Date: 20080422

Docket: T-1365-06

Citation: 2008 FC 520

Ottawa, Ontario, April 22, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

PAUL LENZEN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Mr. Paul Lenzen (the "Applicant") seeks judicial review of the decision of the Veterans Review and Appeal Board (the "VRAB") made July 5, 2006. In its decision, the VRAB determined that the Applicant was entitled to a two-fifths entitlement to a disability pension, but that the remaining three-fifths pension would be withheld on the grounds that the factors of age, weight and

the natural progression of a pre-existing condition of ankylosing spondylitis ("AS") disease contributed to his current disability.

[2] The Applicant seeks an order quashing the decision of the VRAB and a redetermination of his entitlement to a pension.

II. Background

[3] The Applicant is a former member of the Royal Canadian Mounted Police (the "RCMP"). He joined the RCMP in November 1977 and remained a member until October 22, 2002 when he received a medical discharge. In the course of his service, he was involved in three accidents, that is a head-on motor vehicle collision on November 29, 1977, a second motor vehicle accident involving a high impact collision on January 13, 1987 and a collision between two motorized boats on August 3, 1991.

[4] On December 3, 1991, the Applicant applied for a pension. A medical précis, dated December 8, 1993, was prepared. This document shows that his claim is based on the condition of AS and lumbar disc disease ("LDD"). The document provides a brief history of the Applicant's physical condition from the time of his enlistment in the RCMP in November 1977 up to December 1992. The document refers to the motor vehicle accidents in November 1977 and January 1987, as well as to the boating accident of August 1991.

[5] In a decision dated April 18, 1994, the Canadian Pension Commission denied the Applicant's claim on the grounds that the evidence did not show that the injuries "sustained during service would be significant enough to cause or aggravate the claimed condition."

[6] The medical précis refers to reports obtained in 1992 from Dr. Fagnou, a specialist in internal medicine and rheumatic disease. He indicated that the Applicant suffers from AS. In his report of December 10, 1992, Dr. Fagnou said that "accidents do not cause this disease", and cautioned that the symptoms of the disease may be "exacerbated by a spine injury."

[7] The Applicant sought review of the initial decision and obtained a decision, made on March 23, 1995, from an Entitlement Board. This decision awarded him a one-fifth pension entitlement and determined that he suffered from a 40% disability.

[8] The Entitlement Board dealt with the two conditions of AS and LDD together, at the request of the Advocate who represented the Applicant at the hearing. The Entitlement Board referred to the 1991 motor vehicle accident on the Bow River in Cochrane, Alberta. In its concluding paragraph, the Entitlement Board said the following:

> The Board has paid close attention to the testimony of the applicant, Mr. Lenzen, and the material placed before it and the arguments of the Advocate. While the duty status of some of the accidents is not quite clear, it is obvious that the result of one accident lead [*sic*] into another and that Constable Lenzen has received a great deal of trauma to his back over his period of R.C.M.P. Service and the Entitlement Board will find in favour of him.

[9] The Applicant appealed the decision of the Entitlement Board to the Board. In its decision, dated February 1, 1996, the Board reviewed the summary of evidence that was submitted to the Entitlement Board. It referred to the motor vehicle accident of November 1977, the motor vehicle accident of January 1987 and the boating accident of August 1991. The Board expressed the opinion that the "number of reported incidents involving the Appellant's back are minor, trivial, and self-limiting as recorded in the Medical Precis, and that the claimed condition itself is genetic in nature; not related to the Royal Canadian Mounted Police Service." Nonetheless, it confirmed the one-fifth pension entitlement as "fair, adequate and appropriate recognition" of the aggravation that may have been caused by service incidents.

[10] The Board considered, as well, the Applicant's LDD as a basis for pension entitlement. It found that this condition was caused by the AS condition and found that the one-fifth pension entitlement awarded by the Entitlement Board, in respect of both conditions, was appropriate. The Board upheld the decision of the Entitlement Board.

[11] A few years after his retirement from the RCMP on medical grounds, the Applicant sought reconsideration of his pension entitlement. By letter dated May 13, 2005, Counsel for the Applicant advised that the Applicant was seeking a review of his pension eligibility, pursuant to section 82 of the *Pension Act*, R.S.C. 1985, c. P-6, on the basis of new evidence. The letter set out submissions on behalf of the Applicant concerning the new evidence which consisted of medical reports from Dr. Ian Scott and Dr. Sharmila Kulkarni.

[12] Dr. Scott had been a Health Services Medical Consultant to the RCMP during the time leading up to the Applicant's discharge from the RCMP in 2002. At that time, due to a perceived conflict between his role as a medical consultant to the RCMP and the Applicant's status as a member of the RCMP, Dr. Scott was not authorized to provide a medical opinion in support of the Applicant's pension entitlement application.

[13] However, following Dr. Scott's retirement as a RCMP Medical Consultant in 2003, he provided a report dated February 13, 2004 based upon his review of RCMP accident reports, injury statements, medical records and personnel files from 1978 to 2002. Dr. Scott acknowledged that he was not conducting a full independent medical examination and recommended that the Applicant obtain a "further complete assessment of impairment" from a physiatrist. In that regard, the Applicant obtained a report from Dr. Kulkarni, a doctor of physical medicine, and that report is dated December 13, 2004.

[14] According to both the Tribunal Record and the affidavit of the Applicant filed in this matter, a hearing was held on May 23, 2006 relative to his request for a reconsideration of the decision that had been made by the Board on February 1, 1996. The submissions filed by the Applicant in support of his request for reconsideration on the basis of new evidence clearly stated that he was not challenging the assessment of his disability at 40% but was challenging the assessment that he was entitled only to a one-fifth pension relative to the 40% disability.

[15] In its decision of May 23, 2006, the Board first dealt with the Applicant's request for reconsideration of the decision of February 1, 1996, on the basis that he had "significant and fresh evidence" that could reasonably be expected to change his pension entitlement. According to the decision, two exhibits were submitted, R1-L1 and R1-L2. Exhibit R1-L1 included an affidavit sworn by the Applicant on December 29, 2005, as well as a letter dated May 13, 2005 from his Counsel. The Affidavit included as attachments Appendices A to D. Appendix C was a medical report dated February 13, 2004 from Dr. Ian Scott and Appendix D was a medical report dated October 22, 2004, from Dr. Sharmila Kulkarni.

[16] The material constituting Exhibit R1-L1 included guidelines drafted by Veterans Affairs Canada in May 2002, relating to pension entitlement for AS. These guidelines are called the "Entitlement Eligibility Guidelines." In his request for reconsideration of his pension entitlement, the Applicant, through his Counsel, requested that these guidelines be considered in the reconsideration of his claim for increased pension eligibility.

[17] Exhibit R1-L2 consisted of a collision report, a RCMP Motor Vehicle Accident Report from the 1987 motor vehicle accident and a RCMP Motor Vehicle Accident Report respecting the August 1991 boating collision. It appears that the material constituting Exhibit R1-L2 was submitted by Counsel for the Applicant after the hearing on May 23, 2006, under cover of a letter dated May 23, 2006.

[18] In its decision, the Board just dealt with the application for reconsideration. It determined that the evidence submitted on behalf of the Applicant met the "four-part '*MacKay*' fresh evidence test, paying specific attention to the opinions from Dr. Scott and Dr. Kulkarni and the accident reports." The Board then proceeded to a full reconsideration hearing.

[19] The Board reviewed the facts regarding the 1977, 1987 and 1991 accidents. It provided a summary of complaints and symptoms presented by the Applicant over the period December 1, 1977 to November 2002. It noted that as of November 2002, it was "known" that the Applicant suffered from AS.

[20] The Board referred to various medical reports, first mentioning a report dated October 22, 1992 from Dr. Fagnou. It referred to a report dated December 10, 1992 from Dr. Fundytus. It acknowledged the report, dated February 13, 2004, from Dr. Scott and his opinion that the "major etiologic factor" in the Applicant's "impairment of function is due to the characteristics of the impact forces" imposed upon the Applicant in the various accidents, the Board concluded that the "facts of this case do not appear to support a major aggravation."

[21] Under the heading "Decision", the Board determined that there was no new evidence concerning the 1977 accident. It said that it could not "conclude based on the evidence" that this accident was directly related to the Applicant's service.

[22] The Board went on to say that the first two accidents, that is the motor vehicle accidents of 1977 and 1987, appeared to be "self-limiting soft-tissue injuries." The Board noted Dr. Kulkarni's opinion that the 1987 accident "significantly aggravated" the condition of AS. It noted that this view was shared by Dr. Fagnou, Dr. Fundytus and Dr. Scott. Ultimately, the Board said that it was "reasonable to conclude" that the 1987 motor vehicle accident caused some permanent aggravation to the Applicant's condition of AS. It concluded, at the same time, that only the 1987 motor vehicle accident was "proven to be service-related."

[23] The Board then proceeded to deal with the boating accident that occurred in August 1991. It said that the accident report dated September 6, 1991 indicated that the Applicant "agreed to operate the RCMP jet boat on his own time (voluntary time)." The Board also said that "at some point", the Applicant and others "went off on their own and began their own recreational activity of racing."

[24] The Board quoted from the RCMP accident report relating to the August 1991 accident where the investigating officer found that the Applicant was not "wholly responsible for this collision." On the basis of its interpretation of the accident report, the Board found that the Applicant was "not in the performance of his RCMP duties at that specific time when the boating accident occurred."

[25] Ultimately, the Board concluded that it should focus on the 1987 motor vehicle accident in assessing the Applicant's request for reconsideration on the basis of new evidence. It found that that accident "aggravated" the Applicant's conditions to "a moderate degree." It increased his

pension entitlements to two-fifths and withheld the remaining three-fifths for the "reasons of age, weight and for the natural progression of the pre-existing AS condition which most likely would have occurred even without the trauma in 1987."

III. Submissions

i) The Applicant

[26] The Applicant argues that the Board committed several errors in reaching its decision. He submits that it erred by making a finding as to the impact of his weight upon his physical limitations without either giving him an opportunity to address that factor, contrary to the decision in *MacKay v. Canada (Attorney General)* (1997), 129 F.T.R. 286, or without obtaining its own medical opinion as authorized by section 38 of the VRAB Act. In this regard, the Applicant relies on the decision in *Rivard v. Attorney General of Canada* (2001), 209 F.T.R. 43 (T.D.).

[27] The Applicant argues that the Board further erred in finding that he was not on duty when the 1991 accident occurred. He submits that in doing so, the Board assessed his actions that day in isolation from the general framework of his employment. Relying on the decision in *Wannamaker v. Attorney General of Canada* (2006), 289 F.T.R. 298 (F.C.), the Applicant says this approach by the Board was wrong.

[28] The Applicant submits that the Board made a patently unreasonable finding in concluding that the 1991 accident "would have been considered minor" relative to his condition. He argues that this conclusion is contrary to the opinions expressed in the new medical evidence.

[29] The Applicant challenges the Board's finding that the 1991 boating accident arose from the "recreational activity of racing". He submits that this finding is unsupported by the evidence. Further, the Applicant argues that he was not given the opportunity to respond to the Board's finding that he was off-duty when the 1991 boating accident occurred. This loss of opportunity to respond is contrary to the Court's decision in *MacKay*.

[30] Finally, the Applicant submits that since the Board made no adverse credibility findings, it erred in failing to make positive findings in accordance with sections 3 and 39 of the Act, as discussed in *MacKay*.

ii) The Respondent

[31] For his part, the Respondent argues that the Board's findings are not patently unreasonable and judicial intervention is unwarranted.

III. Discussion

[32] The first matter to be addressed is the appropriate standard of review. According to the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, decisions of administrative decision makers are to be reviewed on either the standard of correctness or that of reasonableness.

[33] In the present case, the Board was engaged in a reconsideration of the assessment of entitlement to a disability pension. This is essentially a factual exercise that required the Board to weigh the evidence that was presented, having regard to the requirements of the Act. The standard of reasonableness will apply.

[34] The Applicant's eligibility to apply for a disability pension arises pursuant to the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11. Section 32 of that statute provides as follows:

32. Subject to this Part, an award in accordance with the Pension Act shall be granted to or in respect of	32. Sous réserve des autres dispositions de la présente partie, une compensation conforme à la Loi sur les pensions doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service de l'intéressé dans la Gendarmerie, à toute personne, ou à l'égard de celle-ci :
(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability or has died, or	(a) visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant ou après cette date, a subi une invalidité ou est décédée;
(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died,	(b) ayant servi dans la Gendarmerie à tout moment
in any case where the injury or disease or aggravation thereof resulting in the disability or death in respect of which the	

application for the award is made arose out of, or was directly connected with, the person's service in the Force.	après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

[35] His application for pension benefits was initially made pursuant to the *Pension Act*, R.S.C. 1985, c. P-6. Section 2 of that legislation is relevant and provides as follows:

2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.	2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

[36] The Board's assessment of the evidence is to be informed by the VRAB Act. Sections 3 and 39 are relevant to that assessment and provide as follows:

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	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

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.	gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.
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.	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.

[37] The Board was engaged in an application for reconsideration. Subsection 32(1) of the Act deals with reconsideration proceedings and provides as follows:

32. (1) Notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1)	32. (1) Par dérogation à l'article 31, le comité d'appel peut, de son propre chef, réexaminer une décision rendue en

or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.	vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.

[38] Sections 3 and 39 of the Act have been interpreted to mean that a person seeking a benefit must submit sufficient evidence to establish a causal link between his or her injury or disability and his or her period of service. These statutory provisions do not relieve an applicant for a disability pension under the Act from the obligation of adducing sufficient probative evidence to meet the requirements for the award of a disability pension. In this regard, I refer to the decisions in *Hall v. Canada (Attorney General)* (1998), 152 F.T.R. 58; aff'd (1993), 250 N.R. 93 (Fed. C.A.), *Tonner v. Canada (Minister of Veterans Affairs*) (1995), 96 F.T.R. 146; aff'd [1996] F.C.J. no. 825 (Fed. C.A.) and *MacKay*.

[39] In the present case, I am satisfied that the Board made unreasonable findings of fact with respect to the issue of the Applicant's weight as affecting his pension eligibility, the characterization of the circumstances of the 1991 accident as being primarily a "recreational" activity, the finding

that the Applicant was off duty on August 3, 1991 and its finding that the 1991 accident was of a minor consequence for the Applicant.

[40] The Applicant's weight had been mentioned in earlier medical reports but it was not identified as a contributing factor to his symptoms of physical limitations. In this regard, I refer to the report dated October 22, 1992, from Dr. Fagnou. Weight was not mentioned as a contributing factor in the prior decision of the Entitlement Board, dated March 23, 1995 or of the Board in its decision dated February 1, 1996. Indeed, weight was given only passing mention in the medical précis prepared in 1994, at page 251 of the Tribunal Record.

[41] If weight were an important factor to be considered by the Board upon a request for reconsideration pursuant to section 32 of the Act, in my view, the Applicant should have been given the opportunity to address the issue. Failure to provide that opportunity amounts to a breach of procedural fairness.

[42] Further, the Board had the option, pursuant to section 38 of the Act, to obtain its own medical opinion addressing the issue. It did not do so. It was not authorized to substitute its own opinion, absent evidence as to the relationship of alleged excess weight, to the Applicant's disability. As found by the Court in *Rivard* at para. 40, there is no presumption that the Board holds any expertise in medical matters:

> In my view, the fact that section 38 of the VRAA allows the Board to seek medical advice on any medical matter suggests that the Board

> has no particular medical expertise. That was acknowledged by jurisprudence, beginning with Moar v. Canada (Attorney General) (1995), 103 F.T.R. 314 (T.D.). Mr. Justice Heald's conclusion in Moar, supra, was cited in several cases, in particular in Weare v. Canada (Attorney General) (1998), 153 F.T.R. 75 (T.D.). MacKay J.'s comments at paragraphs 14 and 15 read:
>
> > Under section 38 of the Act, the Board may seek independent medical opinions regarding any matter before the Board. Mr. Justice Heald, in Moar v. Canada (Attorney General), (1995), 103 F.T.R. 314, at p. 316 commenting on a similar provision, s.10(3) of the former, and now repealed Veterans Appeal Board Act, and its significance for the deference to be accorded by the Court to the Board's decision, had this to say:
> >
> > > The issue in this case clearly involves medical matters. Section 10(3) of the Veterans Appeal Board Act empowers the Board to obtain independent medical opinions relating to any matter before the Board. On this basis I conclude that the Board is not to be afforded the deference usually given to tribunals of a specialized nature because of their particular expertise.
> > > …

[43] I turn now to the Board’s dismissal of the 1991 boating accident as a basis for the Applicant’s claim for pension entitlement. As noted above, the Board made three specific findings, that is with respect to the Applicant’s status as being “off duty”, the description of the accident as a “recreational activity” and finally, that he was not engaged in RCMP service at the time. The evidence upon which the Board relied in making these findings was not the new medical evidence that was presented, but an accident report dated September 6, 1991. It appears that the Board interpreted the accident report on September 6, 1991 to reach these findings.

[44] In my opinion, the Board erred in doing so. In the first place, this accident report is not "new" evidence, within the first criteria discussed in *MacKay* at para. 23. It is referenced in the medical précis that was prepared in December 1993, as Exhibit 19, at page 252 of the Tribunal Record. Second, the Applicant did not refer to this accident report as "new evidence" in his request for reconsideration, as set out in his letter of May 13, 2005.

[45] The criteria for new evidence is discussed in *MacKay* at para. 23 as follows:

> However, I am satisfied that Dr. Murdoch's report qualifies as "new evidence" for the purposes of s. 111. The applicant has cited a test for "new" evidence from **R. v. Palmer**, [1980] 1 S.C.R. 759; 30 N.R. 181; 106 D.L.R.(3d) 212, at p. 224 [D.L.R.] (hereinafter **Palmer**):
>
> > "…The following principles have emerged:
> >
> > (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see **McMartin v. The Queen**, [1965] 1 C.C.C. 142; 46 D.L.R.(2d) 372; [1964] S.C.R. 484;
> >
> > (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
> >
> > (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) it must be such that if believed it could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result."

[46] Further, the accident report in question does not record that the Applicant was off duty. Rather, it records that the Applicant agreed to operate the police boat while on "voluntary overtime." The report also notes that "all uniform personnel (both RCMP and F & W) were therefore on duty and in acceptable uniform."

[47] The language in the RCMP accident report contradicts the Board's findings that the Applicant was off duty. The Board purports to rely on that report for its finding. The Board, in my opinion, made an unreasonable finding in that regard.

[48] Likewise, the Board erred in finding that the Applicant was engaged in "recreational activity" on August 3, 1991. The RCMP accident report does not say that. The accident report discusses responsibility for the collision and concludes that the operators of both vessels were at fault.

[49] As well, the Board purported to rely on this accident report in determining that the Applicant was not engaged in RCMP service when the boating accident occurred on August 3, 1991. In my opinion, this finding is not reasonable. The accident report does not say that the Applicant was not engaged in RCMP service. There is no evidence that voluntary overtime is unpaid overtime. The reference in the accident report to "acceptable uniform" does not support the Board's findings.

[50] Finally, the Board erred by failing to consider the new medical evidence in relation to the 1991 accident. Although it provided no reasons why it considered the medical reports of Dr. Scott

and Dr. Kulkarni to be “new evidence”, within the framework discussed in *MacKay*, once it did so, it was required to draw “every reasonable inference in favour of the Applicant” as discussed in *MacKay* at para. 31.

[51] It seems that the Board considered a pre-existing accident report that was available to earlier decision-makers, as the foundation for revisiting factual findings as to the employment duty status of the Applicant in August 1991.

[52] I am satisfied that this application for judicial review should be allowed. The Board made unreasonable findings. It failed to provide the Applicant the opportunity to make submissions with respect to the new medical evidence. It failed to weigh the new evidence in accordance with sections 3 and 39 of the VRAB Act. It failed to apply the relevant jurisprudence.

[53] Accordingly, this application is allowed, the matter is remitted to a differently constituted panel of the Board for redetermination. The Applicant shall have his costs, to be taxed.

JUDGMENT

This application for judicial review is allowed and the matter is remitted to a differently constituted panel of the Board for redetermination. The Applicant shall have his costs, to be taxed.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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