Federal Court  Cour fédérale

Date: 20130307

Docket: T-456-12

Citation: 2013 FC 240

Ottawa, Ontario, March 7, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

LAURENTIUS WERRING

Applicant

and

ATTORNEY GENERAL OF CANADA AND VETERANS APPEAL AND REVIEW BOARD OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Laurentius Werring [the Applicant] has applied for judicial review of a decision of the Veterans Review and Appeal Board [the Board], dated January 17, 2012 [the Decision], wherein the Board refused to increase his disability award pursuant to s. 46 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [the Act].

[2] The Applicant served in the Canadian Forces from 1974 to 1995. In 2003 and 2004, he was awarded disability benefits under the *Pension Act*, RSC 1985, c P-6 for Legg Perthes Disease with

osteoarthritis of both hips and the left knee [the Pensioned Conditions]. The award meant that the Department of Veterans Affairs [Veterans Affairs] recognized the aggravating effect that military service had had on the Applicant's Legg Perthes disease.

[3] The years following the Applicant's release from the Canadian Forces were marked by physical inactivity, which the Applicant alleges was caused by his Pensioned Condition and the deterioration of his physical abilities. The Applicant suffered a heart attack in 2002. Thereafter, he underwent a right hip replacement in the hope of improving his mobility. In 2008, he applied to Veterans Affairs for a disability award for various conditions, including coronary artery disease, a hiatus hernia and hypertension. This application was made pursuant to s. 46 of the Act [the Section 46 Claim]. It applies to conditions that arise out of or are directly connected to military service. The Applicant claimed that the Pensioned Conditions required him to lead a sedentary lifestyle which had a debilitating effect on his health and caused the conditions covered by the Section 46 Claim.

[4] Veterans Affairs refused the Section 46 Claim in its entirety. The Applicant appealed to the Entitlement Review Panel of the Veterans Review and Appeal Board [the Review Panel], but only with respect to coronary artery disease and hypertension [the Claim and the Claimed Conditions]. The Review Panel decided that the Applicant was entitled to a disability award in the amount of one-fifth for coronary artery disease and denied the Claim for hypertension. The Applicant appealed this outcome to the Board, which rendered the Decision under review.

[5] By the time the Claim reached the Board, the Applicant's medical evidence consisted of two letters from Dr. Marino Labinaz. He is a cardiologist and a director of the Cardiac Catheterization

Laboratory and the Cardiac Fellowship Program at the University of Ottawa Heart Institute. He is also a professor of medicine at the University of Ottawa. Dr. Labinaz' first letter was dated October 7, 2010 and followed his examination of the Applicant. It described the Applicant's general condition, noting that he had difficulty walking or standing for long periods of time. It also reported the Applicant's statement that, due to his arthritis, he was unable to exercise to any great extent. Dr. Labinaz then provided his view about the connection between physical activity and coronary problems, stating that physical inactivity is an independent risk factor for coronary artery disease. This analysis led Dr. Labinaz to conclude that the Applicant's Pensioned Conditions, by impeding physical activity, "seriously aggravated" his coronary artery disease. The letter did not address hypertension.

[6] The second letter from Dr. Labinaz, dated March 11, 2011, was a critical response to the Review Panel's decision. The letter addressed the causal links between an inability to exercise and the Applicant's development of hypertension, excessive weight and coronary artery disease. The letter concluded that the Pensioned Conditions had a major, if not a severe impact on the Claimed Conditions. Together these letters will be described as the "Opinion".

The Decision

[7] The Board's brief reasons show its concern with the Applicant's assertion that the Pensioned Conditions meant that he was unable to exercise or take other steps to prevent the onset of the Claimed Conditions. The Board said that it had not been provided with any evidence to indicate that the Applicant was unable to exercise due to the Pensioned Conditions. Turning to the Opinion, the Board found that it was not "credible" because it did not address the possibility of dietary control or

consider whether an exercise program could be developed for and undertaken by the Applicant. The Board also noted that the Opinion did not contain a valid and complete a medical history of the Applicant and said that such a history was an essential component of a valid medical opinion.

[8] The Board held that it could not reasonably infer from the evidence that a disability entitlement was warranted in the Applicant's case. Although the Board concluded that the Applicant failed to prove the facts required to establish entitlement to a disability award for either of the Claimed Conditions, it nevertheless decided not to reverse the Review Panel's decision to grant an award of one-fifth for coronary artery disease.

The Parties' Positions

[9] The Applicant takes issue with the Board's conclusions about the "credibility" of Dr. Labinaz' opinion. He submits that the Board erred either because it failed to ask Dr. Labinaz for more information or because it failed to seek a second opinion.

[10] On the other hand, the Respondent submits that it was the Applicant's burden to demonstrate his entitlement to benefits under the Act. The Board required proof of a link between the Pensioned Conditions and the Claimed Conditions, and that proof should have included evidence of the Applicant's inability to exercise. With no evidence on that subject, the Board could not possibly have concluded that the Claimed Conditions arose from or were aggravated by the Applicant's military service.

The Standard of Review

[11] The standard of review is not in dispute. The Board's weighing of the evidence and interpretation of its statutory scheme is reviewable on a standard of reasonableness (*Grant v Canada (Veterans Review and Appeal Board)*, 2006 FC 1456 at para 25; *Jarvis v Canada (Attorney General)*, 2011 FC 944).

Discussion and Conclusions

[12] Counsel for both parties agreed during the oral submissions that to establish his entitlement to a disability award under the Act for the Claimed Conditions, the Applicant had to establish the following two causal links with respect to each of the Claimed Conditions:

Link 1: The Pensioned Condition rendered the Applicant unable to exercise;

Link 2: The inability to exercise caused the Claimed Condition.

The success of the Applicant's judicial review rests on the reasonableness of the Board's findings with respect to the evidence provided by the Applicant to establish these Link.

[13] The Board expressed concern about the lack of evidence about Link 1. It noted that Dr. Labinaz did not address an exercise regime that the Applicant might have been able to perform and noted that the only evidence related to the Applicant's inability to exercise came from Dr. Labinaz, who, in turn, relied on what he was told by the Applicant. Thus, there was no independent objective evidence about the extent to which the Applicant's Pensioned Condition left him incapable of performing any type of exercise.

[14] In my view, Link 1 could only be established with expert evidence that addressed the extent of the Applicant's arthritis and his ability to undertake a customized exercise programme.

[15] I have also concluded that although s. 38(1) of the VRAB Act provides that the Board "may" obtain independent medical advice, it is not obliged to do so.

[16] Before closing I wish to note that, the Board offered a characterization of Dr. Labinaz's evidence that I find problematic. The Board said that it did not find the Opinion "credible" because it did not address dietary control or exercise. However, Dr. Labinaz was not asked to address those issues presumably because they were outside his expertise as a cardiologist. His focus, quite properly, was on Link 2. In these circumstances the Board should simply have described his evidence as "insufficient" for its purposes.

[17] For all the reasons noted above, the application for judicial review will be dismissed.

ORDER

THIS COURT ORDERS that:

The application for judicial review of the Decision is hereby dismissed.

"Sandra J. Simpson"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

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