Federal Court  Cour fédérale

Date: 20111207

Docket: T-926-11

Citation: 2011 FC 1431

Montréal, Quebec, December 7, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

ROBERT HALL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered by an Appeal Panel of the Veterans Review and Appeal Board of Canada (the Appeal Panel), dated May 9, 2011. This decision upheld the decision of a Review Panel to deny a disability award to Robert Hall (the applicant). The applicant alleges that he is entitled to an award pursuant to section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [Veterans Compensation Act] on the ground that he developed a solar elastosis condition as a result of ultraviolet radiation treatments (UV treatments) that he received from military doctors at the

beginning of his military career. The Appeal Panel found that there was not a sufficient nexus between the applicant's military duties and the development of his medical condition; hence, he was not entitled to a disability award. The applicant is challenging that decision. For the reasons that follow, this judicial review is allowed.

I. Background

[2] The applicant is 68 years old. He joined the Canadian Forces (CF) on September 17, 1959 and served until October 12, 1998, except for a few months in the early sixties. When the applicant enrolled in the CF, he was suffering from severe acne. In 1965, a military physician prescribed UV treatments to be undergone in a military hospital. The applicant estimates that he received approximately 200-250 UV treatments between April 1965 and December 1966.

[3] Several decades later, he developed severe skin conditions. First, he developed multiple actinic keratosis on his face, scalp and trunk and basal cell carcinomas on his face, scalp and forearm. Subsequently, he developed solar elastosis.

[4] In October 2007, the applicant submitted a disability claim to Veterans Affairs Canada (VAC) in relation to his multiple actinic keratosis and the basal cell carcinomas. The Minister denied his claim but, on August 6, 2009, a Review Panel granted him a full award. The Review Panel found that there was a sufficient nexus between the UV treatments that the applicant received at the beginning of his career and his medical condition. It is implicit from the decision that the Review Panel was satisfied that there was a sufficient connection between the applicant's condition and his military service.

[5] When the applicant's solar elastosis developed, he submitted a second claim to the VAC in relation to this condition. The VAC denied that claim on April 6, 2011. The applicant appealed from this decision before the Review Panel, which upheld the denial.

[6] The Review Panel did not question the connection between the applicant's solar elastosis and the UV treatments. Rather, the Review Panel decided that there was an insufficient nexus between the applicant's condition and his military service. The Review Panel did not "find that the Applicant was engaged in the performance of a task or service related to his military duties when he was receiving ultraviolet treatments for his acne. . ." Therefore, the Review Panel concluded that the applicant had not established "a service relationship between the development of solar elastosis and his military service." In reaching its decision, the Review Panel referred to *King v Canada (Veterans Review and Appeal Board)*, 2001 FCT 535, 205 FTR 204, [*King*], in which Justice Nadon discussed the connection required by paragraph 21(2)(*a*) of the *Pension Act*, RSC 1985, c P-6 [Pension Act]. That provision governed disability and pension awards to CF members and veterans prior to the coming into force of the Veterans Compensations Act and also required that the injury arise out of or be directly connected with the military service in order for the injury to be pensionable. In this case, the Review Panel cited the following excerpt of Justice Nadon's reasons:

> [65] . . Pursuant to paragraph 21(2)(a), only those injuries or diseases which arise out of or are directly connected with an applicant's military service are pensionable… an applicant's military service must be the primary cause of the injury or the disability and causation must be established.

[7] The Review Panel noted the earlier decision which allowed the applicant's claim in relation to his condition of actinic keratosis and basal cell carcinomas but stated that the Review Panel failed

to fully consider the relationship between the applicant's ultraviolet treatments and the execution of his military duties.

II. The decision under review

[8] The applicant appealed from the decision of the Review Panel but, on May 6, 2011, the Appeal Panel upheld the Review Panel's decision.

[9] The Appeal Panel accepted that the solar elastosis was caused by the ultraviolet treatments received by the applicant. It also acknowledged that the applicant was granted an award for the actinic keratosis and basal cell carcinoma under almost identical circumstances. The Appeal Panel's reasons read as follows:

> The Board has reviewed all the evidence on file and has considered the submission of the Advocate. The Board finds, as did the Review Panel, that although the Appellant was under the treatment of military doctors he was not engaged in the performance of a task or service related to his military duties when he was receiving the ultraviolet treatments for his acne; he was not engaged in the undertaking of a service requirement which required him to be in a particular place because of the command nor was he in a special category in which he would be embraced by an all inclusive coverage.
>
> In light of all of the above, the Appeal Panel concludes that disability award entitlement is not warranted for the Appellant's claimed condition of solar elastosis pursuant to section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.
>
> [Emphasis added]

III. Issues

[10] The only issue to be decided in this case is whether the Review Board's decision was reasonable.

IV. Standard of review

[11] Both parties agreed, correctly in my view, that the Appeal Panel's decision should be reviewed under the standard of reasonableness. This case turns on the interpretation of the Veterans Compensation Act and the application of section 45 of the Act to the specific set of facts of record. It therefore involves a question of mixed fact and law. This inference is in accordance with the jurisprudence of this Court and of the Federal Court of Appeal (*Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at para 12, 156 ACWS (3d) 929; *Acreman v Canada (Attorney General)*, 2010 FC 1331 at para 18, 381 FTR 139, and *Lebrasseur v Canada (Attorney General)*, 2010 FC 98 at para 13, 361 FTR 84 [*Lebrasseur*]).

[12] The Court's role when reviewing a decision under the reasonableness standard is explained in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190:

> [47]. . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Analysis

A. *Legislative framework*

[13] Members or veterans of the CF who suffer from a service-related injury or disease are entitled to receive disability awards pursuant to section 45 of the Veterans Compensation Act which reads as follows:

45. (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from	**45.** (1) Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :
(*a*) a service-related injury or disease; or (*b*) a non-service-related injury or disease that was aggravated by service.	*a*) soit par une blessure ou maladie liée au service; *b*) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.
(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.	(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une indemnité d'invalidité.

[14] Section 2 of the Veterans Compensation Act defines as follows the phrase "service related injury or disease:"

"service-related injury or disease"	« liée au service »
"service-related injury or disease" means an injury or a disease that	« liée au service » Se dit de la blessure ou maladie :

(*a*) was attributable to or was incurred during special duty service; or	*a*) soit survenue au cours du service spécial ou attribuable à celui-ci;
(*b*) arose out of or was directly connected with service in the Canadian Forces.	*b*) soit consécutive ou rattachée directement au service dans les Forces canadiennes.

[15] Disputes arising out of the Veterans Compensation Act are governed by the process set forth in the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [VRABA]. Section 4 of the VRABA establishes the Veterans Review and Appeal Board. The mandate to establish a Review Panel and an Appeal Panel rests with the Chairperson of the Board. Sections 3 and 39 of the VRABA provide guidance to Panel members with respect to legislative interpretation and assessment of evidence:

3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled. [Emphasis added]	**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. [Je souligne]
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.

B. *Positions of the parties*

[16] The applicant submits that the Appeal Panel's decision was unreasonable on several accounts.

[17] First, he contends that, in assessing whether he had incurred a service-related injury, the Appeal Panel applied the wrong test. He argues that by concluding that the applicant "was not engaged in the performance of a task or service related to his military duties when he was receiving the UV treatments," the Appeal Board required that there exist a direct causal connection between his condition and the actual performance of specific tasks related to his military duties. He submits that this test involves an excessively narrow construction of the phrase "arose out of" in the definition of "service-related injury or disease." That construction is at odds with the purpose of the Veterans Compensation Act, with sections 3 and 39 of the VRABA and with the recent case law interpreting the Veterans Compensation Act.

[18] The applicant submits that the Veterans Compensation Act has a welfare purpose: its object is to ensure the financial security of former members of the Canadian Forces. Therefore, its

provisions must be given a liberal and broad interpretation; indeed, that is required by section 3 of the VRABA. The applicant further contends that the phrase “arose out of”, properly read, does not require that the injury or disease result directly from the performance of specific military duties.

[19] The applicant submits that there has been an evolution over the years in the manner in which the Courts have construed the phrase “arose out of” in the context of veteran disability awards. The case law first developed in the context of the Pension Act. The applicant concedes that the test developed in the early jurisprudence required that military service be the “primary cause” of the injury or disease related to the disability claim. This early test was the one applied in *King*, above, and the one referred to by the Review Panel and the Appeal Panel in the applicant’s case. The applicant contends that this test is no longer the recognized test and that recent cases no longer require a direct causal relationship between a claimant’s medical condition and military duties. The applicant cites *Canada (Attorney General) v Frye*, 2005 FCA 264, 141 ACWS (3d) 660 [*Frye*], *Lebrasseur,* above, *Bradley v Canada (Attorney General)*, 2011 FC 309 (available on CanLII) [*Bradley*] and *Zielke v Canada (Attorney General)*, 2009 FC 1183, 361 FTR 16, in support of his positio. The applicant further contends that the decision *Boisvert v Canada (Attorney General)*, 2009 FC 735 (available on CanLII) [*Boisvert*] in which Justice De Montigny cites *King* is exceptional and that *McLean v Canada (Attorney General)*, 2011 FC 1047 (available on CanLII) [*McLean*] and is easily distinguishable on the facts. The applicant further contends that the case law pertaining to medical negligence submitted by the respondent is not relevant.

[20] The applicant argues that the appropriate test is whether the activity that caused his condition (in this case, the UV treatments) took place within the context of military service and whether he would have developed his current condition but for the fact that he was in the CF.

[21] The applicant is of the view that by applying the wrong test to determine whether his condition was a service-related injury or disease, the Appeal Board rendered a decision that was unreasonable.

[22] In the alternative, the applicant contends that, even if the "primary cause" test is the correct test, he does meet this test and the Appeal Panel's decision was unreasonable because it failed to consider all of the evidence to make its determination. The applicant points to the following elements which he contends should have led the Appeal Panel to conclude that his condition arose out of his military service:

a. His condition of solar elastosis resulted from the UV treatments that he received while he was in the CF;

b. He was required, as all CF members were, to seek any and all medical treatment from military doctors;

c. The medical officer who ordered the treatment was his superior;

d. When he received the UV treatments, he was following an order from a superior.

[23] The applicant argues that the Appeal Panel failed to consider these circumstances and, therefore, rendered an unreasonable decision. The applicant adds that the Appeal Panel erred in failing to make every reasonable inference in his favour, as directed by section 39 of the VRABA.

[24] The applicant also submits that the Appeal Panel failed to provide adequate reasons. He argues that the Appeal Panel's decision lacks justification, transparency and intelligibility as it failed to analyse the relationship between his military service and his current condition. He further contends that the Appeal Panel should also have explained why it chose to follow *King*, above, and to reject *Frye*. Moreover, the Appeal Panel should have explained why it chose to depart from the prior decision rendered by the Review Panel in relation to his actinic keratosis and basal cell carcinomas.

[25] The respondent submits that the Appeal Panel's decision is reasonable and that the applicant is asking the Court to substitute its own assessment of the evidence to the Appeal Panel's assessment which is not the Court's role in judicial review proceedings.

[26] The respondent takes the view that the "primary cause" test that the Appeal Panel applied is the appropriate test to assess whether a condition is a service-related injury or disease. The Appeal Panel was not satisfied that the applicant's military service was the primary cause for his medical condition and it was reasonably open to it to conclude that the applicant's condition did not arise out of his military service. The respondent relies on the test articulated by Justice Nadon in *King*, above. He also cites *Boisvert*, above, and *McLean*, above, which, counsel submitted, are recent applications of the "primary cause" test. The respondent further contends that the "primary cause" test is not inconsistent with the principles enunciated in *Frye* where the Federal Court of Appeal ruled that it is not enough for a person to show that he or she was serving in the CF at the time that the activity which led to the injury or the disease occurred.

[27] The respondent also finds support for this position in the cases pertaining to medical negligence in the military context. In the respondent's view, those cases stand for the more general proposition that, absent a finding of negligence, there is an insufficient causal connection between a member's military service and the result of medical treatment received at military facilities to grant a pension or disability award.

[28] The respondent cites *Gannon v Canada (Attorney General)*, 2006 FC 600, at para 20, 292 FTR 280 [*Gannon*] in support of his submission that the correct approach to claims relating to medical negligence is not based on the existence of a sufficient causal connection between the member's military service and the medical outcome. Rather, it is "because the Department of Defence assumes the obligation to provide adequate medical care to all servicemen."

[29] The respondent also cites a case decided by the Supreme Court of Canada (SCC) that considered the relationship between medical treatment and military service in a civil action against the Crown for negligence. In *Mérineau v Canada* , [1983] 2 SCR 362 (available on CanLII) [*Mérineau*], the appellant received a blood transfusion with blood of the wrong type in a military hospital and instituted a civil action against the Crown for negligence. The Crown objected to the Court's jurisdiction on the basis that the plaintiff should have claimed benefits under the Pension Act. Subsection 21(2) of the Pension Act, in force at the time, contained language similar to that of the provision in issue herein: "arose out of or was directly connected with" military service. As Justice Pratte explained it:

> There is certainly a link between the damage for which the appellant is claiming compensation and his status as a serviceman, but I think that link is too tenuous for one to say that the damage is directly connected to his military service.

[30] The respondent also referred to *O'Connor v Canada*, 94 FTR 93, 54 ACWS (3d) 896 [*O'Connor*], in which the Federal Court applied *Mérineau* to a case about a soldier who received substandard treatment in a military hospital for a herniated disc. In *O'Connor*, the Court decided that subsection 21(2) of the Pension Act was not broad enough to justify the award of a pension in such circumstances.

[31] The respondent argues that while these cases involve civil actions directed at the Crown and based on medical negligence, they illustrate the relationship between military medical care and military service. In the case at bar, the applicant did not provide any evidence of medical negligence or mismanagement and *Mérineau*, above, and *O'Connor*, above, are strongly persuasive that the applicant's situation does not qualify him for the disability award. In the absence of any inadequate medical care, attention, or management, it was reasonable for the Appeal Panel to conclude that the applicant's condition did not qualify him for the award sought.

[32] The respondent further contends that the Appeal Panel did not violate section 39 of the VRABA. The respondent submits that this section did not come into play in this case since the Appeal Panel was not required to draw any inference from the evidence. The evidence spoke for itself and could be relied on to determine the outcome of the matter. Furthermore, the evidence was not contradicted and, therefore, there was no doubt to be resolved in favour of the applicant.

[33] The respondent also rejects the applicant's submission that the Appeal Panel's reasons were insufficient. The respondent contends that it is apparent from the decision that the Appeal Panel understood the issues and considered all the evidence. The respondent further argues that the Appeal Panel was not required to specifically refer to every item of evidence (*Anderson v Canada (Attorney General)*, 2009 FC 1122 at para 24 (available on CanLII) [*Anderson*]). Moreover, the assessment of the adequacy of the reasons could not be based solely on a consideration of the portion entitled "Analysis/Reasons". The Appeal Panel was not required to discuss how it distinguished its most recent decision from earlier ones. The respondent argues that the authorities submitted by the applicant do not deal with similar or analogous factual situations to the case at bar. Therefore, they are of limited usefulness.

[34] Finally, the respondent argued that there is nothing unreasonable in the fact that the decision under review is inconsistent with a prior decision of the Board regarding the same facts. The Appeal Panel plainly stated that the applicant received a disability benefit to which he was not entitled; accordingly, in arguing that he is entitled to receive the disability award because an award was previously granted in the same circumstances, the applicant is arguing that the Appeal Panel should remain bound by a case that was wrongly decided.

C. *Discussion*

[35] The Veterans Compensation Act sets forth the conditions under which members and veterans of the CF are entitled to receive compensation. The simple fact that a CF member or veteran was injured or developed a disease while he was serving is not sufficient to entitle him to a disability award. The injury or the disease must be service-related or must have been aggravated by

service. The definition of a service-related injury or disease under the Veterans Compensation Act clearly encompasses two alternative criteria: an injury or disease is service-related if it arose out of the service in the CF or if it was directly connected with the service in the CF. It appears from the words used by Parliament that the criteria referring to the “arose out of” military service is less stringent than the “directly connected with” portion of the definition.

[36] It is not disputed by the respondent that the Veterans Compensation Act must be construed in a broad and liberal manner; that flows from the general purpose of the Act, which is to provide entitlements in specific circumstances, and from section 3 of the VRABA in particular, which clearly sets out this principle that the Act “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.”

[37] The Federal Court of Appeal was very clear on that matter in *Frye*, above, when it interpreted paragraph 21(2)*(b)* of the Pension Act. In my view, the Court was also clear that a direct or immediate causal connection between an injury or disease and military service was not required in order to determine whether a condition “arose out of” military service. This, in my view, sets aside the “primary cause” test. The Court made the following comments:

> [21] The liberal approach to the interpretation of the *Pension Act*, mandated both by Parliament and by the interpretative principles outlined above, requires that the phrase "arose out of" in paragraph 21(2)(b) be interpreted in a broad manner. This phrase, used in another statute, was interpreted broadly in *Amos v. Insurance Corp of British Columbia*, [1995] 3 S.C.R. 405 at para. 21, where Major J. said:
>
> > The question is whether the requisite nexus or causal link exists between the shooting and the appellant's ownership,

> use or operation of the van. With respect to causation, it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase "arising out of" is broader than "caused by", and must be interpreted in a more liberal manner.

[22] Since then, several courts have applied this reasoning to determine whether injuries "arose out of" the use and operation of an automobile in the insurance context. Even though, in some cases, the automobile played only a minor role in the injuries, courts have found a sufficient causal nexus between the injury and the operation of a vehicle: see, for example, *Lefor (Litigation guardian of) v. McClure* (2000), 49 O.R. (3d) 557 (C.A.).

[. . .]

[25] First, as the Judge himself pointed out (at para. 20), it is significant that the phrase "arose out of" is linked to "directly connected with" by the word "or". This would appear to indicate that Parliament did not intend to provide that a claimant was eligible for a pension only if the injury or death both "arose out of" *and* was "directly connected with" military service.

[. . .]

[29] Consequently, since the purpose of the Pension Act is to provide pensions in defined circumstances, which must be interpreted liberally and generously, a broad interpretation of paragraph 21(1)(b) is required in order to facilitate entitlement. Hence, we are of the view that a claimant may fall within paragraph 21(1)(b) by establishing that death or injury arose out of military service, whether or not there was a direct connection between them. In other words, while it is not enough that the person was serving in the armed forces at the time, the causal nexus that a claimant must show between the death or injury and military service need be neither direct nor immediate.

[. . .]

[31] The Board seems thus to have treated recreational activities and military service as mutually exclusive categories, so that, since the Corporal Berger's death occurred while engaging in recreational activity, it did not arise out of military service. In so reasoning, the Board failed to look at all the circumstances in order to determine whether, while linked to recreational activity, Corporal Berger's

> death was not also sufficiently causally linked to military service that his death could be said to have arisen out of military service. This narrow approach to the phrase "arose out of or directly connected with" is not consistent with the liberal and generous interpretative approach to the Act that is required by law.
>
> [Emphasis added]

[38] In my humble opinion, this approach is consistent with the language used by Parliament in the definition of service-related injury and with the purpose of the Veterans Compensation Act. This approach was also applied by Justice Tremblay-Lamer in *Lebrasseur*, above, and by Justice Phelan in *Bradley*, above.

[39] In *Lebrasseur*, above, Justice Tremblay-Lamer made the following comments:

> [22] The terms "arose out of" are understood as not requiring a direct causal link. In a case turning on the interpretation of a regulation providing insurance coverage for injuries arising "out of" the use of a motor vehicle, the Supreme Court has cautioned against "a technical construction that defeats the object and insuring intent of the legislation providing coverage." (*Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at par. 17, 127 D.L.R. (4th) 618.) The words "arose out of" therefore only require "some nexus or causal relationship (not necessarily a direct or proximate causal relationship)" (*ibid*; emphasis in the original).
>
> [23] In my view, this interpretation of the terms "arose out of" is well- suited to the *Pension Act*. I note that Parliament, in its wisdom, has seen it fit to make clear the *Pension 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 ... as a result of ... service ... may be fulfilled."

[40] In *Bradley*, above, Justice Phelan expressed the following:

> [20] In assessing the reasonableness of the Appeal Board's decision, the Court must consider not only the decision's constituent parts but also its overall approach. For the reasons outlined below,

> the Court finds that the Appeal Board took an approach to the case which was inconsistent with s. 3 of the Act and approached the claim in a bureaucratic, narrow and parsimonious manner. This is inconsistent with the legislation and the decisions of this Court and the Court of Appeal with respect to the manner in which the assessment of a pension claim is to be conducted. It is not sufficient to pay lip service to the generous reading and application of the legislation which Parliament intended, this Court has affirmed and which members of the Armed Forces deserve.
>
> [. . .]
>
> [31] The Appeal Board, in general, focused on whether the Applicant was performing a specific military function or duty at the specific moment of the injury, rather than whether the Applicant's injury arose from his being in military service. . . .

[41] I am of the view that these authorities clearly stand for a broad and liberal approach with respect to the interpretation of the Veterans Compensation Act and I concur with that approach.

[42] I wish to comment on some of the authorities that the respondent cites.

[43] I have reservations about the relevance of *Mérineau* in this case. First, Justice Pratte's reasons seem to be focussed on the portion of the definition that relates to the direct connection with military service: "There is certainly a link between the damage for which the appellant is claiming compensation and his status as a serviceman, but I think that link is too tenuous for one to say that the damage is directly connected to his military service."

[44] Second, I am not sure that the interpretation suggested by Justice Pratte would still stand in the light of *Amos v Insurance Corp. of British Columbia*, [1995] 3 SCR 405, 127 DLR (4th) 618 [*Amos*], in which the Supreme Court of Canada gave a liberal and broad interpretation of the phrase

"arose out of" in the context of insurance. It is worth noting that both *Lebrasseur*, above, and *Frye*, above, referred to *Amos*.

[45] In *Gannon,* above, referred to by the respondent, the focus was on medical negligence because such was the basis of the claim. Justice Snider specified at paragraph 18 of her reasons that the submissions had focussed on the alleged mismanagement of the applicant's condition. Therefore, *Gannon* cannot provide enlightenment as to the proper interpretation of section 21 of the Pension Act or as to the treatment of a service-related injury or disease under the Veterans Compensation Act.

[46] With all due respect to my learned colleagues, I am of the view that the approach taken by the Court in *Lebrasseur*, above, and *Bradley*, above, is more consistent with the principles enunciated by the Federal Court of Appeal in *Frye*, above, than the "primary cause" approach favoured by the Court in *King*, above, *Boisvert*, above, and *Mc Lean*, above. It is important to add that the context in which Boisvert and McLean were rendered was different than the one in this case; in those cases the issues involved the sufficiency of the medical evidence.

[47] I will now return to the test applied by the Appeal Panel. The Appeal Panel referred to *King*, above, when it cited excerpts of the Review Panel's decision. In its reasons, it also endorsed the rationale of the Review Panel. Therefore, I infer that the Appeal Panel implicitly applied the "primary cause" test enunciated in *King*. For the reasons above, it is my view that this test is not consistent with a broad and liberal interpretation of the Veterans Compensation Act. However, in the alternative, I conclude that the Appeal Panel erred in its application of the test.

[48] The Appeal Panel's reasons are quite succinct and lack detail. However, it appears that the Appeal Panel rejected the applicant's claim on the sole ground that he was not performing his military duties when he received the UV treatments. The Appeal Panel suggests that, to be service-related, the injury or the disease must absolutely occur while the member or veteran is performing specific military duties. This, in my view, is an excessively restrictive application of the "primary cause" test. There could be circumstances in which the military service of a member may very well be the "primary cause" for an injury or a disease even if the member was not performing his or her actual military duties when it occurred. The Appeal Panel should have considered whether the circumstances in which the applicant received the UV treatments were sufficiently related to his military service to warrant an award. In particular, the Appeal Panel should have kept in mind that the applicant was required to seek medical treatment from a military physician, that he received the UV treatments because they were prescribed by a military physician, who was his superior in rank, and should have discussed whether this was sufficient to conclude that the applicant's medical condition arose out of his military service. Clearly, the Appeal Panel did not take into account these elements: it decided the matter on the simple ground that the applicant was not performing his military duties when he received the UV treatments. Accordingly, the Appeal Panel failed to consider relevant evidence and therefore its decision is unreasonable and cannot stand.

VI. Remedy sought

[49] The applicant asks to have the Court set aside the Appeal Panel's decision and grant him a full award for his solar elastosis condition. In the alternative, he asks the Court to refer the matter back to a differently constituted Appeal Panel with the specific direction that his claim be allowed.

[50] I have concluded that the Appeal Panel erred by applying the wrong test and by ignoring relevant evidence. However, it is not the Court's role to entertain the applicant's claim for benefits and to assess whether the evidence is sufficient to conclude that his condition of solar elastosis arose out of his military service. The Court will however send the file back for re-determination by a differently constituted Appeal Panel which will be guided by the present reasons.

JUDGMENT

The application for judicial review is allowed. The Appeal Panel's decision of May 9, 2011 is set aside and the matter is sent back for re-determination by a differently constituted Appeal Panel.

Costs are awarded to the applicant.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-926-11
STYLE OF CAUSE:	ROBERT HALL and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	November 9, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	BÉDARD J.
DATED:	December 7, 2011

APPEARANCES:

Karen Poetker	FOR THE APPLICANT
Susan Eros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pitblado LLP Winnipeg, Manitoba	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT