Federal Court Cour fédérale

Date: 20110902

Docket: T-1349-10

Citation: 2011 FC 1047

Ottawa, Ontario, September 2, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

CYRIL EUGENE MCLEAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Cyril McLean served as a member of the RCMP from 1970 until his retirement as Inspector in 1998. He started off in small detachments in Saskatchewan, then moved to headquarters in Ottawa in 1978. Thereafter, he served in a number of overseas assignments.

[2] In 2005, Mr. McLean applied for a disability pension. He claimed that bilateral osteoarthritis in his knees arose from his service in the RCMP. He relied on evidence of a number of knee injuries

that he sustained in the early to mid-1970s, as well as a medical opinion linking those injuries to his current condition.

[3] Mr. McLean's claim was turned down by the Minister of Veterans Affairs, by an Entitlement Review Panel, and by an Entitlement Appeal Board, mainly on the basis that the evidence did not support a connection between his injuries and osteoarthritis. He sought judicial review of the latter decision in Federal Court and Justice Michael Phelan ordered the Board to reassess Mr. McLean's claim. Justice Phelan found that the Board had ignored evidence about the nature of Mr. McLean's law enforcement experiences in the 1970s, had unreasonably questioned the reliability of the medical report relied on by Mr. McLean, and had failed to abide by the evidentiary rules set out in the *Veterans Review and Appeal Board Act*, SC 1995, c 18, s 39 (statutory references are set out in Annex A).

[4] On its second assessment, the Board again concluded that Mr. McLean's claim was not supported by the evidence. He argues that the Board made similar errors again and arrived at an unreasonable conclusion. He asks me to quash the Board's decision. However, I can find no basis for overturning the Board's decision and must, therefore, dismiss this application for judicial review. In my view, the Board's conclusion is defensible based on the law and the evidence before it.

[5] The sole issue is whether the Board's decision was unreasonable.

II. The Board's Decision

[6] Before the Board, Mr. McLean argued that he sustained numerous knee injuries in the course of his service. He said that being an RCMP officer in rural Saskatchewan in the 1970s was a strenuous and rough occupation, which sometimes involved breaking up fights and chasing suspects on foot. He argued that this work, together with an on-duty car accident in 1973, injured his knees and caused his present disability.

[7] The Board reviewed the medical evidence from the 1970s, which included the following:

- A clinical report dated July 13, 1973 that mentions Mr. McLean's right knee, although the context is unclear;
- A clinical report dated November 23, 1974 that provides a diagnosis of "torn meniscus R medial";
- A clinical report dated July 1976 that provides a diagnosis of a "possible lateral meniscus tear" of the left knee, with a complaint of discomfort in the left knee;
- A clinical report dated August 12, 1976 that diagnoses an injury to the right medial meniscus;
- A letter signed by Mr. McLean on August 13, 1976, recounting an incident in which he injured his knee picking up garbage near his house on his way home from work;
- A letter signed by Mr. McLean on August 24, 1976, reporting that his knee had healed and that he returned to full duties on August 17, 1976;
- A clinical report dated 13 December, 1976 that diagnoses a left medial meniscus tear;
- A letter dated January 14, 1977 by an orthopaedic surgeon, Dr. John Wedge, to whom Mr. McLean was referred. Dr. Wedge noted that the referral was for chronic knee pain over the previous five years. Acute pain and swelling of the knee in August 1976 was noted though without "real trauma" to the knee. Dr. Wedge observed that Mr. McLean "has never had any serious injuries to either knee." He provided a diagnosis of chondromalacia patella and noted that he did "not feel that he has a significant story to suggest a tear of his meniscus";

- A clinical report dated September 30, 1977 that provides a diagnosis of post-traumatic chondromalacia patella of the right knee; and

- A clinical report dated December 18, 1978 that notes a sore left knee with a diagnosis of chondromalacia patella.

[8] The Board next considered the medical reports from 2004 to the present:

- A diagnostic imaging report dated February 1, 2004 noted no fracture, dislocation or effusion present after a fall involving the left knee;

- An MRI dated June 22, 2005 on the left knee noted recurrent medial knee pain and tears of the lateral meniscus, under-surface fraying of the medial meniscus, and evidence of past injury to the medial collateral ligament;

- Dr. R.R. Glasgow, an orthopaedic surgeon, noted that Mr. McLean's history includes "a right knee injury sustained…while working as a RCMP officer." He diagnosed a meniscal tear in the right knee and recommended an arthroscopy;

- Dr. Ruben Hansen provided several reports including a provisional diagnosis of osteoarthritis of the right knee on November 24, 2005 and a confirmed diagnosis in the left knee. The report notes bilateral knee trauma in the 1970s from "dealing with perpetrators." In a report dated February 22, 2006 he notes "as his physician and advocate…he has radiologic findings of cartilage injury within both knees that again are typical of chronic, recurrent injury sustained in law enforcement personnel." In a June 12, 2006 letter he notes a "rather extensive list of traumatic injuries" to "support my claim of osteoarthritis of the left and right knee" that he believes is "directly linked to his years of service in the RCMP." A report from October 30, 2006 notes that "his complaints of joint pain in areas included in trauma early in his career are consistent with osteoarthritic complications."

[9] The Board also considered the following evidence from Mr. McLean's family members and former colleagues:

- Mr. Ben Soave said he trained with Mr. McLean in 1970 and recalled that he had suffered several injuries in training and in a car accident near Kindersley, Saskatchewan;

- Mr. Bob Preston stated that he served with Mr. McLean and recalled the car accident and his knee problems;

- Mr. T.A. Gibbons recalled that Mr. McLean had been involved in many arrests and bar fights. He also stated that Mr. McLean had suffered service-related knee injuries in 1971, a second injury sometime between 1972 and 1977, and in a car accident;
- Mr. Allan D. Grier described working conditions for RCMP officers in the area where Mr. McLean worked and noted that injuries were common and were often self-treated. He also recalled the car accident and the fact that Mr. McLean had injured his knees;
- Mr. McLean's wife recalled that he had knee complaints and that after the car accident she had to bandage his knees for several days; and
- Mr. McLean's daughter, Ms. Andrea McLean, and her husband, Mr. Lucas Ewart, recalled stories about Mr. McLean's injuries.

[10] The Board made a number of findings of fact to settle issues that had been in dispute in prior hearings:

- It accepted that Mr. McLean had been involved in a car accident during his service;
- It acknowledged that the early years of Mr. McLean's service were rough and likely caused him numerous, relatively minor, injuries;
- It found that a confirmed diagnosis of bilateral chondromalacia patella was established by Dr. John Wedge in his report of January 14, 1977;
- It concluded that Mr. McLean had provided sufficient evidence to establish a diagnosis of bilateral osteoarthritis of the knees;
- It found that Mr. McLean's evidence on the whole was credible, and there was no indication of any attempt to mislead or exaggerate;
- It did not doubt that Mr. McLean had suffered some injury to his knees in the course of his duties and acknowledged his belief that those injuries caused or contributed to his disability.

[11] The Board found there was only one question to decide: was the evidence sufficient to allow a finding that Mr. McLean's bilateral knee osteoarthritis after his retirement arose out of or was

directly connected with his RCMP service in the 1970s, pursuant to subsection 21(2) of the *Pension Act*?

[12] Along with the whole of the evidence, the Board considered the Entitlement Eligibility Guidelines (EEGs). It acknowledged that, while not binding, the EEGs express the current state of medical knowledge and consensus on the cause of osteoarthritis based on a broad review of medical studies. It noted that the purpose of the EEGs was to promote sound and consistent decision-making. It then reviewed certain key statements found in the EEGs:

- Osteoarthritis is primarily associated with natural processes connected with aging. However, medical consensus also recognizes that direct injury to the joints from specific or cumulative joint trauma can be a causal factor in the acceleration of the condition;

- For pension entitlement on the basis of osteoarthritis, there must be evidence of specific joint injury or trauma arising from the applicant's service;

- Joint trauma can be either "specific" or "cumulative." Specific trauma is a physical injury to a joint, including a fracture but excluding soft-tissue injury. The risk of developing osteoarthritis increases with the severity of the specific trauma. In the knee, the type of specific trauma most strongly associated with osteoarthritis is injury involving direct damage to the articular cartilage and underlying subchondral bone of the joint, or specific injury to ligaments and tendons resulting in an unstable joint. Specific trauma sufficient to cause or aggravate osteoarthritis will result in acute symptoms of pain, swelling, or altered mobility within 24 hours of the injury lasting several days following onset in the absence of medical intervention. Signs and symptoms of osteoarthritis must present in the affected joint within 25 years of the specific trauma in order to causally connect the osteoarthritis to the traumatic injury; and

- Cumulative joint trauma results from repetitive activity which involves an increased load placed on a specific weight-bearing joint over an extended time period. The medical consensus is that osteoarthritis in weight-bearing joints may be accelerated by cumulative physical trauma to the joints. Consequently, cumulative joint trauma should be considered in a disability claim for osteoarthritis in the absence of a specific injury to that joint. Cumulative joint trauma of the knees is defined with reference to certain, specific occupational activities.

[13] The Board weighed the evidence and considered the EEGs to determine whether a causal link had been established between Mr. McLean's current osteoarthritis and his RCMP service in the 1970s. It found that the evidence did not establish that connection for the following reasons:

- The first medical entry related to a knee injury was in July 1973. If the estimates of when the car accident occurred are correct, this report would be several months after the accident, and there is no explanation of what gave rise to this right knee complaint;

- The diagnosis of a torn right medial meniscus in November 1974 is without any indication of a precipitating event. The report of a suspected left lateral meniscal tear in July 1976 also gives no indication of what caused the complaint;

- The report of the August 1976 injury to the right knee clearly establishes that the injury occurred when Mr. McLean, returning home from his RCMP detachment, bent over to pick up some garbage in front of his house. While Mr. McLean argued that this was a trivial injury superimposed upon a previous, more serious, service-related injury, the Board found there was no evidence to support that submission. The Board concluded it was not a service-related injury since he was returning home from work, was in front of his own house, and was not on duty or under the control of the RCMP in any meaningful sense. Accordingly, he was within the sphere of personal activity and his status as an RCMP officer played no part in the event;

- While Mr. McLean suffered a further right knee injury in January 2004, this was clearly unrelated to his RCMP service given that he retired in 1998;

- Dr. Wedge's 1977 report noted a history of five years of knee pain, but stated that Mr. McLean had never had "serious injuries" to either knee. The report found that previous diagnoses of meniscal tears were inaccurate given the absence of a "significant story to suggest a tear of the meniscus." Instead, a diagnosis of chondromalacia patella was given; and

- Two more reports diagnosing chondromalacia patella were given in 1977 on the right knee and in 1978 on the left knee.

[14] The Board then considered Dr. Hansen's evidence. It found this, too, was insufficient to support a connection between Mr. McLean's RCMP service and osteoarthritis. While the Board did not question Dr. Hansen's medical skills, it found his opinion not to be credible to the extent that he

relied on unproven assumptions to draw a causal connection between Mr. McLean's injuries from the 1970s and his current experience with osteoarthritis, in particular:

- He based his opinion on the working conditions in the first few years of Mr. McLean's career; however, there was no evidence of any further injury or complaint of knee problems until well after his retirement;

- Dr. Hansen failed to consider that osteoarthritis is a natural degenerative condition experienced by a significant portion of the population even in the absence of any prior trauma;

- He based his opinion explicitly on what he describes as an "extensive list of traumatic injuries" between 1973 and 1978. However, none of the medical documents give any indication that the complaints were precipitated by "trauma." Indeed, with the exception of non-service injuries, no precipitating event of any sort is identified. The Board was not prepared simply to assume the complaints arose directly from a service-related trauma. Indeed, the 1977 report from Dr. Wedge noted that significant trauma was denied by Mr. McLean and found no events significant enough to suggest meniscal tears;

- The Board had little evidence before it to support the argument that police officers have a higher incidence of osteoarthritis secondary to trauma or, more specifically, that Mr. McLean's osteoarthritis arose from traumatic injury. The Board noted that an opinion from an objective orthopaedic surgeon might have been helpful. The Board also noted that although Mr. McLean had been under the care of a surgeon, no evidence or medical reports were provided from the treating specialist;

- Dr. Hansen did not provide a credible explanation linking the chondromalacia patella diagnosed in 1977 and 1978 to RCMP service in the absence of traumatic knee injury. Without a detailed medical opinion addressing this alleged connection, the Board was unable to infer that osteoarthritis of the knees, or chondromalacia patella, had resulted from injuries arising from RCMP service.

[15] The Board also noted that, while credible, Mr. McLean, his wife, his daughter, and his son-in-law were not medically trained and, therefore, their evidence linking osteoarthritis to service injuries could not be given much weight.

IV. Was the Board's Decision Unreasonable?

(a) Mr. McLean's submissions

[16] Mr. McLean submits that section 39 of the *VRAB Act* limits the Board's jurisdiction to assess evidence before it. That is, it imposes certain obligations on the Board which, if ignored or misapplied, justify setting aside the Board's decision on judicial review:

> **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.

[17] In this case, Mr. McLean argues that the Board erred in rejecting uncontradicted, credible evidence from himself and Dr. Hansen, and in failing to resolve in his favour any doubt it may have had in the weighing of the evidence. This submission is tied to Mr. McLean's main contention that the Board erred in finding that the evidence did not establish a connection between his current osteoarthritis and his RCMP service in the 1970s.

[18] Mr. McLean also points to a number of alleged errors in the Board's analysis. First, he says the Board failed to take into account the fact that he suffered his first knee injuries during RCMP training in 1970. It also ignored the fact that he was subsequently involved in many arrests in which he re-injured his knees. While the Board found Mr. McLean generally to be credible, it failed, he

maintains, to provide reasons why it did not accept his evidence in this area. Therefore, it failed to abide by the duty to accept credible, uncontradicted evidence (s 39(b)).

[19] Second, Mr. McLean says that the Board erroneously concluded that his right knee injury in 1976 was not related to his RCMP service. The Board was required to look at whether the activity leading to the injury was performed within the context of his service: *Wannamaker v Canada (Attorney General),* 2007 FCA 126, at para 42. The Board's decision to separate the activity in which he was engaged (returning home from work) from the circumstances of his RCMP service was unreasonable. Going to and from work, he submits, is directly related to his service in the RCMP; he would not have been in front of his house that day if he had not been returning from work.

[20] Third, Mr. McLean submits that the Board erred in its reliance on the EEGs. The Board preferred the EEGs over the uncontradicted opinion of Dr. Hansen, who had concluded that Mr. McLean's disability was directly linked to injuries sustained during his RCMP service. While s 35(2) of the *Pension Act* allows the Board to use the EEGs, greater weight must be given to the medical evidence filed by an applicant: *Cramb v Canada (Attorney General)*, 2006 FC 638 at para 25. The EEGs are "soft laws" that can be considered by administrative decision-makers, but they cannot be given undue weight: R. Sullivan, *Sullivan on the Construction of Statutes 5th ed*, at p 621-6; *Miller McClelland Ltd v Barrhead Savings & Credit Union Ltd*, [1995] AJ No 167 at paras 8-10 (CA). Dr. Hansen's evidence was directed at Mr. McLean's particular situation, unlike the EEGs. Additionally, Mr. McLean maintains that if the Board wished to rely on the EEGs, it should have afforded him an opportunity to respond to them.

[21] Fourth, Mr. McLean submits that the Board's finding that Dr. Hansen's evidence was not credible was unreasonable. The Board did not provide any support for that finding. Dr. Hansen provided evidence of Mr. McLean's entire medical history as it related to his disability, and it was uncontradicted by other evidence. The Board stated that Dr. Hansen had noted a "list of extensive traumatic injuries" without identifying the specific traumas and without noting that osteoarthritis is a degenerative condition. However, Mr. McLean notes that there was evidence before the Board of three specific traumatic injuries to his knees:

(i) 1970 injury during training:

These injuries were corroborated by Mr. Soave and Mr. Preston. The Board failed to consider this material.

(ii) 1973 car accident:

The Board failed to recognize this as a trauma leading to Mr. McLean's disability; and

(iii) 1976 injury to right knee while returning from work:

The Board erroneously concluded that this was not a service-related injury.

[22] Fifth, Mr. McLean submits that the Board erred in finding that the opinion of an orthopaedic surgeon could have helped it decide whether the injuries in question arose out of or were directly connected to his service. Mr. McLean points out that the Board had before it the opinions of two orthopaedic surgeons (Drs. Wedge and Glasgow), who had diagnosed chronic episodes of chondromalacia patella and meniscal tears, respectively. In addition, Mr. McLean notes that the Board failed to seek an independent medical opinion (as it had the power to do) but, instead, relied on its own medical expertise: *Theriault v Canada (Attorney General)*, 2006 FC 1070 at para 60.

[23] Sixth, Mr. McLean says there was evidence before the Board that his disability was present in 1977 (according to Dr. Wedge's report), many years before his 2004 injury.

(b) Causation and s 39 of the *VRAB Act*

[24] According to s 21(2)(a) of the *Pension Act*, an applicant must show that service was the "primary cause" of the injury or the disability and must establish causation: *Lunn*, above at para 50 (citing *Boisvert v Canada (Attorney General)*, 2009 FC 735 at para 24). In determining whether causation has been established, decision-makers are required to consider the presumptions found in subsection 21(3) of the *Pension Act*, as well as section 2 of the *Pension Act* and section 3 of the *VRAB Act* which call for a broad and liberal construction and interpretation of the provisions of the two statutes.

[25] Additionally, s 39 of the *VRAB Act* sets out rules designed to favour an applicant with respect to his or her burden of proof. However, the effect of this provision is not to compel the Board to accept all of the allegations made by a member (*Boisvert*, above, at para 28). Rather, the applicant must establish, on a balance of probabilities, that he or she suffers from a disability and that the disability arose out of or was directly connected with his or her military service.

[26] According to Justice Sharlow in *Wannamaker*, the purpose of section 39 is to ensure that the evidence in support of an application is viewed in the best possible light, but it does not relieve the applicant of the burden of proving entitlement. Nor does it operate to require the Board to accept all the evidence presented by an applicant. For instance, if the Board finds certain evidence not to be credible, it need not accept it, even if it is uncontradicted (at paras 5-6).

(c) Application to the facts in this case

[27] The Board accepted that Mr. McLean had been in a car accident during his service, that he had suffered numerous, relatively minor, injuries in the course of the early years of his service, and that he had been diagnosed with chondromalacia patella in 1977. The Board explicitly stated that it did not doubt that he had suffered injuries to his knees in the course of his service. It accepted the credible, uncontradicted evidence before it in these areas.

[28] However, the Board correctly noted that there were significant gaps in the evidence. For example, there was little evidence about the cause, nature or severity of Mr. McLean's injuries. The evidence did not contain details that would have allowed the Board to identify Mr. McLean's injuries as the cause of his present disability. While Mr. McLean had been diagnosed with chondromalacia patella and possibly with meniscal tears, no medical report described how those conditions came about.

[29] I see no error in the Board's conclusion that Mr. McLean's knee injury in 1976 was not service-related. In *Wannamaker*, above, an applicant who slipped and fell on work property while on his way to work was found to have engaged in an activity relating to his military service (that conclusion was overturned on other grounds by the Federal Court of Appeal, above). In my view, this case is distinguishable from *Wannamaker*. Here, Mr. McLean was not on work property when his injury occurred; nor was he actually in the act of returning from work at the time. Mr. McLean stopped to pick something off the ground as he arrived home. The Board reasonably concluded that Mr. McLean was "clearly within the sphere of personal activity" when the injury occurred.

[30] Nor can I conclude that the Board's use of the EEGs was unreasonable. The Board acknowledged that the EEGs had been used for guidance only, in an effort to promote sound, consistent decision-making. As I read its decision, the Board did not substitute its interpretation of the EEGs for the "uncontradicted" opinion of Dr. Hansen. Having reasonably determined, in my view, that Dr. Hansen's evidence could not be relied on to establish causation, it was open to the Board to look to the EEGs for guidance on the mechanism of action, symptoms, prognosis, and etiology of osteoarthritis.

[31] Further, the Board explained its concerns about Dr. Hansen's opinion. The absence of details about Mr. McLean's injuries led the Board to conclude that Dr. Hansen's opinion was not supported by the evidence. As I see it, the Board found that Dr. Hansen's evidence drew a causal connection between Mr. McLean's service and his present osteoarthritis based on unproven assumptions about the frequency, nature and extent of his alleged injuries. Further, the Board's additional concerns about Dr. Hansen's credibility and objectivity derived from his role as an "advocate" for Mr. McLean and his failure to consider that osteoarthritis is a natural degenerative condition experienced by a large number of individuals in the absence of trauma.

[32] Regarding the application of s 21(3) of the *Pension Act*, I cannot conclude that the Board erred in its approach. Mr. McLean asserted that s 21(3) of the *Pension Act* operates to create a presumption that the knee injuries he sustained in training in 1970 were service-related. However, that presumption does not establish a causal connection between those injuries and a current disability: *Lunn*, above. Mr. McLean's injuries during training are presumed to be service-related, but that does not prove that his osteoarthritis was caused by those injuries. In any case, the injuries

were unspecified and did not appear to require any treatment or time off. Given the dearth of detail about the kind, nature or extent of those injuries, I cannot conclude that the Board erred in its treatment of that evidence.

[33] Overall, I do not see any reviewable error with respect to the Board's treatment of the evidence in light of section 39 of the *VRAB Act*. The Board found that Mr. McLean had not established, on a balance of probabilities, the required causal connection between his present disability and injuries incurred during his service in the 1970s. That determination was not unreasonable based on the law and the facts before it.

V. Conclusion and Disposition

[34] I do not see any reviewable error in the Board's treatment of the evidence or its interpretation of the applicable statutes. Further, as Mr. McLean had not established, on a balance of probabilities, the required causal connection between his present disability and injuries incurred during service, the Board's conclusion was not unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed, with costs.

"James W. O'Reilly"

Judge

Annex "A"

Review and Appeal Board Act, SC 1995, c 18

Rules of evidence

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.

Loi sur le Tribunal des anciens combattants (révision et appel), LC 1995, ch 18

Règles régissant la preuve

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1349-10
STYLE OF CAUSE:	CYRIL EUGENE MCLEAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 13, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	O'REILLY J.
DATED:	September 2, 2011

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