Date: 20070801

Docket: T-2080-05

Citation: 2007 FC 809

Ottawa, Ontario, August 1, 2007

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

GREGORY ALLAN MACDONALD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Mr. Gregory Allan MacDonald (the "Applicant") seeks judicial review of the decision made on November 8, 2005 by the Veterans Review and Appeal Board (the "Board") relative to his application for pension benefits pursuant the *Pension Act*, R.S.C. 1985, c. P-6 (the "Pension Act"). The Applicant sought pension benefits in respect of problems with his right knee, specifically internal derangement of that knee and varicose veins.

[2] The subject of this application for judicial review is the decision of the Board, exercising the jurisdiction conferred upon it by the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, as amended (the "VRAB Act").

II. Background

[3] The following facts are taken from the Tribunal Record (the "T.R.") that was filed pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules").

[4] The Applicant was a member of the Regular Canadian Forces between September 2, 1965 and June 18, 1975. On November 24, 1998, he applied to Veterans Affairs Canada for a disability pension for internal derangement of the right knee and varicose veins. He claimed that he was entitled to a disability pension pursuant to subsection 21(2) of the Pension Act on the grounds that his conditions arose from or were directly related to his military service. He attributed these conditions to a 1968 football injury he sustained while playing football for the Royal Military College ("RMC") at a game in Saskatoon, Saskatchewan.

[5] By letter dated December 29, 1999, the Minister found that the Applicant's claim with respect to varicose veins in the right knee was not pensionable pursuant to subsection 21(2) of the Pension Act. The letter noted that the service documents showed only one reference to the claimed condition, that is in a Medical Board Proceeding dated June 18, 1975, recording a small varicosity in the right leg. The letter also mentioned a note, dated May 20, 1999, from Dr. Louis St. Arnaud

who recorded that the varicose vein “behind your right knee could be related to an injury in September of 1969”.

[6] On April 7, 2000, the Minister determined that the Applicant’s condition of internal derangement of the right knee was not pensionable pursuant to subsection 21(2) of the Pension Act. The letter refers to right knee injuries in 1966 and noted that there is no record of complaints relative to the right knee until the summer of 1999. The Minister concluded that the 1966 injury was “temporary in nature and did not cause a permanent disability” (T.R. pages 248-249).

[7] The Applicant requested review of both decisions, pursuant to section 20 of the VRAB Act. The Entitlement Review hearing proceeded on April 27, 2000 relative to the varicose veins condition. According to the decision rendered after that hearing (T.R. pages 282-289), the Board considered the report of Dr. St. Arnaud, as well as the medical information in the Applicant’s file. In rejecting the claim for pension benefits with respect to this injury, the Board stated the following:

> The Board also can find no Medical Report of any injury sustained in 1968 concerning a hit to the right knee and the only record concerning the right knee problem is found in a Medical Attendance Record dated 4 January 1966 which provides a history of right knee injury during the previous week. At that time an X-ray was taking [sic] and the knee was considered normal. The second right knee injury was recorded on 24 January 1966 which indicated that the Applicant fell on the right knee Saturday and presented with swelling but no pain. There is no evidence of an ongoing right knee problem between 1966 and 1999 and therefore the Board concluded that the 1966 injury was temporary in nature and did not cause permanent disability.

> Based on the Applicant's testimony, the Board accepts that the Applicant was part of the team representing the Royal Military College of Kingston in 1968 but cannot find any medical evidence to related [sic] the varicose veins condition to injuries sustained to the right knee. Furthermore, the Board cannot find any Report of Injury or medical findings concerning an injury of 1968. Based on the evidence therefore, the Board reached the conclusion that the varicose vein condition is not pensionable under subsection 21(2) of the *Pension Act*. (T.R. pages 268-271)

[8] An Entitlement Hearing was held on June 27, 2000 with respect to the Applicant's right knee condition. In its decision in that regard, the Board considered the following exhibits that were tendered as part of the evidence: (T.R. pages 268-271)

> Exhibit M-1: a letter from Dr. David G. Wiltshire, FRCS(C), Orthopaedic Surgery – dated June 20, 2000;
>
> Exhibit M-2: Medical Attendance Record dated January 24, 1966;
>
> Exhibit M-3: Basketball – Text and photos 1966-67, 1966-67, 1965-66 (3 pages)
>
> Exhibit M-4: The Football Redmen – text and photos 1968 (2 pages)
>
> Exhibit M-5: A letter of Roger B. Tucker, dated June 14, 2000; and
>
> Exhibit M-6: A letter of C.W. Badcock, dated June 20, 2000, Team Trainer/physiotherapist.

[9] The Board made the following comments prior to expressing its conclusion that the condition complained of did not give rise to pension entitlement pursuant to subsection 21(2) and paragraph 21(3)(a) of the Pension Act:

> In its review, the Board has noted the following:
>
> - the first record of a right knee problem is reported on a Medical Attendance Record of 4 January 1966 and an X-ray taken the same day shows a normal right knee;
>
> - a second right knee injury is reported on 24 January which presented swelling but no pain;
>
> - no further right knee complaints or injuries are recorded during service. Furthermore, the Medical Board Proceedings dated 18 June 1975, do not bear any complaints or mentions of any problems regarding the right knee.
>
> In its review of the evidence, the Board also noted that the Applicant had complained of pain in the right knee only since summer 1999 and that the pain had started while jogging and golfing. The first diagnosis of a right knee derangement is dated in the fall of 1999.
>
> It should also be noted that this Board has not been presented any Report on injuries in relation to the football incident of 1968, nor documented evidence from a responsible authority confirming that the activity was authorized or organized, nor objective, descriptive medical expertise linking the present condition to service-related factors.
>
> Based on the above observations, in the absence of continuity of complaints over a period exceeding thirty years, and pursuant to subsection 21(2) and paragraph 21(3)(a) of the *Pension Act*, the Board has to deny pension entitlement. (T.R. pages 269-270)

[10] An Entitlement Review hearing took place on April 27, 2000, relative to the varicose veins condition. An Entitlement Review hearing was held on June 27, 2000, relative to the right knee problem. At the conclusion of each hearing, the Board denied the claims of the Applicant. The Applicant sought an appeal of the two Entitlement Review decisions.

[11] The Entitlement Appeal was heard on November 21, 2000, addressing the two conditions, that is the right knee internal derangement and the varicose veins condition. The Board issued a decision dated November 21, 2000 and addressed each complaint separately (T.R. pages 321-327).

[12] With respect to internal derangement of the right knee, the Board rejected the claim on the basis of a lack of evidence as follows:

> The Appellant testified that he suffered an injury to his right knee in 1968 while playing football for the Royal Military College, however, the Board was not presented with documented evidence that the Appellant suffered a significant injury to the right knee in 1968 or at any other time during his peacetime service, which would directly connect the internal derangement right knee as having arose out or [sic] having been permanently aggravated by his military service. It is only in 1999 that the evidence on file shows that the Appellant reported increasing pain in his knee while jogging.
>
> In addressing Dr. Wiltshire's opinion of June 2000 which states that the Appellant suffered from an old tear to the A.C.L. ligament of his right knee, the Board was not presented with medical or other documented evidence to relate the torn ligament to a football injury during peace time service some thirty years previously.
>
> Therefore, based on the lack of evidence of a significant injury and in the absence of objective medical evidence relating the claimed condition to military service, the Board does not find the claimed condition arose out of or was directly connected to the Appellant's Regular Force service and rules to affirm the Entitlement Review Board decision of 27 June 2000. (T.R. page 323)

[13] In rejecting the appeal with respect to the varicose veins complaint, the Board referred to the note from Dr. St. Arnaud. This note, dated May 20, 1999, says the following:

> Varicose veins behind R. Knee. Could be associated to injury in Saskatoon 1969

[14] The Board recorded that the Advocate had informed it that the reference to 1969 by Dr. St. Arnaud was an error and that the reference was to the injury in 1968. However, the Board found that evidence presented did not support the Applicant's claim and said the following:

> As to the claim that the condition of varicose veins arose out of an injury in service, in particular a football injury in 1968, the Board could find no documented evidence to support that claim as there is no medical evidence of a significant injury to the right knee or to the leg in service which would directly connect the varicose veins condition as having arose out of or having been permanently aggravated by peacetime service.
>
> Therefore, based on the evidence, the Board finds that the claimed condition did not arise out of nor was it directly connected to the Appellant's peacetime service for the purposes of Subsection 21(2) of the *Pension Act*. The Board rules to affirm the Entitlement Board decision of 27 April 2000.
>
> In arriving at this decision, this Board has carefully reviewed all the evidence, medical records and the submissions presented by the Representative, and has complied fully with the statutory obligation to resolve any doubt in the weighing of evidence in favour of the Appellant as contained in sections 3 and 39 of the *Veterans Review and Appeal Board Act*. (T.R. page 325)

[15] In its disposition of the Entitlement Appeal, the Board referred to sections 25 and 26 of the VRAB, governing appeals, as well as to sections 3 and 39 relating to the interpretation of the VRAB Act.

[16] On May 24, 2001, the Applicant applied for reconsideration of the Board's decision dated November 21, 2000. This request was made pursuant to section 32 of the VRAB Act. The letter requesting the reconsideration, written by a member of the Bureau of Pension Advocates, sought the reconsideration on the basis of new evidence that was tendered on behalf of the Applicant. The new evidence consisted of a Notice of Application for judicial review that was filed by the Applicant in the Federal Court of Canada, in cause number T-20-01. In that proceeding, the Applicant sought judicial review of the Board's decision made on November 21, 2000 which decision was received by the Applicant on December 22, 2000.

[17] The new evidence also included a lengthy affidavit that was filed by the Applicant in support of his Application for Judicial Review and a Notice of Discontinuance relative to that application. The exhibits to the Applicant's affidavit include an Operation Report from Dr. David Wiltshire relative to arthroscopic surgery performed on the Applicant's right knee on November 23, 1999.

[18] The affidavit also includes unsworn statements from colleagues of the Applicant while he was a student at RMC during the fall of 1968. Mr. Lorne McCartney, Mr. Roger B. Tucker, Mr. David Shaw, Robert B. Mitchell, Colonel RCHA (Ret'd.) and Mr. John Carlson provided statements by way of letter or email, saying that they remembered that the Applicant had suffered a knee injury in 1968 during a football game in Saskatoon.

[19] The Applicant also provided, as exhibits to his affidavit, correspondence from two other classmates that referenced his injury in “anecdotal ways”. These exhibits are found at pages 279 and 280 of the Tribunal Record.

[20] The Applicant addressed the issue of lack of evidence in his affidavit at paragraph 22 as follows:

> The “lack of evidence of a significant injury” is due to the fact that my medical records for the period between April 1968 and November 1968 are missing. There is no mention of a severe cut to my lower back that occurred in May of 1968 which caused me to miss my Graduation Parade from CMR and no entry at all relating to any of the treatments I received in the summer while training with the Fleet nor to the many treatments I received that fall. I was taped for most practices and for every game that fall by Chuck Badcock, the team physiotherapist. The fact that my records have been lost is entirely outside my control. (T.R. page 231)

[21] The Applicant attached, as Exhibit 12, copies of correspondence relative to his request for copies of his medical records while a member of the armed forces. The records were not produced and it appears that they were lost or destroyed. An email, dated 03/01/2001 from Mr. Ross McKenzie, a fellow cadet, advised that the College had shredded old case files from the 1960s (T.R. page 314).

[22] The Applicant also provided a statement from Mr. C.W. Badcock, the team physiotherapist who had treated his injury in 1968. This statement, found at T.R., page 291 and provides as follows:

> The above named was a player on the RMC Representative Football Team in 1968 and 1969. During that time I was the team trainer / physiotherapist and administered various treatments to many of the players on the team. All of my treatments were recorded on documents that should have been made part of their individual medical files and I am disturbed that in Mr. MacDonald's case those records appear to have gone missing.
>
> I do not recall the specific play or game that resulted in the injury to Mr. MacDonald's right knee but I do recall that I applied adhesive elastic bandages to his right knee on several occasions over the course of the season in 1968 and I would not have done so had he not been injured.

[23] The reconsideration decision of the Board is dated February 12, 2002. The Board refers to the new evidence submitted by the Applicant as consisting of his Application for Judicial Review and the Notice of Discontinuance dated February 5, 2001, relative to that application. The Board referred to a letter from Dr. Wiltshire, dated January 11, 2001, that was part of Exhibit R1-Ex-M1 which stated in part as follows:

> Although I did not treat Mr. MacDonald until 1999 and have no personal knowledge of the injury he mentions, I can state unequivocally that the nature of the tear I observed while performing surgery on his right knee was consistent with an injury that was incurred as long as 30 years ago (T.R. page 212).

[24] The Board commented on the available medical information as follows:

> The only current medical information before the Board relating to the condition of the Applicant's right knee is an X-ray dated 10 December 1998, which revealed no bone or joint abnormality in the right knee and a medical examination report dated 23 April 1999 signed by Dr. St. Arnaud, who examined the right knee and stated:
>
> - Mild effusion Rt knee
> - Instability Rt knee, grade 2, MCL
> - full, painless active and passive ROM (T.R. page 212)

[25] The Board also commented on the statements provided by colleagues of the Applicant as follows:

> … However, the Board would expect that if the partial ligament tear had occurred in 1968, there would have been complaints and or treatment, even if intermittent over the years. There is no record of treatment or complaints until 1998. Furthermore, the absence of even slight degenerative change or osteoarthritis to the right knee, as shown in the arthroscopy and the X-ray thirty years after a ligament tear, would seem to support a more recent injury to the ACL. …
> (T.R. page 214)

[26] The Board considered the opinion of Dr. Wiltshire that the ACL had been in the right knee was consistent with an injury thirty years earlier but found that this was no explanation as to how "one would differentiate between a recent tear to a ligament compared to one that is significantly older, i.e. thirty years old" (T.R. page 214).

[27] The Board also considered the evidence from Dr. St. Arnaud, that is a note dated May 20, 1999, relative to the varicose veins condition and made the following statement:

> In dealing with the Varicose Veins condition, the Board notes a handwritten note from Dr. St. Arnaud dated 20 May 1999, where he stated:
>
> > Varicose vein behind (R) knee.
> > Could be associated to injury in Saskatoon 1969.
>
> The Board has considered Dr. St. Arnaud's opinion; however, in the absence of an explanation as to the relationship between the varicose veins and the Regular Force service, the Board will deny pension entitlement under subsection 21(2) of the *Pension Act*. (T.R. page 214)

The Board upheld the decision of the Entitlement Appeal and dismissed the Applicant's claim for pension benefits.

[28] The Applicant sought judicial review of the reconsideration decision in cause number T-609-02. By Reasons for Order dated October 30, 2003, 2003 FC 1263, Justice Lemieux allowed that application and remitted the matter to a differently constituted panel of the Board for re-determination. The Court found that the Board had improperly made medical findings, as follows:

> [24] In short, the tribunal embarked upon forbidden territory making medical findings to discount uncontradicted credible evidence when it had no inherent medical expertise and had the ability to obtain and share independent medical evidence on points which troubled it.

[29] The Court expressed concern about the failure of the Board to comment on the missing medical records of the Applicant, as follows:

> [25] While my findings are sufficient to dispose of this application, I add that I am troubled by the failure of the tribunal to comment on the evidence in the record showing Mr. MacDonald had been treated immediately after his football injury and his medical records, for a critical period (May to November 1968), were lost by the Defence establishment.

[30] A rehearing of the reconsideration decision took place in September 2005. The Applicant was represented at this hearing by an advocate from the Bureau of Pension Advocates. He sought, however, to make submissions on his behalf, in addition to those presented by the Advocate.

[31] The evidence before the Board at the reconsideration hearing included the prior decisions, as well as the evidence, both testimony and documentary, in connection with the prior decisions. The Board acknowledged that there were further materials including a medical report from Dr. William D. Stanish, FRCS(C), FACS, an orthopaedic surgeon from Halifax, Nova Scotia, a medical report dated May 31, 2005 from Dr. David Wiltshire and a medical report dated June 15, 2005 from Dr. Andrew Jordan.

[32] The report from Dr. Stanish was requested by the Board, as independent medical advice, pursuant to subsection 38(1) of the VRAB Act. In his report, dated September 7, 2004, Dr. Stanish expressed the opinion that the Applicant's problems with his right knee are not associated with the 1968 football injury. He said that he had reviewed medical records that had been provided to him

and noted that "apparently the medical records from May of 1968 to November of 1968 are not available" (T.R. page 28).

[33] The Applicant provided a copy of Dr. Stanish's report to Dr. Wiltshire and Dr. Wiltshire wrote a further report, dated May 31, 2005 in which he referred to Dr. Stanish's opinion. Dr. Wiltshire maintained his opinion that the Applicant's right knee problem was associated with the injury suffered in 1968, saying as follows:

> According to Mr. MacDonald's statement he suffered an injury to the right knee in 1966 and then again in a football game in 1968. I believe it is possible and perhaps even probable that he suffered the partial tear to the anterior cruciate ligament at that time. It is also possible that he suffered a small sub-acute tear of the medial meniscus at that time which could have been in the white zone intra-substance and remained present but only minimally symptomatic until I finally saw him in 1999. These are possibilities not necessarily probabilities.
>
> The physical examinations subsequent to this injury documented in the Armed Forces records do not make any mention of symptoms in the right knee. One must take into account of course that Mr. MacDonald was an officer in the Armed Forces, was highly motivated, would want to be deemed fully medically fit for duty as a pilot or in the Submarine Forces and therefore would be unlikely to complain of any problem that was not physically disabling.
>
> I agree that my arthroscopic findings in 1999 did not disclose any evidence of meniscal damage but it is possible that I missed the tear of the meniscus especially if it was intra-substance.
>
> I agree that I did not note any significant ligament laxity in the knee either in the collateral ligaments or in the cruciate ligaments at any of my examinations. There is however a partial tear of the anterior cruciate ligament which is probably the result of his knee injury in 1968. Dr. Stanish feels that Mr. MacDonald's medial sided right knee discomfort and pathology is very common in males over 40 and

> I agree with that. He feels that it is not at all associated with his football injury of 1968 but I do not feel we can rule out that possibility entirely. I feel that Mr. MacDonald should have the benefit of the doubt in this case in view of his well documented history of medial sided right knee injury while in the Armed Forces. (T.R. page 37-38)

[34] Dr. Jordan's report addressed the varicose veins condition. His letter was short and provides as follows:

> Greg is a 58-year-old male in my general practice in Merrickville. He was previously in the military and while in the military sustained a significant right knee injury. The original injury was in 1968. He has had further problems with it leading to repeat arthroscopic procedures on the same knee in 1999.
>
> At this point he has isolated significant varicose veins in his right lower leg. I would support Greg in his contention that these varicose veins are a direct results [sic] of the major knee injury he suffered in 1968. I believe he would be entitled to any additional benefits related to these veins. The veins are quite swollen and he experiences some heaviness and pain in that area as a result. (T.R. page 39)

[35] The Board again dismissed the Applicants claim. First, the Board dismissed the Applicant's argument that he was entitled**,** as a matter of procedural fairness to present oral "observations and argumentation" in addition to the oral arguments made on his behalf by his legal counsel.

[36] Second, the Board ruled that the Applicant's right knee problem and varicose veins conditions did not arise out of, nor were they directly connected with his service in peace time in the Regular Force, and accordingly were not pensionable disabilities pursuant to subsection 21(2) of the

Pension Act. The Board said that it had reviewed any previous decisions to this claim and had examined all the evidence, including testimony and documentary evidence, as well as the new evidence submitted. The new evidence included a medical report from Dr. William D. Stanish dated September 7, 2004, a medical report from Dr. Wiltshire dated May 31, 2005 and a medical report from Dr. Andrew Jordan dated June 15, 2005. As well, the Board reviewed various medical reference documents relating to varicose veins and internal derangement of the knees.

[37] The Board accepted that the Applicant's knee was injured in a 1968 football game, but concluded that the medical notes and letters submitted by the Applicant were not credible because

> […] they were not based on any documented medical history and were more in the way of speculation and/or they did not provide a proper explanation as to how the physicians arrived at their opinions. (T.R. page 10)

[38] The Board further held that it was unreasonable to find that an injury which did not affect the Applicant's participation in

> […] competitive collegiate football for the remainder of the season, and gave rise to no recorded medical complaints, findings or treatments for some 31 years following, could be considered significant enough to result in the claimed current disabilities. (T.R. page 10)

[39] The Board determined that the medical evidence submitted by the Applicant was weak specifically referring to a medical report dated January 11, 2001 prepared by Dr. David G. Wiltshire and a note dated May 20, 1999, written by Dr. Louis St. Arnaud.

[40] The Board ultimately decided that the opinion of Dr. Stanish was credible and held that the evidence from Dr. Wiltshire was not credible. It questioned whether Dr. Wiltshire had been given access to the military service records and said that:

> … it requires a medical report to include a reasonably accurate history or anamnesis in order to qualify as credible evidence under section 39 of the Veterans Review and Appeal Board Act. (T.R. pages 12-13)

[41] As for the varicose veins, the Board concluded that it could not find any permanent "disability" as defined in section 3 of the Act. It also commented on the lack of "any credible evidence based on the actual history of the condition" to show that it was caused by the Applicant's military service.

[42] In the result, the Board dismissed the Applicant's claim for a pension in respect of both the internal derangement of the right knee and the varicose veins conditions.

III. Submissions

i) The Applicant's Submissions

[43] The Applicant first raises an issue of procedural fairness. He argues that the Board failed to observe a principle of natural justice when it denied him the opportunity to make oral submissions in addition to those made by his legal counsel. He submits that he is entitled to make such submissions pursuant to section 28 of the Act and that it is critical that he have the opportunity to do so because his credibility is at issue. Specifically, the Applicant claims that the Board questioned his credibility as a result of missing medical reports for the period May through December 1968.

[44] The Applicant next submits that the Board erred in reaching its decision by improperly making a medical finding. In this regard, the Applicant says that the May 31, 2005 report from Dr. Wiltshire explains the specific damage that he suffered to his right knee, and that this is the first such explanation that is included in the record. He submits that Dr. Stanish's original 2004 medical report was based only on the information available in the record at that time, and that Dr. Stanish has not had the benefit of this new evidence, that is the later report from Dr. Wiltshire.

[45] Because the Board did not provide Dr. Wiltshire's May 31, 2005 report to Dr. Stanish or to any other medical expert, the Applicant argues that the Board improperly made a medical finding, rather than a credibility finding, when it dismissed Dr. Wiltshire's evidence.

[46] The Applicant further submits that the Board improperly applied sections 3 and 39 of the VRAB Act. He submits that the Board erred in determining that a medical report was required to include a reasonably accurate history or anamnesis in order to qualify as credible evidence pursuant to section 39 of the VRAB Act. The Applicant points out that the Board accepted Dr. Wiltshire as a specialist but then determined that his evidence was not credible.

[47] He says that the Board was presented with uncontradicted evidence from Mr. Lorne McCartney, Mr. Roger Tucker, Mr. David Shaw and Mr. Bruce Mitchell, as well as from the Applicant himself, that the Applicant had suffered the injury that he claims, but the Board then failed to comment on the credibility of this evidence. The Applicant argues that the Board therefore failed to accept this evidence.

[48] The Applicant argues that the Board erred in deciding that Dr. Stanish's opinion was credible despite the fact that Dr. Stanish based his opinion on the only documentary evidence available at the time he authored his report in September 2004**,** without the opportunity to consider either Dr. Wiltshire's report from May 2005 or the missing medical records.

[49] The Applicant argues that by failing to accept credible evidence, the Board failed to resolve any doubts in his favour and to give full weight to his evidence as required by sections 3 and 39 of the VRAB Act.

ii) The Respondent's Submissions

[50] The Respondent argues that the refusal of the Board to allow the Applicant to make oral submissions in addition to those made by counsel on his behalf does not, contrary to the Applicant's submissions, constitute a breach of procedural fairness.

[51] Second, the Respondent argues that the Board did not make any reviewable errors in its assessment of the evidence before it. It submits that subsection 21(2) of the Pension Act requires that two conditions be satisfied before the Applicant can be entitled to the pension that he seeks, namely: (i) his medical conditions must be disabilities flowing from an injury, and (ii) his military service must be a direct cause of the injury.

[52] The Respondent notes that sections 3 and 39 of the VRAB Act create liberal and purposive guidelines for the Board to follow, but maintains that these guidelines do not relieve an applicant of the burden of proving on a balance of probabilities that his disability arose out of or in connection with military service. In this regard, the Respondent relies on the decision in *Wood v. Canada (Attorney General)* (2001), 199 F.T.R. 133 at paragraphs 22 and 24.

[53] In the present case, the Respondent argues that there was sufficient evidence upon which the Board could conclude that the Applicant's 1968 football injury was not significant enough to cause the presently claimed disability. In particular, it says that the Board's finding is supported by its

weighing of the evidence of Dr. Wiltshire and Dr. St. Arnaud; its analysis of the evidence of Dr. Stanish; and the Applicant's medical history, including his 1975 discharge documents.

IV. Discussion and Disposition

[54] The Applicant raises two issues in this application. The first is a question of procedural fairness relating to the Board's decision to reject his request to speak to the matter, in addition to being represented by a member from the Bureau of Pension Advocates. The second issue relates to the Board's rejection of his claim, on the basis of its findings as to the credibility of the evidence of Dr. Stanish in comparison with the other evidence that was submitted, including the evidence from Dr. Wiltshire and Dr. St. Arnaud.

[55] The first matter to be addressed is the identification of the applicable standard of review, having regard to a functional and pragmatic analysis. Four factors are to be considered in conducting such an analysis, as follows: the presence or absence of a privative clause; the expertise of the tribunal; the purpose of the legislation and of the specific statutory provision; and the nature of the question in issue. Questions of procedural fairness are not subject to the pragmatic and functional analysis and are reviewable on the standard of correctness.

[56] The Applicant's pension application is governed by the Pension Act. Paragraph 21(2)(a) of that Act provides as follows:

21(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, (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;	21(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) 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;

[57] Section 31 of the VRAB Act provides that decisions of the Appeal Board are final and binding. However, subsection 32(1) and 111 of that statute authorize the Board to reconsider its decision in certain circumstances. The combined effect of these provisions suggest a high level of deference.

[58] The purpose of the VRAB Act is to establish the Board as an independent body to review decisions of the Minister or his delegates regarding the award of pensions under the Pension Act. The right to appeal to the Board is granted by section 25 of the VRAB Act. The factor of statutory purpose attracts deference.

[59] The third factor is the expertise of the Tribunal. The Board is mandated to act as a review panel and is experienced in conducting reviews. This factor attracts a high degree of deference.

[60] Finally, the nature of the question must be considered. The Board must decide if an applicant meets the criteria for receiving a pension under the relevant legislation. This is primarily a fact-oriented exercise and supports a deferential standard.

[61] Upon balancing the four factors, I conclude that the appropriate standard of review with respect to the merits of the case is that of patent unreasonableness. I refer to the decision in *Woo Estate v. Canada (Attorney General)* (2002), 229 F.T.R. 217 at page 55 where the Court said the following:

> This court has held that in light of the legislative framework which confers exclusive jurisdiction on the Veterans Review and Appeal Board, as well as the privative clause which renders its decision final and binding, the applicable standard of review is that of patent unreasonableness (**Weare v. Canada (Attorney General)**, [1998] F.C.J. No. 1145; 153 F.T.R. 75 (T.D.)). Consequently, interference is only warranted if I find that the decision of the Board was based on an error of law, or on an erroneous finding of fact made in a perverse or capricious manner without regard to the material before it.

[62] As noted above, the issue with respect to alleged breach of procedural fairness will be assessed on the standard of correctness.

[63] The Applicant relies on section 28 to support his argument that the Board breached his right to procedural fairness in disallowing his request to make submissions in addition to those presented by his advocate. Section 28 of the VRAB Act provides as follows:

28(1) Subject to subsection (2), an appellant may make a written submission to the appeal panel or may appear before it, in person or by representative and at their own expense, to present evidence and oral arguments. (2) Only documented evidence may be submitted under subsection (1).	28(1) Sous réserve du paragraphe (2), l'appelant peut soit adresser une déclaration écrite au comité d'appel, soit comparaître devant celui-ci, mais à ses frais, en personne ou par l'intermédiaire de son représentant, pour y présenter des éléments de preuve et ses arguments oraux. (2) Seuls des éléments de preuve documentés peuvent être soumis en vertu du paragraphe (1).

[64] I disagree with the Applicant's submissions that he suffered a breach of procedural fairness. Section 28 provides that an applicant may be represented by a member of the Bureau of Pension Advocates or by a lawyer of his choice. The Applicant was represented in the hearing before the Board and he had no right to present oral arguments in addition to those made on his behalf. I am satisfied that the Board committed no error in refusing to allow the Applicant to make his personal submissions.

[65] I turn now to the substantive issues raised in this proceeding. Did the Board commit a reviewable error in refusing to award the Applicant a pension for the conditions complained of, that

is internal derangement of the right knee and varicose veins in the right knee. The Board stated that it preferred the evidence of the expert whom it had engaged over the evidence tendered by Dr. Wiltshire and Dr. St. Arnaud, on behalf of the Applicant.

[66] The Applicant's pension application was made pursuant to the Pension Act. Section 2 of that Act sets out the guiding principle for the interpretation and application of that statute 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.

[67] A similar provision is found in section 3 of the VRAB Act, 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 recognized obligation of the people and Government of Canada to those who have	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 gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur

served their country so well and to their dependants may be fulfilled.	pays et des personnes à leur charge.

[68] According to the decision in *MacKay v. Canada (Attorney General)* (1997), 129 F.T.R. 286, section 3 and section 39 of the VRAB are to inform the Board in its assessment of the evidence submitted to it. Section 39 provides as follows:

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.

[69] Sections 3 and 39 of the VRAB Act have been interpreted as requiring an applicant to present sufficient credible evidence to establish a causal link between the injury or disease and that person's period of service. In that regard, I refer to the decisions in *Hall v. Canada (Attorney*

General) (1998), 152 F.T.R. 58, aff'd. (1999), 250 N.R. 93 (Fed. C.A.) and *Tonner v. Canada (Minister of Veterans Affairs)* (1995), 94 F.T.R. 146, aff'd. [1996] F.C.J. No. 825 (F.C.A.).

[70] In my opinion, the Board erred in accepting the evidence of Dr. Stanish over that of Dr. Wiltshire because in so doing, it ignored the language and intent of section 39 of the VRAB Act. That section requires that any doubt arising from credible evidence is to be resolved in favour of an applicant.

[71] The evidentiary presumption set forth in section 39 is subject to an applicant's burden to show causation. In this case, Dr. Stanish and frequently the Board commented on the lack of evidence in the medical records to substantiate the Applicant's claim that his problems with the right knee arose from an injury sustained in 1968 in a football game when he was a cadet at RMC. Dr. Stanish did not comment on the cause of the loss nor its effect upon the making of his opinion. Whatever the consequences of his silence in that regard, there was evidence before the Board, submitted by the Applicant, that the records for the period May to November 1986 were missing. He tendered evidence respecting his efforts to retrieve the records, by submitting requests pursuant to relevant legislation for access to the personal information. He obtained statements from fellow cadets. He submitted the best evidence available to establish causation.

[72] Dr. Stanish provided an opinion upon the basis of his review of available records. On the other hand, Dr. Wiltshire offered an opinion on the basis of his examination of the patient and his review of the history provided by the Applicant. The Board had the authority, pursuant to subsection

38(1) of the VRAB Act, to ask the Applicant to submit to a medical examination by an independent medical doctor. It chose not to do so.

[73] The absence of an entry in the Applicant's discharge medical, relative to the 1968 football incident, is not determinative, in my opinion. Both Dr. Stanish and the Board looked for some evidence in the record about the cause of the injury; that is a more relevant point in time, in my view.

[74] In my opinion, the Board erred by failing to address the fact that medical records for a relevant period, that is from April to November 1968, are missing from the official record. The military, not the Applicant, was responsible for the maintenance of the personal records, including the medical records. In *Parveen v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 660, Justice Reed dealt with the consequences of an incomplete record, albeit in the context of immigration law, and said the following at paragraph 9:

> There are other similar discrepancies between the applicant's and the visa officer's descriptions of what occurred at the interview. I do not find it necessary to describe them. I think it is sufficient to note that the respondent controls the record that is put before the Court. …

[75] The observation is apt in the present case. The Applicant seeks a pension in respect of injuries arising from an event that occurred while he was in active service. He sought to introduce his medical records. There is no evidence that he had control of those records nor of their unavailability. He should not be penalized for a gap in the medical history that arises from their

unavailability. It is clear that the Board focused on the incompleteness of the record but it erred by failing to acknowledge the reasons for that state of affairs.

[76] The evidence of Dr. Wiltshire supports the Applicant's claim and the evidence of Dr. Stanish undermines it. Dr. Stanish reviewed the available medical history and acknowledges a gap in the record, without commenting on the effect of such gap upon his opinion. Dr. Wiltshire observed the Applicant as well as reviewing his history. In favouring the evidence of Dr. Stanish, the Board failed to apply section 39 of the VRAB Act which clearly provides that any doubt on the credibility of evidence is to be resolved in favour of an applicant for a pension. In my opinion, this was a reviewable error.

[77] I find that the Board also erred in rejecting the Applicant's claim for pension benefits with respect to the varicose vein condition.

[78] In the first place, this finding of the Board ignores the findings of Justice Lemieux at paragraph 2 of his reasons allowing the Applicant's application for judicial review in 2003:

> The tribunal recognized Mr. McDonald had an injury to the right knee in 1968 while playing football for RMC in Kingston, an activity which was organized and authorized by the military. As a result of this finding, there is no issue the applicant suffered a "disability" resulting from an injury within the meaning of subsection 21(2)(a) of the *Pension Act*. [emphasis added]

[79] In my opinion, the Board erred by reversing a prior finding that was upheld on judicial review.

[80] Further, the Board erred by purporting to dismiss the claim for pension benefits on the ground of an alleged lack of credible evidence. This basis for dismissal is not supported by the evidence.

[81] The evidence in support of the varicose veins condition was supplied by Dr. St. Arnaud and Dr. Jordan. This evidence was uncontradicted and there is no basis to question its credibility. Dr. Stanish was not asked to address that condition and did not do so. Accordingly, I conclude that the Board's conclusions with respect to the varicose veins condition is patently unreasonable.

[82] In the result, this application for judicial review is allowed and the decision of the Board, dated November 8, 2005, is set aside. The matter is remitted to a differently constituted panel of the Board for re-determination. In the exercise of my discretion pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 I award the Applicant his costs in the amount of $1,000.00.

ORDER

The application for judicial review is allowed and the decision of November 8, 2005 is set aside, the matter to be remitted to a differently constituted panel of the Board for re-determination.

In the exercise of my discretion pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, the Applicant shall have his costs in the amount of $1,000.00.

"E. Heneghan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2080-05
STYLE OF CAUSE:	Gregory Allan MacDonald and The Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 31, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Heneghan J.
DATED:	August 1, 2007

APPEARANCES:

Gregory Allan MacDonald (self-represented)	FOR APPLICANT
Tatiana Sandler	FOR RESPONDENT

SOLICITORS OF RECORD:

Applicant is self-represented	FOR APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR RESPONDENT