Federal Court  Cour fédérale

Date: 20190118

Docket: T-945-18

Citation: 2019 FC 73

Ottawa, Ontario, January 18, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

GARY CRUMMEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision [the Decision] of the Entitlement Appeal Panel [EAP] of the Veterans Review and Appeal Board [VRAB], communicated by letter dated April 23, 2018, in which the EAP affirmed the decision of the Entitlement Review Panel [ERP] of the VRAB, dated November 24, 2015, and denied the Applicant disability award entitlement for compression fractures to his thoracic spine T4, T9, and T10, under section 45 of

the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 (renamed the *Veterans Well-being Act*, SC 2005, c 21, effective April 1, 2018) [the Act].

[2] As explained in greater detail below, this application is allowed, because I have found the EAP's adverse credibility conclusion, with respect to one of the medical opinions submitted in evidence by the Applicant, to be unreasonable.

II. **Background**

[3] The Applicant, Gary Crummey, is a 52-year-old man who serves in the Canadian Armed Forces, Regular Force. He served in the Reserve Force from November 7, 1983 to July 17, 1990, and then commenced his service in the Regular Force. Mr. Crummey's service included two tours of Special Duty service, one in Israel (May 28, 2003 to December 3, 2003) and one in Egypt (April 3, 2008 to October 25, 2008).

[4] In 2013, Mr. Crummey applied for a pension under the Act, based on compression fractures to the T4, T9, and T10 vertebrae of his thoracic spine. Veterans Affairs Canada [VAC] denied his claim on February 5, 2014, concluding that the fractures did not arise out of, and were not directly connected to, his Regular Force service, and were not incurred during, and were not attributable to, his Special Duty service.

[5] Mr. Crummey applied to the ERP to review VAC's decision. On November 24, 2015, the ERP denied his application and upheld the VAC decision. The ERP found that there was

insufficient evidence to support a service relationship between the fractures and Mr. Crummey's Regular Force service or Special Duty service.

[6] Mr. Crummey then appealed the ERP's decision to the EAP and submitted two physicians' reports in support of his appeal. In the Decision that is the subject of this application for judicial review, the EAP affirmed the decision of the ERP.

III. **Decision of the Entitlement Appeal Panel**

[7] The EAP canvassed the evidence and arguments on which Mr. Crummey relied in support of his appeal, noting his position that his chronic mid-back problems originated from an injury that occurred during Special Duty service in Egypt in 2008, when he fell twice while completing an obstacle course, and that other service factors contributed to or aggravated his condition. Mr. Crummey's evidence included documentation related to the incident in Egypt, an Emergency Report dated November 10, 2011 related to a fall onto his back at CFB Stadacona in Nova Scotia, an X-ray report of his thoracic spine dated November 7, 2012, which confirmed the claimed compressions fractures, and the two physicians' reports which Mr. Crummey submitted in support of his appeal.

[8] The EAP referred to the October 18, 2016 report of Dr. Richard Dumais, supplemented by a letter dated June 20, 2017, and the September 9, 2016 report of Dr. Jeremy Smith, each of which expressed opinions as to the cause of Mr. Crummey's thoracic compression fractures. Dr. Dumais opined that the fractures were partially attributable to service-related factors and incidents and that service-related factors played as great a role as non-service-related factors. Dr.

Smith stated that there are several military service-related potential causes of the fractures, that none of the causes can be pinpointed as the exact cause, but that, in the absence of other probable causes, his medical opinion was that the fractures are probably service-related.

[9] In its analysis, the EAP explained that it had taken into consideration s 39 of the *Veterans Review and Appeal Board Act,* SC 1995, c 18 [VRAB Act], which requires it to: (a) draw every reasonable inference in favour of the appellant; (b) accept any uncontradicted evidence from the appellant that it considers to be credible in the circumstances; and (c) resolve in favour of the appellant any doubt, in the weighing of the evidence, as to whether the appellant has established a case. The EAP also observed that s 39 does not relieve an appellant of the burden of proving the facts needed in a case to link the claimed condition to service and that the EAP does not have to accept all evidence presented by an appellant if it finds that the evidence is not credible, even if it is not contradicted.

[10] The EAP cited a July 10, 2008 Medical Clinic Report (related to Mr. Crummey's service in Egypt), that noted that Mr. Crummey had fallen down three weeks before and had hurt his back, but not his head and neck. This document also identified that Mr. Crummey felt pain in different degrees and locations, usually in the occipital region, but that he had no other complaints. The EAP also noted a November 9, 2010 Periodic Health Assessment which referred to Mr. Crummey having chronic lower-back pain and a lumbar strain, treatment through "physio & HM program," and the issue being resolved.

[11] In addressing the evidence of Dr. Dumais, the EAP expressed concerns with the doctor's report. It noted that he based his opinion on non-contemporaneous medical reports of service injuries. The EAP observed that there were no complaints in service, temporary or permanent medical categories, as a result of Mr. Crummey's falls and that he continued to serve until 2012 with no complaints or issues with his back. The EAP further stated that the examples provided did not suggest a chronic nature to his injuries and that the most recent comment indicated that any problem Mr. Crummey had with his back had resolved in 2010. The EAP also noted that Dr. Dumais is a pain specialist and stated that it would be more comfortable with comments from a musculoskeletal expert such as an orthopaedic surgeon.

[12] Addressing Dr. Smith's evidence, the EAP found his opinion, that the thoracic compression fractures are probably service-related, to be very speculative in nature. The EAP found that Dr. Smith's opinion was not credible and that it therefore could not afford the opinion much weight.

[13] The EAP commented that it did not find a record of medical treatment for issues with Mr. Crummey's thoracic spine area. It referenced reports of injuries completed near the end of Mr. Crummey's tours as part of his exit regime. A Declaration of Injury or Illness During Service in a Special Duty Area (Israel) dated November 24, 2003 reported pulled lower back muscles while weight training, which were treated in theatre with no problems on return. A Declaration of Injury or Illness During Service in a Special Duty Area (Egypt) dated October 12, 2008 noted that Mr. Crummey fell off a rope bridge and hit his back and head. This Declaration also contained the entries "Possible concussion, am better now" and "headaches x 2 months physio".

A Medical Examination Record dated November 9, 2010 stated that Mr. Crummey was fit for full duties, noting lower back pain as the only issue. The EPA also observed that the claimed condition of compressed fractures of the thoracic vertebrae was not diagnosed until July 11, 2012.

[14] The EAP concluded that it had not been presented with any persuasive credible medical evidence pinpointing the cause and/or aggravation of Mr. Crummey's condition specifically to his time in the Regular Force. The EAP also held that there was no persuasive evidence or credible opinion causally linking service factors to the development and/or aggravation of the condition. The EAP therefore affirmed the ERP's decision and denied Mr. Crummey disability award entitlement under s 45 of the Act.

IV. **Issues and Standard of Review**

[15] The Applicant describes the sole issue in this judicial review as whether the EAP erred in determining that he was not eligible for a disability award for his condition. The parties agree, and I concur, that the applicable standard of review is reasonableness (see *Leroux v Canada (Attorney General)*, 2012 FC 869 [*Leroux*] at para 32).

V. **Analysis**

[16] Mr. Crummey's principal position is that the EAP unreasonably found that the two physicians' reports were not credible. Before turning to his arguments in support of that position,

it is useful to review briefly certain legislative provisions relevant to the decisions made by the EAP.

[17] The principal provision engaged in the present case, to create an entitlement to apply for disability benefits, is s 45(1)(a) of the Act, which provides as follows:

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) service-related injury or disease;	**(a)** soit par une blessure ou maladie liée au service;
…	…

[18] Section 43 of the Act sets out as follows certain rules governing how evidence presented in support of applications under the Act must be considered:

Benefit of doubt	**Décisions**
43 In making a decision under this Part or under section 84, the Minister and any person designated under section 67 shall	**43** Lors de la prise d'une décision au titre de la présente partie ou de l'article 84, le ministre ou quiconque est désigné au titre de l'article 67
(a) draw from the circumstances of the case, and any evidence presented to the Minister or person, every reasonable inference in favour of an applicant under this Part or under section 84;	(a) tire des circonstances portées à sa connaissance et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible au demandeur;

(b) accept any uncontradicted evidence presented to the Minister or the person, by the applicant, that the Minister or person considers to be credible in the circumstances; and	**(b)** accepte tout élément de preuve non contredit que le demandeur lui présente et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case.	**(c)** tranche en faveur du demandeur toute incertitude quant au bien-fondé de la demande.

[19] Materially identical provisions are contained in s 39 of the VRAB Act, the statute which governs the operation of the VRAB. The Respondent's Memorandum of Fact and Law describes the effect of the relevant statutory provisions as follows:

> Thus, the onus is on an applicant to establish causation. However, while an applicant must provide evidence to demonstrate that his or her disability is related to military service, section 43 of the [Act] in conjunction with section 39 of the VRAB Act require the [VRAB] to apply certain rules of evidence that are of benefit to an applicant; these sections are commonly referred to as the "benefit of the doubt" provisions. The decision-maker must draw all reasonable and favourable inferences that can be drawn with respect to an applicant's case, as well as resolve any doubt as to whether a case has been established in favour of an applicant.

[20] I agree with this description and would also note the explanation found in *Wannaker v Canada (Attorney General)*, 2007 FCA 126 [*Wannaker*] at paras 5-6, which addresses in particular the interpretation of s 39(b) of the VRAB Act (and therefore s 43(b) of the Act), surrounding the nature and effect of credibility determinations to be made by the VRAB:

> [5] Section 39 ensures that the evidence in support of a pension application is considered in the best light possible. However, section 39 does not relieve the pension applicant of the burden of proving on a balance of probabilities the facts required to establish entitlement to a pension: *Wood v. Canada (Attorney General)* (2001), 199 F.T.R. 133 (Fed. T.D.), *Cundell v. Canada (Attorney General)* (2000), 180 F.T.R. 193 (Fed. T.D.).
>
> [6] Nor does section 39 require the Board to accept all evidence presented by the applicant. The Board is not obliged to accept evidence presented by the applicant if the Board finds that evidence not to be credible, even if the evidence is not contradicted, although the Board may be obliged to explain why it finds evidence not to be credible: *MacDonald v. Canada (Attorney General)* (1999), 164 F.T.R. 42 (Fed. T.D.) at paragraphs 22 and 29. Evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove.

[21] In the Decision, the EAP considered these principles and summarized them as follows:

> This means that in weighing the evidence before it, the Panel will look at it in the best light possible and resolve doubt so that it benefits the Appellant. The Federal Court has confirmed, though, that this law does not relieve the appellants of the burden of proving the facts needed in their cases to link the claimed condition to service. The Panel does not have to accept all evidence presented by an appellant if it finds that it is not credible, even if it is not contradicted.

[22] Again, in my view, this represents an accurate description of the applicable principles. The principal issue raised by Mr. Crummey is not the EAP's understanding of the "benefit of the doubt" provisions, but rather whether its conclusion, that the two physicians' evidence was not credible, represents a reasonable determination. He notes that, as explained by the Federal Court of Appeal in *Wannaker*, the EAP was required to explain why it found the evidence not to be credible, taking into account that evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove.

[23] With respect to the report of Dr. Dumais, Mr. Crummey raises three arguments in support of his position that the EAP unreasonably found the evidence not to be credible:

A. Mr. Crummey submits that it was an error for the EAP to find that Dr. Dumais had not addressed issues with his back that may not be service-related, given that Dr. Dumais expressly considered and rejected, as a cause of the thoracic fractures, an incident in which Mr. Crummey was struck by a vehicle in a Tim Horton's parking lot in a non-service context;

B. Mr. Crummey submits that the EAP failed to explain why Dr. Dumais' opinion was lacking in credibility because it was based on non-contemporaneous medical reports; and

C. Mr. Crummey submits that the EAP failed to explain why it discounted Dr. Dumais' experience with musculoskeletal injuries, based on his expertise being as a pain specialist rather than as an orthopedic surgeon.

[24] Guided by the description in *Wannaker* of the factors to be taken into account by the EAP in assessing the credibility of evidence, I do not find the EAP's assessment of Dr. Dumais' report to be outside the boundaries of reasonableness. As the Respondent submits, Dr. Dumais' opinion clearly implies that the fractures were caused in part by events that are not service-related, but his report does not identify these events. With respect to the EAP's concern about the opinion being based on non-contemporaneous medical reports, I find the concern to be self-explanatory, i.e. that the lack of contemporaneous documentation of the events upon which the opinion were based served to undermine the opinion. Mr. Crummey refers the Court to the finding in *Jansen v*

Canada (Attorney General), 2017 FC 8 at para 53, that the EAP erred in its treatment of the lack of contemporaneous medical evidence in that case. However, that finding was based on the facts of the case, in which the applicant had given an explanation as to why no contemporaneous evidence existed. Finally, with respect to the EAP's assessment of Dr. Dumais' area of expertise, this is the sort of analysis to which the Court must show significant deference (see *Beaudoin v Canada* (*Attorney General),* 2014 FC 536 at para 12).

[25] However, with respect to the report by Dr. Smith, I agree with Mr. Crummey's submission that the Decision does not intelligibly demonstrate the basis for the EAP's finding that Dr. Smith's opinion was not credible. The only reason given by the EAP is that it finds the opinion to be very speculative in nature. However, Dr. Smith referred to three service-related incidents upon which his opinion was based, i.e. the 2003 weightlifting injury in Israel, the 2008 falls from the obstacle course in Egypt, and the subsequent fall at CFB Stadacona, in each case providing an explanation why the nature of the incident could cause compression fractures of the sort with which Mr. Crummey had been diagnosed.

[26] Dr. Smith also referred to the possibility that military duties such as ruck marches and battle fitness testing, which required carrying heavy weight for long distances, could cause thoracic compression fractures The Respondent argues that this component of the opinion is particularly abstract or hypothetical, as it is not linked to information about Mr. Crummey's particular service. While this reasoning was not provided by the EAP, I appreciate that it could represent an explanation for its conclusion that the opinion was speculative in so far as it was based on this aspect of military service. However, with respect to the three service-related

incidents that Mr. Crummey experienced, the occurrence of which it appears is uncontested, I find no intelligible explanation in the Decision for the finding that Dr. Smith's opinion is speculative. Similar to the analysis in *Leroux* at para 64, I find Dr. Smith's report to be sufficiently supported to understand its foundation, particularly taking into account his experience as a military doctor, and I find the EAP's conclusion that the opinion is speculative to be unreasonable.

[27] I have considered the Respondent's argument that the EAP found Dr. Smith's opinion to be speculative because it identified several possible service-related causes of the thoracic fractures and was not conclusive as to the cause. It is not possible to determine from the Decision whether this was the reasoning underlying the EAP's finding. However, if this was the reasoning, I would have difficulty accepting that it is a reasonable analysis. If a person has experienced more than one service-related incident, each of which could be the cause of the injury under consideration, such that a physician cannot identify which of those incidents is the precise cause, surely this cannot be a basis to find the physician's opinion lacking in credibility.

[28] Finally, I have considered a further argument advanced by Mr. Crummey, that the EAP erred by imposing additional evidentiary requirements contrary to the applicable legislative provisions. This argument turns on the final paragraph of the EAP's analysis, in which it concluded as follows:

> The Panel has not been presented with any persuasive credible medical evidence pinpointing the cause and/or aggravation of the Appellant's claimed condition, specifically to his time in the Regular Force. As well, there has been no persuasive analysis, nor credible opinion causally linking service factors to the development and/or aggravation of the condition.

[29] Mr. Crummey submits that, by requiring medical evidence to be "persuasive", in addition to credible, the EAP breached the legislative direction that it accept any uncontradicted evidence presented to it that it considered to be credible. I do not find merit to this particular argument. As the Respondent submits, and as I have found earlier in these reasons, the Decision demonstrates that the EAP understood the "benefit of the doubt" provisions. I read the use of the word "persuasive" simply as shorthand for its conclusion that Mr. Crummey had not satisfied his burden of establishing a causal connection between his service and his injury.

[30] Mr. Crummey also submits that the EAP's use of the word "pinpointing" represents an error, requiring the identification of the cause of an injury with a certainty that is inconsistent with the "benefit of the doubt" provisions. If this wording were to be read as suggesting a requirement to identify one cause to the exclusion of all others, I agree it would represent an error, for the reasons explained in paragraph 27 above. However, I prefer the interpretation offered by the Respondent, that the EAP was merely referring to the requirement to establish the cause of the injury as service-related. In reaching that conclusion, I note that the EAP's language refers to pinpointing the cause and/or aggravation of the claimed condition specifically to Mr. Crummey's time in the Regular Force. I find no error in the EAP identifying such a requirement, as establishing a causal link with the period of service is what is required of an applicant for benefits.

[31] However, the opinion of Dr. Smith is sufficiently fundamental to Mr. Crummey's appeal to the EAP that its unreasonable treatment, as explained above, renders the Decision itself

unreasonable. Therefore, the Decision must be set aside and returned to a differently constituted panel of the EAP for redetermination.

[32] As neither party is claiming costs, none are awarded.

JUDGMENT IN T-945-18

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the EAP for redetermination. There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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