spine during his military service.
>
> …

> As a result, the Board was not able to conclude that a service relationship has been established, and with regret the Board affirms the previous decision dated 24 January 2012 and denies disability award entitlement on grounds that there is insufficient evidence to establish a relationship between the claimed condition of degenerative disc disease cervical spine and the Appellant's Regular Force service.

II. **Standard of Review**

[8] The issues raised on this application are matters of mixed fact and law attracting the standard of review of reasonableness. On this the parties agree.

III. **Issues**

[9] Mr. Manuge asserts the following four reviewable errors in the Board's decision;

a. The Board ignored a crucial piece of evidence – Mr. Manuge's 1989 diagnosed cervical strain suggestive of degenerative disc disease;

b. The Board misstated Mr. Manuge's evidence on the cause of this neck condition;

c. The Board erred by rejecting the uncontradicted medical opinion of Dr. Ducharme; and

d. The Board ignored its own Entitlement Eligibility Guidelines (Osteoarthritis).

The first and fourth issues were combined during Mr. Wallace's oral argument and it makes sense to consider them together.

IV. **Analysis**

[10] There is nothing in the record before me to support the argument that the Board either ignored or misinterpreted material evidence in coming to the conclusion Mr. Manuge had failed to establish a link between his military service and his 2010 diagnosis of degenerative cervical disc disease. Although Mr. Manuge advanced a theory of causation, it was seen by the Board to be no stronger than the medical evidence supporting it. Mr. Manuge did not contend his neck problems reported in 1989 and 1990 were triggered by any particular accident or event. His evidence was only that he believed the condition to be related to the rigours of his military service. Although he did attribute the paucity of medical evidence during service to a culture of military stoicism, that explanation would not extend to the absence of relevant medical evidence after he left the CF in 1990. It was the evidentiary gap between 1990 and 2010 that was at the heart of the Board's conclusion that Mr. Manuge had failed to meet the burden of proving causation.

[11] Mr. Wallace argues the Board erred by overlooking Mr. Manuge's medical history from 1989 and by failing to link that history to the 2010 diagnosis of cervical disc disease.
Mr. Wallace points to medical literature disclosing that the symptoms of disc disease will often initially appear intermittently and progress, often over years, to a persistent condition. He also relies on medical literature attributing disc disease, in many cases, to long-standing mechanical stress of the sort experienced by Mr. Manage including constant vibration. In the face of this evidence it is argued the Board erred by failing to consider the possibility the 1989 diagnosis of recurring cervical strain was, in fact, the early onset of cervical disc disease. Mr. Wallace

buttresses his argument by reference to the Veterans Affairs Canada Entitlement Eligibility Guidelines [Guidelines] for assisting adjudicators tasked with determining pension eligibility. Those Guidelines provide the following advice:

> The subsection **medical conditions which are to be included in entitlement assessment** serves to identify conditions for which separate entitlement need not be sought, and which will be included in the assessment of the primary condition. The inclusions may be disabilities for which separate entitlement is held.
>
> Any common conditions which are readily apparent are listed. This section is not all-inclusive. As a general rule, the basis for combining diagnoses arises where:
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> 1. a disability progressed so as to develop different features which appear at different times and the different features are part of the same disease process and involve the same body or organ system;
>
> 2. two or more disabilities have similar symptoms and effects which cannot be separated for assessment purposes, usually involving the same body part or organ system. As ongoing consultation is taking place with Health Care Programs, this subsection is not finalized for all entitlement guidelines.
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> [Emphasis in original]

[12] In the list of medical conditions adjudicators may consider in common under a diagnosis of osteoarthritis are degenerative disc disease of the cervical spine and chronic cervical sprain/strain.

[13] I accept Mr. Wallace's point that the Guidelines represent an available diagnostic shortcut. However, the Guidelines explicitly state they are "not intended to be a textbook of

medicine or of causation" nor are they "mandatory or binding" on adjudicators. Policy guidelines are, of course, just that; they do not fetter the discretion of a decision-maker.

[14] Further, the Board did not ignore Mr. Manuge's 1989 medical history. Those details are accurately recounted in the decision along with a summary of his entire relevant medical history. The Board also referenced the causation evidence advanced by Mr. Manuge concerning "stresses and strains and rigours" associated with his military service and the medical information linking disc disease to persistent mechanical stress. Similarly, the Board looked for evidence of an acute injury to the neck and found nothing of significance. This was not unreasonable in the face of Mr. Manuge's evidence that his neck problem was not triggered by any particular incident but was, rather, caused by an accumulation of stress over a number of years of active service (see Application Record at page 453). This was a distinguishing feature from Mr. Manuge's shoulder condition. He was able to establish his shoulder problem was likely triggered by a particular incident during military service and an award was made by the Board on that basis.

[15] What the Board was essentially left with from the contemporaneous medical records was a 1989-1990 diagnosis of intermittent neck strain and spasm with no radiological evidence of disc disease followed, 20 years later, by a diagnosis of cervical disc disease supported by clear radiological evidence. Although Dr. Ducharme was involved with the care of Mr. Manuge from 2004 onwards there is nothing in his report of October 14, 2011 to establish that Mr. Manuge's neck presented as a particular problem until 2010 when an MRI was ordered. The Board was clearly concerned by the evidentiary lacuna between 1990 and 2010. It was not unreasonable for

the Board to require some evidence of persistent neck problems in the period between 1990 and 2010 before making a diagnostic link of the sort advanced by Mr. Manuge.

[16] Dr. Ducharme failed to fill in that gap beyond the vague assertion that, at some unspecified date after 2004, Mr. Manuge began to complain about neck pain. The problem could not have a major concern before 2010 because it was only then Dr. Ducharme obtained radiological data and referred Mr. Manuge for surgery.

[17] In the end, the complaint that the Board erred by ignoring or misinterpreting relevant evidence amounts only to a concern about the weight it attributed to the evidence. Ms. Chan acknowledged on behalf of the Minister that a different outcome could have been obtained on this record but she is correct that the possibility of disparate outcomes does not render a decision unreasonable.

[18] I also cannot identify any reviewable error in the Board's treatment of Mr. Manuge's testimony or of his medical history. With the exception of a 1986 tracked vehicle accident the Board identified the various events he put forward possible contributors to his 1989 cervical complaint. The Board's failure to mention the 1986 incident is immaterial in the face of Mr. Manuge's acknowledged inability to connect that or any other specific event to his documented problems in 1989. According to Mr. Manuge this was just one of a series of stressors he believed were the cause of his neck symptoms. The testimony now relied upon by Mr. Manuge attributing additional significance to the 1986 incident is not compelling in the face

of his other acknowledgements that he could not identify a specific triggering event. The Board's failure to expressly note the 1986 incident is, accordingly, of no legal consequence.

[19] The Board gave little weight to Dr. Ducharme's 2011 medical opinion "attributing a greater than 50% probability that [Mr. Manuge's] degenerative cervical disc disease is directly attributed to the pounding his neck took in discharging the responsibilities of his job while serving from 1981-1990". On this issue the Board relied heavily on the analysis outlined in the Entitlement Review decision from 2012. That decision dealt with Dr. Ducharme's opinion in the following way:

> With respect to the medical opinion offered by Dr. Ducharme at ER-M2, that the Applicant's neck condition is likely due to his military responsibilities between 1981 and 1990 and that this probability is greater than 50%, the Panel notes that Dr. Ducharme's information is not compatible with the conventional medical literature as embodied in the Veterans Affairs Canada Medical Guidelines respecting degenerative disc disease. It is appreciated that Dr. Ducharme says his opinion is based on his observation of the evolution of the Applicant's symptoms and the time he has known the Applicant, a review of some of the records that the Applicant has provided, and the collection of investigations, along with a brief review of the literature which Dr. Ducharme states, seems to support that these occupational related stressors had an effect on his neck and arm problems. The Panel also respects that Veterans Affairs Canada is of the view that normal service activities such as described by the Applicant in riding in military vehicles across rough terrain do not in and of themselves result in, cause or contribute, to any specific disability such as those claimed by the Applicant.
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> The Panel concludes that Dr. Ducharme's information does not sufficiently set out facts and data upon which his opinion of the development of the Applicant's condition is based. Dr. Ducharme has not sufficiently identified the theory and methodology he has relied on in coming to his conclusions. He has not shown examinations or measurements that he has conducted, made accurate inquiries, nor that he consulted a complete medical history, and Dr. Ducharme has not accounted for obvious alternative explanations such as those spoken of in the Medical

> Guidelines respecting the development of degenerative disc disease and degenerative arthritis.

These concerns are legitimate and provide a sound basis for discounting the value of Dr. Ducharme's opinion. Dr. Ducharme did not discuss the significance of the large gap in Mr. Manuge's medical history after 1990 and he was particularly vague about when Mr. Manuge first complained about the condition of his neck. It is quite apparent this was not a matter of concern for some time after Mr. Manuge came under Dr. Ducharme's care.

[20] The absence of any reported medical history of on-going neck symptoms after 1990 was critical to the establishment of a clinical link to the 2010 diagnosis. Dr. Ducharme's gloss of this evidentiary gap along with the Board's other identified concerns provide a reasonable foundation for Board's negative assessment of this evidence.

[21] On the basis of the above I am satisfied that the Board's decision was reasonable and this application is dismissed.

[22] The Respondent is not seeking costs and none are awarded.

JUDGMENT

THIS COURT ADJUGES that this application is dismissed without costs.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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