Federal Court  Cour fédérale

Date: 20170103

Docket: T-1914-15

Citation: 2017 FC 8

Ottawa, Ontario, January 3, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

LESLEY JANSEN

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the August 5, 2015 decision of an entitlement appeal panel of the Veterans Review and Appeal Board denying the Applicant's entitlement to disability benefits which she seeks pursuant to s 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 ("*CF Compensation Act*").

Background

[2] The Applicant is a veteran of the Canadian Forces. She joined the military when she was seventeen years old and served during the period July 5, 1972 to October 26, 1984. On January 11, 2013, the Applicant submitted an Application for Disability Benefits for two claimed conditions: instability right ankle and osteoarthritis left ankle with instability.

[3] In a decision dated May 21, 2013, Veterans Affairs Canada ("VAC") declined to grant a disability award. With respect to the condition of instability right ankle, VAC noted that the Medical Questionnaire dated April 12, 2013, indicated instability of the right ankle as the Applicant's diagnosis. However, VAC did not recognize this as a diagnosis because, by itself, this was considered to be a symptom of an underlying condition. The evidence reviewed did not include enough medical information to provide a diagnosis of the Applicant's condition; that it did not include enough medical information to confirm the cause of her condition; that because the medical evidence did not provide a diagnosis, VAC was not able to determine that the Applicant had a disability; and, that this meant her medical condition did not arise out of, or is not directly connected with her Reserve Force service.

[4] With respect to the osteoarthritis left ankle with instability, VAC noted that the x-ray report dated December 21, 2012 and the Medical Questionnaire dated April 12, 2013 provided the diagnosis. However, that the evidence reviewed did not include enough medical information to confirm the cause of the Applicant's condition and this meant that her medical condition did not arise out of, or is not directly connected with, her Reserve Force service.

[5] The Applicant appealed this decision to an entitlement review panel ("Review Panel") of the Veterans Review and Appeal Board ("VRAB"). The Review Panel stated that it had considered all of the documentation on the file, the arguments made by the Pension's Advocate on behalf of the Applicant, the Applicant's testimony, and new evidence submitted by the Applicant at the hearing. This included a letter from Dr. Adam dated January 11, 2014 recounting the history provided by the Applicant of her bilateral ankle problems, and letters from the Applicant dated February 27, 2014, November 6, 2013, October 7, 2013 and August 18, 2014 together with their associated attachments.

[6] The Review Panel found that there was no contemporaneous objective medical evidence of a service-related ankle injury to either the right or left ankle and that the medical declarations which were signed by the Applicant indicated that she did not sustain any service-related injuries to her ankle or otherwise during her years of service. The Review Panel also noted that there was evidence of the two non-service-related injuries to the Applicant's ankles in each of 1982 and 1985 but, again, found that there was no contemporaneous medical evidence of a service-related injury during her service.

[7] The Review Panel rendered its decision on August 19, 2014 affirming the decision of VAC and denying disability award entitlement for both conditions on the basis that there was insufficient evidence to establish a relationship between the claimed conditions and the Applicant's Reserve Force service.

[8] On June 15, 2015, the Applicant appealed the Review Panel's decision by way of written submissions to an entitlement appeal panel ("Appeal Panel") of the VRAB. The Applicant submitted new medical evidence in support of her claim, being the medical opinion of her physician, Dr. R. Cronin, dated March 2, 2015.

[9] On July 14, 2015, the Appeal Panel rendered its written decision affirming the reasons of the Review Panel. This is a review of that decision.

Decision Under Review

[10] The Appeal Panel stated that the issue before it was whether the Applicant had established that the instability right ankle and/or osteoarthritis left ankle with instability arose out of, are directly connected with, or aggravated by, her military service.

[11] The Appeal Panel noted that the Review Panel had made a finding that there was no contemporaneous objective medical evidence of a service-related ankle injury to either the right or the left ankle. The Review Panel had noted that the medical declarations signed by the Applicant indicated that she did not sustain any service-related injuries to her ankle during her Reserve Force service. Also noted by the Review Panel was a severe ankle injury in 1982 which the Applicant had testified was a non-service-related injury. Additionally, she had experienced a non-service-related injury in 1985 while playing badminton.

[12] The Appeal Panel noted the new medical opinion of Dr. Cronin and the submission by the Pension's Advocate that there was reasonable and credible evidence to suggest there is a link

between the Applicant's service and the claimed ankle conditions and that the new medical evidence raised an element of doubt which should be resolved in the Applicant's favour.

[13] In its analysis, the Appeal Panel stated that it applied the requirements of s 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 ("*VRAB Act*"), which it set out. This meant, in weighing the evidence before it, that the Appeal Panel would look at the evidence in the best light possible and resolve doubt so that it benefited the Applicant. However, this provision did not relieve applicants from the burden of proving the facts needed in their cases to link the claimed condition to service. Nor did the Appeal Panel have to accept all evidence presented by an applicant if it found it was not credible, even if it was not contradicted (*MacDonald v Canada (Attorney General)*, [1999] FCJ No 346 (FCTD) at paras 22 and 29; *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at paras 5 and 6 ("*Wannamaker*"); *Rioux v Canada (Attorney General)*, 2008 FC 991 at para 32).

[14] The Appeal Panel found that the evidence did not establish that the claimed conditions arose out of or are otherwise connected with the Applicant's military service. In particular, it agreed with the reasons of the Review Panel.

[15] With regard to Dr. Cronin's opinion, the Appeal Panel found that it essentially relied on the history provided by the Applicant. As noted by the Review Panel and Dr. Cronin, there was no medical entry whatsoever pertaining to the ankle injuries which the Applicant stated occurred in the course of her military training. The Appeal Panel stated that it was reasonable to infer that, had the injuries been sufficiently significant to produce the long-term effects, there would

have been a medical consultation which would have been documented. The Appeal Panel also stated that Dr. Cronin made no reference to the two non-service-related injuries from 1982 and 1985. The Appeal Panel found that Dr. Cronin's opinion did not advance the Applicant's case.

[16] The Appeal Panel affirmed the decision of the Review Panel denying disability award entitlement for disability arising from instability right ankle and osteoarthritis left ankle with instability.

Relevant Legislation

***Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21**

Definitions	**Définitions**
2 (1) The following definitions apply in this Act.	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
aggravated by service,	*due au service*
in respect of an injury or a disease, means an injury or a disease that has been aggravated, if the aggravation	Se dit de l'aggravation d'une blessure ou maladie non liée au service qui est :
(a) was attributable to or was incurred during special duty service; or	a) soit survenue au cours du service spécial ou attribuable à celui-ci;
(b) arose out of or was directly connected with service in the Canadian Forces.	b) soit consécutive ou rattachée directement au service dans les Forces canadiennes.
…	…
service-related injury or disease	*liée au service*

means an injury or a disease that	Se dit de la blessure ou maladie :
(a) was attributable to or was incurred during special duty service; or	a) soit survenue au cours du service spécial ou attribuable à celui-ci;
(b) arose out of or was directly connected with service in the Canadian Forces.	b) soit consécutive ou rattachée directement au service dans les Forces canadiennes.
…	…
Eligibility	**Admissibilité**
45 (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from	45 (1) Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée:
(a) a service-related injury or disease; or	a) soit par une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service.	b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.
Compensable fraction	**Fraction**
(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.	(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une indemnité d'invalidité.

***Veterans Review and Appeal Board Act*, SC 1995 c 18**

Construction	**Principe général**

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.
…	…
Rules of evidence	**Règles régissant la preuve**
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	c) il tranche en sa faveur toute incertitude quant au bien-fondé

evidence, as to whether the applicant or appellant has established a case.	de la demande.

***Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50**

Disability Awards	**Indemnité d'invalidité**
49 An application for a disability award shall include	49 La demande d'indemnité d'invalidité est accompagnée des renseignements et documents suivants :
(a) medical reports or other records that document the member's or veteran's injury or disease, diagnosis, disability and increase in the extent of the disability; and	a) tout dossier ou bilan médical concernant les blessures, les maladies, les diagnostics, l'invalidité ou toute augmentation du degré d'invalidité du militaire ou du vétéran;
…	…
50 For the purposes of subsection 45(1) of the Act, a member or veteran is presumed, in the absence of evidence to the contrary, to have established that an injury or disease is a service-related injury or disease, or a non-service-related injury or disease that was aggravated by service, if it is demonstrated that the injury or disease or its aggravation was incurred in the course of	50 Pour l'application du paragraphe 45(1) de la Loi, le militaire ou le vétéran est présumé démontrer, en l'absence de preuve contraire, qu'il souffre d'une invalidité causée soit par une blessure ou une maladie liée au service, soit par une blessure ou maladie non liée au service dont l'aggravation est due au service, s'il est établi que la blessure ou la maladie, ou leur aggravation, est survenue au cours :
(a) any physical training or sports activity in which the member or veteran was	a) d'un entraînement physique ou d'une activité sportive auquel le militaire ou le

participating that was authorized or organized by a military authority, or performed in the interests of the service although not authorized or organized by a military authority;

vétéran participait et qui était autorisé ou organisé par une autorité militaire ou, à défaut, exécuté dans l'intérêt du service;

(b) any activity incidental to or directly connected with an activity described in paragraph (a), including the transportation of the member or veteran by any means between the place at which the member or veteran normally performed duties and the place of the activity;

b) d'une activité accessoire à une activité visée à l'alinéa a) ou s'y rattachant directement, y compris le transport du militaire ou du vétéran par quelque moyen que ce soit entre le lieu où il exerçait normalement ses fonctions et le lieu de cette activité;

…

…

(f) any military operation, training or administration, as a result of either a specific order or an established military custom or practice, whether or not a failure to perform the act that resulted in the injury or disease or its aggravation would have resulted in disciplinary action against the member or veteran; or

f) d'une opération, d'un entraînement ou d'une activité administrative militaire, soit par suite d'un ordre précis, soit par suite d'usages ou de pratiques militaires établis, que l'omission d'accomplir l'acte qui a entraîné la blessure ou la maladie, ou leur aggravation, eût entraîné ou non des mesures disciplinaires contre le militaire ou le vétéran;

…

…

51 Subject to section 52, if an application for a disability award is in respect of a disability or disabling condition of a member or veteran that was not obvious at the time they became a member of the forces and was not recorded on their medical examination prior to enrolment, the member or

51 Sous réserve de l'article 52, lorsque l'invalidité ou l'affection entraînant l'incapacité du militaire ou du vétéran pour laquelle une demande d'indemnité a été présentée n'était pas évidente au moment où il est devenu militaire et n'a pas été consignée lors d'un examen médical avant l'enrôlement,

veteran is presumed to have been in the medical condition found on their enrolment medical examination unless there is	l'état de santé du militaire ou du vétéran est présumé avoir été celui qui a été constaté lors de l'examen médical, sauf dans les cas suivants :
(a) recorded evidence that the disability or disabling condition was diagnosed within three months after enrolment; or	a) il a été consigné une preuve que l'invalidité ou l'affection entraînant l'incapacité a été diagnostiquée dans les trois mois qui ont suivi l'enrôlement;
(b) medical evidence that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to enrolment.	b) il est établi par une preuve médicale, hors de tout doute raisonnable, que l'invalidité ou l'affection entraînant l'incapacité existait avant l'enrôlement.

Issues

[17] The Applicant lists seven points in issue, however, in my view these are all captured within the question of whether the Appeal Panel's decision was reasonable. Accordingly, I would reframe the issues as follows:

i. As a preliminary issue, should portions of the Applicant's affidavit be struck?

ii. Was the Appeal Panel's decision reasonable?

Standard of Review

[18] The Applicant submits that the standard of review is reasonableness for some of the issues it has raised (*Wannamaker*). However, on "normative legal questions" if attracted, a correctness standard precedes it (*Prairie Acid Rain Coalition v Canada (Fisheries and Oceans)*,

2006 FCA 31). Further, that the decision at issue raises pure questions of law that are reviewable for correctness.

[19] The Respondent submits that the standard of review of the VRAB's decision has previously been determined to be reasonableness and, as such, a standard of review analysis is unnecessary (*Hynes v Canada (Attorney General)*, 2012 FC 207 at para 22). The reasonableness standard applies to the VRAB's interpretation of the medical evidence and its assessment of the Applicant's credibility (*Balderstone v Canada (Attorney General)*, 2014 FC 942 at para 17). That standard also applies to questions of whether the VRAB has properly given effect to s 39 of the *VRAB Act*, which is a question of mixed fact and law (*Wannamaker* at para 13).

[20] I agree with the Respondent that the applicable standard of review is reasonableness. This has been previously determined in the decisions cited by the Respondent and elsewhere (*Anderson v Canada (Attorney General)*, 2009 FC 1122 at para 23 ("*Anderson*"); *Moreau v Canada (Veterans Review and Appeal Board)*, 2013 FC 168 at para 24; *Ryan v Canada (Attorney General)*, 2016 FC 1246 at para 29; *Ben-Tahir v Canada (Attorney General)*, 2015 FC 881 at para 39 ("*Ben-Tahir*")). The standard also applies to the VRAB's interpretation of medical evidence and assessment of disability (*Gilbert v Canada (Attorney General)*, 2012 FC 1112 at para 24; *Ben-Tahir* at para 39; *Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21).

[21] While the Applicant submits that the issues raised concern pure questions of law, such questions concern the correct legal test (*Ledcor Construction Ltd v Northbridge Indemnity*

Insurance Co, 2016 SCC 37 at para 43). To the extent that the Applicant, in its written submissions, may be implicitly contesting the test for causation in the context of assessing a disability award under s 45 of the *CF Compensation Act*, in essence and as discussed below, its submissions are really concerned with the Appeal Panel's treatment of the evidence and do not raise pure questions of law. Nor does the Applicant raise a statutory interpretation issue and, in any event, reasonableness is the presumptive standard of review when a tribunal is interpreting its home statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54; *Thomson v Canada (Attorney General)*, 2016 FCA 253 at para 20).

Issue 1: As a preliminary issue, should portions of the Applicant's affidavit be struck?

[22] In support of her application for judicial review, the Applicant filed an affidavit sworn on November 26, 2015. The Respondent submits that portions of the Applicant's affidavit should be disregarded. It notes that Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 require that affidavits be confined to facts within the deponent's personal knowledge and that the Court may strike affidavits or portions of them where they contain opinion, argument or legal conclusions (*Sharma v Canadian Pacific Railway*, 2016 FC 135 at para 19 ("*Sharma*"). Further, evidence which could have been before the administrative decision maker, but was not, is inadmissible before the reviewing Court (*Sharma* at para 20; *Anderson* at para 13).

[23] The Applicant made no response to this submission but, at the hearing before me, conceded that the disputed provisions can be disregarded. I agree that this is appropriate.

Issue 2: Was the Appeal Panel's decision reasonable?

Applicant's Position

[24] The Applicant's submissions are somewhat difficult to follow. I have summarized them as best I can below.

i. Medical Statements and Medical Guidelines

[25] The Applicant submits that the Medical Statements on Release – Reserve Force dated August 16, 1972 and October 9, 1984, Enrolment/Transfer Medical Statement dated June 10, 1992, and the Medical Statement dated March 6, 1996 (collectively, the "Medical Statements"), referred to by the Review Panel as the medical declarations, which are all signed by the Applicant, should not be given any weight where there exists evidence to the contrary. The submission appears to be that this approach would be in keeping with the remedial nature of the *VRAB Act*. The Medical Statements are said to be "non est factum" to the scope of the legislation and the *VRAB Act* overrides them to capture any facts of an injury if proven. The Applicant says that the Medical Statements raise a rebuttal presumption and that reliance on them by the Appeal Panel was in error given the existence of a contemporaneous diagnosis of weak ankles in a November 22, 1977 Medical Absentee Certificate.

[26] The Applicant submits that the Medical Guidelines state that "weak ankle anatomical deformity" is a stand alone injury. The Medical Guidelines were not considered in the decision making process because the Medical Statements were given so much weight. The Medical

Guidelines are based on group studies and are to be viewed on objective standards. Any direct evidence by way of medical opinion, same as the 1977 Medical Absentee Certificate or the opinion of Dr. Cronin, is subjective evidence that imparts certitude to the claim confirming the diagnosis of weak ankle deformity as recognized by the Medical Guidelines.

ii. 1977 Medical Absentee Certificate

[27] The Applicant submits that ss 49 and 50 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50 ("Regulations") capture all kinds of medical evidence as probative, regardless of whether it is documented into the medical service file or is from a private physician's medical record. Thus, it was an error to discard or treat as insignificant the 1977 Medical Absentee Certificate of Dr. Kristjannson as, according to the Applicant, this categorically records the diagnosis of "weak ankles" deformity. It was contemporaneous evidence from the service period confirming the diagnosis of "weak ankle anatomical deformity" as recognized by the Medical Guidelines.

iii. Causation

[28] What I take from the Applicant's submissions is that the Appeal Panel erred in its understanding or treatment of causation. The Applicant states that it was an error to bifurcate causation of recurrent torn ligament injuries of weak ankles into two time spans, one related to the service period between 1973 and 1984 ("former period") and the other related to the period 1984 to 2004 ("latter period") when the Applicant was in the Supplementary Reserve Force. The plausibility analysis was flawed because the latter period injuries were misapplied to nullify the

former period injuries in order to reject a bona fide claim. In addition, there was a prior diagnosis of weak ankles as per the 1977 Medical Absentee Certificate. This covered both spans, as a pre-existing injury from 1973 and 1977, and causation flowed downwards from these.

[29] The Applicant submits that the Appeal Panel's reasoning implicitly accepts a diagnosis of torn ligaments but attributes this to injuries in 1982, when the Applicant tripped off a curb, and a 1985 badminton fall, and wrongly treated it as non-service-related. However, if the Appeal Panel implicitly accepts causation with respect to the latter period then it stands to reason that the latter period injuries could not have happened had it not been for the falls in the former period. The recurrence of ankle injuries in 1982 and 1985 were the product of occupational aggravation, but wrongly treated as unrelated, due to the error of bifurcating causation. Injuries while off duty are captured by ss 49 and 50 of the Regulations.

[30] The Applicant submits that the decision was incorrect, unreasonable and unjust as it did not consider the significance of the off-duty injuries that were in continuation of the weak ankle instability coming from the former period and as recognized by the Medical Guidelines.

[31] The Applicant also submits that in the context of a bilateral ankle weakness deformity, the plausible threshold is naturally on the lower side "due to the exercise regime of on-duty & off-duty aggravations, if ankles show recurrences to buckle-up, based on pre-existing torn and stretched ligaments".

iv. Treatment of Other Evidence

[32] The Applicant submits that the expert opinion of Dr. Cronin is based on the medical practices of the day for the treatment of ankle sprains, which he described as being "suck it up and carry on". Further, that the onus was on the Respondent to have documented the injuries into the service record. And, after the military obtained the 1977 Medical Absentee Certificate, it should have recommended that the Applicant be followed up by a military doctor. In any event, s 49 of the Regulations captures any evidence, as probative evidence outside the service record, to override the onus that is imposed on the veteran.

[33] Further, Dr. Cronin corroborated the opinion from the 1977 Medical Absentee Certificate and linked it to the presence of ossiciles in the x-ray report of 2015 that confirms the existence of old injuries. He did not split causation over two periods "so he opined that the presence of torn ligaments is well-nigh during the service period". He also opined that the onset of arthritis was a probability. The Applicant submits that it was an error to discard his report altogether. The Appeal Panel could have given Dr. Cronin an opportunity to proffer a further explanation in order to allay any doubts concerning the implausibility of his opinion, which was unjustly dissected.

[34] Finally, the Applicant submits that she adduced sufficient evidence to establish the diagnosis of "weak ankles anatomical deformity" based on injuries sustained during service or arising therefrom. The evidence was unjustly ignored due to lack of documentation into the service record which is inconsistent with the intent of the *VRAB Act*.

Respondent's Position

[35] The Respondent submits that the Appeal Panel reviewed all of the evidence and, taking the entire record into account, it was reasonable to have concluded that the Applicant had not established a sufficient causal connection between her military service and the claimed conditions.

[36] Section 51 of Regulations establishes a rebuttable presumption of fitness. A veteran who applied for a disability award is presumed to be in the medical condition found in his or her enrolment medical examination unless there is recorded evidence that the disability or disabling condition was diagnosed within three months after enrolment or that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to enrollment (s 51 is similar to s 21(9) of the *Pension Act*, RSC 1985 c P-6). The Applicant has the burden of proving on a balance of probabilities the facts required to establish entitlement to an award.

[37] The Appeal Panel reasonably agreed with the reasons and evidentiary findings of the Review Panel which considered all of the evidence before it, including the Applicant's testimony about the ankle injuries she sustained during her military service in 1973 and 1977.

[38] It was also reasonable and in keeping with its obligations for the Appeal Panel to consider and weigh all of the evidence before it, including the Medical Statements made by the Applicant during her military career (*Hall v Canada (Attorney General)*, [1999] FCJ No 1800 (CA)). There is no evidence that the Appeal Panel disqualified the Applicant from an award

based on the Medical Statements. Rather, it considered these in the context of the totality of the evidence.

[39] It was reasonable for the Appeal Panel to give no weight and to remain unpersuaded by Dr. Cronin's opinion. This opinion was based on the history provided by the Applicant of the 1973 and 1977 injuries. There was no contemporaneous medical evidence yet Dr. Cronin speculated that they were serious enough to have caused long-term effects. It was reasonable for the Appeal Panel to find that the Applicant could not establish indirectly through Dr. Cronin's letter what she had not established directly with the evidence. Further, the Appeal Panel considered that Dr. Cronin did not mention the injuries in 1982 and 1985. Dr. Cronin had been provided with a Statement of Case and as such was aware of these injuries. It was reasonable for the Appeal Panel to consider his lack of reference to these as a significant omission that undermined its confidence in his opinion.

[40] The Respondent submits that contrary to the Applicant's submission, the Appeal Panel did adequately consider the 1977 Medical Absentee Certificate as it expressly considered and endorsed the reasons of the Review Panel which referenced this note. In addition, a tribunal is presumed to have considered all of the evidence before it and the note was in the record (*Anderson* at para 24). Further, that in the absence of any other contemporaneous medical evidence, there is no merit to the argument that the Appeal Panel was required to adopt the note as a "diagnosis" of the claimed conditions.

Analysis

[41] The issue before the Appeal Panel was whether the Applicant had established that the instability right ankle and/or osteoarthritis left ankle with instability arose out of, are directly connected with, or aggravated by, her military service. It found that the evidence did not establish that the claimed conditions arose out of or were otherwise connected with the Applicant's military service. Two reasons were provided for this conclusion. First that the Appeal Panel agreed with the reasons given by the Review Panel, and second, the concerns it had with Dr. Cronin's letter.

[42] When appearing before me, the Applicant submitted that such limited reasons do not amount to the required *de novo* review. While I agree that more could certainly have been expected from the Appeal Panel, the Applicant provided no authority to support its submission. In any event, the Appeal Panel did conduct its own assessment of the new evidence of Dr. Cronin and provided reasons for discounting it. As well, the Appeal Panel did state, albeit in a summary fashion, the evidentiary and other findings of the Review Panel which it adopted.

[43] As to the Review Panel's reasons, these set out the evidence and the Applicant's argument. The Applicant submitted that she had no problems with her ankles at enrolment into service in July 1972 and this does not appear to be in dispute. She submitted that she suffered an injury in August 1973 while training in Wainwright, Alberta when she stepped in a gopher hole. In 1977, she suffered an ankle injury while running as part of military fitness training and sought treatment at that time. In 1982, she injured her ankle when stepping off a curb and required

medical treatment and, in 1985, she injured her left ankle while playing badminton. The Review Panel noted the Applicant's belief that her ankle conditions were caused by the rigours of her Reserve Force training activities.

[44] With respect to the 1973 and 1977 injuries, the Review Panel stated that it was not able to find any contemporaneous objective medical evidence of a service-related ankle injury to either the right or the left ankle. It noted that the medical declarations which the Applicant had signed indicated that the Applicant did not sustain any service-related injuries to her ankle, or otherwise, during her Reserve Force service from July 1972 to October 1984.

[45] As to the 1982 and 1985 injuries, the Review Panel stated that there was evidence that in 1982, the Applicant suffered a severe injury to her ankle and that she had testified that this was a non-service-related injury, as was the 1985 badminton injury. The Review Panel was not able to find any contemporaneous medical evidence of a service-related injury during Reserve Force service and, as a result, was not able to conclude that service relationships had been established.

[46] It concluded that there was insufficient evidence to establish relationships between the claimed conditions of instability right ankle and/or osteoarthritis left ankle with instability and the Applicant's Reserve Force service.

[47] The Applicant submits that the Review Panel, and therefore the Appeal Panel, placed too much weight on the Medical Statements to the exclusion of other relevant evidence. I would first state that I do not agree with the Applicant's characterisation of these documents as

"waivers" nor that the principal of *non est factum* has application in this matter (the Applicant refers to *Marvco Colour Research Ltd v Harris* [1982] 2 SCR 774; *Gallant v Fanshaw Colleage of Applied Arts and Technology*, [2009] OJ No 3977 (SCJ); *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490 in support of this contention).

[48] The first Medical Statement on Reserve – Reserve Force, is a signed declaration of the Applicant that she has not suffered an injury, disease or illness attributable to her military service from enrolment on July 5, 1972 to the date of signature on August 16, 1972. The second Medical Statement on Release – Reserve Force, states the same but covers the period from enrollment on July 5, 1972 to October 9, 1984. The Enrolment/Transfer Medical Statement states that to the best of her knowledge and recollection the Applicant is not aware that she suffers from a medical condition or has a physical limitation that would preclude her fulfilment of the proposed mobilization tasks or had a medical profile below G4 04 upon her release from the Canadian Forces and is dated June 10, 1992. The Medical Statement for Members of the Supplementary Ready Reserve states that to the best of her knowledge and recollection, she did not have a medical profile worse than G404 when she transferred from the Reg F; had not acquired a medical condition; or, had not aggravated any of the said conditions or physical limitations that could preclude her from fulfilling the proposed mobilization tasks, and is dated March 6, 1994.

[49] These documents are contemporaneous with the Applicant's military service, they are signed by her and speak to her medical condition. In my view, the Review Panel was entitled to consider them as such and to weigh them against the other evidence before it. Problematic for

the Applicant in this regard was that the Review Panel also found that there was no contemporaneous objective medical evidence of a service-related ankle injury.

[50] The Applicant submits, however, that this fails to consider the 1977 Medical Absentee Certificate dated September 22, 1977. I would point out that this document indicates that the Applicant was under the medical care of Dr. Kristjannson from September 22, 1977 to "indefinite" and was able to return to school/work on an unspecified date. Under "Remarks" it states "refrain from running and drilling due to weak ankles". VAC addressed the 1977 Medical Absentee Certificate stating that it indicates that the Applicant was to refrain from running and drilling due to weak ankles but did not make any reference to any injury to her left ankle. The Review Panel also acknowledged this evidence. The 1977 Medical Absentee Certificate was not evidence of a service-related injury or, indeed, confirmative of any injury.

[51] The Applicant also relies on the 1977 Medical Absentee Certificate as a contemporaneous diagnosis of weak ankles. In this regard, it is worth recalling that s 2 of the *CF Compensation Act* defines a service-related injury as one which arose out of or was directly connected with service in the Canadian Forces. The 1977 Medical Absentee Certificate simply does not speak to this. In any event, unlike VAC, the Review Panel accepted the diagnosis put forward by the Applicant. It was the link between the injuries and the Applicant's Reserve Force service that was at issue.

[52] Similarly, s 50 of the Regulations states that a veteran is presumed, in the absence of evidence to the contrary, to have established that an injury is a service-related injury, or a non-

service-related injury that was aggravated by service, if it is demonstrated that the injury or its aggravation was incurred in the course of the activities set out. Thus, the Applicant is correct that the presumption is favorable to her. However, the Medical Statements are evidence to the contrary and the only other contemporaneous documentary evidence does not establish that the 1977 injury occurred during the injury of service-related activities. I see no error in the Appeal Panel's treatment of the 19877 Medical Absentee Certificate.

[53] More problematic, in my view, is the Appeal Panel's treatment of the evidence which addressed the lack of any contemporaneous medical evidence as to the 1973 and 1977 injuries. The Applicant's evidence was that she injured her ankle in 1973 while training and in 1977 while running as part of her military fitness training. In her letter of October 7, 2013, the Applicant stated that following the 1973 training injury she saw a medic, no doctor was on site, and that she believed that no documentation of the injury was filed because she had not been seen by a doctor and because her ankle had not been x-rayed. As to the 1977 injury, she provided the 1977 Medical Absentee Certificate to her unit but there was no-follow up on its part.

[54] Before the Appeal Panel, the Applicant provided Dr. Cronin's letter as new evidence that was supportive of a service relationship for the injuries claimed. In that regard, Dr. Cronin noted that the Applicant related a history of two significant ankle injuries occurring during her military training which he states were apparently not properly documented in her medical records or properly assessed. He stated that "It would appear that both episodes were dealt with as they often were in the military with the "suck it up and carry on attitude"". Further, that he was inclined to believe the Applicant's version of events based on his own experience in the military.

His conclusion, based on the evidence available to him, was that her ankle problems in all likelihood were caused by and certainly aggravated by her military service.

[55] It is important to note that neither the Review Panel nor the Appeal Panel raised the credibility of the Applicant as an issue. Her evidence was that the 1973 and 1977 injuries occurred during service. The Review Panel and Appeal Panel did not state that they rejected her evidence. The Review Panel stated that it "acknowledged" her testimony. It then noted the absence of any contemporaneous medical evidence of a service-related ankle injury. Immediately following this, it referred to the Medical Statements signed by the Applicant in which she indicates that she suffered no service-related injuries. This would suggest that, based on the Medical Statements, the Review Panel did not accept as fact that service-related injuries occurred in 1973 and 1977. Put otherwise, the Applicant's testimony on this point would appear to have been found not to be credible because it was contradicted by her Medical Statements. The Appeal Panel also found that Dr. Cronin's opinion "essentially relies on the history provided by the Appellant" and that his opinion did not advance the Applicant's case.

[56] In *Lebrasseur v Canada (Attorney General)*, 2010 FC 98 ("*Lebrasseur*"), Justice Tremblay-Lamer held that it was unreasonable to reject medical reports submitted by the applicant on the basis that he was the source of the information upon which they were based:

> 27 While the Respondent is right that the Board is entitled to make credibility findings and need not accept all of the evidence tendered to it, its calling in question of the medical reports submitted by the Applicant on the basis that he was the source of the health professionals' conclusions is unjustified. It is not enough to say that the reports in question are based on a story told by the Applicant because that does not make them any less credible if that story is true. The Board did not make any findings as to the

> Applicant's credibility; yet it disregarded the favourable credibility finding made by the Panel. Thus, it failed to justify its decision to discount the medical reports.

[57] While in *Lebrasseur* the disability in question was anxiety and depression and, therefore, the reasoning was found to be "particularly flawed", the fact remains that in this case neither the Review Panel nor the Appeal Panel made any clear findings as to the Applicant's credibility. In that regard, if the Appeal Panel was concluding that the Applicant's testimony concerning the service-related injuries was not credible, based on the contradictory Medical Statement's, it was obliged to clearly make that credibility finding (*Lebrasseur* at para 28; *Powell v Canada (Attorney General)*, 2005 FC 433 at paras 31-35 ("*Powell*"); *Dumus v Canada (Attorney General)*, 2006 FC 1533 at para 31) and, without having done so, could not reasonably reject Dr. Cronin's opinion on the basis that it relied on the history provided by the Applicant.

[58] Put otherwise, the Appeal Panel was not obliged to accept the evidence presented by the Applicant if it found that it was not credible, the problem here is that it did not make that finding.

[59] Dr. Cronin also noted that both service-related injuries were not documented in the Applicant's medical records and opines that "It would appear that both episodes were dealt with as they often are in the military with the "suck it up and carry on attitude"". In my view, the Appeal Panel also had an obligation to address this explanation for the lack of documentation or to draw a favourable inference from it (*Powell* at paras 31-35, s 39(b) of *VRAB Act*).

[60] The Appeal Panel also noted Dr. Cronin's admission that there are no medical entries for the ankle injuries which the Applicant stated occurred in the course of her military training. It

states that it is reasonable to infer that, had the injuries been significant enough to produce long-term effects, there would have been a medical consultation which would have been documented. In my view, this inference may have been reasonable had Dr. Cronin not also stated that it was his opinion that the manner in which these injuries were addressed by the military was consistent with his own experience in the military - which opinion was not addressed by the Appeal Panel.

[61] As to the Respondent's submission that the Appeal Panel reasonably assigned little weight to Dr. Cronin's opinion because it lacked credibility as he did not reference the two non-service-related injuries, it is unclear from the Appeal Panel's reasons if it was making an adverse credibility finding based on this omission. The Appeal Panel states only that Dr. Cronin makes no reference to the two non-service injuries in 1982 and 1985. If, or why, it may have discounted this evidence because the earlier injuries were not mentioned cannot be discerned from its reasons.

[62] Given the errors described above, I need not address the Applicant's submissions on causation. However, I would note that the Appeal Panel does not appear to have addressed the evidence from the perspective of an ongoing or cumulative injury. That is, whether the two injuries described as service-related could have contributed to the latter injuries that were not service-related. It may be, because the Appeal Panel did not accept that the first two injuries were service-related, it deemed a causative consideration of the last two injuries to be unnecessary. However, this is not clear from its reasons. Nor did the Review Panel or Appeal Panel make any reference to the Medical Guidelines, to either explain why they have no application or otherwise.

[63] For the reasons above, the decision shall be returned to a differently constituted entitlement appeal panel of the VRAB for redetermination. However, I decline to make the directions to the VRAB as requested by the Applicant. Specifically, that the Medical Statements be set aside as non-binding, “to view her entitlements based on the Medical Guidelines” and, “if required on certitude, by giving an opportunity to the Applicant of leading new medical evidence”.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The decision of the Appeal Panel is quashed and the matter is remitted back to a differently constituted panel for redetermination taking into consideration the reasons contained in this decision; and

3. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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