Federal Court  Cour fédérale

Date: 20140117

Docket: T-1614-12

Citation: 2014 FC 56

Ottawa, Ontario, January17, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

RICHARD JAMES PHELAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Veterans Review and Appeal Board ["VRAB"] Entitlement Appeal Panel dated August 22, 2012, to not reconsider the application of Mr Phelan (the "applicant") on its merits and to confirm its previous decision, dated October 26, 2010, which upheld a January 18, 2010 decision of the VRAB Entitlement Review Panel granting the applicant a three-fifths pension effective from the date of his application, which was February 16, 2009.

Background

[2] The applicant retired from the Royal Canadian Mounted Police (the "RCMP") in December 1998 after 24 years of service. Prior to his retirement, on or about January 28, 1998, he was involved in a motor vehicle accident while on duty in Vancouver, British Columbia (the "Accident"). In or around 2001, he began to experience pain in his neck and other symptoms, but was unable to obtain a diagnosis for the symptoms.

[3] On April 17, 2002, the applicant first applied for a pension in relation to osteoarthritis cervical spine (the "2002 Application"). The application was stamped as received by Veterans Affairs Canada (the "Department"). The application authorized the Royal Canadian Legion (the "Legion") to act as his representative. The application form of the Legion indicated that a physician's diagnosis was necessary.

[4] During 2002, the applicant attempted to gather documentation from the RCMP pertaining to his service, medical history and the Accident. On June 17, 2002, he sent a request to the RCMP and received a response on July 17, 2002, stating that the RCMP was unable to complete the information request within their usual processing time. On July 27, 2002, the applicant wrote a follow up letter noting his need for the reports on the Accident. There is no evidence about whether the RCMP provided documents later or on what date. The applicant obtained notes directly from the police officer who was his partner at the time which confirmed the Accident.

[5] From 2003 to 2008, the applicant's evidence is that he managed his symptoms through chiropractic treatment, exercise and medication, as required.

[6] On February 16, 2009, the applicant filed a new application for a disability pension due to osteoarthritis cervical spine (the "2009 Application"). On March 10, 2009, he provided a letter in support of the 2009 Application, which stated, among other things, that he had "abandoned" his 2002 Application.

[7] In March 2009, the applicant had an MRI. The MRI report of Dr Kruger states: "There is severe, bilateral neural foraminal stenosis secondary to advanced degenerative changes at the uncovertebral joints." The report also indicates that there is "moderate to severe stenosis" at three different levels of the spine.

[8] On July 23, 2009, the applicant's application for a disability pension was denied by the Department. The applicant appealed the July 23, 2009 decision of the Department to the VRAB.

[9] In October 2009, Dr A. Jackson provided a medical opinion which stated:

> On discussing Mr. Phelan's history, he has been an RCMP officer for many years and has not really been in any other ventures that would lead him to cause trauma to his neck to this level at his age. He advises me he has spent many a time rolling around in the dirt with suspects during arrests, etc. but more importantly the only near significant injury that he can remember was in 1998 where he was involved in a motor vehicle accident while on patrol in Vancouver. The vehicle at that time was written off he tells me […]
>
> It is very difficult to directly attribute this specific event to leading to his level of osteoarthritis and degenerative disc disease within his neck. However, it is possible along with a multitude of neck injuries through his service career along with this accident that he did, indeed, develop degenerative discs and osteoarthritis from his service as an RCMP officer.

> In summary, it is impossible to prove or disprove the causation of his early degenerative disc disease but when all things are considered it is more likely than not that his physicality within the job of being an RCMP officer along with a motor vehicle accident may certainly be the main contributing factors.

[10] In January 2010, the VRAB Entitlement Review Panel granted the applicant a disability pension for three-fifths with an effective date of February 16, 2009, the date on which the 2009 Application was commenced.

[11] With respect to the entitlement at three-fifths, the Entitlement Review Panel was of the opinion that, while his services with the RCMP "contributed to a major extent" to his cervical disc condition, the condition "is a natural degenerative process which would have been occurring despite the Applicant's RCMP service." The Entitlement Review Panel took note of the applicant's testimony which recounted that a surgeon had explained to him that this condition normally starts at birth and progresses throughout life. The Entitlement Review Panel further noted the medical opinion of Dr Jackson, which stated that the Accident combined with the applicant's RCMP service may be the main contributing factor to his condition.

[12] With respect to the determination that the effective date of the pension would be February 16, 2009, the Entitlement Review Panel noted that the applicant had submitted an application in 2002, but his evidence was that while waiting for requested documents, his symptoms abated and, as a result, he did not pursue the application. The Entitlement Review Panel found that the applicant withdrew his 2002 Application. The 2009 Application was duly completed and, therefore, the date of the 2009 Application was the effective date.

[13] The applicant appealed the decision of the Entitlement Review Panel to the Entitlement Appeal Panel of the VRAB. The Entitlement Appeal Panel considered two issues; whether the evidence supported a higher proportion of pension entitlement, and whether the 2002 Application or the 2009 Application should be considered for the purpose of retroactive entitlement.

[14] On January 28, 2010, the Entitlement Appeal Panel found that the decision to award the pension at three-fifths was reasonable. The Entitlement Appeal Panel noted the evidence of Dr Jackson that service factors were the main contributing factors and also noted that the applicant was 57 years of age at the time of diagnosis, which was 11 years post service. With respect to retroactivity, the Entitlement Appeal Panel acknowledged that there was evidence of an intention to file in 2002 but it was not persuaded that a duly completed application had been filed in 2002; as such, it concluded that the 2009 Application was the application to be considered for the purpose of retroactivity. The Entitlement Appeal Panel confirmed the effective date as February 16, 2009 and concluded that no additional retroactive award was warranted.

[15] The applicant then sought reconsideration of the October 26, 2010 decision. On August 22, 2012, a differently constituted Entitlement Appeal Panel of the VRAB (the "Panel") found that there was insufficient evidence to open the matter for reconsideration on its merits and confirmed its previous decision.

[16] It is this reconsideration decision that is the subject of the current application for judicial review.

The Reconsideration Decision Under Review

[17] The Panel considered whether or not an error of fact was committed by the previous Entitlement Appeal Panel. The Panel noted that osteoarthritis cervical spine is by its very nature a degenerative disease subject to the natural aging process. As the applicant did not obtain a diagnosis until he was 57 years old, the Panel found that the natural aging process contributed to the development of the condition, and that a three-fifths pension is a reasonable recognition of the role played by the service factors in the development of the condition.

[18] The Panel also considered whether the previous Entitlement Appeal Panel erred in law in deciding not to grant the applicant retroactive entitlements. The previous Entitlement Appeal Panel found that the applicant had withdrawn his 2002 application. Previously, the VRAB Entitlement Review Panel had acknowledged the intention of the applicant to make a disability claim in 2002, but that it was not clear from the evidence whether that claim had been completed.

[19] On reconsideration, the Panel noted that the 2002 Application included some bare particulars and that an interview apparently had been held in June 2002, but that the record was then silent until 2009. The Panel noted that the applicant had referred to the 2002 Application as "abandoned", but had also indicated that he had not intended to discontinue the original claim. The Panel reached the same conclusion as in the first appeal decision, that the applicant had an intention to file in 2002, but added that "either through frustration obtaining records or remission of symptoms, the claim did not proceed any further."

[20] The Panel considered whether the previous Entitlement Appeal Panel erred in law in concluding that the Department did not neglect its duty to assist the applicant pursuant to subsection 81(3) of the *Pension Act*. The Panel reiterated that the Department had not received a duly completed application. The Panel also noted that the applicant admitted to abandoning his 2002 Application and to his inability to proceed with the claim because he was "fine". The Panel confirmed the previous appeal decision that there was insufficient credible evidence to find that the Department had failed in its duty to assist.

[21] The applicable legislation is:

Royal Canadian Mounted Police Superannuation Act, RSC, 1985, c R-11	*Loi sur la pension de retraite de la Gendarmerie royale du Canada, LRC (1985), ch R-11*
32. Subject to this Part and the regulations, an award in accordance with the *Pension Act* shall be granted to or in respect of the following persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force:	32. Sous réserve des autres dispositions de la présente partie et des règlements, une compensation conforme à la Loi sur les pensions doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service dans la Gendarmerie, à toute personne, ou à l'égard de toute personne :
[…]	[…]
(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of	b) ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de

this Act and who has suffered a disability, either before or after that time, or has died.

Pension Act, RSC, 1985, c P-6

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.

[…]

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,

(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;

[…]

la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

Loi sur les pensions, LRC (1985), ch P-6

2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

[…]

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) 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;

[…]

39. (1) A pension awarded for disability shall be made payable from the later of	39. (1) Le paiement d'une pension accordée pour invalidité prend effet à partir de celle des dates suivantes qui est postérieure à l'autre :
(a) the day on which application therefore was first made, and	a) la date à laquelle une demande à cette fin a été présentée en premier lieu;
(b) a day three years prior to the day on which the pension was awarded to the pensioner.	b) une date précédant de trois ans la date à laquelle la pension a été accordée au pensionné.
[…]	[…]
(2) Notwithstanding subsection (1), where a pension is awarded for a disability and the Minister or, in the case of a review or an appeal under the *Veterans Review and Appeal Board Act*, the Veterans Review and Appeal Board is of the opinion that the pension should be awarded from a day earlier than the day prescribed by subsection (1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension.	(2) Malgré le paragraphe (1), lorsqu'il est d'avis que, en raison soit de retards dans l'obtention des dossiers militaires ou autres, soit d'autres difficultés administratives indépendantes de la volonté du demandeur, la pension devrait être accordée à partir d'une date antérieure, le ministre ou le Tribunal, dans le cadre d'une demande de révision ou d'un appel prévus par la *Loi sur le Tribunal des anciens combattants (révision et appel)*, peut accorder au pensionné une compensation supplémentaire dont le montant ne dépasse pas celui de deux années de pension.
[…]	[…]

81. (3) The Minister shall, on request,

(*a*) provide a counselling service to applicants and pensioners with respect to the application of this Act to them; and

(*b*) assist applicants and pensioners in the preparation of applications.

81. (3) Le ministre fournit, sur demande, un service de consultation pour aider les demandeurs ou les pensionnés en ce qui regarde l'application de la présente loi et la préparation d'une demande.

Veterans Review and Appeal Board Act, SC 1995, c 18

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.

[…]

38. (1) The Board may obtain independent medical advice for the purposes of any proceeding under this Act and may require an applicant or appellant to undergo any medical examination that the Board may direct.

Loi sur le Tribunal des anciens combattants (révision et appel), LC 1995, ch 18

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.

[…]

38. (1) Pour toute demande de révision ou tout appel interjeté devant lui, le Tribunal peut requérir l'avis d'un expert médical indépendant et soumettre le demandeur ou l'appelant à des examens médicaux spécifiques.

(2) Before accepting as evidence any medical advice or report on an examination obtained pursuant to subsection (1), the Board shall notify the applicant or appellant of its intention to do so and give them an opportunity to present argument on the issue.	(2) Avant de recevoir en preuve l'avis ou les rapports d'examens obtenus en vertu du paragraphe (1), il informe le demandeur ou l'appelant, selon le cas, de son intention et lui accorde la possibilité de faire valoir ses arguments.
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.
[Emphasis added]	[Je soulingne]

The Veterans Affairs Canada Entitlement Eligibility Guidelines

[22] The Veterans Affairs Canada Entitlement Eligibility Guidelines include definitions, diagnostic standards and pension considerations including causes and aggravation of various types of osteoarthritis ["OA"]. The applicant's condition is specifically included in the definitions of

osteoarthritis. The relevant excerpts of the "Entitlement Eligibility Guidelines – Osteoarthrosis/Osteoarthritis" (the "Guidelines") are set out below;

> **PLEASE NOTE**: An application for pension entitlement for OA requires that a 'disability" from OA be present. For VAC pension purposes, a "disability' from OA is demonstrated when relevant signs and/or symptoms are present. X-ray evidence alone is insufficient, as the condition must be symptomatic. X-ray findings do not correlate well with symptoms of OA. While it is accepted that osteophytes and joint space narrowing are signs of OA, they do not mean that OA is symptomatic.
>
> (At page 1)
>
> […]
>
> **DIAGNOSTIC STANDARD**
>
> Diagnosis by a qualified medical practitioner is required. While x-rays and other diagnostic tests such as bone scans are often helpful, the clinical characteristics must be provided, For VAC pension purposes, a disability resulting from OA is present only when there are relevant signs and/or symptoms of OA demonstrated.
>
> Each claimed joint should be individually diagnosed, and the diagnosis for each joint should describe the site(s) affected. […]
>
> (At Page 2)
>
> […]
>
> **CLINICAL FEATURES**
>
> OA is a common disease, with more than 75% of individuals over 70 years of age showing some definite radiographic evidence of OA. While the incidence of OA increases with age, the disease is not caused solely by aging of articular tissues. Joint trauma and other factors may accelerate the development of OA, and it is on these aspects that the *Pension Considerations* section is focused.
>
> A number of factors has been implicated in the pathogenesis of OA, including but not limited to age, gender, ethnicity, biochemical (e.g. bone density), and genetics.
>
> […]

> After the initial stages of cartilage degeneration (from many causes, including injury), there may be a delay of many years before a person feels joint pain or an x-ray shows osteoarthritic changes. Significant cartilage damage may have occurred before relevant signs and symptoms appear.
>
> There are known inconsistencies between findings on x- rays and clinical symptoms, with only 50% to 60% of subjects with radiographic OA being clinically symptomatic. Further, an absence of x-ray evidence of OA does not exclude the presence of the disease, particularly in the early stages. Clinical symptoms, which must be recurrent or continuous after initial manifestation, may precede x-ray findings by up to approximately 10 years.
>
> (At page 5)
>
> […]
>
> **PENSION CONSIDERATIONS**
>
> **A. CAUSES AND/OR AGGRAVATION**
>
> […] **EACH CASE SHOULD BE ADJUDICATED ON THE EVIDENCE PROVIDED AND ITS OWN MERITS**.
>
> **General**:
>
> […]
>
> Where there is no evidence that risk factors, including aging, have contributed to the development of PA in any given case, no restriction on entitlement should occur.
>
> (At page 7)

Issues

[23] The applicant submits that the Panel erred in assessing his entitlement to a pension, specifically: the degree to which his service in the RCMP and the Accident contributed to his osteoarthritis; and the evidence in support of his entitlement. The applicant also submits that the

Panel erred: in determining the effective date of the pension; and in failing to apply the provisions of subsection 39(2) and the overall purposes of the *Pension Act*.

Standard of review

[24] The Panel's determination of the applicant's entitlement to a pension at three-fifths involves the interpretation and assessment of medical evidence, and is reviewable on a standard of reasonableness (*Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21, 375 FTR 13).

[25] There are two issues relating to retroactivity. First, the application of subsection 39(1), which is a question of statutory interpretation, is reviewable on a standard of correctness (*Canada (Attorney General) v MacDonald*, 2003 FCA 31 at para 11, 238 FTR 172; *Robertson Estate v Canada*, 2010 FC 233 at para 33, 360 FTR 306 [*Robertson Estate*]; *Atkins v Canada (Attorney General)*, 2009 FC 939 at para 20, 352 FTR 316 [*Atkins*]). However, the findings of fact concerning the date the application is made are reviewable on a standard of reasonableness. Second, the application of subsection 39(2), which is an exercise of discretion by the Panel, is reviewable on a standard of reasonableness (*Skouras v Canada (Attorney General)*, 2006 FC 183 at paras 10-15, [2006] FCJ No 263).

[26] The role of the court on judicial review where the standard of reasonableness applies is to determine whether the Panel's decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to

substitute its own view of a preferable outcome.": (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). The Court will not re-weigh the evidence or remake the decision.

Material not before the decision makers

[27] The parties agree that on judicial review, the Court can only consider the evidence which was before the board, commission or other tribunal whose decision is being reviewed, unless certain narrow exceptions apply (*Via Rail Canada Inc v Canada (Canadian Human Rights Commission)*, [1998] 1 FC 376 at paras 14-24, 135 FTR 214; *Robertson Estate, supra* at paras 28-31). The applicant's own handwritten note dated 2007 is, therefore, not admitted.

Did the Panel err in confirming the decision to award a pension of three-fifths?

[28] The applicant submits that the Panel does not have any medical expertise, and that in drawing medical conclusions, the Panel can rely only upon the medical evidence before it (*Gilbert v Canada (Attorney General)*, 2010 FC 1300 at para 10, [2010] FCJ No 1622). In addition, the applicant notes that the *VRAB Act* should be construed liberally in recognition of the services rendered by members of the Armed Forces (*Frye v Canada (Attorney General)*, 2005 FCA 264 at paras 14-19, 338 NR 382; *Boisvert v Canada (Attorney General)*, 2009 FC 735 at para 26, [2009] FCJ No. 1377).

[29] The applicant submits that the Panel must accept any uncontradicted evidence, and that it may only reject evidence if there is contradictory evidence or if it finds the evidence to not be credible (*Rivard v Canada (Attorney General)*, 2003 FC 1490, [2003] FCJ No 1948 [*Rivard*];

MacDonald v Canada (Attorney General), 2003 FC 1263 at paras 18-22, 241 FTR 308; *King v Canada (Veterans Review and Appeal Board)*, 2001 FCT 535 at para 39, 205 FTR 204).

[30] Noting the specific provisions of the legislation, the applicant submits that the legislative scheme was set up in favour of applicants and is not intended to be adversarial (*Woo Estate v Canada (Attorney General)*, 2002 FCT 1233 at para 71, 229 FTR 217) and that the Panel is required to resolve any doubt about the evidence in the applicant's favour (*Wood v Canada (Attorney General)*, 199 FTR 133, [2001] FCJ No 52 at para 23).

[31] The applicant also relies on the Guidelines, which note that symptoms of osteoarthritis "may remain mild or may disappear for long periods" and that "where there is no evidence that risk factors, including aging, have contributed [to the disease], no restriction on entitlement should occur."

[32] The applicant submits that the Panel erred in evaluating the medical evidence, in light of its statutory obligations. The applicant argues that the Panel's assessment of three-fifths entitlement does not adequately recognize the role that service factors had to play in the development of his condition and does not accord with the medical opinion of Dr Jackson. The applicant reiterates that any doubt should be resolved in his favour.

[33] More specifically, the applicant submits that the Panel erred in finding that the natural aging process contributed to his condition. The applicant argues that the Panel erred in equating his age at diagnosis with his age at the onset of the condition. The applicant notes that delay in the onset of

symptoms and periods without symptoms are consistent with the information provided in the Guidelines, moreover, he experienced symptoms and sought treatment following the Accident.

[34] The applicant also notes that in 2009, at the age of 57, his condition was characterized by the MRI report and by Dr Jackson as "severe" and "advanced", indicating that it had been accelerated by the Accident and his service with the RCMP, rather than by the natural aging process.

[35] The applicant submits that it was an error for the Panel to reduce his pension by two-fifths (and award only three-fifths) given that aging is not a contributing factor. Without contradictory evidence, and bearing in mind that the interpretation of the medical evidence and the statutory scheme should favour the applicant, no restriction on entitlement should have occurred, in accordance with the Guidelines.

[36] The respondent agrees with the purpose of the legislation, that it is to be interpreted liberally, and that credible evidence should be interpreted in favour of the veteran. The respondent submits that the Panel considered all the evidence in accordance with the purpose and principles of the legislation and reached a reasonable conclusion.

[37] The respondent submits that Dr Jackson's letter of March 2009 is the first and only evidence of a diagnosis of the applicant. The respondent does not dispute that symptoms can arise later, but that without a diagnosis, there is no disability upon which to base a disability pension. The respondent submits that because the Panel does not have medical expertise, it must rely on a medical diagnosis to evaluate an application for a disability pension.

[38] The respondent notes that a MRI was requested from the applicant in 2002, but there is no evidence that a MRI was conducted, since the results were never revealed.

[39] The respondent submits that there is some evidence that other factors, including aging, contributed to the development of the applicant's osteoarthritis. The diagnosis was not obtained until 11 years post-service, which suggests that the Accident and service in the RCMP are not the only contributing factors. The respondent also submits that Dr Jackson's opinion is tentative and does not provide a strong causal connection between the applicant's condition and his RCMP service.

[40] The respondent acknowledges that the applicant suffers from osteoarthritis but submits that the issue is the extent to which his service, including the Accident, contributed to this condition. The respondent's position is that when all the evidence is considered, the award of a three-fifths pension is reasonable.

The Panel's decision regarding the applicant's entitlement to a three-fifths pension is reasonable

[41] The Panel, on reconsideration, concluded that its decision, which confirmed that a pension of three-fifths should be awarded, should be upheld.

[42] I acknowledge that the legislation calls for a liberal interpretation, that uncontradicted evidence should be accepted, and that doubts should be resolved in favour of the applicant. Bearing those principles in mind, I find that the Panel's conclusion was reasonable.

[43] Section 38 of the *VRAB Act* permits the VRAB to require a medical opinion and to obtain independent medical advice. The VRAB does not have medical expertise and therefore must rely on the opinion of those qualified to diagnose a disability. The Guidelines state that a diagnosis by a qualified medical practitioner is required.

[44] The medical evidence does not support a finding that the Accident and the applicant's services with the RCMP were the *sole* contributing factors to the applicant's osteoarthritis.

[45] The timing of the onset of the applicant's symptoms, the applicant's testimony concerning advice he had obtained from a surgeon, the applicant's inability to secure a diagnosis between 2002 and 2009, the Guidelines, and Dr Jackson's medical diagnosis, all reasonably support the finding that the Accident and the applicant's RCMP service were the *main* contributory factors in the development or acceleration of the applicant's osteoarthritis.

[46] The Guidelines provide for several possible risk factors, but there is no evidence of these other risk factors except aging. But as noted above, the Guidelines indicate:

> *Where there is no evidence that risk factors, <u>including aging</u>, have contributed to the development of OA in any given case, no restriction on entitlement should occur*.
> [Emphasis added]

[47] While the applicant argues that his condition was advanced at the age of 57 and, therefore, it must have been present earlier and that aging should not be a factor to reduce the entitlement, the applicant did not have any medical diagnosis before the age of 57. The medical evidence does not

indicate that the condition existed at a particular point earlier in time, only that the physicality of his RCMP service and the Accident may be the main contributing factors to his current "advanced … degenerative disc disease"

[48] It was open to the Panel to conclude that aging played a role in the condition as there was some evidence that aging was a risk factor. Such a conclusion meets the standard of reasonableness in accordance with the principles articulated in *Dunsmuir*. Therefore, the decision to uphold the applicant's entitlement to a three-fifths pension is reasonable.

Did the Panel err in confirming that the effective date of the disability pension is February 16, 2009?

[49] The applicant submits that the Panel erred by finding that his 2002 Application was not "completed". The applicant argues that the legislation requires only that an application be "made" and on a liberal interpretation of the legislation, given his efforts and intention to submit a claim in 2002, he "made" an application.

[50] The applicant submits that the 2002 Application must be considered in determining the effective date pursuant to subsection 39(1) because it was stamped as "received" by the Department. Although he used the term "abandoned", this should not be strictly and literally construed.

[51] The applicant submits that he did not abandon or withdraw the 2002 Application. Rather, he was simply unable, through no fault of his own, to obtain the necessary records to complete it. The applicant submits that he had the right to presume that the 2002 Application remained open and active, absent any advice from the Department to the contrary.

[52] With respect to the Panel's reliance on his testimony that he did not proceed with his 2002 Application because he was "fine", the applicant submits that he should not be penalized for refusing to take advantage of the pension system at a time when his symptoms were manageable.

[53] The applicant also submits that a medical diagnosis is not required and that it is unfair to require an applicant to provide a diagnosis as this may be beyond their control; for example, an applicant may have symptoms but there is no confirmed diagnosis for the symptoms being experienced. The diagnosis may be possible only years later.

[54] The respondent submits that subsection 39(1) of the *Pension Act* provides two options for an effective date; the later of the date of the application or a date three years prior to the date of the decision. In this case, the respondent notes that there are three dates to consider: April 18, 2002, the date on which the 2002 Application was made; February 16, 2009, the date on which the 2009 Application was made; and January 28, 2007, the date three years prior to the decision.

[55] The respondent submits, however, that April 18, 2002 is not a possible date to consider for the purposes of subsection 39(1) of the *Pension Act*. The applicant's own words were that he abandoned this claim, and even on a liberal interpretation, there is no other way to interpret this statement, considering that the applicant also indicated that he did not proceed with the claim because he was "fine". The applicant's behaviour also demonstrated abandonment, since neither he nor the Legion provided any documentation, particularly a medical diagnosis, as required, to support the 2002 Application.

[56] The respondent suggests that the inability to obtain a diagnosis is likely the reason why he chose to abandon his application; the inability to obtain other documents is inconsequential if a diagnosis was not obtained.

[57] In addition, the applicant commenced a new application in 2009 and would not have done so unless he regarded his 2002 Application as abandoned. If he had intended to rely on and reactivate his 2002 Application, he could have provided the necessary support for that application.

The Panel did not err in its application of subsection 39(1) of the Pension Act

[58] The Panel did not err in confirming the effective date of the applicant's entitlement to be February 16, 2009, the date on which the 2009 Application was commenced.

[59] In *Atkins*, *supra* at paras 31-34, Justice Phelan considered the power of the Panel to alter the effective date of a pension and remarked that:

> 31 The power of the Reconsideration Panel (or any other relevant deciding body) to alter the effective date of a pension is very circumscribed. Section 39 sets out two circumstances for setting a date on which a pension is payable.
>
> 32 Under s.39 (1) the pension is payable on the later (not the "earlier") of the day on which the application is made and a day three years prior to the day the pension is awarded. The practical anticipated effect of the provision is that any award should be made within three years of an application being filed.
>
> 33 Since the Applicant withdrew the cervical injury claim from his 1992 application, that application has no bearing on the calculation of the date on which the award is payable and does not form a basis for retroactivity from October 11, 2002 (three years prior to the date of the award).

> 34 The cervical pension application was completed June 29, 2005 and awarded October 11, 2005 (three years earlier being October 11, 2002). The pension was made payable on June 29, 2005, the later of the two possible dates under s.39 (1).
>
> [Emphasis in original.]

[60] The key issue is whether the applicant's pension claim was "made" on April 18, 2002, the date on which the 2002 Application was submitted. If the claim was made then, the relevant date pursuant to subsection 39(1) of the *Pension Act* would be the later of April 2002 or three years prior to January 28, 2010, (the date of the decision). The applicant would then be entitled to a pension effective from January 28, 2007.

[61] Although the standard of review for the application of subsection 39(1) of the *Pension Act* is correctness, it stems from a finding of fact with respect to when the application was made. That finding is reviewable on a standard of reasonableness.

[62] The Panel reasonably concluded that the applicant's pension claim was not made on April 18, 2002. Given the statements of the applicant, he abandoned, withdrew or simply did not pursue, with the requisite supporting documents, his 2002 Application.

[63] The fact that the applicant submitted a new application in 2009 as opposed to reactivating his 2002 Application adds further support to the Panel's finding. In addition, although the applicant maintains that he was frustrated in his earlier attempts to obtain documents, the Panel noted that the record was silent from 2002 to 2009. If his intention had been to pursue the 2002 Application, it

would be reasonable to expect some further communication by the applicant or by the Legion, acting on his behalf, with the Department.

[64] In addition, the Guidelines and the Legion's application form indicate that a medical diagnosis is required. The diagnosis was provided only after the 2009 Application had been commenced. Although the *Pension Act* is to be liberally interpreted in favour of the applicant, such a liberal interpretation must be done within the context of the statute. The Department must be able to ensure that there is a disability upon which to base the entitlement. A medical diagnosis provides that basis.

[65] The applicant submits that, in some cases, a diagnosis may not be possible although symptoms may exist. That may be the case for some potential applicants. However, as I read the Guidelines as a whole, both a medical diagnosis and symptoms are required to support a claim. The Guidelines note that a disability is present only when there are relevant signs and/or symptoms of osteoarthritis demonstrated.

[66] In the present case, the applicant has been found by the decision-makers to be candid and credible; there is no suggestion of bad faith. However, the applicant's position that a diagnosis should not be necessary to base a claim and that the 2002 Application should be considered would invite an interpretation that a claim could be submitted to start the clock for the purposes of retroactivity, although the diagnosis or the aggravated symptoms may not be present until a later date. This can not be what the legislation intends, even on a favourable interpretation for applicants.

[67] While a fully completed application may not be required under subsection 39(1) of the *Pension Act* in order for the Department to assess the claim, something more than a bare application is required in order to support the view that the application is "made".

[68] The supporting documents to establish the disability must be provided within a reasonable period following the application form. As evidenced by the applicant's 2009 claim, which was made in February, the supporting documents, including the medical diagnosis obtained in March, were provided shortly afterward. It is conceivable that the Department could review the application and require more information, but at the outset, the application must be substantially completed with supporting documentation to permit the Department to assess the claim. The 2002 Application was only commenced, no supporting documents were provided, and the Panel reasonably found that it was not "made".

[69] The Panel reasonably found that the application was made in 2009 (and was not made in 2002) and correctly determined that the effective date of the pension was 2009.

Did the Panel err in finding that there was no evidence to reconsider whether to exercise its discretion pursuant to subsection 39(2) of the Pension Act?

[70] The applicant submits that the only requirement for the exercise of the discretion conferred by subsection 39(2) of the *Pension* Act is that the Panel be of the opinion that the pension should be awarded from a day earlier than the day prescribed by reason of administrative difficulties (*Rivard, supra* at para 16), and that in this case, there was evidence of delay. The applicant refers to the July 17, 2002 letter from the RCMP stating that it was unable to process the applicant's request for

records within their usual processing time. The applicant also referred to the decision where the Panel acknowledged his frustration in obtaining records from the RCMP.

[71] The applicant submits that the threshold for the exercise of discretion pursuant to subsection 39(2) of the *Pension Act* is low.

[72] The respondent submits that it was reasonable for the Panel not to grant an additional award under subsection 39(2) of the *Pension Act*. The respondent argues that any delay regarding the 2002 Application was because of the applicant's abandonment of it, his symptom-free period and his inability to obtain a medical diagnosis.

The Panel did not err regarding subsection 39(2)

[73] The Panel did not err in confirming its decision to not exercise the discretion pursuant to subsection 39(2) of the *Pension Act* to grant retroactive entitlement of up to two additional years.

[74] While there is no requirement for the applicant to specifically request an additional award, subsection 39(2) is a discretionary provision and the Panel is not required to make an additional award even if it concludes that there was administrative delay.

[75] In *Rivard, supra* at para 16, Justice Pinard gave the following interpretation of subsection 39(2) of the *Pension Act*:

> 16 Here, the board wrongly made the exercise of the discretion conferred upon it by the provision in question dependant upon a specific request for additional compensation by the pensioner. There is nothing in subsection 39(2) that restricts the discretionary powers

> given to the board in such a way. The only requirement for the exercise of the discretion conferred by the provision is that the board be of the opinion "that the pension should be awarded from a day earlier than the day prescribed ... by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant." Thus, whether or not a request for additional compensation pursuant to subsection 39(2) is made, the board may, if the record before it indicates that there were such delays or other administrative difficulties and if it is of the opinion that the pension should be awarded from an earlier date because of these delays or administrative difficulties, award additional compensation to the pensioner where the amount does not exceed two years of pension. In my view, this interpretation of subsection 39(2) is supported by the duty imposed upon the board by section 3 of the VRAB Act to interpret the provisions of the Act liberally "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". Further, section 2 of the Pension Act requires that the provisions of that Act be liberally construed and interpreted.

[76] The Panel noted that the 2002 Application did not proceed because of "frustration obtaining records", but the Panel also found that the relevant application for the purpose of retroactivity was the 2009 Application. Given this finding, the applicant's frustration in obtaining records to support the 2002 Application, which as noted above, was reasonably found not to have been "made", does not support the application of subsection 39(2); the Panel's decision not to apply subsection 39(2) is reasonable.

[77] Although the applicant may have been frustrated by some delays in obtaining his record in 2002, he did not have a diagnosis, he did not pursue the application, and he commenced a new application in 2009.

[78] As noted by the respondent, if the Panel had exercised its discretion to make the effective date retroactive up to two years (which could have made the effective date of the pension as early as 2005), the pension would have been awarded for a period of time long before the applicant's diagnosis, during which he was experiencing no or few symptoms.

[79] The applicant submits that he should not be penalised for not pursuing his 2002 Application because he had no symptoms for a period of time after 2002 and he acted in good faith. As noted above, there is no dispute that the applicant acted in good faith. However, if the Panel had awarded the pension retroactively from 2005, the pension would have covered a period of time when the applicant would not have met the criteria for a pension, as he had no diagnosis and there is no evidence that he had any symptoms at that time.

The Panel did not err in finding that the Department did not neglect its duty to assist the applicant

[80] The applicant submits that the legislation makes it clear that it should be interpreted in favour of an applicant, and therefore the Department's duty to assist, pursuant to subsection 81(3) of the *Pension Act*, is engaged regardless of whether an application is duly completed.

[81] The Panel reasonably concluded that there was no evidence that the Department failed in its duty to inform the applicant or in its duty to assist.

[82] The Department is only required to provide counselling services or assist with pension applications where such a request is made (*Robertson Estate*, *supra* at paras 41-42). Neither the applicant nor the Legion, on his behalf, made a request for counselling services or assistance in

preparing the 2002 Application. The filing of a claim, whether fully completed or not, does not constitute a request for assistance.

[83] The opening words of subsection 81(3) of the *Pension Act* are clear: "The Minister shall, *on request* …" If the duty were owed proactively by the Department to all those who applied for a pension, the provision would not be drafted as it is.

[84] While the Department has an obligation to make arrangements for the care of veterans depending on their needs and circumstances, not all veterans in all circumstances are to be given every benefit (*Robertson Estate, supra* at 41). In the present circumstances, the applicant was represented by the Legion and should have been aware that a medical diagnosis was required to complete his application. The Department's duty to assist needs not, absent any explicit request by the applicant, extend to alerting the applicant about the requirements of his pension claim beyond the disclosure through the Guidelines and the instructions on the application form.

Conclusion

[85] Despite Mr Phelan's diligent efforts in pursuing his entitlement to a larger disability pension that would provide compensation from a date earlier than the 2009 Application and which would recognise the extent of the disability he now suffers, the decision of the Panel, that there is insufficient evidence to open up the application for reconsideration on its merits, is reasonable. The application for judicial review has necessarily involved looking beyond the reconsideration decision to the findings made by the previous decision-makers of the VRAB, which were also reasonable. There is no basis upon which to find the Panel erred in any way.

[86] The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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