Federal Court  Cour fédérale

Date: 20120710

Docket: T-827-11

Citation: 2012 FC 869

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 10, 2012

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

RICHARD LEROUX

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] I am seized with an application for judicial review of a decision rendered on February 9, 2011, by the Appeal Division of the Veterans Review and Appeal Board Canada (the Board) finding that Richard Leroux (the applicant) was not entitled to a pension allowance for his cervical osteoarthritis. For the following reasons, the application is allowed.

I. Background

[2] The applicant held various positions with the Canadian Forces during the period of 1985 to 2002. He was an infantryman from 1985 to 1991, supply technician from 1991 to 2002 and traffic technician starting in 2002.

[3] On October 1, 2003, he applied for an allowance for cervical osteoarthritis and lumbar disc disease. His application was denied by Veterans Affairs Canada (the Department) on November 23, 2004, and many subsequent decisions were rendered. The Board recognized the applicant's entitlement for the lumbar disc disease and it is not in question in the present case.

II. Background

[4] The applicant's case had been the subject of many decisions before the one in question in this judicial review was rendered.

[5] I will begin with the history of the applicant's allegations of neck pain and the medical attention he received.

[6] The applicant began reporting discomfort in the cervical region in 1995.

[7] In February 1995, he first reported discomfort after feeling a strain and pain in his neck after missing a step on a ladder. X-rays taken after this incident were normal.

[8] In 1998, a small herniated disc at C5-C6 was discovered by chance during a magnetic resonance imaging (MRI) exam further to claims of back and rib pain.

[9] In 1999, the applicant had a consultation for neck stiffness after performing repetitive movements and transporting bags of sand.

[10] In 2001, when serving in Bosnia, the applicant had physiotherapy treatments for neck pain and stiffness that appeared after he had hit his head three weeks earlier.

[11] In August 2002, the applicant again had a consultation for pain in the cervical region. An X-ray showed:

> [TRANSLATION]
> Cervical spine
> No prior x-ray for comparison.
> Prevertebral soft tissue normal. Slight straightening of the cervical spine. Visible osteophytes at C5-C6 with beginnings of ossification of the anterior longitudinal ligament. Beginnings of intervertebral narrowing in this area…

[12] In 2003, the applicant again received physiotherapy treatments for his sore neck. On August 16, 2003, Dr. Jutras diagnosed cervical osteoarthritis and on October 1, 2003, the applicant submitted a claim for pension entitlements.

[13] In his claim form, the applicant described the link between his condition and his military service as follows:

> [TRANSLATION]
> Injury and stiffness in the neck on the left side caused by an old steel helmet during a combat exercise when I was at 3R22R (031) (6

> years) Crushed my neck because when I got up I bumped my head and the shock went to my neck (911 // supply // on the Hmc&Provider)

[14] The application was supported by various consultation and X-ray reports.

[15] The applicant's claim was first dismissed by the Department in a decision dated November 23, 2004. The Department found that without a serious injury in the neck area related to his service, the applicant's cervical osteoarthritis was not consecutive to or directly related to his Regular Force service. This decision was affirmed on June 8, 2005, by the Veterans Review and Appeal Board Canada (Review Committee).

[16] The file was then processed by the Board. In support of his appeal, the applicant submitted an expert medical report prepared by Dr. Michel Leroux, orthopaedic surgeon, dated December 19, 2006. After summarizing the various tasks the applicant carried out, Dr. Leroux provided a background of the claims of cervical pain. He then provided the following opinion:

> [TRANSLATION]
> In addition to the definitions sent for the two statements requiring physical abilities and an unusual requirement for activities the patient performed in the Forces and considering the new X-rays that now show cervical and lumbar osteoarthritis in addition to the various consultations for various cervical and lumbar issues.
>
> We must note that there is a relationship between the aggravation of the lower back and cervical conditions and there is a link between the tasks performed during his military service that we rate at 3 out of 5.
>
> The accumulation of repetitive strain injuries could have aggravated the two conditions, cervical and lumbar, as they are more significant than normal aging considering the age of the patient, who is only 43. Osteoarthritis is more advanced that what should be seen for normal aging at this time.

[17] On November 28, 2007, the Board granted the applicant pension benefits for his lumbar condition but denied the entitlement for his cervical condition. The reasons for the Board's decision are:

> [TRANSLATION]
> As for the cervical osteoarthritis, the Board does not see any specific trauma to the appellant's neck and after reviewing the Veterans Affairs Canada Entitlement Eligibility Guidelines, the Board notes that repetitive activities or repetitive strain injuries do not apply to the cervical spine since it is a non-weight bearing joint.

[18] The applicant submitted an application for reconsideration of the decision with the Board, and supported his application with a second medical report by Dr. Leroux, dated June 16, 2008, and a report by a military doctor, Major Yves Parisot, dated January 25, 2008.

[19] In his additional report, Dr. Leroux indicated the following regarding the causal relationship between the applicant's condition and his military service:

> [TRANSLATION]
> In the **synthesis and discussion**, it is clearly stated that the patient was a supply technician and in the infantry from 1985 to 2002. During that time he would have transported many loads, regularly and repeatedly pushed, pulled objects weighing up to 90 pounds as a traffic technician and also handled loads up to 80 pounds with turning movements on pallets, in addition to the training as a soldier, performing "PT tests", walking 13 km wearing equipment, weapons and helmet, that can weigh up to 60 or 70 pounds.
>
> The cervical osteoarthritis is clear on the last X-rays and clearly more significant in a man who is still young at 43.
>
> There is therefore a relationship between the aggravation of the cervical condition and the duties performed during his military service for at least 3/5.

> The accumulation of repetitive strain injuries and trauma would aggravate the two conditions, cervical and lumbar, in a much more significant manner than normal aging.
>
> Therefore, we state again that there is a relationship between the activities in the Forces and the cervical disease.
>
> [Highlighted in the original]

[20] It is also relevant to quote the following from Dr. Parisot's report:

> [TRANSLATION]
> 1. In relation to a decision by the Veterans Review and Appeal Board (VRAB) on an application for compensation for a cervical osteoarthritis issue (ref. A), it is noted that eligibility for compensation regarding the repetitive activities and repetitive strain injuries do not apply to the cervical spine because it is not considered a weight-bearing joint. Dr. Leroux's report on this (ref. B) argues in favour of a causal relationship between MCpl Leroux's current cervical disability issue and the wearing of a helmet with conditions—including a posterolateral herniated disc at C5-C6—in which wearing a helmet substantially increases the risk of subsequent deterioration of the cervical disease. As you say, I agree with the fact that the cervical spine is not a weight-bearing joint; therefore, wearing the helmet, the weight of which over a prolonged period is significant, was usual and repetitive when MCpl Leroux carried out his military duties over 21 years of service. Moreover, as MCpl Leroux's disease advanced, wearing this helmet, not ergonomic for the physiologically non-weight bearing cervical spine, ocurred, over time, under increasingly adverse conditions for these joints that were already jeopardized. I sincerely believe that this argument should be revised for a decision that favours MCpl Leroux's application for compensation regarding his cervical osteoarthritis issue.

[21] On June 10, 2009, the Board dismissed the applicant's application for review. The Board did not recognize Dr. Leroux's June 16, 2008, report as new evidence because part of his December 19, 2006, report was repeated. As for Dr. Parisot's report, the Board found that it was not new evidence that is ground for reconsideration because the report could have been presented earlier. The Board also found that it was reasonable to find that Dr. Parisot's report would not have influenced a

potential decision. The Board issued comments regarding the content of Dr. Parisot's report regarding wearing the helmet and made a particular mention that the doctor had not explained the extent to which wearing the helmet would have an effect on the development of the applicant's cervical osteoarthritis. The Board added that Dr. Parisot did not specify the type of helmet in question or how frequently or for how long the applicant wore this steel helmet.

[22] This decision was the subject of an application for judicial review and was set aside by Martineau J. (docket T-1523-09). Martineau J. referred the case back so the review application could be reconsidered by another panel. Among other things, it found that it was unreasonable for the Board to have found that Dr. Parisot's report could have been submitted earlier without considering the applicant's explanations or all the circumstances in his record. Martineau J. also found that it was unreasonable to find that Dr. Parisot's report, if believed, with the other evidence provided earlier, would not have influenced the outcome of the application. Martineau J. felt that this statement was contrary to the actual contents of the report and the evidence on file. The judge also felt that the Appeal Board neglected to consider the rules of evidence noted at article 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRAB Act*]. Lastly he indicated that the Appeal Board should have convened a hearing and questioned Dr. Parisot or asked him to answer in writing if it had questions regarding the impact of wearing a steel helmet.

III. The impugned decision

[23] On February 9, 2011, the Board again dismissed the applicant's application for reconsideration. Contrary to the June 10, 2009, decision, the Appeal Board agreed to review Dr. Leroux's additional report of June 2008 and that of Dr. Parisot, and it ruled on the merits of the

applicant's entitlement application. The Board did not, however, accept the medical evidence provided by Dr. Leroux and Dr. Parisot and found their reports were not credible.

[24] The Board first indicated that the evidence did not show the applicant had suffered a significant trauma that would have led to ongoing complaints. The Board also noted that the whiplash incident in 1995 did not result in any ongoing complaints or any further mention in his medical history.

[25] The Board then noted that it had to try and assess [TRANSLATION] "the possible role of repetitive strain injuries on the appellant's cervical osteoarthritis."

[26] The Board noted that it had not received any scientific medical literature showing the role of repetitive strain injuries, of causal or exacerbating factors on the cervical osteoarthritis condition. It added that it had also not received statistical studies that would lead to the finding that the applicant's cervical osteoarthritis could have been caused or aggravated by wearing a metal helmet. The Board added that wearing the helmet had not resulted in any complaints of pain by the applicant and the only complaint about this was the one noted in Dr. Leroux's report, which refers to wearing his motorcycle helmet. The Board inferred that the applicant did not exclusively wear a helmet for his military service. The Board also noted that there was no documented complaint of neck pain while carrying a load.

[27] The Board then found that Dr. Leroux's 2006 report was not credible. It felt that:

a. Dr. Leroux's opinion referred more to factors related to lumbar disc disease than cervical osteoarthritis and in the section of the report "Synthesis and discussion", Dr. Leroux reported mainly on factors that apply to lumbar disc disease rather than cervical osteoarthritis;

b. for a medical opinion to be credible, the doctor must indicate how he came to his conclusion. It stated that [TRANSLATION] "the conclusion must note all the factors causing the condition in question and indicate the evidence that supports the relationship made with the service";

c. Dr. Leroux did not explain [translation] "in a transparent and rational manner how he came to his conclusion" on the relationship between the cervical condition and the duties the applicant performed during his military service;

d. although Dr. Leroux mentions repetitive strain injuries that may have aggravated the applicant's two conditions, it was not possible to understand the factual and scientific basis of this statement. It noted that in the "Synthesis and discussion" section of his report, Dr. Leroux did not make any reference to wearing the metal helmet or the specific role this played in terms of repetitive strain injury.

[28] The Board did not grant any more credibility to the additional report Dr. Leroux prepared in 2008. It noted that Dr. Leroux mentioned the latest X-rays that show a more advanced osteoarthritis in a 43-year-old man, but the most recent X-rays were from 2002 and did not lead to the conclusion that the deterioration was greater considering the applicant's age. The Board also noted that Dr. Leroux did not indicate how he came to three-fifths as the proportion of the condition that was attributable to military service. The Board stated again that it [TRANSLATION] "had not received any

scientific medical information that would indicate that lifting loads and handling loads would play a role in aggravating cervical osteoarthritis."

[29] The Board did not grant credibility to Dr. Parisot's opinion either, for the following reasons:

a. Dr. Parisot mentioned a posterolateral herniated disc at C5-C6 but the latest X-ray reports do not indicate a herniated disc but rather osteophytes and early pinching;

b. the Board does not understand the basis of the statement that helmet is "not ergonomic for the physiologically non-weight bearing cervical spine";

c. the Board does not understand the physician's statement that the applicant's joints were "already jeopardized";

d. the statement that the applicant wore a steel helmet for 21 years is inaccurate because the helmet was only worn in specific circumstances, namely during exercises;

e. Dr. Parisot's statement regarding the risk of deterioration of the cervical disease resulting from wearing the steel helmet is not supported by any statistical study or scientific medical literature.

[30] The Board concluded its decision with the following statements:

> [TRANSLATION]
> The Board must note that it absolutely does not want to take a negative approach to the appellant's applications, but feels it is its duty to render a decision based on credible evidence, not on medical expertise that is simply a reassertion of the appellant's claim with no medical expertise or with an opinion that is not supported factually or with scientific evidence. If this evidence exists, the Board will be happy to review this decision, but according to the medical evidence on file, the Board cannot consider Dr. Leroux's or Dr. Parisot's opinions as credible under the circumstances.

IV. The issue

[31] The only issue in this case is regarding the reasonableness of the Board's decision. More specifically, the Court must determine whether it was reasonable for the Board to not lend credibility to the medical reports of Drs. Leroux and Parisot.

V. The standard of review

[32] The two parties submitted, and I agree with them, that the Board decision was to be reviewed according to the standard of reasonableness. The decision made by the Board is one that, in my opinion, was a mixed question of fact and law that involves interpretation of medical evidence, which is within its mandate. However, it is well established that interpretation of medical evidence and of a causal link between an injury or disease and military service is reviewable under the standard of reasonableness (*Wannamaker v Canada (Attorney General)*, 2007 FCA 126 at paras 12 and 13, 156 ACWS (3d) 929 [*Wannamaker*]; *Goldsworthy v Canada (Attorney General)*, 2008 FC 380 at paras 10-14 (available on CanLII) and *Boisvert v Canada (Attorney General)*, 2009 FC 735 at paras 33-36 (available on CanLII) [*Boisvert*]; *Gillis v Canada (Attorney General)*, 2009 FC 504 at para 17 (available on CanLII); *Acreman v Canada (Attorney General)*, 2010 FC 1331 at para 18, 381 FTR 139 [*Acreman*]; *Armstrong v Canada (Attorney General)*, 2010 FC 91 at para 33, 361 FTR 91 [*Armstrong*]; *Beauchene v Canada (Attorney General)*, 2010 FC 980, 375 FTR 13.

[33] Since this case law sufficiently established the applicable standard of review, I feel it is not necessary to proceed with a standard of review analysis.

VI. The parties' positions

A. *Applicant's position*

[34] The applicant claims that the Board's decision is unreasonable in regard to the medical evidence on file and that it was unreasonable for it to not grant any credibility to the opinions of Drs Leroux and Parisot. The applicant claims that from the start the Board was confused about the issue to decide when it asked the following question:

> [TRANSLATION]
> Is the medical evidence in support of the appellant's application credible in the circumstances and/or sufficient to raise reasonable doubt in the Tribunal's mind?

The applicant insists that the applicable burden is the balance of probabilities and it is not relevant to question whether the evidence raises a reasonable doubt.

[35] The applicant also claims that the decision violates the clear directives given by Martineau J. regarding the credibility of the medical evidence.

[36] The applicant also insists that Dr. Leroux is specialized doctor with a specific expertise, who met with the applicant and inquired about the duties he carried out during his military career. The applicant claims that if the Board had questions or clarifications for the doctors, it could have, under section 38 of the *VRAB Act*, convened a hearing or asked for clarifications in writing. The applicant also submits that the Board neglected to consider section 2 of the *Pension Act*, RSC 1985, c P-6 [*Pension Act*] and sections 3 and 39 of the *VRAB Act*.

[37] The applicant also states that the medical evidence clearly shows that the applicant's osteoarthritis is more severe than osteoarthritis that would normally be found in a person of his age,

that he complained of neck pain and consulted many times and the medical evidence establishes a causal link between his condition and the duties he performed during his military service.

[38] The applicant claims that the Board is not made up of doctors and it should have accepted the medical evidence that is substantiated, credible and uncontradicted. During the hearing, the applicant also noted that the Board found the opinion of Dr. Leroux was not sufficiently substantiated but the same Board was satisfied and accepted the link to his lumbar condition. The applicant submits that the medical evidence was based on many elements and not just wearing the helmet, which seems to be the only element the Board relied on to dismiss his application.

[39] Considering the background of the case and the many decisions already rendered by the Appeal Board in the case, the applicant asked the Court to render the decision the Board should have made or refer the case back with clear and precise directions.

B. *Respondent's position*

[40] The respondent claims that the Board's decision is reasonable and it made a reasonable assessment of the medical evidence. The respondent claims that the burden was on the applicant, who did not establish, on a balance of probabilities, that his military service was the direct cause of his osteoarthritis condition, as required under subsection 21(2) of the *Pension Act* to justify his entitlement eligibility.

[41] The respondent did not question the applicant's cervical osteoarthritis condition but insists that the evidence was insufficient to establish that the condition was consecutive or related to his

military service. The respondent acknowledges that section 39 of the *VRAB Act* obliges the Board to accept any uncontradicted evidence that "it considers to be credible..." This provision does not, however, exempt the applicant from his duty to prove a causal link between his condition and his military service and it is the Board's responsibility to determine whether the evidence, although uncontradicted, is credible and to assess its probative value.

[42] The applicant also claims that the Board conducted a thorough analysis of the medical evidence and that its decision had reasons and was well stated; it explained in detail why it dismissed Dr. Leroux and Dr. Parisot's reports. The respondent submits that Dr. Leroux neglected to explain in his report the premises followed or the basis of his opinion that a causal link existed. Moreover, Dr. Leroux's findings are not supported by any medical foundation. The respondent insists on the fact that the only evidence related to wearing a helmet is the applicant's story. Dr. Leroux also erred in his 2008 report by referring to supposedly new X-rays, when the last X-rays were from 2002.

[43] As for Dr. Parisot, the respondent claims that he did not provide a medical basis for the finding that the applicant's cervical osteoarthritis was caused by wearing a helmet. It states that Dr. Parisot does not explain how and to what extent wearing the helmet could have contributed to the applicant's condition. In short, the three medical reports were not sufficiently supported and the Board's interpretation was in fact reasonable.

[44] As for the remedies sought by the applicant, the respondent claims that if the Court allows the application for judicial review, it must refer the case back to the Board for review and not render

a decision that, in his opinion, should have been rendered. As for issuing specific directions, the respondent claims that the Court should refrain because the power to issue directions in the nature of a verdict should only be used in the clearest of circumstances (*Rafuse v Canada (Minister of Human Resources Development)*, 2002 FCA 31 at para 14, 222 FTR 160).

VII. Analysis

A. *Preliminary observation*

[45] The respondent does not claim the Board erred by agreeing to consider Dr. Leroux's 2008 report and Dr. Parisot's report during its review of the applicant's application. Therefore, I do not believe that it is necessary to review the parameters that apply to justify reconsideration. I would also note that I feel the additional evidence presented by the applicant in support of his application for reconsideration meets the criteria established in *Palmer v The Queen*, [1980] 1 SCR 759, 106 DLR (3d) 212, at page 224.

[46] In this case, the Board found that the medical evidence, in its entirety, did not justify allowing the application because it was not credible. This is the aspect I will focus on.

B. *Legal framework*

[47] The pension entitlement claimed by the applicant is pursuant to subsection 21(2) of the *Pension Act*, which states:

(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,	(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire

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

[48] There was no challenge that the burden of proof is on the applicant. The case law of this Court has established that to meet his burden, the applicant was to show that the military service was the main cause of his injury or disease and he was to establish this causal link. (*King v Canada (Veterans Review and Appeal Board)*, 2001 FCT 535 at para 65, 205 FTR 204 [*King*]; *Leclerc v Canada (Attorney General)* (1996), 126 FTR 94 at paras 18-21, 70 ACWS (3d) 916 (FCTD); *Boisvert, supra* at para 26).

[49] In its review of the applicant's case and the evidence on file, the Board must also consider the interpretive rule contained at section 2 of the *Pension Act*:

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	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

of military service, and to their dependants, may be fulfilled.	suite de leur service militaire, ainsi que les personnes à leur charge.

[50] The Appeal Board must also consider articles 3 and 39 of the *VRAB Act* that set out favourable rules regarding the assessment of evidence:

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

[51] As noted by Teitelbaum J. in *Mackay v Canada (Attorney General)* (1997), 129 FTR 286 at para 24, 71 ACWS (3d) 270 (FCTD): "section 3 therefore creates certain liberal and purposive guidelines for claims for veterans' pension in the light of the nation's great moral debt to those who have served this country."

[52] Section 39 establishes guidelines for handling evidence:

39. In all proceedings under this Act, the Board shall	39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(a) draw from all the circumstances of the case and all the evidence presented to it	*a*) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions

every reasonable inference in favour of the applicant or appellant;	les plus favorables possible à celui-ci;
(*b*) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	*b*) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(*c*) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.	*c*) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[53] It is also known that these rules do not relieve the applicant of his burden of proof nor do they oblige the Board to blindly accept any evidence, even when uncontradicted. Section 39 of the *VRAB Act* clearly states that the Board must accept any evidence that "it considers to be credible". The Court of Appeal summarized the impact and limits of section 39 in *Wannamaker* at paras 5 and 6, where Sharlow J. for the Court, stated:

> Section 39 ensures that the evidence in support of a pension application is considered in the best light possible. However, section 39 does not relieve the pension applicant of the burden of proving on a balance of probabilities the facts required to establish entitlement to a pension: *Wood v. Canada (Attorney General)*, (2001), 199 F.T.R. 133 (F.C.T.D.), *Cundell v. Canada (Attorney General)* (2000), 180 F.T.R. 193 (F.C.T.D).
>
> Nor does section 39 require the Board to accept all evidence presented by the applicant. The Board is not obliged to accept evidence presented by the applicant if the Board finds that evidence not to be credible, even if the evidence is not contradicted, although the Board may be obliged to explain why it finds evidence not to be credible: *MacDonald v. Canada (Attorney General)*, (1999), 164 F.T.R. 42 at paragraphs 22 and 29. Evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove.

(See also *King*, at para 39)

[54] The assessment the Board makes of the "credibility" of the medical evidence must be reasonable and take into consideration the guidelines provided at section 2 of the *Pension Act* and section 3 of the *VRAB Act*. In this case, I feel that the assessment the Board made of the medical evidence and in particular, of the opinions issued by Drs. Leroux and Parisot, was unreasonable.

[55] First, although not a determining factor, it is of note that the medical evidence composed of reports by Dr. Leroux and Dr. Parisot was not contradicted and the Board did not find it necessary to obtain additional medical evidence using section 38 of the *VRAB Act*. Although the Board does not have an obligation to require additional evidence, it may do so when it has doubts as to the credibility of the evidence presented by an applicant.

[56] Moreover, the Board does not have any particular medical expertise. In my opinion, the statements by Harrington J. in *Armstrong* at paras 36-38, apply to the present case:

> [37] There is no basis to assume that the Board itself has any medical expertise. Section 38 of its Act allows it to obtain its own medical evidence. This led Mr. Justice Nadon, as he then was, to conclude in *Rivard v. Attorney General of Canada*, 2001 FCT 704, 209 F.T.R. 43, that the Board has no inherent expertise in this area.

[57] Additionally, it is odd to note that the Board considered Dr. Leroux's 2006 report to be credible for the applicant's lumbar condition, but not for the cervical condition. In his 8-page report, Dr. Leroux addresses, in my opinion, both of the applicant's conditions and the causal link, with as much attention to both conditions.

[58] It is true that Dr. Leroux does not refer to any statistical studies or medical literature to support his opinion regarding the causal link, but I feel this is insufficient to claim that his opinion is not credible.

[59] First, Dr. Leroux is an orthopaedic surgeon with the expertise and all the qualities required to give an opinion on the applicant's condition and the causal link between his condition and the duties he performed during his military service. In my opinion, it is not necessary for a medical specialist to support his findings with medical literature or statistics in all cases. In this case, one can imagine that the questions Dr. Leroux was asked are clearly within his field of expertise and medical knowledge. Also, his reports are not tabloid journalism, summary reports or reports that could be considered "reports of convenience". Dr. Leroux met with the applicant, questioned him about the duties he fulfilled and the tasks he performed and he conducted a physical exam of the applicant. Nothing in the file would lead to a questioning of the truthfulness or conformity of the information the applicant gave to Dr. Leroux. Dr. Leroux provided a detailed overview of the tasks the applicant performed during his career and there is no reason to doubt the accuracy of this summary. As Mandamin J. stated in *Acreman*: "the opinion of a medical specialist...especially one who has examined a patient, should be carefully considered."

[60] Moreover, Dr. Leroux issued an unequivocal opinion about the causal link between the applicant's condition and the duties he performed. He indicated that repetitive strain injuries would have aggravated the applicant's two conditions. He also noted that the applicant's osteoarthritis was more severe than what should normally be found in someone of his age. The fact his opinion was based on X-rays from 2002 does not change a thing, on the contrary. In 2002, the applicant was

younger still, and he would normally have had even less osteoarthritis than what was noted. In his additional report of June 16, 2008, Dr. Leroux restated the main duties the applicant carried out that led him to find there was a causal link:

> In the **synthesis and discussion**, it is clearly stated that the patient was a supply technician and in the infantry from 1985 to 2002. During that time he would have transported many loads, regularly and repeatedly pushed, pulled objects weighing up to 90 pounds as a traffic technician and also handled loads up to 80 pounds with turning movements on pallets, in addition to the training as a soldier, performing "PT tests", walking 13 km wearing equipment, weapons and helmet, that can weigh up to 60 or 70 pounds.
>
> [Highlighted in the original]

[61] Dr. Leroux clearly indicated that his opinion was there was a relationship between the aggravation of the applicant's condition and the duties he carried out during his military service in a minimum proportion of 3/5.

[62] Therefore, in light of Dr. Leroux's two reports, I feel that it was unreasonable for the Board to find that the 2006 report was based more on factors relevant to the disc disease than the cervical condition. I also feel that a full reading of both reports leads to the conclusion that Dr. Leroux found that the various duties the appellant carried out, in particular those he mentioned again in the second report, led to repetitive strain injuries in the cervical area. The Board indicates that the X-ray report from 2002 does not show that the applicant had more severe osteoarthritis than what was expected in a person of his age. The X-ray report simply does not provide an opinion on this issue; it describes the "photo" of the applicant's cervical region. However, Dr. Leroux has the expertise required to issue an opinion on the scope of the applicant's condition and his opinion is absolutely not contradicted. Moreover, the fact that guidelines on repetitive strain injuries only apply to

weight-bearing joints does not exclude the possibility that repetitive strain injuries might cause or aggravate a condition in the cervical region, which is not a weight-bearing joint precisely because it does not have a support function. Wearing the helmet is a good example. It is not difficult to imagine that walking while wearing equipment, a weapon and helmet that could weigh 60-70 pounds might lead to repetitive strain injuries to the cervical region, which is not a weight-bearing joint. This is what I understand from Dr. Parisot's report when he states that wearing the helmet is "not ergonomic for the physiologically non-weight bearing cervical spine."

[63] Also, I find that Board's interpretation of Dr. Parisot's report was unfair and unreasonable. First, it discredits Dr. Parisot who mentions a hernia. However, the MRI from 1998 mentioned a herniated disc. The fact the 2002 X-ray report did not see it changes nothing. Moreover, when Dr. Parisot speaks of joints that are "already jeopardized" it is clear that he is referring to the applicant's neck pain, his advanced osteoarthritis and the X-ray findings. It is also possible to infer that, as a military doctor, Dr. Parisot is well aware of the characteristics of the steel helmets worn by infantrymen.

[64] I therefore feel that in whole, Dr Leroux's reports are sufficiently supported for me to understand the foundation and elements underlying his opinion. The same can be said of Dr. Parisot's report. As a military doctor, he should have strong knowledge of the duties the applicant performed and the equipment used, and he supports Dr. Leroux's opinion.

[65] For all these reasons, I feel that it was unreasonable in this case to dismiss the two reports by Dr. Leroux and that of Dr. Parisot and not grant them any credibility. In light of the medical

evidence the file, the Board did not comply with the criteria set out in section 2 of the *Pension Act* and sections 3 and 39 of the *VRAB Act*, and the Court's intervention is justified.

[66] The case is referred back to another panel of the Board for reconsideration in light of the findings in this judgment.

JUDGMENT

THE COURT RULES that the application for judicial review is allowed, with costs. The Board's February 9, 2011, decision is quashed and the matter is referred back so the applicant's request for reconsideration can be reviewed by a new panel in light of the present judgment.

"Marie-Josée Bédard"
Judge

Certified true translation
Elizabeth Tan, Translator