Federal Court  Cour fédérale

Date: 20130809

Docket: T-1333-12

Citation: 2013 FC 852

Ottawa, Ontario, August 9, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BRIAN ROACH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under section 18.1 of the *Federal Courts Act*, RSC 1985 c F-7 for judicial review of a decision dated 18 June 2012 (Decision) of the Veterans Review and Appeal Board (Board). In the Decision, the Board ruled that the Applicant's medical condition, complications from diabetes, did not arise out of or was not directly connected with his service with the Royal Canadian Mounted Police (RCMP).

BACKGROUND

[2] The Applicant is a 55-year-old man. He has served with the RCMP since 1 July 1980. He was on a leave of absence starting 7 November 2011 and retired on 7 November 2012.

[3] The Applicant was diagnosed with Type 1 insulin-dependent diabetes in April, 1992. It is important for diabetics to maintain blood sugar levels within a normal range, or else they may develop complications. According to the Canadian Diabetes Association, treatment of Type 1 diabetes is dependent on taking insulin as required, eating healthy meals and snacks, regular physical activity, and managing stress (Applicant's Record, Tab 3).

[4] The Applicant states that his ability to treat and control his diabetes was seriously affected by his service with the RCMP. As a result, he developed a number of related complications, including diabetic neuropathy and diabetic retinopathy. Diabetic neuropathy is nerve damage and a feeling of numbness in the diabetic's extremities. Once this condition has developed, it can lead to diabetic foot infection, the risk of amputation, and erectile dysfunction. Diabetic retinopathy is the development of aneurysms in the diabetic's eyes, which may cause temporary blindness and lead to permanent vision loss.

[5] The Applicant applied for a disability pension on the grounds that the development of these diabetic complications is directly connected to his service with the RCMP. The Applicant says he was a hardworking and committed member of the RCMP and that each of his postings demanded long hours, a significant amount of stress, and a selfless dedication to this job.

The Applicant's History with the RCMP

[6] In 1992, shortly after the Applicant was diagnosed with diabetes, he was ordered to report for duty at a two-year posting in Shamattawa, Manitoba. Shamattawa is an isolated reserve in Northern Manitoba, with a population of approximately 750 people. At this time, the Shamattawa reserve was considered by the RCMP to be one of the most violent postings in Manitoba.

[7] Due to its remote location, living conditions in Shamattawa were poor, particularly for someone with diabetes. In particular:

- The Applicant and the other officers lived in trailers that were old and broken down. The window screens had holes, and there were leaks in the floors and roof;

- There was no physician in Shamattawa. The only health care facility was a federal nursing station;

- Fresh food was scarce, which made it difficult to follow a healthy diet. The Applicant could order groceries from Thompson, but due to the weather conditions, these groceries frequently could not be delivered; and

- There were no exercise facilities.

[8] Furthermore, the Applicant's work load was onerous. He carried approximately 250 files, which were all of a violent nature. The hours were long, and the Applicant was on call around the

clock. He frequently had to skip meals and insulin shots, and could not establish a regular schedule for the treatment of his diabetes.

[9] In 1994, the Applicant was transferred to the Criminal Intelligence Section in Winnipeg, where he was stationed until 1997. At this posting, he completed wiretap investigations, which involved preparing and reviewing extensive materials. He worked long hours, and regularly had to skip meals to complete his work. It was also difficult for him to monitor his blood sugar levels, and on a number of occasions he had to consume chocolate bars to keep his blood sugar levels from falling too low.

[10] From 1997 until 2000, the Applicant was stationed with the Winnipeg Drug Section where he supervised major drug-related cases. He was again required to work long and irregular hours, and struggled to control his blood sugar levels. The Applicant's smoking and drinking also increased due to the expectations of his job as an undercover operator.

[11] In 2000, the Applicant was elected by his fellow members to represent them as a Division Staff Relations Representative (DSRR). He was promoted to the National Executive of the program in 2005. The nature of the program and the role of a DSSR involved the following:

- DSSRs represent RCMP members with respect to anything that may affect their welfare or dignity. They are involved in negotiations over working conditions, and provide support and advice to members who are involved in serious incidents, including the death of a member, a shooting by an RCMP officer, a death in a cell or during an arrest, or the arrest of an RCMP member;

- Regular duties included dispute resolution and meetings with RCMP management. However, when a major traumatic event occurs, DSSRs spend weeks at a time working extensive overtime dealing with high stress situations;

- DSSRs work 10 to 14 hours a day, and often take urgent calls outside of working hours;

- DSSRs who (like the Applicant) are members of the National Executive are expected to travel frequently. Meal times are irregular, and it is not unusual to miss meals entirely; and

- There are few jobs in the RCMP that are as stressful as being a DSSR on the National Executive.

[12] While working as a DSSR, the Applicant made himself available 24 hours a day to the members he represented. He traveled extensively and worked irregular hours, which made it difficult for him to control his blood sugar levels. By the time of his disability application, the Applicant was smoking two packs a day of cigarettes due to the stress of his DSSR position.

The Applicant's Medical History

[13] Normal blood sugar levels range from 4.5 to 6%. After receiving treatment, and prior to starting his Shamattawa posting, the Applicant's blood sugar levels normalized to 4.85%. While working in Shamattawa, the Applicant's blood sugar levels ranged from 8% to 11.6%. While posted in the Criminal Intelligence Section, they ranged from 9.4% to 10.2%. While posted in the

Winnipeg Drug Section, they ranged from 8.8 to 11%. While the Applicant was a DSSR, they ranged from 8.7% to 10%. Since commencing his leave of absence in November, 2011, the Applicant's blood sugar levels have improved to 7%.

[14] The Applicant's specialist from 1992 to 2011, Dr. Wiseman, attributed the Applicant's inability to monitor his blood sugar levels to his demanding profession (Applicant's Record, page 81). Since Dr. Wiseman retired, the Applicant has been treated by Dr. Silha. In a report dated 20 April 2012 (Applicant's Record, page 144), Dr. Silha agreed that the Applicant's ability to control his diabetes was impeded by his demanding occupation, and noted a marked improvement since the Applicant went on leave. Dr. Silha also pointed to the posting in Shamattawa as a significant challenge in the Applicant's diabetes control.

[15] As a result of his inability to control his blood sugar levels, the Applicant developed diabetic complications. Namely, the Applicant has numbness in his left foot (diabetic neuropathy) and vision impairment (diabetic retinopathy). These complications have had a serious impact on the Applicant's quality of life; it is difficult for him to attend social and family functions due to the pain in his legs, and he in unable to perform usual household tasks. He is also suffering from erectile dysfunction. Even if the Applicant continues to properly control his blood sugar levels, he will continue to suffer the consequences of being unable to properly control his diabetes for nearly 20 years (Applicant's Record, page 144).

[16] The Applicant has submitted Affidavits from a number of members of the RCMP who worked with him and who observed the effect that his service had on his health. Kevin Macdougall recalls the Applicant looking extremely tired, drinking large quantities of water, injecting insulin during the day, and sometimes having slurred speech. Gordon Dalziel states that he and the

Applicant would often not have time to eat lunch or dinner due to their heavy work load, and when they did have time to eat they would sometimes be forced to grab fast-food because of the limited amount of time. Ken Legge and David MacDonald remember the Applicant telling them what his high blood sugar levels were and the detrimental effect work was having on his health.

[17] Roy Hill states that the Applicant was often unable to follow his daily routine due to urgent work and meetings, and it was often apparent that he had not eaten at the appropriate time. During long meetings, he witnessed the Applicant taking his insulin shots at the table and he had to bring him food to help him make it to the next break. He witnessed a gradual decline in the Applicant's health. The Applicant once experienced temporary blindness for several days. Mr. Hill says that the negative impact that the job had on the Applicant's health affected his tolerance and personality.

[18] The Affidavits of the Applicant's fellow RCMP officers state that he was a hardworking member of the RCMP, who sacrificed his own health to fulfill his job responsibilities.

[19] On 9 August 2010, the Applicant submitted an application to Veteran Affairs Canada (VAC) for a disability pension relating to three conditions: tinnitus, post-traumatic stress disorder, and diabetes. On 26 January 2011, VAC granted the application as it related to tinnitus and post-traumatic stress disorder, but denied his claim related to diabetes.

[20] The Applicant appealed the VAC decision and attended a hearing before the Entitlement Review Panel on 10 August 2011, who dismissed his application on 9 September 2011. The Applicant then appealed this decision to the Board, who dismissed the Applicant's appeal on 18 June 2012.

DECISION UNDER REVIEW

[21] The Applicant requested three-fifths entitlement on the basis that his diabetic condition was aggravated or worsened due to his service with the RCMP.

[22] The Board started by reviewing the medical evidence. It noted that a report dated 9 July 1992 said that the Applicant's vision had returned to normal after his diabetes was controlled. A report dated 6 April 1993 noted that a slight blurring of vision had returned.

[23] A report dated 22 November 1999 stated that the Applicant was "safely able to continue with his position," and that he is not considered a front line constable and so is not required to meet the most stringent occupational restrictions. Another report dated 3 December 1999 said that there was "certainly no proliferative disease and no cause for alarm at the moment." On 7 February 2000 it was reported that the Applicant has a "few scattered microaneurysms" but no "evidence of other diabetic complications." In 2001, the Applicant was noted as having "very minimal background retinopathy." Other reports from 2002 until 2008 note that the Applicant is diabetic, but nothing further is noted.

[24] A medical report from Dr. Wiseman dated 12 November 2010 stated that:

> I agree with Mr. Roach's suggestion that the work load and regular hours required for his occupation and the Royal Canadian Mounted Police had a deleterious effect on his diabetic control, leading to diabetic complications, particularly the neuropathy in his legs.

[25] The report dated 16 April 2012 from Dr. Silha stated that the Applicant's condition has markedly improved since he left active duty, and that his ability to control his diabetes was impeded by his occupation, particularly in the early years. Dr. Silha also noted co-morbidities that could be attributed to suboptimal control of diabetes. The Board also noted the affidavits of the Applicant's colleagues, as well as hemoglobin results from the years 1992 until 2011, which were above normal ranges, for the most part.

[26] The Board acknowledged its obligations under section 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 (VRABA), to accept all uncontradicted evidence and draw all reasonable inferences in favour of the Applicant. It also noted that the Applicant was not seeking full entitlement, due to the fact that the cause of diabetes is unknown and the Applicant had some known risk factors, such as being a smoker.

[27] The Board did not think that the evidence supported the Applicant's submission that his service with the RCMP seriously affected his ability to treat and control his diabetes. Although the evidence showed that the Applicant developed retinopathy and numbness in his right foot, it did not think there were any serious complications from these conditions throughout the Applicant's service. The Board noted that most of the Applicant's clinical reports were unremarkable regarding the Applicant's diabetic condition and the resulting retinopathy and neuropathy.

[28] The Board noted that the Applicant's blood sugar readings had been above the normal range, but there was no evidence that these above-normal readings had deleterious consequences. The Applicant was monitored by specialists on a regular basis, and there were no indications that his condition was worsening. The Board noted Dr. Wiseman's opinion dated 12 November 2010,

but was unable to conclude that the facts supported his view on the "deleterious effect" of the Applicant's working conditions. The Board noted that Dr. Silha's opinion did not address the fact that the Applicant was a smoker, and though he discussed co-morbidities he did not specifically address whether they existed in the Applicant's case. Thus, the Board did not give probative value to Dr. Silha's opinion.

[29] The Board accepted that many workplace demands were put on the Applicant throughout his career, but found there was insufficient evidence that his diabetic condition, while diagnosed in service, worsened. Further, even if it found a worsening of the condition, the evidence suggested that the factors were not sufficiently out of the Applicant's control as to impede his ability to manage his condition. Thus, the Board dismissed the Applicant's appeal.

ISSUES

[30] The Applicant submits the following issue in this application:

- Did the Board commit an error in reaching the Decision?

STANDARD OF REVIEW

[31] The Supreme Court of Canada, in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[32] In *Beauchene v Canada (Attorney General)*, 2010 FC 980 [*Beauchene*], the Court held at paragraph 21 that "the interpretation of medical evidence and the assessment of an applicant's disability" are matters of mixed fact and law that are reviewable on a reasonableness standard. This approach was followed in *Sloane v Canada (Attorney General)*, 2012 FC 567 and *Moreau v Canada (Veterans Review and Appeal Board)*, 2013 FC 168. Thus, the standard of review application to this issue in this case is reasonableness.

[33] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[34] The following sections of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 (*RCMP Superannuation Act*), are applicable to this application:

Eligibility for awards under *Pension Act*	**Admissibilité à une compensation conforme à la *Loi sur les pensions***
32. Subject to this Part and the regulations, an award in accordance with the *Pension Act* shall be granted to or in respect of the following	32. Sous réserve des autres dispositions de la présente partie et des règlements, une compensation conforme à la *Loi sur les pensions* doit être

persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force:	accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service dans la Gendarmerie, à toute personne, ou à l'égard de toute personne :
(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability or has died; and	a) visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant ou après cette date, a subi une invalidité ou est décédée;
(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died.	b) ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

[35] The following sections of the *Pension Act*, RSC 1985, c P-16, are applicable to this application:

Service in militia or reserve army and in peace time	**Milice active non permanente ou armée de réserve en temps de paix**
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,	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) where a member of the forces suffers disability	a) des pensions sont, sur demande, accordées aux

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;

(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

(c) where a member of the forces is in receipt of an additional pension under paragraph (a), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner dies, except where an award is payable under subsection 34(8), the additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in respect of another spouse or common-law partner is

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;

b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

c) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa a), du paragraphe (5) ou de l'article 36 continue d'être versée pendant l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui il cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

awarded to the member commencing during that period, until the date that it so commences; and

(d) where, in respect of a survivor who was living with the member of the forces at the time of that member's death,

d) d'une part, une pension égale à la somme visée au sous-alinéa (ii) est payée au survivant qui vivait avec le membre des forces au moment du décès au lieu de la pension visée à l'alinéa b) pendant une période d'un an à compter de la date depuis laquelle une pension est payable aux termes de l'article 56 — sauf que pour l'application du présent alinéa, la mention « si elle est postérieure, la date du lendemain du décès » à l'alinéa 56(1)a) doit s'interpréter comme signifiant « s'il est postérieur, le premier jour du mois suivant celui au cours duquel est survenu le décès » — d'autre part, après cette année, la pension payée au survivant l'est conformément aux taux prévus à l'annexe II, lorsque, à l'égard de celui-ci, le premier des montants suivants est inférieur au second :

(i) the pension payable under paragraph (b)

(i) la pension payable en application de l'alinéa b),

is less than

(ii) the aggregate of the basic pension and the additional pension for a

(ii) la somme de la pension de base et de la pension supplémentaire

spouse or common-law partner payable to the member under paragraph (a), subsection (5) or section 36 at the time of the member's death,	pour un époux ou conjoint de fait qui, à son décès, est payable au membre en application de l'alinéa a), du paragraphe (5) ou de l'article 36.

a pension equal to the amount described in subparagraph (ii) shall be paid to the survivor in lieu of the pension payable under paragraph (b) for a period of one year commencing on the effective date of award as provided in section 56 (except that the words "from the day following the date of death" in subparagraph 56(1)(a)(i) shall be read as "from the first day of the month following the month of the member's death"), and thereafter a pension shall be paid to the survivor in accordance with the rates set out in Schedule II.

[36] The following sections of the VRABA are applicable to this application:

Construction	**Principe général**
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	**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.

and to their dependants may be fulfilled.	
[…]	[…]
Rules of evidence	**Règles régissant la preuve**
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 every reasonable inference in favour of the applicant or appellant;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions 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.

ARGUMENTS

The Applicant

[37] In *MacKay v Canada (Attorney General)*, [1997] FCJ No 495, Justice Max Teitelbaum commented on the legislation governing this application:

> 21 In effect, Section 39 requires that when new and credible evidence is presented during a reconsideration proceeding, the

> VRAB has a duty to consider and weigh the evidence in the applicant's favour.
>
> […]
>
> 24 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.

[38] To establish a disability pension, the Applicant must prove that:

a) He suffered an injury, disease or aggravation thereof resulting in the disability; and

b) It was directly connected to his service with the RCMP.

[39] The Applicant is not required to demonstrate that his service with the RCMP is the only cause of his disability. The amount of entitlement to a disability pension is awarded in fifths; if his RCMP service played a minimal part in aggravating his disability, the Applicant will be entitled to one-fifth (or 20%) of a disability pension.

[40] Because the Board concluded that the Applicant was not entitled to a disability pension, it did not address the extent of his disability. The Board only considered whether the evidence established that the development of complications relating to the Applicant's diabetes were service related. The Applicant's application was based on the grounds that he had developed a physical disability during his service with the RCMP (namely, serious, permanent diabetic complications), and that the development of these complications was directly connected to his service with the RCMP. He submitted that as a result of his job, he was unable to manage his blood sugar levels, which led to the development of serious diabetes-related complications.

[41] Pensions have been granted to RCMP members in the past for complications arising from diabetes (see, for example, *Yates v Canada*, 2002 FCT 111). The Applicant submitted medical evidence clearly demonstrating that the demands of his job contributed to the development of the complications he suffers from.

[42] The Applicant did not claim that his service with the RCMP caused his diabetes, or even that it was the sole cause of his diabetic complications. His submission was that, in light of the evidence establishing a clear connection between his diabetic complications and his service with the RCMP, he is entitled to a least three-fifths of a disability pension.

[43] The Applicant submits that in reaching its conclusion the Board failed to give proper consideration to the evidence submitted by the Applicant, and failed to give the Applicant the benefit of the doubt as required by statute. It is clear that the Applicant's inability to control his diabetes has seriously affected his quality of life; however none of the complications were addressed by the Board and appear to have been ignored or disregarded.

[44] The Applicant submits that the extent of his disability and the seriousness of his medical condition are not factors in determining his entitlement to a pension. These issues should be assessed by the Board in determining the extent of the Applicant's disability pension, and not his entitlement to a disability pension.

[45] The Board's contention that there was "no evidence" that the Applicant's above-normal blood sugar levels had deleterious consequences is contrary to the credible medical evidence provided by Dr. Silha and Dr. Wiseman. The Board cannot simply ignore the evidence of the physicians who have been responsible for treating the Applicant.

[46] Furthermore, the Board's conclusion that the "workplace factors" were not sufficiently beyond the care and control of the Applicant so as to impede his ability to manage his condition are contrary to the uncontradicted evidence from the Applicant, several of his fellow RCMP officers, and Dr. Silha. This evidence all supports the Applicant's submission that it was very difficult for him to control his blood sugar levels due to his workplace demands. No evidence was put forward to the contrary; the suggestion that the Applicant could have managed his condition better is based on the Board's own beliefs and assumptions, and not on the evidence before it.

[47] The Board's conclusions are contrary to its statutory obligation to accept any uncontradicted and credible evidence put forward by the Applicant. The Federal Court has condemned decisions of the Board that fail to accept uncontradicted evidence presented on behalf of applicants, particularly when the Board's decision is based on the Board's own medical opinion rather than the medical evidence adduced in a pension applicant's file (*Rivard v Canada (Attorney General)*, [2001] FCJ No 1072 [*Rivard*]; *Armstrong v Canada (Attorney General)*, 2010 FC 91 [*Armstrong*]).

[48] As pointed out in *Rivard*, the fact that section 38 of the VRABA allows the Board to seek medical advice on any matter suggests that the Board has no particular medical expertise. If the Board disagreed with the medical evidence put forward by the Applicant, it should have obtained medical evidence under section 38. As the Court said at paragraph 42 of *Rivard*:

> In my opinion, the very existence of section 38 suggests that the Board does not have an inherent jurisdiction over medical matters. It does not have any particular medical expertise that would enable it to state without supporting evidence that Dr. Sestier's opinion and the article he adduced in this case were not part of the medical consensus. Therefore, I believe that the Board could not present

> medical facts that had not been adduced as evidence for the purpose of rebutting the applicant's evidence. If the Board required evidence other than that adduced by the applicant or evidence representing the medical context, it had only to invoke section 38 and seek medical advice.

[49] The Court's comments in *Rivard* apply particularly to the Board's decision in the present case to give "no probative value" to Dr. Silha's advice. The Board rejected Dr. Silha's opinion because it did not address that the Applicant had been a smoker, and did not specifically address whether any co-morbidities exist in the Applicant's case. The Applicant submits that if the Board required further medical evidence on these two factors, it could have invoked section 38 and sought medical advice. It chose not to do so, and as a result cannot rely on the absence of this evidence to conclude that the Applicant is not entitled to a pension.

[50] The Applicant submits that it was a clear error for the Board to reject the medical evidence of Dr. Silha and Dr. Wiseman, who are recognized specialists and who treated the Applicant. The policy of the *Pension Act*, which was reiterated by the Court in *Schut v Canada*, 2003 FC 1323 [*Schut*] at paragraph 18 states that:

> On the other hand, medical opinion, expressed by a recognised specialist in a field, who has treated or examined the applicant, should be accepted unless it is obviously or admittedly based solely on the history obtained from the applicant (not based on personal examination of the applicant), or is entirely speculative.

[51] The Applicant submits that the Board erred in law by failing to consider the overwhelming and uncontradicted evidence presented on his behalf which established that his medical condition arose out of and was directly connected to his service with the RCMP.

The Respondent

[52] In proceedings before the Board, an applicant is required to prove his case on a balance of probabilities (*Moar v Canada (Attorney General)*, 2006 FC 610 at paragraph 10). In *Canada (Attorney General) v Wannamaker*, 2007 FCA 126, the Federal Court of Appeal noted that section 39 of the VRABA ensures that the evidence submitted by an applicant is considered "in the best light possible." This provision, however, "does not relieve the pension application of the burden of proving on a balance of probabilities the facts required to establish the entitlement to a pension." The Court in *Wannamaker* went on to say that evidence is credible if it is "plausible, reliable and logically capable of proving the fact it is intended to prove."

[53] The Federal Court noted in *Tonner v Canada (Minister of Veterans Affairs)*, [1995] FCJ No 550, that section 39 does not imply that any submission made by an applicant must automatically be accepted by the Board. The Court said that an applicant's claim must still be supported by evidence that is credible and reasonable. Although the Board is required to draw every reasonable inference in favour of the applicant, the facts inferred must be grounded on "more than a mere possibility" (*Elliot v Canada (Attorney General)*, 2003 FCA 298 at paragraph 46).

[54] In accordance with section 32 of the *RCMP Superannuation Act*, the Applicant must establish that he suffered a disease resulting in the disability and that it was directly connected to his service with the RCMP. The Respondent submits that the Board was correct in determining

that the medical evidence submitted by the Applicant failed to establish that his medical condition was aggravated by his service with the RCMP.

[55] Regardless of whether a pension has been granted to other RCMP members for diabetes in other situations, the Board is entitled to deference in evaluating the evidence presented by the Applicant. The Board evaluated that evidence, and reasonably came to the following conclusions:

- The cause of type 1 diabetes is unknown, but it is manageable through care and control of overall health;
- The Applicant has some known risk factors, such as being a smoker;
- There was no evidence of any serious complications from the Applicant's diabetes throughout his service with the RCMP;
- The Applicant's condition was monitored fairly regularly;
- Workplace factors were not sufficiently beyond the care and control of the Applicant so as to impede his ability to manage his condition.

[56] The Board is entitled to deference in reviewing the reliability and credibility of medical evidence that was presented by the Applicant; it was within the range of acceptable outcomes for the Board to determine that the facts do not support Dr. Wiseman's view contained in his letter of 12 November 2010. Similarly, the Board was entitled to conclude that it could not give

probative value to Dr. Silha's opinion because he did not address that the Applicant had been a smoker, and did not specifically address whether co-morbidities exist in the Applicant's case.

[57] Despite the Applicant's assertions, the Board did not attempt to substitute and assert its own beliefs and assumptions for uncontradicted medical evidence. It simply found a lack of credible medical evidence to establish a pension entitlement. The cases presented by the Applicant, *Rivard* and *Armstrong*, both involve situations where the Board substituted its own medical conclusions for the medical evidence before it.

[58] In *Schut*, also cited by the Applicant, the Board found that the medical evidence was not sufficiently credible and reasonable to support the applicant's case on the balance of probabilities, and denied entitlement accordingly. The Federal Court supported that finding.

[59] Furthermore, the Applicant has raised section 38 of the VRABA for the first time in his Memorandum of Fact and Law, and contends that if the Board disagreed with the medical evidence adduced by the Applicant, it could have obtained medical evidence under that section. However, the Respondent submits that the Applicant cannot argue grounds for relief that were not plead in his Notice of Application (*Producteurs Laitiers du Canada v Cyprus (Commerce and Industry)*, 2010 FC 719).

[60] Also, the Federal Court has held that, unless an issue is jurisdictional, it will not review a tribunal's decision on an issue that was not raised before it. Since it appears that section 38 was not raised before the Board, its decision should not be reviewed on this issue (*Sinclair v Canada (Attorney General)*, 2006 FC 528). Section 38 is purely discretionary and the Board is not required to adduce its own medical evidence to contradict the evidence of the Applicant. In this

case, as in *Schut*, it only had to evaluate the evidence presented to it. It found this evidence wanting.

[61] The Respondent submits that even when viewed in the best possible light, the evidence fails to establish, on a balance of probabilities, that the Applicant is entitled to a pension. The medical evidence suggests that although in 1992 the Applicant was suffering from diabetes and had developed symptoms related to retinopathy and numbness in his right foot, there is an absence of credible medical evidence establishing that the Applicant has experienced an aggravation of his condition that is directly connected to his service with the RCMP. The Applicant has failed to demonstrate that the Decision was unreasonable.

ANALYSIS

[62] As the Board acknowledges in its Decision, Dr. Wiseman's medical opinion of 12 November 2010 was that

> the workload and regular (*sic*) hours required for his [the Applicant's] occupation at the Royal Canadian Mounted Police had a deleterious effect on his diabetic control, leading to diabetic complications, particularly the neuropathy and in his legs.

[63] The Applicant himself had suggested this to Dr. Wiseman, but that does not devalue it as a medical opinion and the Board does not discount Dr. Wiseman's medical opinion for that reason. The Board simply says

> While the Appeal Panel agrees that the evidence supports that the Appellant developed symptoms related to retinopathy and numbness in the Appellant's right foot, it does not note any serious complications from these conditions throughout the Appellant's service. In fact, most of the Clinical Report and Account forms are unremarkable as it pertains to the Appellant's diabetic condition and the resulting retinopathy and neuropathy.

> As for the blood sugar levels, the Appeal Panel has looked at them carefully, and does note that they are above the normal range. However, again, there is no evidence that these above-normal readings had deleterious consequences. In fact, the Clinical Report and Account forms through the Appellant's career note the diagnosis of diabetes, but other than just around the time of diagnosis of the condition in 1992, there is no further evidence that the Appellant's blood sugar levels were causing any medical issues.
>
> By all accounts, despite the high blood sugar recordings, the evidence suggests that the Applicant was being monitored by medical specialists on a fairly regular basis. On a reading of those contemporaneous reports, no red flags were raised that would support that the condition worsened.
>
> As it pertains to Dr. Wiseman's opinion dated 12 November 2010, while the Appeal Panel notes that he talks about the "deleterious effect on his [the Appellant's] diabetic control", the Panel is unable to conclude that the facts support this view.

[64] The Board thought the Applicant presented insufficient medical evidence to support his case, and it would appear that "the facts" which do not support Dr. Wiseman's 12 November 2010 medical opinion, are the earlier clinical reports and account forms referred to by the Board which do not speak to "deleterious consequences."

[65] What this reasoning fails to address is that

a. The purpose of the earlier reports was not to assess deleterious consequences and entitlement to a pension but to decide, at each point in time, whether the Applicant could discharge the duties assigned to him. Dr. Wiseman's opinion is specifically directed as the cause of the deleterious consequences. This distinction

was made in considerable detail to the Board in submissions, and yet the Board chooses to ignore it and does not say why;

b. The Board acknowledges that the Applicant provided "a number of affidavits by fellow RCMP officers, who also worked as Staff Relations Representatives during their RCMP career." These affidavits provide direct evidence (albeit by non-medical personnel) of the difficult conditions under which the Applicant had to work and the impact this had on his ability to manage his diabetic condition. This evidence is not mentioned further by the Board and we are not told why it should be left out of account. It corroborates what Dr. Wiseman says about the cause of the deleterious effects and contradicts the Board's conclusion that "workplace factors were not sufficiently beyond the care and control of the Appellant as to impede his ability to manage the condition." The Board should have addressed this evidence. There was no evidence that the Applicant could have managed his condition in a way that would have prevented deleterious effects. The Respondent has made much of an earlier letter by Dr. Wiseman to Dr. Swires, the Health Service Officer in Winnipeg, which reads in part as follows:

> I do not think there is any doubt Mr. Roach has insulin-dependent diabetes and I am arranging for him to see the Diabetic Education Centre as soon as possible regarding insulin administration and home blood sugar monitoring. It is of interest that he has a microaneurysm on the left, indicating that he has had diabetes for much longer than his symptoms suggest.
>
> I do not think there is any specific contraindication for him going to Shamattawa as long as his blood sugars are well controlled and he is compliant with his diabetic regimen and as long as he does not go out for long treks without any supervision. I advised him

> strongly to stop smoking and his periodic binging should also be discontinued. He will be returning to see me in two weeks.

The Respondent argues that this is medical evidence that, in 1992, the Applicant's condition was manageable in terms of his job. In my view, however, the words "as long as his blood sugars are well controlled and he is compliant with his diabetic regimen" does not support the view that the conditions of the Applicant's employment will allow this to happen, and we have the affidavits from the Applicant's colleagues and the 2010 opinion of Dr. Wiseman that the necessary control was not possible because of the job and this led to the deleterious effects that Dr. Wiseman says, as a medical opinion, are related directly to the Applicant's job.

[66] The Board also says that Dr. Silha's medical opinion has no probative value because

> he does not address that the Applicant has been a smoker, and, although he speaks of co-morbidites, he does not specifically address whether they exist in the Applicant's case.

In my view, this is not sufficient reason to reject Dr. Silha's clear medical opinion that despite the fact that "presently glycemic control is adequate, he will still continue to suffer consequences of years with inadequate glycemic control in future." In Dr. Silha's medical opinion, the Applicant's early posting in rural Manitoba clearly

> represented a challenge with diabetes control in terms of adequate nutritional support, as well as time requirements with his stressful job, not always allowing him appropriate planning of his insulin.

[67] Dr. Wiseman and Dr. Silha are the Applicant's treating physicians with a knowledge of his whole file. Their opinions cannot be sidestepped in the ways attempted by the Board. The Board failed to consider what is basically uncontradicted evidence that establishes that the aggravation and deleterious consequences of the Applicant's disease arose out of, or are directly connected with, his service in the RCMP. In particular, the Board has not reasonably applied section 39 of the Act. This matter must be referred back for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision of the Board is quashed and the matter is referred back to the Board for re-determination in accordance with my reasons.

2. The Respondent will pay the Applicant's costs in this matter.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1333-12**
STYLE OF CAUSE:	**BRIAN ROACH v AGC**
PLACE OF HEARING:	Vancouver
DATE OF HEARING:	July 9, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	RUSSELL J.
DATED:	August 9, 2013

APPEARANCES:

Jillian Frank	FOR THE APPLICANT
Malcolm Palmer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Heenan Blaikie LLP Vancouver, British Columbia	FOR THE APPLICANT
Department of Justice Vancouver, British Columbia	FOR THE RESPONDENT