Federal Court  Cour fédérale

Date: 20101206

Docket: T-288-10, T-289-10

Citation: 2010 FC 1229

Ottawa, Ontario, December 6, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HUGH VINCENT LUNN

Applicant

and

VETERANS AFFAIRS CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of two decisions of the Veterans Review and Appeal Board (Board), both dated 7 January 2010 (Decision(s)), denying the Applicant's claims for a disability pension on the basis that the Applicant's hearing loss and his degenerative disc disease of the lumbar spine did not arise out of, nor were they directly connected to, his service in the Canadian Forces within the meaning of subsection 21(2) of the *Pension Act*, R.S., 1985, c. P-6 (Act).

BACKGROUND

[2] The Applicant began his military service in the Reserve Force in October 1974 and went on to serve in the Regular Force in April 1976. He retired in March 1995 after nearly 19 years of service in the Regular Forces. During his military career, he served in the infantry and worked as an airframe mechanic. He also played the bagpipes in the military band. The Applicant claims that his current hearing loss and degenerative disc disease of the lumbar spine are attributable to events that occurred during his military service.

T-288-10: Hearing Loss

[3] The Applicant claims that his hearing was damaged in 1981 when an artillery round was detonated close to the trench in which he was situated. This initial injury was exacerbated by prolonged exposure to noise during the Applicant's service in the infantry and in the military band.

[4] The Applicant's hearing was tested prior to his joining the Regular Forces in 1976 and on a number of occasions prior to his retirement. The last of these audiograms was conducted as part of his Medical Examination for Release dated 9 March 1994. In all cases, the results were interpreted as indicating that the Applicant had normal hearing.

[5] In February 2008 and again in April 2009, the Applicant underwent additional audiograms. Again, the audiologist interpreting the results described the Applicant's hearing as normal, although these same results meet the Veterans Affairs' standards for disabling hearing loss.

[6] In January 2008, the Applicant applied for a disability pension based on hearing loss pursuant to section 21(2) of the *Pension Act*. The Applicant says that his hearing loss is attributable to his military service. In his view, under section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21, he is entitled to $62, 500, which is 25 percent of the full pension award for this kind of injury.

[7] In June 2008, the Department of Veterans Affairs denied the Applicant's claim to a pension based on hearing loss. The Entitlement Review Panel (the Panel) affirmed that decision in July 2009, having examined the results of the audiograms conducted during the Applicant's military service as well as those conducted in February 2008 and April 2009. Both decision-makers found that the evidence demonstrated that the Applicant had normal hearing while he was in the military. Moreover, the Applicant failed to establish that his current hearing loss resulted from the 1981 artillery round detonation or from prolonged exposure to noise while he was in the infantry and the military band.

[8] In January 2010, the Veterans Review Appeal Board affirmed the earlier decisions to deny the pension claim.

[9] On 2 March 2010, the Applicant commenced this application for judicial review of the Board's decision denying his claim for a disability pension based on hearing loss.

T-289-10: Degenerative Disc Disease of the Lumbar Spine

[10] The Applicant also claims that he injured his back while servicing an aircraft in 1990 when pulling cables from an electrical panel during an electrical fire. He reported the injury to his supervisors but did not consult a doctor because work was too busy at the time. He claims that the injury was not sufficiently serious to prevent him from riding his bike home but that he had difficulty walking in the months immediately following the incident.

[11] The Applicant states that he injured his back again in 1991 after running five miles from his workplace to his home and then shovelling snow. The injury was subsequently aggravated by prolonged sitting at a work-related leadership course. The Applicant reported the injury to his supervisors and to a military doctor, and he was treated by a physiotherapist. According to his 9 March 1994 Medical Examination for Release, his back was normal.

[12] The Applicant claims that his disability, which is attributable to the above-noted back injuries, is totally disabling, that he cannot now walk in excess of three miles at a time and that his injury has the potential to prevent him from walking at all in the future. Consequently, pursuant to s. 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, he is entitled to $250, 000, which is 100 percent of the full pension award for this kind of injury.

[13] In June 2008, pursuant to section 21(2) of the *Pension Act*, the Applicant applied for a disability pension for degenerative disc disease of the lumbar spine.

[14] On 7 April 2009, the Department of Veterans Affairs denied the Applicant's claim. On 16 July 2009, the Entitlement Review Panel affirmed the Department's decision. Both decision-makers found no credible medical evidence linking the service-related injuries to the Applicant's current disability.

[15] In January 2010, the Veterans Review Appeal Board affirmed the earlier decisions to deny the Applicant's pension claim.

[16] On 8 February 2010, the Applicant commenced this application for judicial review of the Board's Decision denying his claim for a disability pension based on degenerative disc disease.

DECISIONS UNDER REVIEW

T-288-10: Hearing Loss

[17] The hearing before the Veterans Review Appeal Board concerning the Applicant's pension claim for hearing loss was conducted by teleconference. The Applicant was represented by a Bureau of Pensions Advocate from the Department of Veterans Affairs.

[18] The Advocate submitted that the in-service audiograms, particularly the release audiogram, did not meet the desired standard as set out in the Veterans Affairs Canada Entitlement Eligibility Guidelines. The Board acknowledged this but stated that there was no evidence before it to indicate that the in-service audiograms were inaccurate. In the circumstances, they were the best available record of the Applicant's hearing condition throughout his service and at the time of his discharge. In the absence of evidence to discredit the audiograms, the Board accepted them as accurate.

[19] Ultimately, the Veterans Review Appeal Board found that, according to the medical evidence presented, the Applicant's hearing was consistently found to be normal while he was in the military and at the time of his Medical Examination for Release, dated 9 March 1994. The Board acknowledged that the Applicant was currently suffering from disabling hearing loss but found that the more likely cause was the Applicant's age rather than an injury sustained during his time of service.

T-289-10: Degenerative Disc Disease of the Lumbar Spine

[20] The hearing before the Veterans Review Appeal Board concerning the Applicant's pension claim for degenerative disc disease of the lumbar spine was conducted by teleconference using written submissions from a Bureau of Pensions Advocate from the Department of Veterans Affairs.

[21] The Board accepted that the Applicant injured himself in the 1990 cable-pulling incident. However, there was no medical evidence available to support the Applicant's subjective belief that

he suffered a significant injury. The Board concluded that the 1991 running and snow-shovelling injuries also were not significant because they had been resolved with treatment and because, in the Applicant's 1994 Medical Examination for Release, his spine was described as normal.

[22] The Board commented that an X-ray taken on August 2008 showed degenerative changes consistent with the Applicant's age of 53 years. It also considered new evidence: a medical opinion dated 20 October 2009, in which Dr. Bernard Lalonde said that he could not state "with certainty" whether the Applicant's lumbar disc disease is "a result of incidences occurring in the 1990's or whether it is just a natural aging process or brought on and extenuated (*sic*) by the fact that he is significantly overweight." The Advocate argued that because Dr. Lalonde could not specifically rule out the contribution made by the service-related injuries then, at minimum, partial pension entitlement was warranted.

[23] The Board concluded, however, that the medical opinion does not support a finding that the service-related injuries, which were not proven significant, contributed to the disability. Therefore, the Applicant's current back condition was not attributable to his military service.

ISSUES

[24] The principal issues on the application can be summarized as follows:

1. Whether the Board erred in relying on the audiograms conducted during the Applicant's military service as evidence that the Applicant's hearing loss was not attributable to his military service; and
2. Whether the Board erred in finding that the Applicant's degenerative disc disease was not caused by an injury sustained during military service.

STATUTORY PROVISIONS

[25] The following provisions of the Act are applicable in these proceedings:

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 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 ….

[26] The following provisions of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, are applicable to these proceedings:

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.

STANDARD OF REVIEW

[27] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the 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.

[28] Both issues deal with the Board's assessment of the evidence and, as such, are fact-based questions. These attract a standard of reasonableness upon review. See *Dunsmuir*, above, at paragraph 51.

[29] 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. 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."

ARGUMENTS

The Applicant

T-288-10: Hearing Loss

[30] The Applicant asserts that the audiograms conducted while he was in the military were "faulty" because they failed to detect the hearing loss that he had already suffered by the time he retired from military service. He also asserts that the documents are "perjured" and were "created

out of necessity for the workplace," although it is unclear from his submissions what he means by these comments.

[31] The Applicant argues that these earlier audiograms should be disregarded in favour of the "new" audiograms – those conducted in February 2008 and April 2009 – which prove that the Applicant suffers from disabling hearing loss according to Veterans Affairs Canada standards. These new audiograms were conducted by a hearing clinic. The Applicant seems to believe that the clinic has no connection to the military and, therefore, is "without the prejudices of that workplace where they frequently make simple but routine mistakes."

[32] The Applicant states that the Board refused to consider the possibility that the earlier audiograms were flawed. In relying upon them, the Board committed a reviewable error.

[33] Under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, hearing loss is identified as a disability. The Applicant argues that, because he has suffered hearing loss as a result of his military service, this statute entitles him to a disability pension.

[34] The Applicant asks the Court to make an award of costs in his favour.

T-289-10: Degenerative Disc of the Lumbar Spine

[35] Although the Applicant consulted a military doctor about the running and snow-shovelling incident in 1991 when he was stationed in Cold Lake, Alberta, the Applicant observes that there is "next to no information" on his medical file regarding his back injury. It appears that, around the time of this incident, the Applicant was facing a court martial. The Applicant seems to suggest that, given those circumstances, the military focused "first and foremost" on the Applicant's psychiatric condition at the expense of maintaining a complete record of his physical condition.

[36] The Applicant believes that the Board either disregarded or failed to give sufficient consideration to this limited medical evidence because it considered his claim to be yet "another example of the department's time being abused by the handling of negative reports." He personally believes that he carries his weight well enough and that it does not contribute to his disability.

[37] In the Applicant's view, the Board has "an obligation to make reasonable decisions, not to frivolously decide a case based on how much medical information is at hand."

[38] The Applicant asks the Court to make an award of costs in his favour.

Charter Issues

[39] The Applicant also alleges that the denial of a pension for both his hearing loss and his back problems is a breach of his rights under section 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act; 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. However, the Applicant does not develop his argument on Charter issues and it is difficult to see how he can bring his case within the scope of these Charter sections.

The Respondent

T-288-10: Hearing Loss

[40] The Respondent argues that, pursuant to subsection 21(2)(*a*) of the *Pension Act*, an applicant must meet two conditions to qualify for a pension. First, he must suffer a disability that results from an injury. Second, the injury must arise from or be aggravated by the applicant's military service. It is not enough that the applicant was a member of the Canadian Forces and is now disabled. There must be a causal connection between the injury and the performance of military service.

[41] Pursuant to subsection 21(2) of the Act, it is the Board's duty to consider the circumstances of the injury and assess the strength of the causal connection between the injury and the applicant's military service. See *McTague v. Canada (Attorney General)* (1999), [2000] 1 F.C. 647, [1999] F.C.J. No. 1559 (T.D.) at paragraph 67.

[42] Pursuant to subsection 21(2.1) of the Act, if the disability results from an aggravation of the injury, fractions of the total disability which represent the extent to which the injury was aggravated will be pensionable.

[43] In the instant case, the Applicant first raised the issue of his hearing loss in 2008—almost 13 years after his release from the military—when he applied for a disability pension. The Applicant needed to adduce sufficient credible evidence to prove on a balance of probabilities that the hearing loss he suffers today was directly related to his military service. In the Board's view, the Applicant did not adduce sufficient evidence to establish that link.

[44] The Board accepted the audiograms as the best evidence of the Applicant's hearing condition up to the time of his release from military service. Under section 39 of the *Veterans Review and Appeal Board Act*, the Board must weigh that evidence in the best light possible for the applicant, but this does not relieve the applicant of his burden to prove on the balance of probabilities that he suffered an injury during his service. See *Wannamaker v. Canada (Attorney General)*, 2007 FCA 126, 361 N.R. 266; *MacNeill v. Canada (Attorney General)* (1998), 151 F.T.R. 124, [1998] F.C.J. No. 1115 at paragraphs 21-22.

[45] The Board found no evidence to contradict the audiograms. Therefore, the Respondent argues, the Board's finding that the Applicant's hearing loss was not attributable to his military service was reasonable.

T-289-10: Degenerative Disc Disease of the Lumbar Spine

[46] The Respondent acknowledges that the Applicant suffers from degenerative disc disease of the lumbar spine. However, for reasons similar to those canvassed above, the Applicant is not entitled to a disability pension. The Applicant failed to meet the two conditions under subsection 21(2)(*a*) of the *Pension Act* discussed above. In the absence of sufficient evidence which proves on a balance of probabilities that there is a causal connection between the Applicant's degenerative disc disease and his military service, the Board acted reasonably in finding that the Applicant's pension claim should be denied.

[47] The Board noted that the Applicant's condition was not diagnosed until September 2008 which, the Respondent points out, is 13 years after he retired from the military. The Department's review of the physical therapy reports, medical board proceedings, a medical examination for release and a medical questionnaire support the Board's finding that the Applicant suffered no lower back injury during his military service.

[48] The Respondent argues that, in reaching its decision, the Board properly weighed all of the relevant evidence: first, that the Applicant's 1991 injury, caused by running and snow-shovelling, was treated and resolved; second, that the Applicant's Medical Examination for Release indicates that his back was normal; and, third, that there was a 17-year gap between the 1991 injury and the pension claim. Moreover, the Respondent argues, the medical report from the Applicant's own witness, Dr. Lalonde, supports the Board's finding.

ANALYSIS

[49] The same principal issue arises in both of these applications: Was the Board's finding of no causal link between the Applicant's injuries and his military service reasonable?

[50] In *Boisvert v. Canada (Attorney General)*, 2009 FC 735, Justice de Montigny has recently considered in some detail the general framework and principles for deciding this issue:

> **23** Entitlement to a pension is provided under section 21 of the *Pension Act*. Pension eligibility differs depending on whether the person concerned was a member of the Forces during war or in peace time: if service was during war, it is paragraph 21(1)(*a*) that applies; if in peace time, it is paragraph 21(2)(*a*). The latter provision reads as follows:
>
> PART III
> PENSIONS
>
> Service during war, or special duty service
>
> **21.** (1) ...
>
> Service in militia or reserve army and in peace time
>
> (2)
>
> In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,
>
> (*a*) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;
>
> * * *
>
> [translation omitted]
>
> **24** As already noted by Justice Nadon, then of the Federal Court, in *King* v. *Canada (Veterans Review and Appeal Board)*, [2001]

F.C.J. No. 850, 2001 FCT 535 (at paragraph 65), paragraph 21(2)(*a*) is more narrow in scope than paragraph 21(1)(*a*). While the latter refers to an injury or disease "that was attributable to or was incurred during such military service", paragraph 21(2)(*a*) refers instead to an injury or disease "that arose out of or was directly connected with such military service". In other words, the member of the Forces who suffered an injury or disease in peace time must establish that military service was the "primary cause" of the injury or the disability and must establish causation. See also: *Leclerc* v. *Canada (Attorney General)*, [1996] F.C.J. No. 1425, 126 F.T.R. 94, at paragraphs 18-21.

25 It should be pointed out that subsection 21(3) of the same Act establishes a presumption as to the existence of the causal connection required under paragraph 21(2)(*a*) between the incident cited and the injury or disease suffered. The provision specifies that an injury or disease shall be presumed, in the absence of evidence to the contrary, "to have arisen out of or to have been directly connected with military service" if it was incurred in the course of any of the circumstances listed in the subsection's various paragraphs:

> Presumption
>
> (3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of
>
> (*a*) any physical training or any sports activity in which the member was participating that was authorized or organized by a military authority, or performed in the interests of the service although not authorized or organized by a military authority;
>
> (*b*) any activity incidental to or directly connected with an activity described in paragraph (*a*), including the transportation of the member by any means between the place the member normally performed duties and the place of that activity;

(*c*) the transportation of the member, in the course of duties, in a military vessel, vehicle or aircraft or by any means of transportation authorized by a military authority, or any act done or action taken by the member or any other person that was incidental to or directly connected with that transportation;

(*d*) the transportation of the member while on authorized leave by any means authorized by a military authority, other than public transportation, between the place the member normally performed duties and the place at which the member was to take leave or a place at which public transportation was available;

(*e*) service in an area in which the prevalence of the disease contracted by the member, or that aggravated an existing disease or injury of the member, constituted a health hazard to persons in that area;

(*f*) any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member; and

(*g*) the performance by the member of any duties that exposed the member to an environmental hazard that might reasonably have caused the disease or injury or the aggravation thereof.

* * *

[translation omitted]

26 Attention should also be drawn to section 2 of the *Pension Act* and section 3 of the *Board Act*, which call for a broad and liberal construction and interpretation of the provisions of these two statutes in recognition of what the members of the Forces have done for their country. These provisions read as follows:

Pension Act:

CONSTRUCTION
Construction

2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

* * *

[translation omitted]

Board Act:

Construction

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.

* * *

[translation omitted]

27 Finally, another provision that must be taken into account is section 39 of the *Board Act*, which sets out rules favouring the applicant with respect to his or her burden of proof:

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.

* * *

[translation omitted]

> **28** This provision, which generally gives the applicant or appellant the benefit of the doubt, has occasioned much debate over the nature of the evidence that will allow the applicant or appellant to succeed. The decisions of this Court and of the Court of Appeal instruct us that the effect of this provision is not to compel the Board to accept all of the allegations made by a veteran. Under the terms of paragraph 21(2)(*a*), the applicant must establish, on the standard of proof applicable in civil matters (a balance of probabilities), that he or she suffers from a disability and that this disability arose out of or was directly connected with his or her military service. It is the member who must prove causation between the alleged incident and the condition cited. Justice Sharlow, writing for the Court of Appeal, summarized the impact of section 39 well in *Canada (Attorney General)* v. *Wannamaker*, 2007 FCA 126, at paragraphs 5 and 6:
>
> > 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: *Nisbet* v. *Canada (Attorney General)*, 2004 FC 1106, at paras. 17-19; *Moar* v. *Canada (Attorney General)*, 2006 FC 610, at paras. 10 and 29; *Currie* v. *Canada (Attorney General)*, 2005 FC 1512, at para. 9; *Comeau* v. *Canada (Attorney General)*, 2005 FC 1648, at paras. 22-25; *McTague* v. *Canada (Attorney General)*, [2000] 1 F.C. 647; *Gillis* v. *Canada (Attorney General)*, 2004 FC 751.

[…]

> **36** The Court must therefore ask itself whether the Board's decision, in terms of both form and substance, can be considered reasonable. In terms of form, the reasonableness of the decision will be assessed according to its justification, transparency and intelligibility, whereas in terms of substance, it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47). As the Supreme Court took pains to point out, this new single standard does not call for greater judicial interference in the administrative process. Indeed, the courts must not lose sight of the fact that such questions when submitted to administrative boards and tribunals can often lead to more than one reasonable outcome and that it is not up to the reviewing court to substitute the decision it might have made if it, and not the administrative board or tribunal, had dealt with the question.

T-288-10: Hearing Loss

[51] The Applicant says that the Board was unreasonable to rely upon the earlier, in-service and release audiogram testing because that testing did not pick up his hearing loss in the way that his 2008 and 2009 tests did. He says that the earlier technology was not sufficient for the job. In other

words, he says that, given that the 2008 and 2009 audiograms detected his slight hearing impairment, it is reasonable to assume that the impairment has existed since 1981 when the artillery round was detonated close to the trench in which he was situated, and that this initial injury was exacerbated by prolonged exposure to noise during his military service in the infantry and in the military band.

[52] The Applicant concedes that he has no way of proving that the earlier audiogram testing was faulty in any way, but he says it would be reasonable to assume, given the 2008 and 2009 testing, that it was.

[53] However, the Board examined this very issue and concluded that while "the [Applicant] believes that his discharge audiogram was inaccurate, there is no medical evidence to support his contention" and the "Panel was not presented with any medical evidence which would indicate that the discharge audiogram, as well as the previous in-service audiograms, were inaccurate."

[54] Because the Applicant concedes that he has no evidence that the earlier audiograms were inaccurate and failed to detect his hearing loss, he is really saying that the Board should have applied a presumption, based upon the 2008 and 2009 testing, that the earlier testing was inaccurate and that the hearing loss only detected in 2008 (14 years following discharge) should be linked to an incident which occurred in 1991 and which was then exacerbated by his exposure to further noise as an airframe mechanic and as a piper in the military band.

[55] As Justice de Montigny points out in *Boisvert*, above, at paragraph 24, when it comes to paragraph 21(2)(*a*) of the Act, "the member of the Forces who suffered an injury or disease in peace time must establish that military service was the 'primary cause' of the injury or the disability and must establish causation."

[56] The Applicant has not argued that the presumption established under subsection 21(3) of the Act comes into play on these facts and my review of the situation suggests that it does not.

[57] In *Bernier v. Canada (Attorney General)*, 2003 FCT 14, Justice Blais observed, at paragraph 32ff, that, for the plaintiff to be entitled to a pension, two conditions must be met: first, the veteran's condition must be pensionable, i.e., a disability resulting from injury or disease; and, second, the original condition must arise from, or be aggravated by, the veteran's military service:

> 32. … Thus, causation must be established, and in the absence of evidence to the contrary, the presumption found in s. 21(3) of the *Pension Act* allows for causation to be presumed if the injury was incurred during the course of the veteran's service.
>
> […]
>
> 35 In *Hall v. Canada (Attorney General)* (1998), 152 F.T.R. 58, [1998] F.C.J. No. 890, Reed J. stated:[19] ... While the applicant correctly asserts that uncontradicted evidence by him should be accepted unless a lack of credibility finding is made, and that every reasonable inference should be drawn and any reasonable doubt resolved in his favour, he still has the obligation to demonstrate that the medical difficulty from which he now suffers arose out of or in connection with his military service; that is, the causal linkage must be established.

[58] It appears to me that, in the present case, Mr. Lunn's medical records constitute the "evidence to the contrary" to which Justice Blais refers in paragraph 32. These military medical records evidence no hearing loss in service or upon discharge. Also, there was no evidence of significant injury to the back; the evidence indicates a back injury that was resolved with physiotherapy.

[59] The presumption in section 21(3) is triggered in the absence of evidence to the contrary. In Mr. Lunn's case, there is evidence to the contrary: the medical records. Mr. Lunn argues that the audiogram technology and testing were not adequate, but this is his subjective view only.

[60] I do not think that the presumption in section 21(3) requires the Court to prefer Mr. Lunn's subjective beliefs regarding the quality of the testing over the evidence in the medical records. It requires only that the Court believe his assertions of significant back and hearing injuries (since no lack of credibility was found), provided his assertions are uncontradicted. However, these assertions are contradicted by both the in-service audiograms and the audiogram conducted at the time of his release from the military, both of which said that his back and hearing were "normal."

[61] Justice Teitelbaum's decision in *Cundell v. Canada (Attorney General)*, 180 F.T.R. 193, [2000] F.C.J. No. 38, is helpful with respect to Dr. Lalonde's letter. In that case, which is a judicial review of a rejected pension claim, the medical expert reported that the cause of the applicant's injury was "unclear" and that it was impossible to say if military service contributed to the applicant's injury. Justice Teitelbaum observed as follows:

> 59 It may be a fact that the etiology of sarcoidosis is unclear but what is not "unclear" is that all x-rays of the applicant before he went to the Persian Gulf showed no problem with his lungs and upon return or soon thereafter, the x-rays of the applicant's lungs show the sarcoidosis. [my emphasis]

[62] In other words, Justice Teitelbaum found a causative link between military service and the injury because, in *Cundell*, there was a record of an injury while the applicant was in the service, and there was a short timeline between the causative injury and the manifestation of the condition. Having found the causative link, Justice Teitelbaum was able to engage the section 21(3) presumption to find that the Board should have interpreted the doctor's letter so as to give the applicant the benefit of the doubt, as is required under section 39 of the *Veterans Review and Appeal Board Act*.

[63] *Cundell* is distinguishable from the present case. Although Dr. Lalonde's letter is also unclear, there is no medical record of hearing loss or significant back injury to make the causative link. The back and hearing were normal upon discharge. Mr. Lunn has no evidence to contradict the Medical Release Report. The fact that the hearing loss and degenerative disc disease were not detected until many years after his release from the military makes causation that much harder to establish.

[64] In *Nisbet v. Canada (Attorney General)*, 2004 FC 1106, another pension application judicial review, Justice Beaudry is clear that the presumption is triggered only after the causal link is established:

> 18 There is an onus on the Applicant to demonstrate a causal link between the alleged disability and his or her years of service with the RCMP. Only after that causal link is establish will it become necessary to consider paragraph 21(2)(a) and the presumption contained in 21(3)(a) of the Pension Act. That principle was confirmed by the Federal Court of Appeal in *Elliot v. Canada (Attorney General)*, 2003 FCA 298, [2003] F.C.J. No. 1060 (F.C.A.) (QL), at paragraph 23:
>
> > The appellant reproaches the Judge below of having failed to deal specifically with the issues arising under paragraphs 21(2)(a) and 21(3)(f) of the Act. I agree with the respondent that unless the appellant succeeds on the first issue, i.e. whether there is a causal link between the lunch at CFB Borden and his IBS, there is no reason to deal with the issues arising under paragraphs 21(2)(a) and 21(3)(f). I therefore turn to the first issue raised by the appeal.
>
> [my emphasis]

[65] Finally, the case of *Weare v. Canada (Attorney General)* (1998), 153 F.T.R. 75, [1998] F.C.J. No. 1145, shares a number of similarities with the instant case, including a long passage of time between the injury and the pension application. In that case, the Board found that the medical evidence was insufficient to support the conclusion that the condition pertaining to the lumbar spine was attributable to the Regular Force service or that there was any linkage between the spinal condition and the already pensioned condition of bilateral pes planus. The applicant was discharged in 1959 and applied for a disability pension in 1994. Justice MacKay stated as follows:

> 19 Yet, the Board may reject the applicant's medical evidence when it has before it contradictory medical evidence, as noted by Mr. Justice Cullen in Re *Hornby*. Further, ss. 3 and 39 of the [VAB] Act do not mean that whatever submission is made by a veteran, that submission must automatically be accepted by the members of the Board. The evidence must be credible and must be reasonable. Finally, there is an obligation on the veteran to present evidence suggesting a causal link between service in the Forces and the

> ailment of which he or she complains. In the words of Madame Justice Reed in *Hall v. Canada (Attorney General)*:
>
> > While the applicant correctly asserts that uncontradicted evidence by him should be accepted unless a lack of credibility finding is made, and that every reasonable inference should be drawn, and any reasonable doubt resolved in his favour, he still has the obligation to demonstrate that the medical difficulty from which he now suffers arose out of or in connection with his military service; that is, the causal linkage must be established.
>
> 20 In the case at bar, having examined the record that was before the Board, while there is little doubt the applicant suffers from knee and hearing ailments, I can find little if any evidence offered by the applicant demonstrating a causal link between his military service and these ailments. On the other hand, the report prepared by the Medical Advisory Directorate indicates that the hearing loss is not attributable to military service and that there is no evidence supporting a conclusion that the knee problems originated from service in the armed forces.
>
> 21 On this basis, it is my view that it cannot be said that the Board came to a patently unreasonable finding or that it failed to weigh medical evidence in a proper fashion in relation to the claims by Mr. Weare in regard to his knees and his hearing. In the absence of any evidence of causality presented by the applicant, it is not open to the Board to conclude that such causality exists where medical reports it has requested suggest otherwise. In these circumstances, the Board cannot simply infer that ailments developing many years after Mr. Weare's discharge from the services were caused by his fall while in training in 1958.

[66] In summary, then, it appears to me that the section 21(3) presumption is not engaged unless causation is established. Mr. Lunn has failed to show causation. The fact that Dr. Lalonde’s letter is inconclusive does not assist Mr. Lunn, as there is no evidence that his hearing was damaged in the service, no evidence that his back injury was significant and persisted after physiotherapy (in fact,

the evidence is to the contrary) and no evidence that his back and hearing health was anything less than “normal” when he left the military.

[67] Nor do I think that the concessions provided by section 39 of the Act assist the Applicant. He simply did not demonstrate to the Board that, on a balance of probabilities, his present hearing loss can in any way be attributable to what occurred during his time in the service. In fact, the Applicant conceded at the oral hearing that he had no evidence to this effect other than his own subjective belief and assertion that this was the case.

[68] I do not see how the Board’s reasons and conclusions on the hearing impairment issue can be said to fall outside the range established by *Dunsmuir*.

[69] The Applicant also says that he believes the Board’s refusal of a pension for his hearing impairment amounts to a denial of his rights under sections 7 and 15 of the Charter. This remains a subjective assertion and he has adduced no authority or argument in principle as to why this should be the case.

[70] The relevant provisions of the Act do not create a pension scheme based upon membership in the Canadian Forces. The legislation requires a causal connection between the injury and the performance of military service. This means that the Board is required by Parliament to consider the circumstances of the injury and to assess the strength of the causal connection between the injury and the Applicant’s military services.

[71] This is all that has occurred in this case and the Board has simply decided that such a connection was not established by the Applicant. I cannot see, therefore, why anything that has occurred in this case gives rise to a section 7 or a section 15 Charter issue.

[72] *McTague v. Canada (Attorney General) (T.D.)*, [2000] 1 F.C. 647, shares similar facts with the instant case. That case was an application for judicial review of a Veterans Review and Appeal Board decision confirming earlier determinations that the applicant was not eligible for a disability pension under the *Pension Act* pursuant to paragraph 21(2)(*a*). The applicant was seriously injured when hit by a vehicle while crossing a road to return to the base where he was on duty, from the restaurant where he had eaten dinner because there was no mess on the base. The Veterans Review and Appeal Board found that there was an insufficient causal link between the applicant's military service and the injury to satisfy paragraph 21(2)(*a*). The Court carried out a pragmatic and functional analysis to determine the standard of review. As part of that analysis, Justice Evans distinguished the rights at stake as being "not of the same order" as those protected under sections 7 and 15 of the Charter:

> 33 Second, the nature of the rights determined by the Board is also relevant. Disability pensions are doubtless of great importance to the individuals concerned, but their denial is not normally likely to consign unsuccessful claimants to destitution, nor to preclude their pursuit of other remedies such as, in this case, a claim in tort against the owner of the vehicle that hit MWO McTague, or a statutory claim under the provincial motor vehicle compensation fund.
>
> 34 In my opinion, the rights at stake here are not of the same order of importance as the right to be recognized as a refugee (*Pushpanathan*, supra), or to be free from discrimination [page664] (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554). The statutory rights in question in those cases were closely linked to

> constitutional rights protected by sections 7 and 15 of the Canadian Charter of Rights and Freedoms … respectively.

[73] *Krasnick Estate v. Canada (Minister of Veterans Affairs)*, 2007 FC 1322, involved a judicial review of the decision of the Department of Veterans Affairs denying the applicant's eligibility for reimbursement of Chronic Care expenses. The applicant had served with the Canadian Armed Forces in the Second World War during which time he was injured, for which he received a small pension from DVA. The applicant was placed in a long-term care facility, for which DVA agreed to pay but refused reimbursement retroactive to the date that the applicant entered the care. *Inter alia*, the applicant sought certain declarations as to the *Charter*. Justice Hughes relied upon the Supreme Court of Canada decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 to decide the application of section 15 to the facts of that case:

> 29 The Applicants further argue that section 15(1) of the *Charter* applies and that Horace, as a veteran no longer mentally competent to deal with his affairs, has been deprived of equal benefits. The Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 canvassed what a claimant must first established before the *Charter*, section 15, comes into play. Binnie J. for the Court summarized three factors at paragraph 23: (1) whether a law imposes differential treatment between the claimant and others; (2) whether an enumerated or analogous ground of discrimination is the basis for the differential treatment; and (3) whether the law in question has a "discriminatory" purpose or effect.
>
> 30 Applicants' Counsel argues that the Regulations fail to make provision for care of or access by those who are not mentally competent. This is not a "discriminatory" provision of the Regulations but, taking the argument at its best, failure to make special provision for one particular group of persons. There is no "discrimination" in the Regulations, all persons are treated the same, no group directly or indirectly is discriminated against and application of the Regulations does not have a discriminatory effect. The Applicants simply do not get beyond point (1) of the *Law* test.

> 31 Further, the Applicants fail the third branch of the *Law* test. As set out by the Supreme Court of Canada in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 at paragraph 58, while a financial deprivation may exist it must be shown that the legislation promotes the view that a person is less capable or less worthy of recognition or value as a human being or as a member of Canadian society:
>
> > The question therefore is not just whether the appellant has suffered the deprivation of a financial benefit, which he has, but whether the deprivation promotes the view that persons with temporary disabilities are "less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration" (emphasis added). In *Miron v. Trudel*, [1995] 2 S.C.R. 418, McLachlin J. noted, at para. 132, that "distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory:.
>
> 32 Nothing in the Regulations has been shown to diminish the sense of capability or worth or value of mentally incompetent veterans. The Regulations provide a scheme whereby benefits may be provided, nothing in that scheme reflects badly on a person in any way contemplated by *Granovsky*.
>
> 33 Thus, I find that the *Charter* does not assist the Applicants. Therefore, I do not have to address the issue as to whether reliance upon the *Charter* can survive Horace's death.

[74] I add here that the test as set out in *Law* was recently affirmed by the Supreme Court in *R. v. Kapp*, 2008 SCC 41, where the Court stated:

> 14 Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. *Andrews* set the template for this Court's commitment to substantive equality -- a template which subsequent decisions have enriched but never abandoned.
>
> […]

> 17 The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[75] It appears to me that the reasoning that Justice Hughes applied in *Krasnick* applies in the instant case. Mr. Lunn's situation would not meet the test set out in *Law*. Mr. Lunn has not been singled out for differential treatment; he has simply had his claim denied. The jurisprudence attests to the authority of the Veterans Review and Appeal Board to deny pension applications where causation has not been established. Moreover, the jurisprudence does not suggest that section 21 of the *Pension Act* is discriminatory.

T-289-10: Degenerative Disc Disease of the Lumbar Spine

[76] Similar causation and evidentiary problems arise in relation to the Applicant's claim for a pension based upon his back injury.

[77] The Board accepted that the Applicant had injured himself in 1990 as he had described in his testimony at the review hearing. Once again, however, apart from the Applicant's own subjective beliefs, the Board "was not presented with any medical evidence which would substantiate that the [Applicant] suffered from a significant injury in 1990 which would have accelerated the onset of the degenerative disc disease."

[78] This finding was supported by evidence which showed that:

a. The Applicant did not report the 1990 injury;

b. He did complain in 1991 when he re-injured his back shovelling snow, but this injury was resolved with treatment;

c. The Applicant made no further complaints regarding his back until he made his pension claim in 2008 and his 1994 Medical Examination for Release from the Canadian Forces indicates that his spine was considered “normal.”

[79] The new medical opinion from Dr. Lalonde, date-stamped 20 October 2009 actually supports the Board’s conclusions because it makes it clear that the Applicant’s lumbar disc disease cannot be said to have been caused by what happened during military service and could be “just a natural aging process or brought on and extenuated (*sic*) by the fact that he is significantly overweight.”

[80] The Board also noted that the August 2008 x-ray relied upon by the Applicant shows “early degenerative changes which are consistent with the natural aging process as the [Applicant] was 53 years of age at the time of the x-ray.”

[81] Given the evidence before the Board, the Court cannot say that the Decision on the back issue was unreasonable within the meaning of the range established by *Dunsmuir*.

[82] The Applicant once again raises section 7 and 15 Charter issues but, for the same reasons stated above in relation to T-288-10, I do not think they arise on the facts of this case.

CONCLUSION

[83] The Applicant is obviously suffering in ways that invite sympathy from the Court. However, sympathy is not the criteria that the law says I must apply when considering a judicial review application. Given the legal criteria set out above, I do not think that the Board's Decision in these two matters can be said to be unreasonable and so I must reject both applications.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Applications in both T-288-10 and T-289-10 are dismissed;
2. The Respondent has not asked for costs so that none are awarded;
3. The style of cause is amended in both applications to show the Attorney General of Canada as the proper Respondent.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-288-10, T-289-10
STYLE OF CAUSE:	HUGH VINCENT LUNN Applicant - and - VETERANS AFFAIRS CANADA Respondent
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 4, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	December 6, 2010

APPEARANCES:

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Ms. Lynn Marchildon	RESPONDENT

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