

**Date: 20040108**

**Docket: T-83-02**

**Citation: 2004 FC 19**

[TRADUCTION FRANÇAISE]

**Ottawa, Ontario, January 8, 2004**

**PRESENT: THE HONOURABLE MADAM JUSTICE JOHANNE GAUTHIER**

**BETWEEN:**

**DANIEL LEPAGE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] Daniel Lepage was a member of the Army Reserve from February 1968 to August 1993. He has chondromalacia on the left knee, a condition for which he applied for a disability pension in 1998. On April 20, 2000, his application was rejected by the Review Panel of the Veterans Review and Appeal Board. He appealed that decision before the Appeal Board of the Veterans Review and Appeal Board (the “Board”), which again rejected his application. That decision is the subject of this application for judicial review.

[2] Mr. Lepage submits that the Board erred in determining that he did not prove the causal link between his condition and his 25 years of military service in peace time. He submits that the Board unjustifiably ignored the uncontradicted medical evidence that he had submitted, contrary to section 39 of the *Veterans Review and Appeal Board Act* S.C. [1995], c. 18 (the “Act”).

[3] The respondent submits that the Board did not simply ignore the evidence; on the contrary, it weighed it and deemed it unlikely, particularly because of the absence of complaints during Mr. Lepage’s military service.

[4] Section 39 of the Act stipulates:

39. Le Tribunal applique, à l’égard du demandeur ou de l’appelant, les règles suivantes en matière de preuve :

a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;

b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l’occurrence;

c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[mes soulignés]

39. In all proceedings under this Act, the Board shall

(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;

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and

(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

[my emphasis]

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[5] However, section 39 does not release Mr. Lepage from the obligation of establishing, on a balance of probability, that the condition of his left knee arises from or is related to his military service in peace time.

[6] Before examining the evidence submitted in this case, the Court notes that it will apply the standard of patent unreasonableness to the Board's decision on this question of fact and of assessment of the evidence (*McTague v. Canada (Attorney General)*, [1999] F.C.J. No. 1559 (QL)). In its assessment, the Court will naturally take into account that the evidence should have been analyzed according to the principles set out in section 39 of the Act. (*MacDonald v. Canada (Attorney General)*, [1999] F.C.J. No. 346 (QL)).

[7] The evidence concerning the condition of Mr. Lepage's knee can be summarized as follows:

- i) Testimony of Mr. Lepage:  
During his military career, spanning more than 25 years, he participated in many exercises that required a great deal of physical effort. He had a variety of duties. He was a troop drill sergeant, a squadron master warrant officer, and a chief warrant officer. In the early 1980s, he noticed light creaking sounds in his knees. In 1985, he fell while loading a truck (a letter from a witness, Mr. Simard, dated March 10, 1999, was also filed). He was taken to the hospital, but he was not diagnosed with any particular illness or injury. He was advised to take Tylenol to relieve the pain in his left knee. During his discharge examination on October 14, 1993, he stated that Dr. Roberge—Captain Roberge at the time—noted that his knees were creaking. He thought that Dr. Roberge had written a note to that effect in his report. However, the discharge examination report contained no such mention.

- ii) In 1995, during a routine examination of his lumbar condition (for which Mr. Lepage receives a pension), the medical examiner noted in his report that [TRANSLATION] “flexion in both knees occurs at 125°, extension 0° with significant creaking and pain.”
- iii) Mr. Lepage filed his pension application for his left knee condition on July 15, 1998. On August 31, 1998, the doctor from the Department of Veterans Affairs examined him and diagnosed chondromalacia in the left knee with [TRANSLATION] “intermittent pain, creaking during movements, worse after prolonged immobilization.”
- iv) On March 30, 2000, Dr Cloutier, an orthopaedist, conducted an assessment and assessed the anatomicophysiological deficit (APD) at 2% in the left knee.
- v) Mr. Lepage also submitted three new exhibits to the Board: a note from Dr. Roberge dated June 7, 2001, a letter bearing the same date, and a letter dated August 23, 2001, from the same doctor. In those documents, Dr. Roberge states that there is [TRANSLATION] “no doubt that the bilateral patellofemoral pain syndrome and the patellar chondromalacia (mostly on the right knee but also on the left) with which Mr. Lepage is afflicted are a direct result of the repetitive tasks and various duties performed during his years of military service (1968 to 1993).” He also states that, in his opinion, aside from the patient’s history, there is no other causal factor (work or sports) that could explain this knee condition. In his note dated June 7 (exhibit 2), Dr. Roberge states [TRANSLATION] “. . . during his discharge examination on October 14, 1993, I unfortunately failed to report that condition, which was present at the time.”

[8] Therefore, Mr. Lepage suffers from chondromalacia in his left knee, and that condition is minor enough in that, in 2000, it involved a level of disability (“APD”) of only 2%.

[9] The report from Dr. Roberge and Dr. Cloutier, the orthopaedist, states that this condition is progressive and that its main symptoms are creaking accompanied by intermittent pain in certain positions. Presumably, if Mr. Lepage had a disability in 1993, it involved an APD of less than 2%.

[10] It also appears, from Dr. Roberge's correspondence, that this condition is due to repetitive movements, not to a significant accident or injury.

[11] In the circumstances, was it patently unreasonable to conclude, as the Board did, by stating:

...

The Board considered all the evidence on the record and is of the opinion that the appellant did not suffer any significant injury while performing his military duties. In fact, there is no evidence of complaints related to his knee following the incident in 1985, nor during his service or upon his discharge in 1993. The diagnosis of chondromalacia in his left knee was made in 1998, five years after his discharge. Dr. Roberge's opinion that the affliction under appeal was present in 1993 is not supported by the facts on the record given the absence of complaints during the appellant's entire military service.

In light of the above, the Board concluded that the chondromalacia in the left knee was not caused or permanently aggravated by the service . . .

[12] With regard to the evidence on the record (see paragraphs 7 (v) and 9, above), the absence of a significant injury does not seem relevant. In addition, even though he was not diagnosed until August 1998, that is, after filing his pension application, the

symptoms of the illness had already been noted by another doctor acting for the Department of Veterans Affairs in 1995.

[13] Mr. Lepage and Dr.Roberge state that Mr. Lepage's knees were creaking in October 1993. That evidence was dismissed as unlikely because the military record does not contain any complaints on that subject. There is no medical evidence on the record indicating a complaint that one would normally expect from a person afflicted with a similar condition.

[14] To this end, the Court again noted that, although the symptoms of the illness were clearly documented as of April 28,1995, by Dr. Claude Boutet, Mr. Lepage did not file a pension application until three years later.

[15] In these circumstances, would common sense and logic lead one to conclude, as the Board did, that Mr. Lepage surely would have complained if his condition existed prior to his discharge in 1993? I think not.

[16] Considering the evidence and section 39 of the Act, the Court finds that the Board's explanation for setting aside

Mr. Lepage's testimony and Dr. Roberge's note is patently unreasonable.

[17] In its decision, the Board does not make any comments about Dr. Roberge's opinion on the "causality," that is, that the chondromalacia is due to repetitive movements over a certain period of time as opposed to an accident or an injury, and that it cannot be explained by Mr. Lepage's activities since 1993. At the hearing, the parties confirmed that the Board did not have any evidence on the record concerning Mr. Lepage's activities since 1993 that would have allowed it to discredit that opinion. No other theory is documented on the record.

[18] Here still, the Court does not see how, in these circumstances, one can conclude that the provisions of section 39 have been respected.

[19] It is not up to the Court to decide whether Mr. Lepage's pension application is valid or not. It must only determine whether the Board committed a reviewable error justifying that the file be reconsidered by a differently constituted appeal board. Like Mr. Justice Blais in *Bernier v. Canada (Attorney General)* [2003] F.C.J.

No. 62 (QL) (a case that also involved a pension application from another chief warrant officer due to chondromalacia in the knees), I must conclude that the evidence submitted by the applicant was dismissed in a perverse and capricious manner and that the Board's decision must be set aside.

**ORDER**

**THE COURT ORDERS** that:

1. The application for judicial review is allowed and the file is referred for consideration by a differently constituted appeal board.

"Johanne Gauthier"  
Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-83-02

**STYLE OF CAUSE:** DANIEL LEPAGE v.  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** QUÉBEC

**DATE OF HEARING:** JUNE 4, 2003

**REASONS FOR ORDER:** THE HONOURABLE JUSTICE  
GAUTHIER  
**AND ORDER**

**DATED:** JANUARY 8, 2004

**APPEARANCES:**

Odette Lacroix FOR THE  
APPLICANT

Bernard Letarte FOR THE  
RESPONDENT

**SOLICITORS OF RECORD:**

Odette Lacroix FOR THE  
APPLICANT  
Heenan Blaikie Aubut

Morris Rosenberg  
Deputy Attorney General of Canada FOR THE  
RESPONDENT

**FEDERAL COURT**

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