Federal Court		Cour fédérale

Date: 20090720

Docket: T-1044-08

Citation: 2009 FC 735

Ottawa, Ontario, July 20, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ALAIN BOISVERT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Alain Boisvert, is seeking judicial review by this Court of the decision of the Veterans Review and Appeal Board (the Board) dated May 14, 2008, whereby it was determined that the cervical osteoarthritis from which he suffers does not entitle him to a pension under the terms of subsection 21(2) of the *Pension Act*, R.S. 1985, c. P-6 (the Act or the *Pension Act*).

[2] The Board thereby affirmed a previous decision by the review panel, dated August 5, 2005, to the effect that this condition neither arose out of nor was directly connected with military service in peace time in the Regular Force.

[3] That decision had in turn affirmed the decision of the Department of Veterans Affairs (the Department), dated July 27, 2004, denying Mr. Boisvert's pension claim based in particular on cervical osteoarthritis. It should be pointed out that the initial pension claim filed with the Department on July 14, 2003 was not based solely on cervical osteoarthritis, but also on rotator cuff impingement syndrome in the left shoulder and a mucous cyst on the right wrist. The claims based on the latter two conditions were also denied by the Department and the applications for review of those two facets were withdrawn before the review panel. Consequently, only the pension claim connected with the cervical osteoarthritis condition was considered by the Board, both on review and on appeal.

FACTS

[4] Mr. Boisvert joined the Regular Force of the Canadian Army (Armed Forces) in peace time on September 12, 1986. Apart from a short stay in Syria from September 3, 1991 to March 5, 1992, where he was in a special duty area, the applicant always served on Canadian soil. He held the position of supply technician.

[5] In the pension claim he submitted to the Department, the applicant connected his health problems with a blow to the head he sustained by hitting the edge of his car while reaching for his

dress uniform on the back seat. He also maintained that the work to which he was assigned from 1996 to 1999 required him to bend over repeatedly while making the same movements.

[6] In its decision of July 27, 2004, the Department found that the medical evidence submitted by Mr. Boisvert was insufficient to show that the fact that he had hit his head on the frame of his car could have contributed to the development of the alleged condition. As for the fall that the applicant allegedly took on the stairs of his residence as he was leaving for work in February 1997, the Department concluded that it could be more significant but that there was no indication that it was connected with his military duties. The Department also determined that there was no indication that the repetitive strain associated with the work of supply technician could have contributed to the development of his cervical osteoarthritis. Consequently, the Department reached the conclusion that Mr. Boisvert's condition was not directly connected with and had not been aggravated by service in the Regular Force.

[7] On August 17, 2004, Mr. Boisvert filed with the Board an application for review of the Department's decision of July 27, 2004. In support of his application, Mr. Boisvert submitted additional evidence, namely, a statement describing the various events that, in his view, could have contributed to his medical problems, a short letter from a military physician attesting to the many injuries suffered by Mr. Boisvert in the course of his occupation and concluding that all of those injuries [TRANSLATION] "could have caused his problem of chronic neck pain", as well as excerpts from his medical and personal record. Mr. Boisvert also testified during the hearing before the Board.

[8] The Board's review panel delivered its decision on the application on August 5, 2005, and affirmed the Department's decision that the cervical osteoarthritis from which Mr. Boisvert suffers neither arises out of nor is directly connected with military service in peace time in the Regular Force. The panel first noted that the applicant had not filed any complaint regarding a neck injury or trauma while he was performing his duties. The panel then noted the brevity of the medical evidence produced and the absence of a connection between the events mentioned and the condition in question. For these reasons, the panel concluded that absent evidence tending to establish either repetitive strain or movements that could have affected the state of his neck, it could not award Mr. Boisvert a pension for the condition claimed.

[9] On November 15, 2007, Mr. Boisvert appealed that decision to the Board. In the written and oral submissions made on his behalf by counsel from the Bureau of Pensions Advocates, it was again argued based on evidence in the record that Mr. Boisvert's neck problems had begun well before 1996 and that his military service had led to his condition.

[10] New evidence was also introduced, which can be briefly summarized as follows. First, a letter from his osteopath, who, relying on what Mr. Boisvert had told her (she began treating him only in June 2005) and her own observations, concluded that it was [TRANSLATION] "very highly probable that the duties performed by Mr. Boisvert could have affected his physical condition and therefore contributed to the deterioration of his state, and to the resulting residual pain".

[11] Then, a letter from a physiatrist, who, based on his own examination and Mr. Boisvert's medical record and statements, diagnosed symptomatic cervical diskarthrosis [TRANSLATION]

"probably caused by intense physical activity, notably by playing contact hockey, especially since it occurred between 1986 and 1991, that is, more than 12 years ago. Occupational activities may have contributed to the aggravation of his current clinical picture".

[12] Also filed was a letter from the coach of the hockey team on which Mr. Boisvert played from 1986 to 1991, testifying to the extreme violence and great competitiveness that characterized this sport in the army, as well as the many injuries sustained by Mr. Boisvert.

[13] Finally, two letters from an orthopaedist completed the evidence. The first, dated January 23, 2008, gives a medical opinion on Mr. Boisvert at the request of his counsel to determine whether his neck problem was connected with his service in the Armed Forces. Also basing himself on his own physical examination of Mr. Boisvert and on his medical record and his account of events, he gives the opinion that the applicant presents a degree of cervical diskarthrosis well beyond what could be expected for a person of his age, and that [TRANSLATION] "[i]t is clear that this condition, which is very unusual for a man of his age, was engendered in a proportion of 5/5 by his activities in the Canadian Armed Forces". In a second letter from the same orthopaedist, dated March 13, 2008, he adds further details at the request of counsel for Mr. Boisvert. Although the doctor had taken into account the fall on the stairs and the knock against the frame of the car, he was asked to assess the role that those incidents would have played in the development of Mr. Boisvert's disease in view of the fact that the Board had concluded that those incidents had not occurred in the context of military service. To those questions, the doctor answered that the fall on the stairs had had no impact. On the other hand, he said that in his opinion the knock on the car constituted [TRANSLATION] "one of a series of events that contributed to the appearance of cervical

osteoarthritis that is very unusual in a young man of 29", and he concluded, [TRANSLATION] "Consequently, we therefore believe that the intensity of the traumas sustained playing hockey is much greater and if the only injury had been the knock against a door frame, we do not believe that this incident would have contributed in any way whatsoever to the acceleration of cervical osteoarthritis."

[14] In a decision dated May 14, 2008, the Board's appeal panel denied Mr. Boisvert's claim.

IMPUGNED DECISION

[15] The Board first reviewed the new medical evidence submitted by counsel for Mr. Boisvert, and even quoted several of the excerpts reproduced in the paragraphs above. Then it noted that both the osteopath and the physiatrist base themselves on Mr. Boisvert's account to make their diagnoses. Moreover, none of the letters written by these two specialists refers to the fall on the stairs and the blow that the applicant suffered by hitting his head on the edge of his car, or the possible impact of those incidents on his condition.

[16] The Board also assigns no value to the letters from the orthopaedic surgeon, for the following reasons. First, the Board notes that he refers to the two incidents mentioned above only after being informed of them by counsel for Mr. Boisvert. Furthermore, the Board notes that the doctor does not indicate the nature of his relationship with Mr. Boisvert, and in particular the number of times he has seen Mr. Boisvert. Lastly, the Board points out that the doctor does not give

the reasons supporting his conclusion and does not even mention whether he saw Mr. Boisvert again after receiving the letter from counsel.

[17] Consequently, the Board concluded that the new evidence did not satisfy it that the previous decision should be varied, and therefore affirmed the review panel's decision of August 5, 2005.

ISSUES

[18] This application raises only one issue, in my view, which is whether the Board erred in fact or in law by concluding that Mr. Boisvert was not entitled to a pension under subsection 21(2) of the *Pension Act*. Naturally, the answer to that question will be conditioned in part by the identification of the applicable standard of review.

[19] Counsel for the applicant also argued, in a somewhat confused manner, that the rules of natural justice had been violated because his client had not been permitted to testify during the hearing before the Board's appeal panel. Although that argument strikes me as baseless and was not advanced with much conviction, I will deal with it briefly in these reasons.

ANALYSIS

- Preliminary Objection

[20] In a preliminary objection, the respondent requested the striking out of the affidavit signed by the applicant on August 15, 2008 in support of his application for judicial review, and of Exhibit D-1 appended to that affidavit. The latter consists of excerpts from the applicant's medical record that had not been reproduced by the Department's pension officer.

[21] It is settled law that in an application for judicial review only the evidence that was before the original decision-maker may be introduced before the Court: see, for example, *Kaminski* v. *Canada (Minister of Social Development)*, 2008 FCA 225; *Gagnon* v. *Canada (Attorney General)*, 2009 FC 147. I note also that the applicant was entitled, under section 28 of the *Veterans Review and Appeal Board Act*, 1995, c. 18 (the *Board Act*), to present evidence provided it was documented. The applicant availed himself of that opportunity, but the excerpts from the medical record that he now seeks to introduce before the Court were not filed in evidence before the Board; consequently, the applicant is now precluded from doing so as part of his application for judicial review. In any event, counsel for the applicant made no reference to them in his submissions, and even conceded in his memorandum (at paragraph 17) that the criteria for accepting new evidence were not met in this case.

[22] As for the applicant's affidavit, I am of the opinion that it could be introduced in evidence, subject to the removal of certain paragraphs that are more in the nature of argument than of

testimony. The fact that several statements essentially repeat information that Mr. Boisvert already communicated to the Board, although in a slightly different form, is not a sufficient ground for striking out his affidavit. On the other hand, I agree with the respondent that paragraphs 23, 25, 26, 27 and 28 of the affidavit are more in the nature of argument and do not constitute factual evidence. Also, paragraphs 29, 30 and 31 contain several legal and medical conclusions and must for that reason be struck out.

- Legal Framework

[23] Entitlement to a pension is provided under section 21 of the *Pension Act*. Pension eligibility differs depending on whether the person concerned was a member of the Forces during war or in peace time: if service was during war, it is paragraph 21(1)(*a*) that applies; if in peace time, it is paragraph 21(2)(*a*). The latter provision reads as follows:

PART III PENSIONS	PARTIE III PENSIONS
Service during war, or special duty service	Service pendant la guerre ou en service spécial
21. (1) …	**21.** (1) …
Service in militia or reserve army and in peace time	Milice active non permanente ou armée de réserve en temps de paix
(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,	(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :
(*a*) where a member of the	

forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;	*a*) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

[24] As already noted by Justice Nadon, then of the Federal Court, in *King* v. *Canada (Veterans Review and Appeal Board)*, [2001] F.C.J. No. 850, 2001 FCT 535 (at paragraph 65), paragraph 21(2)(*a*) is more narrow in scope than paragraph 21(1)(*a*). While the latter refers to an injury or disease "that was attributable to or was incurred during such military service", paragraph 21(2)(*a*) refers instead to an injury or disease "that arose out of or was directly connected with such military service". In other words, the member of the Forces who suffered an injury or disease in peace time must establish that military service was the "primary cause" of the injury or the disability and must establish causation. See also: *Leclerc* v. *Canada (Attorney General)*, [1996] F.C.J. No. 1425, 126 F.T.R. 94, at paragraphs 18-21.

[25] It should be pointed out that subsection 21(3) of the same Act establishes a presumption as to the existence of the causal connection required under paragraph 21(2)(*a*) between the incident cited and the injury or disease suffered. The provision specifies that an injury or disease shall be presumed, in the absence of evidence to the contrary, "to have arisen out of or to have been directly connected with military service" if it was incurred in the course of any of the circumstances listed in the subsection's various paragraphs:

Presumption

(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of

(*a*) any physical training or any sports activity in which the member was 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;

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

(*c*) the transportation of the member, in the course of duties, in a military vessel, vehicle or aircraft or by any means of transportation authorized by a military authority, or any act done or action taken by the member or any other person that was incidental to or directly

Présomption

(3) Pour l'application du paragraphe (2), une blessure ou maladie — ou son aggravation — est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce paragraphe si elle est survenue au cours :

a) d'exercices d'éducation physique ou d'une activité sportive auxquels le membre des forces participait, lorsqu'ils étaient autorisés ou organisés par une autorité militaire, ou exécutés dans l'intérêt du service quoique non autorisés ni organisés par une autorité militaire;

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

c) soit du transport du membre des forces, à l'occasion de ses fonctions, dans un bâtiment, véhicule ou aéronef militaire ou par quelque autre moyen de transport autorisé par une autorité militaire, soit d'un acte fait ou d'une mesure prise par le membre des forces ou une autre personne lorsque cet

connected with that transportation;

acte ou cette mesure était accessoire ou se rattachait directement à ce transport;

(*d*) the transportation of the member while on authorized leave by any means authorized by a military authority, other than public transportation, between the place the member normally performed duties and the place at which the member was to take leave or a place at which public transportation was available;

d) du transport du membre des forces au cours d'une permission par quelque moyen autorisé par une autorité militaire, autre qu'un moyen de transport public, entre le lieu où il exerçait normalement ses fonctions et soit le lieu où il devait passer son congé, soit un lieu où un moyen de transport public était disponible;

(*e*) service in an area in which the prevalence of the disease contracted by the member, or that aggravated an existing disease or injury of the member, constituted a health hazard to persons in that area;

e) du service dans une zone où la fréquence des cas de la maladie contractée par le membre des forces ou qui a aggravé une maladie ou blessure dont souffrait déjà le membre des forces, constituait un risque pour la santé des personnes se trouvant dans cette zone;

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

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

(*g*) the performance by the member of any duties that exposed the member to an environmental hazard that might reasonably have caused

g) de l'exercice, par le membre des forces, de fonctions qui ont exposé celui-ci à des risques découlant de l'environnement qui auraient

the disease or injury or the aggravation thereof.	raisonnablement pu causer la maladie ou la blessure ou son aggravation.

[26] Attention should also be drawn to section 2 of the *Pension Act* and section 3 of the *Board Act*, which call for a broad and liberal construction and interpretation of the provisions of these two statutes in recognition of what the members of the Forces have done for their country. These provisions read as follows:

Pension Act:

CONSTRUCTION	RÈGLE D'INTERPRÉTATION
Construction	Règle d'interprétation
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.

Board Act:

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	**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

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.	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.

[27] Finally, another provision that must be taken into account is section 39 of the *Board Act*, which sets out rules favouring the applicant with respect to his or her burden of proof:

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 evidence, as to whether the applicant or appellant has established a case.	*c*) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[28] This provision, which generally gives the applicant or appellant the benefit of the doubt, has occasioned much debate over the nature of the evidence that will allow the applicant or appellant to succeed. The decisions of this Court and of the Court of Appeal instruct us that the effect of this provision is not to compel the Board to accept all of the allegations made by a veteran. Under the terms of paragraph 21(2)(*a*), the applicant must establish, on the standard of proof applicable in civil matters (a balance of probabilities), that he or she suffers from a disability and that this disability arose out of or was directly connected with his or her military service. It is the member who must prove causation between the alleged incident and the condition cited. Justice Sharlow, writing for the Court of Appeal, summarized the impact of section 39 well in *Canada (Attorney General)* v. *Wannamaker*, 2007 FCA 126, at paragraphs 5 and 6:

> 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 (F.C.T.D.), *Cundell v. Canada (Attorney General)* (2000), 180 F.T.R. 193 (F.C.T.D).
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> 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 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.
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> See also: *Nisbet* v. *Canada (Attorney General)*, 2004 FC 1106, at paras. 17-19; *Moar* v. *Canada (Attorney General)*, 2006 FC 610, at paras. 10 and 29; *Currie* v. *Canada (Attorney General)*, 2005 FC 1512, at

> para. 9; *Comeau* v. *Canada (Attorney General)*, 2005 FC 1648, at paras. 22-25; *McTague* v. *Canada (Attorney General)*, [2000] 1 F.C. 647; *Gillis* v. *Canada (Attorney General)*, 2004 FC 751.

[29] Neither the *Pension Act* nor the *Board Act* provides for any restrictions or time limits for filing an application for review or reconsideration with the Board or an appeal before it. The Board therefore has jurisdiction to hear such actions regardless of when the facts occurred and when the most recent decision was made.

[30] It is also important to say a few words about the decision-making process as it pertains to veterans' pensions and benefits. It is the Department of Veterans Affairs that is charged with compensating persons who have served in the Canadian Forces in the event of their disability or death. The initial decision is made by a Department official; no hearing is held at the first level. On the strength of the information contained in the claim and in medical reports, the evaluator makes decisions on different questions concerning pension entitlement and on the extent of the disability resulting from a pensionable injury or disease or from the aggravation of that injury or disease.

[31] Section 84 of the *Pension Act* provides that an applicant who is dissatisfied with a decision made by the Department may ask the Board to review it (see also s. 18 of the *Board Act*). The applicant is entitled to a full hearing of his or her claim by the review panel, which is generally composed of at least two members designated by the Chairperson. The applicant may testify himself or herself or call witnesses and is entitled to be paid expenses incurred in attending the hearing. He or she is also entitled to be represented at no cost by counsel from the Department's Bureau of Pensions Advocates. A decision of a majority of the members of the review panel is a decision of

the Board. In the absence of a majority decision, the decision most favourable to the applicant is the decision of the Board. Even after making its decision, the review panel may, on its own motion, re-open the case if it determines that it erred in its findings of fact or interpretation of law. In that event, it can reconsider its decision and either affirm it or, if it is found to be wrong, vary or reverse it: see sections 18 to 24 and 35 of the *Board Act*.

[32] A person who is dissatisfied with the decision of the review panel may appeal the decision to the Board. A hearing is held, and the appellant may then submit documentary evidence and arguments to a panel consisting of at least three members. No testimonial evidence is admissible on appeal. A decision of the majority of members of an appeal panel is a decision of the Board and is final and binding. Nevertheless, even though its decision is final, the appeal panel may under certain circumstances decide to reconsider it. It may do so if the appellant has new evidence to present to the panel or if it determines on its own or as a result of allegations made by a person that an error was made with respect to any finding of fact or interpretation of law. Following the reconsideration, the appeal panel may either affirm the decision or vary or reverse it: see sections 25 to 32 of the *Board Act*.

- Applicable Standard of Review

[33] The Court of Appeal and this Court have dealt many times with the standard of review applicable to decisions of the Board. In the vast majority of cases, it has been held that the question of what caused the disability, as well as the Board's assessment or interpretation of contradictory or inconclusive evidence to determine whether the disability had been caused or aggravated by military

service, were questions of fact that should be reviewed with the greatest deference. Among the decisions that applied the "patently unreasonable" standard are the following: *Caswell* v. *Canada (Attorney General)*, 2004 FC 1364, at paragraph 17; *Nolan* v. *Canada (Attorney General)*, 2005 FC 1305, at paragraph 10; *Rousselle* v. *Canada (Attorney General)*, 2005 FC 330, at paragraph 13; *Comeau* v. *Canada (Attorney General)*, 2005 FC 1648, at paragraph 18, affirmed at 2007 FCA 68, at paragraph 9; *McTague* v. *Canada (Attorney General)*, [2001] 1 F.C. 647, at paragraph 46; *Bradley* v. *Canada (Attorney General)*, 2004 FC 996, at paragraph 11; *Nisbet* v. *Canada (Attorney General)*, 2004 FC 1106.

[34] On the other hand, it has sometimes been held that the question of whether a particular injury arose out of military service (as opposed to the existence of a causal connection between that injury and the applicant's disability) was a question of mixed fact and law reviewable on the standard of reasonableness: *A.G.of Canada* v. *Wannamaker*, 2007 FCA 126, at paragraph 12; *Thériault* v. *Canada (Attorney General)*, 2006 FC 1070, at paragraphs 22-23.

[35] Following the Supreme Court's decision in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, this distinction no longer has any practical consequence since the two standards of review have now been collapsed into one, that of reasonableness. That is in fact the standard applied by my colleagues who have been called upon to review Board decisions since *Dunsmuir*: see, among others, *Bullock* v. *The Attorney General of Canada*, 2008 FC 1117; *Goldsworthy* v. *The Attorney General of Canada*, 2008 FC 380; *Macdonald* v. *Canada (Attorney General)*, 2008 FC 796; *Rioux* v. *Canada (Attorney General)*, 2008 FC 991; *Dugré* v. *Canada (Attorney General)*, 2008 FC 682; *Lenzen* v. *Canada (Attorney General)*, 2008 FC 520; *Clarke* v. *Veterans Review and Appeal Board*,

Attorney General of Canada, 2009 FC 298. Those decisions having already satisfactorily established the applicable standard of review, there is no need to proceed with what has come to be referred to as the "standard of review analysis".

[36] The Court must therefore ask itself whether the Board's decision, in terms of both form and substance, can be considered reasonable. In terms of form, the reasonableness of the decision will be assessed according to its justification, transparency and intelligibility, whereas in terms of substance, it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47). As the Supreme Court took pains to point out, this new single standard does not call for greater judicial interference in the administrative process. Indeed, the courts must not lose sight of the fact that such questions when submitted to administrative boards and tribunals can often lead to more than one reasonable outcome and that it is not up to the reviewing court to substitute the decision it might have made if it, and not the administrative board or tribunal, had dealt with the question.

- Reasonableness of the Board's Decision

[37] Under the terms of paragraph 21(2)(*a*) of the *Pension Act*, Mr. Boisvert first had to establish on a balance of probabilities that his condition constituted a disability. That first qualification was not questioned by the Board, either on review or on appeal, nor for that matter by the Department. It is admitted that the applicant suffers from cervical osteoarthritis, as established by the many expert medical opinions in the record. Mr. Boisvert also had to prove that his disability resulted from an injury or disease that arose out of or was directly connected with his military service. This is where

Mr. Boisvert failed in his evidence. As already discussed above, the Board was of the opinion that the new evidence submitted by the applicant did not allow it to reverse the previous decisions.

[38] Counsel for the applicant argued that the Board had erred by rejecting the medical evidence adduced and by questioning the assessment of the orthopaedic surgeon, in the absence of any contradictory evidence. According to the applicant, the Board exceeded its jurisdiction by substituting its opinion for that of the physician even though none of its members had medical expertise and no second opinion was sought under the authority of section 38 of the *Board Act*.

[39] As previously mentioned, section 39 of the *Board Act* does not exempt an applicant from the obligation to establish that his or her condition is directly attributable to his or her military service. Even if there is no contradictory evidence, the Board is not obliged to blindly accept the evidence adduced by the applicant if it considers that it is not credible or of little probative value. In that case, the Court must weigh the reasons given for rejecting the evidence submitted by the applicant and determine whether they are reasonable, having regard to the record as a whole.

[40] To assess the Board's decision properly, it must be placed in context. The impugned decision resulted from an application to the Board's review panel, which affirmed the Department's decision to deny pension entitlement, essentially for two reasons. First, it was found that the fall on the stairs and the knock on the edge of the car were not events that occurred in the performance of the applicant's military duties. Moreover, the review panel concluded that the medical evidence had not established a connection between those events and the condition in question, and that in the

absence of evidence tending to establish either repetitive strain or movements that could have affected the applicant's neck, no pension could be claimed.

[41] It was therefore to counter those two conclusions that the applicant submitted the additional medical evidence to which I have already referred. The decision the reasonableness of which must now be assessed is therefore not that made by the review panel or the Department, but rather that of the appeal panel which found that the new evidence was insufficient to reverse the original decision.

[42] In my opinion, the Board could assign little credibility to the opinions of the osteopath and the physiatrist, in that these specialists relied essentially on what Mr. Boisvert had told them to formulate their opinions. I would note as well that these two specialists limited themselves to speculating on the possible connection between the duties performed by Mr. Boisvert and his physical condition. The osteopath opined that it was [TRANSLATION] "very highly probable" that the duties performed by Mr. Boisvert could have engendered his neck pain, while the physiatrist concluded that Mr. Boisvert's symptomatic cervical diskarthrosis was [TRANSLATION] "probably caused" by playing hockey and that his occupational activities [TRANSLATION] "may have contributed to the aggravation" of his condition. The question is not whether the Court would have reached the same conclusion, but rather whether the Board's conclusion is reasonable. In view of the case law and the record as a whole, I believe that the Board's reasoning on this point is not unreasonable: *A.G.of Canada* v. *Wannamaker*, above, at paragraph 30; *Nisbet* v. *Attorney General of Canada*, 2004 FC 1106, at paragraph 22.

[43] The same does not apply to the reasons cited for rejecting the opinion of the orthopaedic surgeon. The physician is faulted for not referring to the fall on the stairs and the knock on the car in his first letter, and for mentioning them only when asked to by counsel for Mr. Boisvert. Yet that is not the case. For one thing, he expressly noted in his first letter that Mr. Boisvert had hit his head on the edge of his car in 1996 and that his neck pain increased thereafter. For another, the purpose of his second letter was not to fill a gap in the first letter and to support Mr. Boisvert's thesis, as the Board implies, but to specify that the blow to his head from hitting his car would not, by itself, have contributed to the acceleration of cervical osteoarthritis. Consequently, the fact that this injury occurred while Mr. Boisvert was not performing his duties was not significant.

[44] There is nevertheless another reason why the Board's decision strikes me as unreasonable. In his two letters, the orthopaedic surgeon refers to the numerous injuries suffered by Mr. Boisvert while playing hockey on a Forces team. In his second letter, he even writes that [TRANSLATION] "the intensity of the multiple traumas sustained playing hockey is much greater" than the fact that he hit himself on his car. He was thereby to some extent repeating the opinion given by the physiatrist. What is more, these numerous injuries were corroborated by the coach of the hockey team on which Mr. Boisvert played between 1986 and 1991. Yet subsection 21(3) of the *Pension Act* creates a certain number of presumptions, including the following:

Presumption	Présomption
(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with	(3) Pour l'application du paragraphe (2), une blessure ou maladie — ou son aggravation — est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce

military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of	paragraphe si elle est survenue au cours :
(*a*) any physical training or any sports activity in which the member was 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;	*a*) d'exercices d'éducation physique ou d'une activité sportive auxquels le membre des forces participait, lorsqu'ils étaient autorisés ou organisés par une autorité militaire, ou exécutés dans l'intérêt du service quoique non autorisés ni organisés par une autorité militaire;

[45] Oddly, the Board does not even discuss this aspect of the question, even though it had been argued by counsel for Mr. Boisvert. This was still more uncontradicted evidence that should have benefitted from the presumptions provided for under section 39 of the *Veterans Review and Appeal Board Act*. By failing to explain its reasons for not addressing that question, the Board denies this Court the opportunity to assess the reasonableness of its justification. This is another reason militating in favour of allowing the application for judicial review.

[46] Lastly, the Board cites the unspecified nature of the relationship between the physician and Mr. Boisvert to reject his opinions. In my view, that is a specious argument. It was not necessary for the physician to see Mr. Boisvert again to answer his counsel's request for more details regarding the impact of his fall on the stairs and of the blow he had sustained by hitting his car, because he had already seen Mr. Boisvert and had had ample time to examine him and consider his medical history. As for the question of how often Mr. Boisvert had seen that doctor, it does not seem relevant to me in assessing the merits of his opinion. Unless the doctor's professionalism and ethics are to be called

into question, it must be presumed that his opinion was in accordance with medical practice and that he considered his knowledge of the applicant sufficient in order to exercise his judgment. I find it significant, in fact, that this specialist, in contrast to the osteopath and the physiatrist, expresses a firm opinion devoid of speculation. Not only does he state in his first letter that the degree of Mr. Boisvert's diskarthrosis goes well beyond what could be expected in a patient of his age, but he adds: [TRANSLATION] "It is clear that this condition, which is very unusual for a man of his age, was engendered in a proportion of 5/5 by his activities in the Canadian Armed Forces."

[47] For these reasons, therefore, I am of the opinion that the application for judicial review must be allowed.

[48] Counsel for the applicant also tried to argue that Mr. Boisvert was not given a full and complete hearing before the appeal panel because he was not permitted to testify to establish his credibility. The Department was also criticized for omitting certain important medical evidence from the record that was assembled for the purpose of determining his entitlement to a pension. These arguments strike me as unfounded.

[49] Section 28 of the *Veterans Review and Appeal Board Act* provides that an appellant may make a written submission to the appeal panel or may appear before it, in person or by representative and at the appellant's own expense, to present documented evidence and oral arguments. That seems to me to be fully in keeping with the requirements of procedural fairness, especially since the the Armed Forces are not allowed to appear or to make written submissions before the appeal panel. It is true that the appellant, if he or she chooses to appear (in person or

through counsel), must do so at his or her own expense. But that does not strike me as sufficient to invalidate section 28. The aim of the Act is to allow proceedings to be conducted as informally as possible and to permit applicants to make their arguments and to introduce new evidence without excessive formality. Nothing in the evidence leads me to conclude that the requirements of section 28 were not complied with, and the applicant tried to have this provision declared invalid.

[50] As for the comprehensiveness of the record compiled by the Department, it is before the review panel or, ultimately, the appeal panel of the Board that the applicant should have made his submissions. On judicial review, the Court may consider only the record as it stood before the Board. In any event, a rapid examination of the additional excerpts from Mr. Boisvert's medical record does not allow me to conclude that they are relevant and they would probably not have had a determining impact on the outcome of the case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, with costs.

"Yves de Montigny"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1044-08
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APPEARANCES:

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