Federal Court  Cour fédérale

Date: 20180205

Docket: T-563-17

Citation: 2018 FC 117

Ottawa, Ontario, February 5, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MILES JEFFREY

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

[1] I am not persuaded that there is any basis to set aside the decision by the Veterans Review and Appeal Board [the Board] denying the Applicant's 2016 request for reconsideration of a 1996 decision of the Board's appeal panel, which rejected his application for a military disability pension.

[2] Mr. Jeffrey filed an affidavit in this application that contains evidence not before the decision-maker. I agree with the Respondent that it is not admissible as this review must be

conducted on the basis of the record before the decision-maker: *Delios v Canada (Attorney General)*, 2015 FCA 117, at paras 41-42. It was not considered by the Court.

Background

[3] Mr. Jeffrey served in the Canadian Armed Forces [CAF] Reserve Force for over 2 years, and then for nearly 10 years in the CAF Regular Force. He was released in 1990 at the age of 30. For most of his service he was a military policeman.

[4] He applied for pension entitlement in 1994 for six conditions he claimed were related to his service as a military policeman. In the decision under review he only claimed entitlement as a result of one of these conditions: lumbar disc disease. In his 1994 application relating to lumbar disc disease Mr. Jeffrey claimed his service was hard on his back, and referenced a specific incident in 1981 when he hurt his back getting into a patrol vehicle. His application was denied, and he appealed to the Board's review panel. In 1996 the review panel also denied his entitlement, finding that the available diagnostic evidence did not establish a disability.

[5] Mr. Jeffrey appealed this decision to the Board's appeal panel, which also denied his claim on December 20, 1996. The appeal panel found there was no medical opinion evidence presented that contradicted the Pension Medical Advisory Directorate's opinion that a diagnosis of lumbar disc disease had not been established.

[6] On December 21, 2016. Mr. Jeffrey requested the appeal panel's decision be reconsidered pursuant to section 32 of the *Veteran's Review Appeal Board Act*, SC 1995, c 18.

[the Act]. On April 6, 2017, a reconsideration panel of the Board decided it would not reopen the December 20, 1996 appeal panel decision. It is that decision that is the subject of this judicial review application.

[7] The Board began its reasons by setting out the test for reconsideration under section 32 of the Act. It noted that reconsideration decisions consist of two stages. The first stage is screening, where the Board determines if there is a basis for reopening the previous decision. If the first stage is passed, the second stage is a substantive reconsideration of the decision under appeal, during which the Board may reverse, vary, or affirm the appeal panel's decision.

[8] The Board briefly summarized the factual background of the case and the decisions of the Canadian Pension Commission, the Board's review panel, and its appeal panel, all of which denied the request for pension entitlement for the claimed disability.

[9] The Board then analysed the claim. The Board stated that it fully applied the favourable inferences required by section 39 of the Act. That section provides as follows:

> 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.

[10] The Board noted that Mr. Jeffrey submitted three reasons why the appeal panel's decision should be reopened: (1) errors of fact; (2) errors of law; and (3) new evidence.

[11] The Board noted that the admissibility of new evidence in a reconsideration application must meet the test endorsed by the Federal Court in *Mackay v Attorney General (Canada)*, [1997] FCJ No 495, 129 FTR 286 [*MacKay*]. It must be shown that the evidence could not have been submitted to the appeal panel through the application of due diligence, was credible and capable of belief, was relevant to a decisive issue in the claim, and had a prospect of changing the result of the previous decision.

[12] The Board found that the majority of the material provided was not new evidence, but rather already formed part of the record. However, the Board did find that six pieces of evidence had not previously been considered, and it assessed them under the *Mackay* test. The Board referred to the evidence by exhibit numbers the Advocate provided and made the following analysis.

[13] J1: an undated order by Commander Sharpe and signed by Mr. Jeffery, directing members to engage in physical training. In the relevant part, it provided (all in capitals letters, which have been replaced for ease of reading) as follows:

> From past experience I have learned that [readiness for war and our ability to fight and survive on the battlefield] can best be achieved by maintaining a regular, rigorous and demanding physical training programme. Accordingly, I am directing each and every member of the Brigade and CFB Calgary to maintain a physical fitness programme that will lead to and then sustain a high level of physical fitness, endurance and toughness.

> How is this to be achieved? For the majority of members of the Brigade and CFB Calgary, physical fitness is organized by units and conducted during normal working hours. This is the ideal situation. For many others, military factors often prevail that make it impossible to participate in organized physical training. Such personnel are not excused from the requirement to maintain a physical training programme but rather must organize their own programme. As physical fitness is a bona fide military requirement, physical training can and should be conducted during normal working hours on weekdays. However, when this is impossible or impractical, or when any member has been directed to conduct individual physical training in addition to the unit programme, physical training shall be conducted at a time and location of an individual's choosing. Such personnel will be deemed to be on official military duty as the pursuit of such physical training is for the benefit of the Canadian Forces and is a mandatory, not a voluntary programme.
>
> Physical fitness programmes for those 35 and over must first be approved by a doctor. For all others, the programme must be approved by the Physical Education and Recreation Staff.
>
> [emphasis in original]

[14] The Board found that the document was available to Mr. Jeffrey at the time of his appeal hearing, was not particularly relevant, and had no prospect of changing the result of the decision as it did not relate to issue of the diagnosis of his claimed disability. It was thus found to have failed the *Mackay* test.

[15] J2: a 2002 memo advising against running in combat boots as a part of training. The Board found the document did not exist at the time of the appeal panel's decision and was credible. However, the Board found it was not relevant and would not have changed the outcome of the decision, as it made no reference to the development of disc disease, and so failed the *MacKay* test.

[16] J17: a 1988 record primarily involving Mr. Jeffrey's right elbow. The Board found the document would have been available at the time of the appeal hearing and was not relevant to lower back injuries. The Board thus found that it failed the *MacKay* test.

[17] J19: a 1988 physiotherapy treatment recommendation. The Board found it would have been available at the time of the appeal hearing, and also found that it did not discuss causation of lower back pain and so was not relevant. It was held to have failed the *MacKay* test.

[18] J29: a 2011 report by Neurosurgeon Dr. Michael E. Kelly. In regards to Mr. Jeffrey's back pain the report concluded "[t]he only thing we can rely on is history which does seem indeed consistent with radiculopathy brought on by exercise in the military." The Board found the report was not available at the time of the appeal hearing and was credible in relation to medical matters. However, it found that Dr. Kelly did not have expertise in the legal test for service related disabilities, and so the report was less credible on the issue of whether the injury was "brought on by exercise in the military." Nonetheless, the Board found the report was partially relevant as it addressed one of the key issues before the appeal panel, namely it offered medical confirmation of disc disease.

[19] The Board noted that the report found that an MRI in 2011 confirmed the presence of disc disease. However, the Board also noted that the report further stated that this result may simply represent ongoing disc desiccation which occurs with age. The Board concluded that because the report did not demonstrate that the finding of disc disease was consistent with anything other than the natural aging, and because it did not explain how Mr. Jeffrey's disc

disease was connected to approved or prescribed military service activity, it would not alter the conclusion of appeal panel. Accordingly, it held that the report failed the *MacKay* test.

[20] J30: a 2012 decision by Veterans Affairs Canada that it could not issue a ruling for a newly-claimed disability by the Applicant for "S1 Radiculopathy" because it was considered the same type of disability as lumbar disc disease, which was a claim the Commission had already decided. The Board found this decision was new and credible, however, it determined that it was not relevant as it provided no new information regarding the causation of the lumbar disc disease. Thus it too was found to have failed the *MacKay* test.

[21] In summary, the Board concluded that none of the new evidence offered by Mr. Jeffrey passed the *MacKay* test and therefore found that there was no new evidence that warranted reopening the appeal panel decision.

[22] The Board went on to consider the submission that the appeal panel relied solely on equivocal diagnosis imaging and the opinion of the Pension Medical Advisory Directory and ignored all other relevant evidence. The Board found that the appeal panel had considered all relevant evidence and assigned weight to the documents as it saw fit. The Board suggested that the challenge to the weighing of this evidence was more properly considered as an error of law rather than an error of fact. The Board concluded that there was no evidence the appeal panel misapprehended any significant fact in the case, and thus there were no errors of fact that warranted reopening the decision.

[23] The Board next considered whether the appeal panel made any errors of law. Mr. Jeffrey submitted that the appeal panel erred in failing to properly apply the provisions of subsections 39(a) and (c) of the Act. The Board examined the guidance offered by the Federal Court of Appeal in *Cole v Canada (Attorney General)*, 2015 FCA 119 [*Cole*] and found that the appeal panel considered all the relevant evidence, and correctly found that the most credible evidence was the medical advisory prepared by a Department staff physician because it contained the most complete picture at the time of Mr. Jeffrey's shifting condition.

[24] The Board then considered whether the Applicant's weightlifting was the type of physical training that could reasonably be considered a component of the physical fitness regime required for CAF members. It noted that while the CAF encourages members to participate in physical fitness, exercise, and sports, not every injury arising out of an activity intended to encourage fitness automatically attracts pension entitlement. Each injury must be considered on its own merits. The Board found that there was no military record directing the Applicant to engaging in weightlifting to such a degree that he would render himself disabled.

[25] The Board noted that Mr. Jeffrey disputed the fact that he was lifting 450 pounds at the time of his injury. It held that it was not credible that two doctors, two weeks apart, could identically have misinterpreted a statement made by Mr. Jeffrey as to the weight he was lifting. Further, it found that the weight the Applicant submitted he was lifting (45 pounds) would not equate with the kind of very "heavy" lifting referenced by a number of medical reports. The Board further noted that although Dr. Hoffman urged Mr. Jeffrey to discontinue "lifting extremely heavy weights" in May 1987, he was still lifting 11 months later. The Board also

found it noteworthy that when Mr. Jeffrey initially filed for pension entitlement he did not reference his weightlifting injury. In short, it found that the evidence, taken as a whole, illustrated that lifting very heavy weights was Mr. Jeffrey's own personal pursuit that he chose to engage in and was not a part of "any requirement to be fit for his duties."

[26] Having found there was no new admissible evidence, and no errors of fact or law that would lead to a different result, the Board concluded that the appeal panel's decision would not be re-opened.

Issue

[27] The sole issue in this application is whether the Board's decision not to reconsider the application was reasonable. Notwithstanding the very able submissions of counsel for Mr. Jeffrey, I am not persuaded that the decision under review is unreasonable and should be set aside.

Analysis

[28] Mr. Jeffrey places significant reliance on the opinion of Dr. Kelly that the "only thing we can rely on is his history which does seem indeed to consistent with radiculopathy brought on by exercise in the military." There is nothing in the Doctor's opinion that indicates what he understood Mr. Jeffrey's military exercise was, other than: "He says that at age 20 while exercising in the military in the gym he noticed that he developed pain down the right buttocks to the right calf."

[29] I agree with the Board that even if this opinion (tenuously) connects the current condition with Mr. Jeffrey's military exercise, there is nothing in the opinion that permits one to say with any degree of certainty that this "military exercise" was actually mandated or ordered exercise.

[30] Mr. Jeffrey asserts that he was ordered to engage in a "rigorous and demanding" programme of physical fitness by Commander Sharpe and that his weightlifting programme was the result. Aside from that assertion, there is little to no evidentiary foundation to the claim that his regime was one his Commander ordered. The memo he relies on also states that those engaging in a programme outside the unit programme, which his appears to have been, were to first obtain the approval of the physical fitness staff. There is no evidence of any such approval, even for the weights Mr. Jeffrey says he was lifting. As such it was not unreasonable to find that his programme was outside the directive.

[31] Nevertheless, and more to the point, the Board found that Mr. Jeffrey was doing very heavy lifting in the order of 450 pounds. While he disputes that weight, the finding is based on more than one report, and it is not unreasonable.

[32] In my assessment, the Board's analysis of the new evidence was fair and reasonable and in keeping with the jurisprudence. I do not accept that the Board failed to give the Applicant the benefit of the doubt as mandated by subsection 39(c) of the Act. The inferences Mr. Jeffrey says it ought to have drawn from that evidence were not always "reasonable" as required by subsection 39(a) while the evidence he sought to rely on was not always "uncontradicted" or found to be "credible" as required subsection 39(b).

[33] For these reasons the application fails. The Respondent advised the Court that the Crown was not seeking costs and so this application will be dismissed without costs.

JUDGMENT in T-563-17

THIS COURT'S JUDGMENT IS that the application is dismissed, without costs.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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