Federal Court  Cour fédérale

Date: 20120213

Docket: T-745-11

Citation: 2012 FC 207

Ottawa, Ontario, February 13, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

A. GREGORY HYNES C.D.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, A. Gregory Hynes C.D., is a retired member of the Canadian Armed Forces. In a decision dated March 3, 2011, the Veterans Review and Appeal Board granted Mr. Hynes, a three-fifths pension entitlement for the aggravation of Lumbar Disc Disease incurred while on active service. Mr. Hynes seeks a larger entitlement. He has brought this application for judicial review of the Board's decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Mr. Hynes represented himself at the hearing.

[2] For the reasons that follow, the application is dismissed.

BACKGROUND:

[3] Mr. Hynes served in the Regular Force from December 13, 1972 to July 2, 1975 and again from January 5, 1979 to July 31, 1995. During his first enlistment, Mr. Hynes had complained of back pain attributed to sleeping in tents. No abnormality was found upon examination on his re-enrolment.

[4] While doing rounds at CFB Halifax shortly after his reenlistment, Mr. Hynes slipped and fell. He required physiotherapy and treatment for muscle spasms. In August 1979, he was referred to a surgical consultant at the Gagetown base in New Brunswick when he reported having difficulty performing his assigned tasks as an infantryman due to back pain. No physical cause for the pain had been found on examination by medical officers. The consultant concluded that Mr. Hynes "probably did have a significant injury" and recommended that he be given "the benefit of the doubt" and relieved from heavy activities. The applicant was, thereafter, retrained as a dental technician.

[5] In 1985 Mr. Hynes was injured in a collision with an automobile while riding his bicycle from work. In October, 1992 during an "over 40" medical examination, the examiner recorded symptoms of low back pain but found a normal spinal alignment.

[6] On April 18, 1994, prior to his release from service, Mr. Hynes submitted a claim for a pension entitlement for Lumbar Disc Disease ("LDD"), among other matters. A medical opinion dated April 26, 1995 states in part:

> This condition has not been quite so diagnosed as claimed. The evidence submitted by the advocates in the x-ray of 14 July 1988

> which reveals "minimal disc space narrowing at L5-S1" which is a normal variant seen at this level…Whatever the cause of the back pain, it has not been caused or permanently worsened by any of the duties of the Regular Force Service and it cannot be related to the slip and twist of April 1979 which, after it [sic] resolution, was followed by several asymptomatic years.

[7] In a decision dated May 12, 1995 the Pension Commission found that the claim for LDD was not pensionable as it considered that the symptoms had not arisen from military service.

[8] Mr. Hynes appealed that decision to an Entitlement Review Panel of the Board, pursuant to section 84 of the *Pension Act*, RSC 1985, c P-6 (hereafter the *Pension Act*). In a decision dated November 27, 1996, the Entitlement Review Panel considered that there was sufficient evidence to recommend an award based on the August 1979 surgical consultant's report and a statement in the July 14, 1988 x-ray report.

[9] The 1988 x-ray report found:

> There is minimal disc space narrowing at L5-S1 without evidence of associated significant degenerative change. The remainder of the disc spaces are well preserved and no evidence of fracture, dislocation, or significant degenerative change is seen.

[10] Mr. Hynes was awarded a pension entitlement in the amount of two-fifths for his LDD, retroactive to the date following his release from service. At the same time, the Entitlement Review Panel found that a 1994 diagnosis of mild degenerative disc disease, in a man then 45 years old, was insidious and "not supported by trauma or any accident." Disability pension entitlement for that condition was declined.

[11] Mr. Hynes appealed the decision to an Entitlement Appeal Panel of the Veterans Review and Appeal Board ("the Board"). His appeal representations were made by way of written submissions forwarded to the Board on January 26, 2011 by a member of the Bureau of Pension Advocates, under section 25 of the *Veterans Review and Appeal Board Act*, S C 1995, c 18 ("the Act").

DECISION UNDER REVIEW:

[12] In its decision dated March 3, 2011, the Board increased the entitlement to three-fifths, pursuant to subsection 21(2) of the *Pension Act* effective March 3, 2008 (three years prior to the date of the award). In reaching these conclusions, the Board cited the Advocate's written submissions, an excerpt from the Veterans Affairs Canada Entitlement Eligibility Guidelines entitled "Disc Disease" and a publication entitled *The Merck Manual*, Eighteenth Edition. The latter publications were relied upon in support of the Board's findings regarding the consensus in the medical literature respecting disc disease.

[13] The Board noted that the last medical reference to Mr. Hynes's condition was from 1991, some eighteen years earlier and that there was no medical opinion linking all of the LDD to the Regular Force service. The Board found:

> …the totality of the evidence presented to it, shows that service factors may have contributed to a major degree towards the already partially pensioned condition and the amount of three-fifths best represents that degree of aggravation.

[14] Based on the evidence before it including the medical literature, the Board found that LDD is a natural degenerative illness, and only in rare cases (5%) is a severe injury the sole cause of LDD. It withheld a portion of the entitlement based on Mr. Hynes's age at the time of diagnosis. The Board also withheld a portion of the entitlement because of references to other back trauma, such as the 1985 off-duty bicycle accident.

[15] Subsection 39(1) of the *Pension Act* allows for retroactivity from the later of: the day on which the application was first made, and a day three years prior to the day on which the pension is awarded. The Board found no evidence to substantiate an additional award under subsection 39(2) of the *Pension Act* on the ground that the timing of the award had been beyond the control of the applicant.

ISSUES:

[16] A number of issues raised by the parties in their written submissions were not pursued at the hearing. Mr. Hynes advised the Court that his objection to the Board's decision respecting the effective date of the award would not be addressed. He stated that should he succeed regarding entitlement, he would ask the Board to revisit that question.

[17] Counsel for the respondent acknowledged that some of the material annexed to Mr. Hynes' affidavit, to which objection had been made in the respondent's written representations, was properly considered to have been before the Board as it was found in Mr. Hynes' service file. On review, I found that most of the information attached to Mr. Hynes' affidavit was included in either

the certified tribunal record or the respondent's record. Mr. Hynes withdrew Exhibit 31, a cardiologist's report dated January 15, 2009 and Exhibit 32, a Diagnostic Imaging Report dated February 22, 2011 and accordingly neither were taken into consideration. These documents were not before the Appeal Board for their consideration prior to their decision. They were, therefore, not admissible on this review.

[18] In his written argument Mr. Hynes contended that the Board provided inadequate reasons for its decision. He did not pursue this argument at the hearing. I am satisfied that the Board's reasons were thorough and clearly stated the basis on which it reached its conclusion.

[19] The remaining issues are:

a. whether the Board erred in failing to consider all of the evidence and took extraneous evidence into consideration; and

b. whether the Board erred in its application of s. 39 of the Act.

RELEVANT LEGISLATIVE PROVISIONS:

[20] Section 21(2.1) of the *Pension Act* states:

21. (2.1) Where a pension is awarded in respect of a disability resulting from the aggravation of an injury or disease, only that fraction of the total disability, measured in fifths, that represents the extent to which the injury or disease was aggravated is pensionable.	21. (2.1) En cas d'invalidité résultant de l'aggravation d'une blessure ou maladie, seule la fraction — calculée en cinquièmes — du degré total d'invalidité qui représente l'aggravation peut donner droit à une pension.

[21] Section 39 of the *Veterans Review and Appeal Board Act* reads as follows:

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.

ANALYSIS:

Standard of Review;

[22] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 62, the Supreme Court of Canada held that there is no need to engage in a standard of review analysis where the jurisprudence has already satisfactorily determined the appropriate standard. This Court has determined that the Board is a specialized tribunal with considerable expertise, and therefore its decisions are to be reviewed on a standard of reasonableness: *McLean v Canada (Attorney General)*, 2011 FC 453 at para 27.

Did the Board err in its consideration of the evidence?

[23] Mr. Hynes submits that the Board erred in withholding a portion of his pension entitlement on the ground that his LDD was a naturally occurring condition resulting from aging. He argues that an x-ray in his service file dated May 22, 1979 showed no disk degeneration and that proved that there was no natural degeneration prior to his accident in April of that year. He submits that the Board also erred in considering that the 1995 bicycle accident occurred off-duty. Bicycling to and from work was encouraged by his superiors at the time, he says, as part of his physical fitness regime.

[24] I agree with the respondent that there is no merit to the argument that the Board failed to consider Mr. Hynes' complete medical record – the Board considered the medical evidence that was presented by the applicant, and made its decision on that basis. It is clear from the record that the Board considered the full content of the file, including the new evidence submitted by the applicant, and the Advocate's submissions.

[25] There is also no merit to Mr. Hynes' argument regarding the Board's treatment of the 1985 bicycle accident. In the written representations on appeal, the Advocate did not argue that the bicycle accident occurred on-duty; rather, the Advocate argued that the bicycle accident did not contribute to Mr. Hynes' condition. Mr. Hynes continued to make that argument on the hearing of this application while also advancing as a new argument that his supervisors encouraged him to ride his bicycle for fitness. Having attempted to eliminate the 1985 accident as the cause of the condition

for which he sought an increase in entitlement before the Board, the applicant cannot now claim it was work related.

[26] On the evidence and submissions before the Board, it was reasonable for the Board to withhold a portion of the entitlement on the ground that the condition was a naturally occurring process which occurs with ageing and on the other references to back trauma such as the bicycle accident.

[27] Mr. Hynes also submits that it was improper for the Board to have relied on the Merck Manual's discussion of Neck and Back Pain, citing *Deschênes v Canada (Attorney General)*, 2011 FC 449. In that case, Justice Beaudry agreed that the Board may consult sources other than those in the record. However, the Board's reliance upon an external source to contradict the evidence of the applicant's specialist without giving the applicant an opportunity to respond was found to be improper.

[28] That is not the situation here. The content of the excerpt from the Merck Manual attached to the Board's decision is consistent with the Veterans Affairs Canada Guideline which the applicant concedes was part of the record before the Pension Commission and which was relied upon by his Advocate in her written representations on appeal. The Merck Manual merely elaborates upon what is found in synopsis form in the Guideline. It does not contradict the key points of evidence relied upon by the applicant, and by the Board in increasing his entitlement: the 1988 x-ray report and the 1979 consultant's report.

Did the Board err in its application of s. 39 of the Act?

[29] Mr. Hynes submits that if the Board cannot find beyond a reasonable doubt that non-service factors caused his LDD, then it must grant him the full entitlement. Since the medical literature indicates that 5% of cases of LDD are caused solely by trauma, the Board was required to give him the benefit of the doubt that he fell within that 5%. Even if there was only a one-in-a-million chance that the LDD was caused solely by trauma, Mr. Hynes argues, s. 39 requires that he be given the benefit of the doubt raised by that one chance.

[30] The respondent contends that the determination of the extent of aggravation of an injury or disease involves a measure of subjectivity that does not lend itself to scientific precision. There was no evidence linking the fall to the LDD, and the Board gave Mr. Hynes the benefit of the doubt in granting the increased entitlement.

[31] I agree with the respondent that the applicant overstates the effect of s. 39 in this context. His argument would require the grant of full entitlement in any case where there was even a remote possibility that LDD was solely caused by trauma. S. 39 does not usurp the Board's discretion to exercise its judgment as to causation. As stated in *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at paragraph 5:

> Section 39 ensures that the evidence in support of a pension application is considered in the best light possible. However, s.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 (Fed. T.D.), Cundell v. Canada (Attorney General) (2000), 180 F.T.R. 193 (Fed. T.D.).

[32] In this case, there was no serious conflict in the evidence. The weight of the evidence before the Board was to the effect that LDD occurs naturally with age and would rarely be due to one severe injury. There was no evidence to clearly link causation to the applicant's military service but the Board accepted that service factors may have contributed to the condition. The Board found that the amount of three-fifths best represented the degree of aggravation caused by the service factors.

[33] The spinal x-ray report dated May 22, 1979, prepared a few months after the slip and fall, was normal except for what was described in the April 26, 1995 medical opinion as a developmental anomaly at the S1 level. In her written representations to the Board, the Advocate stated that this anomaly, spina bifida, was not material as it does not contribute nor predispose to LDD. The April 26, 1995 opinion characterized the "minimal disc space narrowing" observed in 1988 to be a normal variant. The August 1979 consultant's report was ambiguous at best.

[34] On this evidence, and in applying s.39, the Board was not required to accept the Advocate's submission that in the absence of evidence to establish beyond all reasonable doubt that non-service-related factors had contributed to the disability it was required to find in favour of full pension entitlement.

[35] In my view, therefore, the Board's decision was reasonable and the application must be dismissed. No costs were requested by the respondent and none will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No award of costs is made.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-745-11
STYLE OF CAUSE:	A. GREGORY HYNES C.D. and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Sydney, Nova Scotia
DATE OF HEARING:	November 17, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	February 13, 2012

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