Federal Court  Cour fédérale

Date: 20101217

Docket: T-969-10

Citation: 2010 FC 1300

Ottawa, Ontario, December 17, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

TIMOTHY GILBERT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Timothy Gilbert seeking judicial review of a decision of an Appeal Panel of the Veterans Review and Appeal Board (Board) rendered on May 25, 2010. The impugned decision upheld an earlier decision by an Assessment Review Panel dated May 8, 2009 which, in turn, had upheld a Department of Veterans Affairs disability assessment from September 23, 2008. Mr. Gilbert contends that the Board erred in assessing his claim under s 35 of the *Pension Act*, RS, 1985, c P-6 (Pension Act) at a 5% loss of function disability rating.

Background

[2] Mr. Gilbert is a long-standing member of the Royal Canadian Mounted Police (RCMP). He was injured in a fall on July 30, 2007 while on duty. His primary injuries were fractures to the right distal tibia and fibula and a fracture to the right calcaneus. The uncontradicted medical evidence indicated that these were serious fractures which were treated by surgical reduction, splinting and a lengthy course of physiotheraphy. Unfortunately, the damage to Mr. Gilbert's ankle resulted in the onset of degenerative posttraumatic arthritis which, by 2009, was predicted to lead to a surgical fusion.

[3] Based on the medical information available at the time, the Department of Veterans Affairs assessed Mr. Gilbert's ankle injury at a level four disability on Table 17.12 of the 2006 Table of Disabilities[1]. Level four is defined as "essentially normal range of motion but pain now present on a daily basis". Mr. Gilbert appealed this assessment but the Assessment Review Panel upheld the Departmental award on the following basis:

> The Panel appreciates, as did the Minister, that the Applicant has essentially normal range of motion but pain present on a daily basis and/or with movement, which therefore attracts a medical impairment rating of Four, as granted by the Minister. The Panel finds that a Quality of Life Level 1 is appropriate in all of the circumstances of this case inasmuch as the Applicant's activities of independent living, recreational/community activities, and personal relationships have been mildly affected, as revealed by the evidence presented to it.

[1] This Table of Disabilities is authorized under ss 35(2) of the Pension Act and is intended to promote a unified standard for the assessment of commonly occurring disabilities.

[4] Mr. Gilbert appealed the above decision to the Board and submitted an updated medical report from his orthopaedic surgeon, Dr. W. B. Henderson, dated January 7, 2010. In that report Dr. Henderson described Mr. Gilbert's medical status at that time as follows:

> I do support the notion that there is the potential for some inaccuracy in determination of disability and possible consideration of new evidence. I am not certain that it is understood quite clearly the difference between an ankle fracture and pilon type fracture. An ankle fracture is not usually as high energy as a pilon type fracture is. Subsequently the destruction of the ankle joint and resulting posttraumatic arthritis is not usually as severe and rapid to progress. Mr. Gilbert did in fact have a pilon type distal tibia fracture and a calcaneus fracture. Both were intra-articular comminuted type fracture. Both had subsequently gone on to rapid degenerative posttraumatic changes.
>
> With regards to the tables, the table used to calculate disability (Table 17.12 Loss of Function Ankle) Mr. Gilbert was assessed as I understand a No. 4 rating; essentially normal range of motion but with pain now present on a daily basis with or without movement. I think the more accurate interpretation would be ankylosis in a position of function which would be a rating of 18. I think it needs to be even considered that an ankylosis in an unfavorable position or flailed joint category be considered which would be a rating of 26. Mr. Gilbert's ankle and subtalar joint are both turning into what is called varus positioning. He does have pain with function, poor motion, and increasing varus deformity as a result of the rapidly developing arthritis.
>
> If consideration to one of the other table was given which I think is reasonable, I think Table 17.9 Loss of Function Lower Limb rating 18 with criteria being walking at a reduced pace on flat ground requiring routine use of cane or crutch and is unable to manage either stairs or ramps without rails, or pain with restricted walking to 250 meters or less would be appropriate as well.
>
> [Emphasis added]

[5] The Board declined to make any adjustment to the Departmental disability assessment. In its reasons the Board quoted a substantial portion of Dr. Henderson's January 7, 2010 report, but in

its conclusion only referred to Dr. Henderson's report from a year earlier. The Board's conclusion is stated as follows:

> Therefore the Board will not disturb the decision of the Assessment Review Panel dated 8 May 2009.
>
> The Board notes Dr. Henderson, in his report dated 30 January 2009, states the Appellant's ankle has a good range of motion, with 10 degrees dorsiflexion to 20 degrees plantar flexion; and a CT scan confirmed a well fixed ankle, with some mild degenerative changes. The Board notes the Appellant's ankle is not fused and there is no clinical evidence of ankylosis.
>
> For these reasons, the assessments will remain as is, and the quality of live level will not be changed.
>
> [Emphasis added]

It is this conclusion that is the subject of this application.

Issue

[6] Did the Board err in its assessment of the medical evidence placed before it with specific reference to Dr. Henderson's 2010 diagnosis of ankylosis?

Analysis

Standard of Review

[7] I agree with the Respondent that the standard of review for the issue raised on this application is reasonableness and I adopt the following statement to that effect from the decision by Justice Michel Beaudry in *Beauchene v Canada (AG)*, 2010 FC 980 at para 21:

> This Court has held that the interpretation of medical evidence and the assessment of an applicant's disability are determinations that fall within the Board's specialised jurisdiction and should be approached

> with deference (*Yates v. Canada (Attorney General)*, 2003 FCT 749 (CanLII), 2003 FCT 749, 237 F.T.R. 300). Such issues are questions of fact or mixed fact and law and subject to review on the standard of reasonableness (*Dunsmuir*, at para. 51).

[8] The criteria by which Mr. Gilbert's ankle injury was assessed are set out in the 2006 Table of Disabilities. (Table 17.12) for loss of ankle function. His disability was throughout assessed at a rating of four, which is described in the Table as "[e]ssentially normal range of motion but pain now present on a daily basis and/or with movement". Dr. Henderson disagreed with that rating and stated in his January 7, 2010 report that a rating of eighteen was warranted on the basis of "ankylosis in a position of function". Although the Board did not say so explicitly, it appears that it did not accept Dr. Henderson's diagnosis of ankylosis and found that that diagnosis was not supported by clinical evidence.

[9] The question before me is whether the Board could reasonably reject Dr. Henderson's diagnosis of ankylosis on the basis of the reasons it gave.

[10] I am guided by the previous jurisprudence of this Court which has held that the Board has no inherent jurisdiction to independently resolve medical questions. In drawing medical conclusions it can rely only upon the medical evidence placed before it or it may solicit independent medical evidence under s 38 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18: see *Rivard v Canada*,[2001] FCJ No 1072. In the absence of adverse credibility findings the Board is also obligated to accept uncontradicted medical evidence: see *MacKay v Canada (AG)*, (1997), 129 FTR 286 at para 26.

[11] Here the Board failed to indicate why it rejected Dr. Henderson's diagnosis of ankylosis. The Board may well be right in its assessment that Mr. Gilbert did not suffer from ankylosis and therefore did not qualify for a higher disability rating. Indeed, part of the problem confronting the Board was the paucity of clinical data presented in Dr. Henderson's report of January 7, 2010 in support of his diagnosis. Nevertheless, Dr. Henderson understood that the initial disability rating of four was based on an observation at that time that Mr. Gilbert had "essentially a normal range of motion". Dr. Henderson then clearly stated that "the more accurate interpretation would be ankylosis". He also observed that Mr. Gilbert was by then suffering from "poor motion" and "rapidly developing arthritis". He concluded by inviting further enquiries. The totality of the medical evidence also indicated very clearly that this was a progressively worsening condition such that the earlier medical reports were losing cogency.

[12] Although the Board quotes the relevant passages from Dr. Henderson's January 7, 2010 report, its conclusion refers only to Dr. Henderson's report from a year earlier which had reported "a good range of motion", "a well fixed ankle" and "some mild degenerative changes". This evidence seems to be the basis for the Board's conclusion that "there is no clinical evidence of ankylosis".

[13] In the absence of any reasoning by the Board as to why it rejected Dr. Henderson's 2010 diagnosis of ankylosis, I am left to speculate about how that evidence was assessed, if at all. One would ordinarily assume that Dr. Henderson had some clinical evidence to back up his diagnosis and, in fact, he did note that Mr. Gilbert's condition had continued to deteriorate and that he exhibited "poor motion". This is in marked contrast to the evidence from the 2009 report that the Board ultimately relied upon. If, as it appears, the assessment of a patient's range of motion is the

critical determining factor in such a diagnosis, the Board had a duty to take this differing evidence into account and to explain how it reached its conclusion that Mr. Gilbert was not suffering from ankylosis.

[14] As noted above, the Board had no authority to independently substitute its opinion for that of Dr. Henderson. It could reject his evidence if there was a rational evidentiary basis and a stated rationale for doing so. The failure here, however, to provide intelligible reasons for rejecting Dr. Henderson's opinion apparently in favour of older and presumably less reliable accounts is a reviewable error: see *King v Canada (AG)*, [2000] FCJ No. 196182 FTR 226 at paras 20 to 22.

[15] Indeed, if the Board was alert to its obligation under s 39 of the *Veterans Review and Appeal Board Act*, it would have either resolved any uncertainty about the basis of Dr. Henderson's diagnosis of ankylosis in favour of Mr. Gilbert or sought out medical clarification. If it had a sound basis for its conclusion that Mr. Gilbert was not suffering from ankylosis, it had a duty to explain it so that Mr. Gilbert could understand.

[16] I am satisfied that this is a matter which must be redetermined on the merits and in accordance with these reasons. There is no reason why the matter cannot be reassessed by the same members of the Board.

[17] The Applicant is entitled to costs which I fix in the amount $2,500.00 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed. The matter is to be redetermined by the Board in accordance with these reasons.

THIS COURT'S FURTHER JUDGMENT is that the Applicant shall have his costs in the amount $2,500.00 inclusive of disbursements.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-969-10
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PLACE OF HEARING:	Calgary, AB
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