

Date: 20090212

Docket: T-338-08

Citation: 2009 FC 147

Ottawa, Ontario, February 12, 2009

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ROBERT GAGNON

Applicant

and

**ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Robert Gagnon enrolled in the Canadian Forces in 1999. In 2005, he sought disability benefits under the *Pensions Act*, R.S.C. 1985, c. P-6, claiming that he injured his back while on military service. The Veterans Review and Appeal Board awarded him two-fifths of a pension, but withheld the remaining three-fifths on the basis that his injuries were partly hereditary and partly caused by non-military activities. Mr. Gagnon submits that the Board erred in failing to grant him a full pension and asks me to order it to re-assess his claim.

[2] I can find no basis for overturning the Board's decision and must, therefore, dismiss this application for judicial review.

[3] Mr. Gagnon presented three main issues:

1. The advocate representing him before the Board was incompetent.
2. There is new evidence supporting his claim.
3. The Board's finding that his injury was not entirely service-related was unreasonable.

I. Factual Background

[4] Mr. Gagnon joined the Canadian Forces in 1999. On his enrolment, it was noted that he had incurred back injuries while playing hockey as a teenager, for which he had received treatment. Still, Mr. Gagnon remained an active hockey player. However, in 2002, he suffered another back injury while playing on the Canadian Forces hockey team. He also hurt his back on the job in 2005 while lifting computer monitors onto a ship.

[5] In 2005, Mr. Gagnon was diagnosed with a degenerative disc disease with disc herniation. He had back surgery (discectomy) in 2005. He still has back pain, as well as some loss of sensation and mobility.

[6] The Board took account of Mr. Gagnon's service-related injuries, but also noted other sources of his back problems, including his previous hockey injuries, a motorcycle accident, two car

accidents, an injury caused by lifting a boat, and a family history of lower back pain. Looking at the circumstances as a whole, the Board concluded that Mr. Gagnon was entitled to a two-fifths pension entitlement.

II. Analysis

1. Was the advocate representing Mr. Gagnon incompetent?

[7] Mr. Gagnon submits that the advocate (appointed by the Board) failed to advise him that a letter from his family doctor was not sufficient to prove an absence of a family history of back problems. The Board concluded that the letter was not a “credible medical opinion.”

[8] The Board’s decision details the various submissions put forward by Mr. Gagnon’s advocate. Clearly, the advocate presented all of the arguments in Mr. Gagnon’s favour. There is nothing in the record to suggest that he was incompetent.

2. Does the new evidence support Mr. Gagnon’s claim?

[9] On a judicial review, the Court will generally consider only the evidence that was before the decision-maker. Its role is to determine whether the decision-maker erred “in light of the evidence that was before it” (*Kaminski v. Canada (Minister of Social Development)*, [2008] F.C.J. No. 1010, at para. 10).

[10] There is no basis for considering the new evidence Mr. Gagnon has assembled and, therefore, I cannot take it into account in deciding whether the Board erred.

3. Was the Board's finding that Mr. Gagnon's injury was not entirely service-related unreasonable?

[11] Mr. Gagnon cites a number of areas where he feels the Board misconstrued or ignored evidence in his favour.

[12] First, Mr. Gagnon states that the Board misunderstood an opinion provided by a Dr. Garth Johnson who stated, "He has a markedly positive family history for spine problems in both his mother and cousin, not specific for a spondyloarthritis". Mr. Gagnon suggests that the Board should have realized that this statement could not be used to support a conclusion that his back problems were hereditary, since spondyloarthritis is itself hereditary. In other words, in Mr. Gagnon's submission, Dr. Johnson's opinion is ambiguous.

[13] Second, Mr. Gagnon argues that the Board should not have relied on an opinion from a chiropractor (Dr. G. McBride) who observed that Mr. Gagnon's "family health history includes a significant maternal history of low back pain, which is of significance because . . . those with a family history of low back pain generally experience a five times greater incidence than the general population."

[14] Third, Mr. Gagnon submits that the Board failed to give sufficient weight to the statements of Mr. Richard Riley, Ms. Jennifer Lapointe and a Dr. Janna, who corroborated his account of being injured by moving computer monitors.

[15] Fourth, Mr. Gagnon argues that the Board failed to abide by its obligations to draw “every reasonable inference in favour of” an applicant, to “accept any uncontradicted evidence presented to it by” an applicant, and to resolve any doubt in favour of an applicant, according to the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, ss. 39(a),(b), and (c).

[16] Mr. Gagnon’s first three arguments are really about the weight that particular elements of the evidence before the Board should have been given. The question of the weight of evidence is a matter that is wholly within the Board’s discretion, subject to the statutory obligations that are the subject of Mr. Gagnon’s fourth argument.

[17] The Board had before it contradictory evidence on the question of a family history of back problems. It resolved the contradiction by favouring the opinions of Drs. Johnson and McBride over the opinion of Mr. Gagnon’s family doctor, Dr. Lagrotteria, as it was entitled to do. The Board did consider the evidence corroborating Mr. Gagnon’s account of being injured while moving computer monitors. That evidence, in part, justified the award of a partial pension. Finally, it appears to me that the Board did draw every reasonable inference and resolve any doubt in Mr. Gagnon’s favour. I cannot see any basis for concluding that the Board failed to discharge its statutory obligations toward him. Indeed, the Board had a co-existing duty to award “only that fraction of the total disability, measured in fifths, that represents the extent to which the injury or

disease was aggravated” during military service (*Pensions Act*, above, s. 21(2.1)). It did so in awarding Mr. Gagnon a two-fifths pension.

III. Conclusion and Disposition

[18] From my review of the record, Mr. Gagnon had a fair opportunity to present his evidence to the Board. In turn, the Board took into account the relevant evidence in arriving at its conclusion. That conclusion was reasonable in the sense that it “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47).

[19] Accordingly, the application for judicial review is dismissed. There is no order as to costs.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.
2. The style of cause is amended to: *Robert Gagnon v. Attorney General of Canada.*

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-338-08

STYLE OF CAUSE: Robert Gagnon v. Veterans Review and Appeal Board
Canada

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 22, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: February 12, 2009

APPEARANCES:

Robert Gagnon THE APPLICANT ON HIS OWN BEHALF

Claudine Patry FOR THE RESPONDENT

SOLICITORS OF RECORD:

Robert Gagnon THE APPLICANT ON HIS OWN BEHALF

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada