Federal Court Cour fédérale

Date: 20130415

Docket: T-1007-12

Citation: 2013 FC 379

Ottawa, Ontario, April 15, 2013

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

CLAUDE A. ROCHON

Applicant

and

ATTORNEY GENERAL FOR CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Veterans Review and Appeal Board (VRAB) denied the Applicant's request for a reconsideration of a decision of the Veterans Appeal Board (VAB) brought pursuant to section 111 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18. The Applicant seeks judicial review of the VRAB's decision.

[2] The Applicant is a former member of the Canadian Forces. He retired in June 1990 after approximately nine years of service. In September 1985, he was hit by a car resulting in an injury to his left knee. The Applicant claims that he was out jogging as part of his training for his unit's

cross-country ski team at the time of the accident. The injury was treated with physiotherapy and two surgeries. In 1989, he was diagnosed with osteoarthritis in the knee and he had a third surgery to fuse the knee.

[3] The Applicant's subsequent application to the Canadian Pension Commission for a military disability pension was dismissed in March 1993. The Applicant claimed that he was doing required sports training at the time of the accident. The Commission accepted that the Applicant's osteoarthritis condition was due to the car accident but concluded that it did not arise from or was directly connected to his military service. In June 1993 and November 1993, the Entitlement Board and the VAB respectively, reached the same conclusion.

[4] In 2012, the Applicant applied to the VRAB, formerly the VAB, for a reconsideration of the VAB decision on the basis of new evidence. The VRAB applied the "*Palmer*" test as articulated in *Mackay v Canada (Attorney General)*, 129 FTR 286 and ultimately declined to reconsider the VAB decision. The evidence consisted of two letters from former members of the Canadian Forces describing physical training requirements around the time of the accident both generally and more specifically about the cross-country ski team. As well, the Applicant submitted letters from two physicians concerning the appropriateness of the surgery to fuse the knee. The last two letters from the physicians will be considered separately.

[5] As to the training requirements, the first letter is from Reverend Larry Greig, a retired army officer who was "responsible for seeing that [his] troops followed the physical fitness programmes, whether on a specific course or on their own time or after hours". He notes that the Canadian Forces

have always had a mandatory physical fitness program set up in a manner that could be followed by personnel on their own time or after hours. He also refers to two programs that were specifically designed to be followed on a member's own time if they were unable to attend regular physical fitness because of their specific duty.

[6] In the second letter, Mr. Joe Soos, a former member of the Canadian Forces, confirms that physical training is done at night and in the day depending on the requirements of the unit. As well, all service members are required to do "PT" at the unit level and participate in a sport of choice. He notes that he was also a member of the cross-country ski team at around the same time period as the Applicant and describes in some detail the training the Applicant was authorized and required to do during the evening in addition to the "troop training". The training included running and skiing on a course at the base and working out at the base gym.

[7] At this point, it is convenient to note that it is not disputed that the standard of review of a VRAB reconsideration decision is reasonableness: *Bullock v Canada (Attorney General)*, 2008 FC 1117.

[8] As to the test the VRAB should apply on an application for reconsideration, the Applicant submits that the appropriate test is set out in *Dubois v Canada (Employment Insurance Commission)*, [1998] FCJ No 768, an employment insurance case. While it is true that the Federal Court of Appeal in *Frye v Canada (Attorney General)*, 2005 FCA 264 characterized employment insurance and pension legislation similarly as both being "benefits-conferring legislation", this was said in the context of a discussion regarding the liberal and generous interpretation of social welfare

legislation. It is also observed that the general principle in *Dubois* is not at odds with the *Palmer* test. Thus, it cannot be taken as displacing the well established *Palmer* test with its appropriate contextual modifications that recognize the liberal interpretation of the legislation and the inferences that should be drawn in favour of the Applicant on an application for reconsideration by the VRAB.

[9] As to the letters regarding training requirements, the VRAB applied *Palmer* and refused to admit the evidence on the grounds that it was not "new" evidence in the sense that it could have been presented in 1993; it was "not credible for pension purposes"; and it did not provide any new evidence that could reasonably be expected to alter the outcome of the earlier decision.

[10] As the Applicant had failed to provide any reason why he could not have presented the evidence regarding his training at the earlier VAB hearing and given the nature of the information provided in the letters, it was not unreasonable for the VRAB to conclude that the evidence could have been presented earlier.

[11] The VRAB went on to find that although the contents of the letters were relevant to the decisive issue in the case, they were not credible because they did not corroborate the Applicant's contention that his osteoarthritis condition was service related. That is, the writers did not indicate that they had witnessed the accident; they did not provide any confirmation that the Applicant was engaging in authorized physical training at the time he was injured; and they did not provide any information about the Applicant's training program for cross-country skiing. While the use of the word "credible" in relation to the observations that follow is misplaced, they are properly directed at the key question in the present case. That is, would the evidence, taken with the other evidence

already adduced, reasonably be expected to alter the outcome of the decision. In my view, the VRAB reasonably concluded that it would not. Although the new evidence gives additional detail about the physical training requirements, it does not provide anything new in relation to the decisive issue.

[12] In his submissions, the Applicant claims that since his burden under section 21(3)(a) of the *Pension Act*, RSC, 1985, c P-6 is to simply show that he was performing the activity that gave rise to the condition "in the interests of his military service", he does not have to demonstrate that he was required or authorized to perform the activity. In my view, this is an attempt to add an additional ground for reconsideration that was not before the VRAB. The application for reconsideration was based on new evidence only and not on an error of fact or law in the earlier decision.

[13] Turning to the letters from the two physicians, in his application to the VRAB for reconsideration the Applicant "contends that the new evidence submitted by [the physicians] should change the result because it confirms that the applicant suffers from a medical condition which has resulted from medical mismanagement by military doctors during his military service."

[14] The claim of medical mismanagement was not advanced in any of the earlier proceedings and is an entirely new claim for which a new application should have been made to the Minister in accordance with section 81(1) of the *Pension Act*. It follows that in considering the issue and in making any findings and drawing any conclusions from the evidence of the two physicians, the

VRAB clearly exceeded its jurisdiction. In these circumstances, the Court finds that no determination was made by the VRAB for the purposes of section 85(1) of the *Pensions Act*.

[15] For the above reasons, I conclude that the VRAB decision was reasonable and the application for judicial review will be dismissed. The Respondent did not ask for costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Dolores M. Hansen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1007-12
STYLE OF CAUSE:	CLAUDE A. ROCHON - and - ATTORNEY GENERAL FOR CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 2, 2013
REASONS FOR JUDGMENT AND JUDGMENT OF:	HANSEN J.
DATED:	

APPEARANCES:

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