

CANADA / JUDGMENT

Matusiak v. Canada (Attorney General)

2005 FC 198

COURT

Federal Court

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BETWEEN :

NICOLAS MATUSIAK

Applicant

AND :

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

TEITELBAUM, J.

- [1] This is an application for judicial review of a decision by the Veterans Review and Appeal Board ("the Board"), dated December 22, 2003 and made pursuant to the Pension Act, RSC 1985, c. P-6, that Master Warrant Officer (Ret.) Nicholas Matusiak ("the Applicant") is not eligible to receive a military service disability pension for major depression.

FACTS

- [2] The Applicant joined the Canadian Forces in June of 1977, and appears to have had a successful career there without incident until 1995. At this time, he was promoted to a new position at the Canadian Forces School of Communication and Electronics ("CFSCE") with a heavy workload which the Applicant submits induced some stress, although it was not incapacitating. The medical record shows that he was diagnosed with dysthymia, or mild depression, at the beginning of 1996.
- [3] In 1997, the Applicant was assigned a new position where he would report to a Major Burke from the British Army who was spending some time with the Canadian Forces. At their introductory interview, the Applicant states that Major Burke told him that he had heard from other officers that the Applicant was a "troublemaker", "disloyal", and "unprofessional". Not a very good way to commence a relationship.
- [4] Their relationship went downhill from there. The Applicant felt Major Burke was spreading rumours about him, although he had no proof of this. No initiatives such as corrective counselling for the Applicant's perceived shortcomings occurred, even though Forces policy would normally require this in a situation where a subordinate was seen as not working to standard.
- [5] The Applicant started seeing a doctor for his stress symptoms more regularly and continued on the anti-depressant medication he had been taking since 1996.
- [6] On April 22, 1998, the Applicant was advised he would be receiving a (largely honorific) temporary promotion to Sergeants Major of the Training Support Squadron, a position that would put him in line for a more conventional promotion down the road. This appointment was to take effect July 11, 1998.
- [7] On April 30, 1998, a special personnel Manning Board was convened at the Applicant's workplace, and his promotion was cancelled. There is some evidence that Major Burke informed the Manning Board that he would be placing the Applicant on a Recorded Warning (RW), an extremely severe penalty. This was in connection with the Applicant's alleged retaliation against a Sergeant, a charge the Applicant denies. The RW, which has been found by the Canadian Forces Grievance Board to be unjustified, was placed on the Applicant's

service record on May 6, 1998. It was then removed by Major Burke two weeks later, once, the Applicant says, the damage to his reputation and his promotion was done.

- [8] The Applicant says he became the subject of many more career-destroying rumours at this point, including an unfounded allegation that he had leaked information about Major Burke encouraging the consumption of alcohol to the Ottawa Sun newspaper.[1] There is no independent evidence of these rumours on the Record.
- [9] The Applicant filed a grievance concerning the RW on June 19, 1998. The first decision on this grievance was handed down on July 8, 1998, by a Lt-Col. Hamel, and it found the Applicant's complaint to be unfounded. The Applicant's medication appears to have stopped working, and his diagnosis was upgraded to major depression by his doctor on the same day as this first response. The Applicant received the response two days later, on July 10, 1998, and says he suffered a nervous breakdown that incapacitated him at work. He went on sick leave and did not return.
- [10] The Applicant continued to pursue his grievance through the regular channels, although there were considerable setbacks, including his original appeal to CFRETS being returned for re-consideration by a different officer at the original level, Lt-Col. Gallant, instead of going through to appeal. The reconsideration was again negative. The medical records show that the Applicant, who was on sick leave and was taking a new medication, was showing some improvement until December 1998, when this setback in his quest for redress occurred.
- [11] The Applicant's Memorandum states that the Applicant's grievance continued to move through the system at a "snail's pace" and he was not accorded the requisite procedural fairness. This is borne out by the March 26, 2002 findings of the Canadian Forces Grievance Board, the level which his appeal eventually reached, which found that both the RW and the manner in which his grievance about it had been handled were inappropriate. The Grievance Board recommended compensation in the form of a disability pension, since the Applicant was at that time seeking such a pension through the separate pensions appeals system.
- [12] By this time, the Applicant had been permanently discharged from the Forces (on February 4, 2002), for medical reasons connected to his major depression. He now no longer has a military career and has not so far been able to return to any kind of work.
- [13] He applied for a disability pension on January 24, 2000, an application that was refused by the Department of Veterans Affairs, except for some compensation related to a knee injury, on December 21, 2000. The decision stated that the Applicant's major depression was not connected to his military service.

- [14] The Applicant appealed this decision to an Entitlement Review Panel ("the Entitlement Review Panel") of the Veterans Review and Appeal Board ("the Board"), which heard his case on October 30, 2001. The Entitlement Review Panel allowed some additional compensation for the Applicant's carpal tunnel syndrome, but found that there was no diagnosis in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) that demonstrated the Applicant's major depression was connected to his service.
- [15] After an unsuccessful request for a re-consideration by the Minister, the Applicant appealed the decision to the Board on August 1, 2003. On December 22, 2003, the Board found that the Applicant indeed suffered from depression but it was not connected to his military service. This decision is the subject of the judicial review before this Court.
- [16] The Applicant has also applied to the Office of the Department of National Defence and Canadian Forces Legal Advisor, Claims and Civil Litigation, in the Department of Justice, for the redress compensation that the Canadian Forces Grievance Board recommended. He received a letter on July 22, 2003, advising him that the Department could not do anything about his compensation while the Applicant's pension appeals process was ongoing, and that if it was successful he would not be eligible for a damages claim in any case. The final outcome of his grievance therefore also depends upon the decision under judicial review.

APPLICANT'S SUBMISSIONS

- [17] The Applicant submits that the question at issue is a matter of mixed fact and law, in that the Board did not dispute the factual finding of the Applicant's depression, but only its causal link to his military service. The Applicant cites *Bradley v. Canada (Attorney General)*, 2001 FCT 793, [2001] FCJ No. 1152 (FCTD) online: QL, as his support for the proposition that the appropriate standard of review for the causation finding under the Pension Act is reasonableness simpliciter.
- [18] The Applicant submits that the Board's decision is unreasonable under this standard, in that it cannot stand up to a somewhat probing examination. (*Ryan v. Law Society of New Brunswick*, (2003) 223 DLR (4th) 577) The Applicant argues that the Board not only applied an incorrect standard of causation, but that it also made a perverse interpretation of the medical evidence on the record.
- [19] The Applicant submits that a causation finding of the illness being "directly connected" to military service, as per s. 21(2)(a) of the Pension Act, is governed by the balance of probabilities standard in *Athey v. Leonati*, [1996] 3 SCR 458, where it is shown that the Forces caused or contributed to the injury pursuant to the but/for test. It is not necessary for sole causation to be proven.

- [20] The Applicant also submits that s. 21(2)(a) contains a further component, a determination of whether the illness "arose out of" military service, and that this causation must be found on a less stringent standard from "directly connected", as per *Amos v. Insurance Corp. of British Columbia*, [1995] 3 SCR 405. This less stringent standard does not require a proximate relationship.
- [21] The Applicant further adds that the wording of the statute indicates that there is no requirement in the statute to prove that the Applicant's illness resulted from live military combat, occurred while on military property or happened while on duty. (*McTague v. Canada*, [2000] 1 FC 647 (FCTD) online: QL, *King v. Canada*, [2001] FCJ No. 850, (FCTD) online: QL.) All that is required is a causal link between the Applicant's military service and the injury, and this can be construed as including administrative interactions and operational decisions. (*John Doe v. Canada*, [2004] FCJ No. 555 (FCTD) online: QL)
- [22] The Applicant further submits that there are three statutory presumptions which required the Board to interpret the evidence as much in the Applicant's favour as reasonably possible, s. 21(2)(a) of the Pension Act, s. 21(3)(f) of the Pension Act, and s. 39(c) of the Veteran Review and Appeals Board Act, RSC 1985, c. 18, which governs the operation of the Board.
- [23] Finally, the Applicant argues that the Board was highly selective in which evidence it chose to emphasize in the medical record, and ignored explanations by both Dr. Trudel and Dr. Girvin for what it found were inconsistencies in their analyses of the causes of the Applicant's illness.

RESPONDENT'S SUBMISSIONS

- [24] The Respondent submits that a standard of patent unreasonableness is applicable to the Board's decision, as per *McTague v. Canada*, [2000] 1 FC 647 (FCTD) online: QL. In *McTague*, this standard was applied to the portion of the decision that concerned factual findings about the medical evidence and whether in fact the claimant's illness was caused by military service.
- [25] The Respondent acknowledges that the standard of review for all other aspects of the Board's decisions is reasonableness simpliciter. (*McTague*, *supra*)
- [26] The Respondent submits that the Court is not permitted to re-weigh the evidence under a patent unreasonableness standard, even if it would have come to a different conclusion. (*Hunt v. Canada (Minister of Veterans Affairs)*, (1998) 145 FTR 96.)
- [27] The Respondent submits that the Board gave full weight to all the medical evidence in the Record, but that most of the evidence failed to demonstrate independent analysis of the causative factors for the Applicant's illness, i.e. they relied solely on the Applicant's representations concerning the reasons for the depression. The Board found that there was no objective evidence in the file to support the causation findings, even though it accepted the diagnosis of depression.

- [28] The Respondent also submits that the Board correctly conducted the causation analysis, weighing both the subjective and objective factors related to causation, and it cites portions of the Board's decision discussing causation to support this argument.
- [29] The Respondent states that the Board was entitled to rely on the report of Dr. Bourgon, who only saw the Applicant once in 1999, rather than his other doctors, since her diagnosis was also supported by a later report of Maj. (Dr.) Trudel, who saw the patient in both 1996 and 2002. The Respondent submits that the Board is entitled to weigh which medical reports it finds more credible, and to make inferences regarding inconsistencies between the reports.
- [30] The Respondent submits that the Board correctly applied the statutory requirements regarding interpretation of the evidence, particularly s. 39 of the Veterans Review and Appeal Board Act, *supra*. Section 39 is as follows:

Rules of evidence

39. In all proceedings under this Act, the Board shall
- (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;
 - (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
 - (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.
- [31] The Respondent submits that the Board made all reasonable inferences in favour of the Applicant, but there remained outstanding inconsistencies which entitled the Board to draw the inferences it did.

STANDARD OF REVIEW

- [32] The parties disagree on which standard of review should be applied to this case. The jurisprudence on this point was recently summarized by Rouleau J. in *Bradley v. Canada (Attorney General)*, 2004 FC 996, a case cited by the Applicant:
- ¶ 11 It is well-settled law that the standard of review for decisions of the VRAB is that put forth by Mr. Justice Evans in *McTague v. Canada (Attorney General)*, [2000] 1 F.C. 647 (T.D.), and applied by MacKay J. in *Bradley v. Canada (Attorney General)*, [2001] F.C.J. No. 1152, 2001 FCT 793. That is, the appropriate standard of review for a decision of the VRAB is reasonableness simpliciter, except where the decision concerns a finding or interpretation from conflicting or inconclusive medical evidence as to whether a claimant's disability was in fact caused or aggravated by military service. In the latter case, the standard of review is patent unreasonableness.

[33] The reference in an earlier 2001 case with the same name, *Bradley v. Canada* (Attorney General), *supra*, cited by both parties, goes into a little more detail. MacKay J. summarizes the jurisprudence on standard of review as follows:

¶ 16 Mr. Justice Evans held in *McTague v. Canada* (Attorney General), [2000] 1 F.C. 647 (T.D.) at 666-7 that the appropriate standard of review for decisions of the Veterans Appeal and Review Board is reasonableness simpliciter except where the decision concerns a finding or inference from conflicting evidence whether the claimant's disability was in fact caused or aggravated by military service. In the latter case, the standard of review is patent unreasonableness.

¶ 17 However, Evans J. also stated that where the questioned decision concerns a determination whether or not there is a causal connection between the injury claimed and military service, the standard of review is reasonableness.

¶ 18 The first of the issues here concerns a finding of mixed fact and law. So far as that issue depends only on interpretation of the law the standard of review is correctness, but in the application of the law, correctly interpreted, e.g. whether the applicant, on the facts before the Board, suffered an injury that was service related, the standard of review is unreasonableness.

[34] The actual wording in *McTague*, *supra*, is as follows:

¶ 45 The applicant's allegation that the Board erred in law by failing to give him the benefit of the doubt and to interpret the legislation in a broad and liberal fashion should be taken into consideration at the stage of deciding if the Board's decision falls short of the standard of reasonableness.

¶ 46 Finally, I should note that it is well established in this Court that the less demanding standard of patent unreasonableness is applicable when the issue in dispute is the Board's weighing or interpretation of often conflicting or inconclusive medical evidence and determining from it whether the claimant's disability was in fact caused or aggravated by military service: *MacDonald v. Canada* (Attorney General), [1999] F.C.J. No. 346 (T.D.) (QL); *Weare v. Canada* (Attorney General) (1998), 153 F.T.R. 75 (F.C.T.D.) [page667]; *Hall v. Canada* (Attorney General) (1998), 152 F.T.R. 58 (F.C.T.D.); *Henderson v. Canada* (Attorney General) (1998), 144 F.T.R. 71 (F.C.T.D.).

[35] Having traced the standard of review analysis in cases such as these back to its root, I find that the standard of review is reasonableness simpliciter for the question of whether the Board failed to interpret the evidence as a whole in the broad manner required by the statute. The standard of patent unreasonableness is applicable solely to the Board's weighing of conflicting medical evidence to determine whether the disability was caused or aggravated by military service.

ANALYSIS

[36] I will begin with an examination of the wording of the statute. Section 3 of the Pension Act provides the definitions on which the section at issue is based:

3. (1) In this Act,

[...]

"disability" means the loss or lessening of the power to will and to do any normal mental or physical act;

[...]

"member of the forces" means

- (a) a person who has served in the Canadian Forces at any time since the commencement of World War I, and
- (b) a Canadian merchant mariner of World War I, World War II or the Korean War, as described in section 21.1;

"military service" or "service" means service as a member of the forces;

[...]

"service in a theatre of actual war" means

- (a) any service as a member of the army or air force of Canada in the period commencing August 14, 1914 and ending November 11, 1918 in the zone of the allied armies on the continent of Europe, Asia or Africa, or in any other place at which the member has sustained injury or contracted disease directly by a hostile act of the enemy,
- (b) any service as a member of the naval forces or merchant navy of Canada in the period described in paragraph (a) on the high seas or wherever contact has been made with hostile forces of the enemy, or in any other place at which the member has sustained injury or contracted disease directly by a hostile act of the enemy, and
- (c) any service as a member of the forces in the period commencing September 1, 1939 and ending
 - (i) May 9, 1945, where the service was in any place outside Canada, and
 - (ii) August 15, 1945, where the service was in the Pacific Ocean or Asia,

or in any place in Canada at which the member has sustained injury or contracted disease directly by a hostile act of the enemy;

[...]

"special duty service" means service as a member of the Canadian Forces in a special duty area designated under section 91.2, or as a member of the Canadian Forces as part of a special duty operation designated under section 91.3, during the period in which that designation is in effect, and includes

- (a) periods of training for the express purpose of service in that area or as part of that operation, wherever that training takes place,
- (b) travel to and from the area, the operation, or the location of training referred to in paragraph (a), and
- (c) authorized leave of absence with pay during that service, wherever that leave is taken,

if that training, travel or leave occurred on a day, not earlier than September 11, 2001, that is in the period during which that designation is in effect;

[37] There is no issue that the Applicant suffers from a disability as defined by the Pension Act. The question is whether it is connected to military service. This service, as defined by the Pension Act, means "service as a member of the forces". A "member of the forces" is someone who has served in the Canadian Forces at any time since World War I.

[38] This is a broad definition which is distinctly separated in the statute from the definition of service in battle or on special duty, and, in keeping with s. 2 and the s. 21(3) presumption in the Pension Act, it must be very broadly construed. Anything directly connected to the Applicant's work for the Forces would fall into this category, and as the Applicant has argued, the decision in John Doe, *supra*, clearly indicates that this includes administrative interactions and operational decisions affecting the Applicant.

[39] In this case, the disability in question is a mental disability, which developed over a lengthy period of time, and its evolution is traceable through a large collection of medical records pertaining to the Applicant, most of which were not noted by the VRAB in its decision. This depression did not occur when the Applicant was off duty, and both the Applicant and his regular doctors directly connect it to violations of Forces procedures and hostile treatment directed at him by his superiors, particularly Major Burke, while at work.

Medical Evidence Findings

[40] In McTague, *supra*, Evans J. states that a standard of patent unreasonableness must be applied to the consideration of whether the medical evidence shows the disability was "in fact caused or aggravated by military service." This wording is drawn from s. 21(3) of the Pension Act, which controls the application of s. 21(2). As the Applicant has noted, it states:

21(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of

[...]

- (f) any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member; and

[41] Also implicated is the wording of s. 21(2)(a):

- (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;

[42] The Board, therefore, was required to consider not merely whether military service was the sole cause of the disability of the Applicant, but also whether it aggravated an existing condition. The Board's conclusion on this point is given at p. 10 of the Decision:

The medical reports do not reasonably raise the inference that work place stress materially contributed to the development of the Appellant's disability.

[43] It is this conclusion that I will evaluate against a standard of patent unreasonableness.

[44] Before I begin, I should note that I will be referring to the copies of the documents in the Tribunal Record that are reproduced in full in the Applicant's Record. My reason for doing so is that these are the only copies of the documents in the Tribunal Record which have page numbers to which everyone can easily refer. All documents to which I will refer were before the Board when it made its decision, although, as I have indicated, were not mentioned, in large part by the Board in its decision.

[45] The medical records show that while the Applicant had suffered from some physical ailments involving his knee, among other things, no mention of depression appears in his record until 1994, when his regular army physician started to look into whether his medication for physical problems was creating a depressive side-effect.[2] He was apparently prescribed the anti-depressant Zoloft, and diagnosed with "depression" at the end of 1995, which he attributed to a "mid-life crisis" and "trying to get ahead".[3]). A psychiatrist's referral was recommended but it is not clear if this was immediately followed up.

[46] This diagnosis was clarified in an "Emergency Report" on January 19, 1996 as being "dysthymia depression".[4] He had gone off Zoloft (also referred to as "sertraline" in the records) over the holidays, apparently had a depressive reaction that led him into Emergency, and appears to have then been put back on the medication.

- [47] According to the DSM-IV,[5] which was used by the Entitlement Review Panel in coming to its original decision to reject the Applicant's claim to a disability pension based on depression, dysthymia is a milder form of depression which can sometimes develop into or be interspersed with bouts of Major Depressive Disorder, or major depression.
- [48] I note that the Board is not very specific as to whether it rejects the Entitlement Review Panel's finding that there is no "specific scientific diagnosis...i.e. DSM-IV"[6] to justify a finding of a depressive disorder. The Board refers to the "claimed condition" of the Applicant, [7] and the "claimed disability of major depression"[8], even after noting the doctors' various diagnoses of "depressive symptoms".[9] The Board initially acknowledges only that the Applicant "clearly suffers from a stress-related psychiatric disability." [10]
- [49] Then the Board concludes as follows, at p. 8 of the Decision:
- In this case, the medical opinions speak credibly in terms of the medical issues involved in the diagnosis of the psychiatric disorder. The Board accepts this diagnosis. However, on the medical-legal issues concerning causation of the disease, these opinions fail to demonstrate an independent analysis of all of the relevant facts in this case, or to clearly analyze or to explain the basis for the medical opinion by taking into account all of the facts which are relevant to determining causation.
- [50] While the Board may not agree with the description of its underlying causes, all parties have agreed that the medical record clearly shows an existing condition. (Although I note that the Board does not specify which diagnosis of which DSM-IV condition it accepts.)
- [51] So let us turn to the Board's assessment of whether this condition, as laid out in the medical records and in the diagnoses accepted by the Board, was subsequently aggravated by events at the Applicant's work.
- [52] The Applicant was referred for a mental health assessment, which resulted in a consultation report by Maj. (Dr.) Trudel of February 6, 1996, that refers to the Applicant's promotion and his denial that it is causing him stress. It also refers to the opinion of the Applicant's wife that his depression is caused by "stress at work".[11] However, Maj. Trudel attributes the stress to the health problems of his father. The Applicant's diagnosis, which the previous records indicate is dysthymia, is indicated to be unchanged and it is recommended that he stay on the anti-depressant for another six months, then taper off it.[12]
- [53] At his February 11, 1996 medical appointment, the notes of the regular army doctor, a Maj. R.J. Wojtyk, also refer to "dysthymia" and "work-related stressors".[13]
- [54] On March 27, 1997, a sleep disorders specialist, Dr. Carlile, notes the Applicant's psychiatric history in his assessment, as "minor depression for the past 2 years." [14]

- [55] The first time a diagnosis of a different and more serious condition, that of major depression, appears on the Applicant's medical records is on July 8, 1998, in a consultant's report by Maj. (Dr.) Girvin.[15] The doctor notes the Applicant's statement that "the medication does not work anymore", but attributes it to medication "poop-out" following the use of an anti-depressant for more than two years. The doctor also rates his "combined stressors" on the DSM-IV axis as "moderate to severe".
- [56] The date of this diagnosis is instructive - the problems involving the Recorded Warning (RW) and the loss of the Applicant's promotion occurred between April and June 1998, and the denial of his first application for a redress grievance was handed down on July 8, 1998, the same day as the new, more serious, diagnosis.
- [57] Two days later, on July 10, 1998 (one day before his promotion would have taken effect, had it not been removed from him), the Applicant became "quite psychotic and totally disabled at work", according to a psychiatric assessment report provided by Dr. Bourgon of the Ottawa Hospital.[16] This self-described "nervous breakdown" was triggered by receiving and reading the response to his grievance, according to the Applicant's Memorandum. It also coincided with the Applicant going on sick leave, according to the Applicant, the finding of the Canadian Forces Grievance Board[17] and a 2002 medical consultation report.[18]
- [58] I must state that I find it odd that in a Tribunal Record which was already incomplete, and to which the Applicant's medical records were added only after a request from the Applicant's counsel, there is almost no paperwork relating to the Applicant's sick leave and when it began. The only documents I have found on this point in the Record are two pieces of correspondence concerning his placement on the Medical Patients Holding List dated Sept. 25/98 and Oct. 6/98.[19]
- [59] Since no one has challenged the accuracy of the CF Grievance Board's findings of fact, I will presume that the Applicant did indeed take sick leave beginning July 10, 1998. A consultation report by Dr. Girvin dated July 30, 1998, confirms that he is on sick leave at this time, and states:
- He describes that he has met with his GP who has put him on a temporary category and given him some sick leave. He has also been contacted by the Major at work who has been asking him why he is absent from work and expecting him to come in. This has been very upsetting for him as this is the same Major who has complained about his work performance in the past.[20]
- [60] The correspondence concerning the Medical Patients Holding List also refers to the need to stop military personnel from "disturbing" the Applicant at home while he is recovering.
- [61] So, as of July 1998, the Applicant's diagnosis is upgraded from dysthymia to major depressive disorder. This directly coincides with both his difficulties at his work and a problem with his anti-depressant medication, he goes on sick leave, and one of his doctors apparently has to take steps to stop Major Burke from calling him at home. The Applicant is put on a new anti-depressant during this time, which also does not work.

- [62] From hereon in, there is almost no medical report that does not make reference to the Applicant's work-related stress. The Applicant is described as having a tendency to "ruminate" about his work situation.[21] An attachment to a medical report of Dr. Meunier dated August 16, 1998 refers to "Depression and Situational Anxiety" and describes the "devastating effect" of "stressors" connected to his grievance process on his "personal and professional capability." [22] This diagnosis is repeated on a hospital admission record dated September 9, 1998.[23]
- [63] Then a medical report by Dr. Girvin dated October 14, 1998 refers to starting the Applicant on a new medication, Paxil, to which he has a good reaction, and describes him as "not as preoccupied" with his work situation.[24] The medical reports show continued improvement until December 10, 1998, when a medical report describes the Applicant telling Dr. Girvin he has "hit a wall" with regard to his depression, even after returning from a vacation in the Bahamas.[25] The report makes reference to the Applicant receiving word that his appeal of the grievance to CFRETS had been sent back down to the initial level for re-consideration instead of going through.
- [64] The negative re-consideration of the Applicant's grievance had, in fact, been handed down from Lt-Col. Gallant ten days earlier, on December 1, 1998.[26]
- [65] So we have the Applicant finding a new working medication and showing steady improvement until his grievance was sent back in an unusual manner and denied for a second time in December 1998, at which point he apparently goes on indefinite sick leave. A letter in the medical record from a Dr. Witte dated December 21, 1998 states that she saw the Applicant on December 18, 1998 and that he is suffering from "a major depression due to work-related issues." [27] (She continued to see him for counselling sessions for three months following.)
- [66] In March 1999, another report by a Dr. Bakish of the Royal Ottawa Hospital, a psychiatric treatment facility, describes the Applicant as experiencing his "second episode of major depression" which is "resistant" to treatment.[28]
- [67] On June 28, 1999, six months after his December 1998 episode, the Applicant saw Dr. Bourgon at the Ottawa Hospital, at the referral of his regular psychiatrist, Dr. Girvin. This is the report that the Board describes in its Decision[29] as diagnosing Major Depression, even though this diagnosis was quite clearly made a year earlier and referred to in subsequent medical reports by a range of doctors.
- [68] In this June 28, 1999 report, Dr. Bourgon finds that the Applicant's major depression may also have had "psychotic features" which are in remission.[30] It is the psychosis that is the new element in this diagnosis, not the major depression. Dr. Bourgon's findings clearly state that the major depression, already diagnosed, may have been even more serious than previously thought.

- [69] Dr. Bourgon's report is the only one of the many medical reports, that can be described as "conflicting" medical evidence, since it questions whether some of the Applicant's work-related stress was self-imposed, and describes his tendencies towards paranoia. However, even its supposed contradictions are limited. The actual analysis under DSM-IV in the same report indicates the "initial stressors" for the Applicant's illness were "work related stress related to his relatively senior position in the military." This finding is consistent with all the previous medical reports dating from July 1998.
- [70] There is no contradictory evidence regarding when the diagnosis was first upgraded. The Board made an inaccurate finding on this point by attributing the diagnosis of Major Depression to the June 28, 1999 report of Dr. Bourgon. Dr. Bourgon upgraded the severity of the diagnosis again by including possible psychosis, but the Applicant was clearly diagnosed with Major Depression in July 1998. Prior to that, he was diagnosed with dysthymia.
- [71] The only other report relied upon by the Board[31] is from 1996 - Maj. Trudel's report referring to the dysthymia diagnosis of that time period as "unchanged". That report might be relevant to a sole causation analysis, but it is not relevant to an analysis of aggravation, since the clear demarcation point at which the Applicant's illness degenerated from dysthymia into major depression was July 1998. Dr. Trudel also concurs with the diagnosis of major depression in a later consultation report of February 1, 2002,[32] the first time he had seen the Applicant since 1996, where he states that the condition was "at the very least aggravated by his military service."
- [72] Section 39(b) of the Veterans Review and Appeal Board Act requires the Board to accept all credible uncontradicted evidence, and the Board indicated in its Decision that it accepts the diagnoses of the doctors, if not the reasons for them. The diagnoses are consistent in showing the progressive development of the Applicant's illness from dysthymia in 1996 to major depression in 1998.
- [73] Bearing in mind that the Board is required to evaluate whether or not the Applicant's work has aggravated his existing condition, let us take a look at what the Record indicates. The Applicant's medication failures and most pronounced depressive episodes, along with the initiation of various types of sick leave from work, all appear to coincide with the first two decisions related to his grievance. The Applicant's existing condition of dysthymia was upgraded to major depression directly immediately following all of the distressing events in his workplace, and his departure from work owing to some form of breakdown coincided with the handing down of the first grievance decision. This is objective evidence observable from the Record, which does not rely on any representations of the Applicant either to his doctors or in his complaints, and which the Board has not considered at all in its decision.
- [74] The Record contains one partially contradictory report that is relevant, that of Dr. Bourgon. This report could be read as indicating that the Applicant imagined his problems at work, although it could also be read as indicating that the Applicant has suspicions that he cannot prove at this juncture which are causing him undue stress. The Board places great reliance

on this one report without indicating why it outweighs the rest of the voluminous evidence from various other doctors in the Record, including that of his regular treatment doctor, Dr. Girvin. This approach is not consistent with section 39(a) of the Veterans Review and Appeal Board Act, which requires the Board to draw every reasonable inference in favour of the Applicant, nor with section 39(c), which requires the Board to resolve in favour of the claimant any doubt in the weighing of the evidence as to whether the Applicant has established a case.

- [75] To summarize, the Board ignored objective evidence that was clear from the Record, and gave undue weight to part of one doctor's report over both the rest of that report and many other reports in the Record without explanation. These are patently unreasonable errors.

Causation

- [76] I will now move to a discussion of causation and the "thin skull" standard as applicable to the Board's determination.

- [77] On this point, I do not think I can do better than the Applicant's able submissions on both the balance of probabilities standard, summarized by the Supreme Court in *Athey*, supra, and on the broader standard of "arising out of", discussed by the Supreme Court in *Amos*, supra. As the Applicant has argued, the wording of s. 21(2)(a) of the Pension Act implies that the broader standard of "arising out of" is applicable, and as per *Amos*, this standard requires only a causal connection, not a proximate relationship. Even if I were to apply the stricter standard of the "but for" test, there is no requirement for sole causation, as Major J. noted in *Athey*:

¶ 17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring.

- [78] There were indeed a myriad of background events to the Applicant's developing depression, and they clearly included his work situation. As per John Doe, supra, both administrative interactions with one's employer and operational decisions are part of that work situation, and in the Applicant's case both of these were found to have been improperly conducted in a manner that was detrimental to him.

- [79] The question before the Board was whether the Applicant's condition was aggravated in a manner that either arose out of or was directly connected to his work. The Board was aware of this requirement, as evidenced by its statement at pp. 4-5 of the Decision:

Unlike claims for physical disabilities, with stress-based claims for psychiatric disability, cause and effect relationships and the origins of stressors are not always obvious from the face of the evidence, due to the fact that there are usually many sources of stress in any person's life, which may potentially cause a stress-related psychiatric disease. Therefore, attention must be given to the question of whether there was evidence as to the existence of service-related stress, and if so, whether this was a significant factor in the development of the psychiatric complaints, when

assessed objectively in light of all of the other stresses and stressful events, or pre-existing complaints, which are unrelated to service.

[80] I have already indicated that I find the Board's handling of this evidence to be patently unreasonable, and I would add that the Board's analysis of the subjective and the objective factors of the Applicant's illness does not reflect the approach described above.

[81] The Board instead concentrates on some case law pertaining to thin-skulled plaintiffs, or "egg-shell personalities", as it describes them. It refers to a case of the British Columbia Court of Appeal called *Yoshikawa v. Yu*, [1996] B.C.J. No. 623 (BCCA) online: QL, and Lambert JA's statement therein that a psychological injury may be compensable when the actions of a wrongdoer are the proximate cause. The actual statement of Lambert JA in that case is as follows:

¶ 19 One of the most important principles, for the purposes of this case, is the principle that, for the purposes of assessing damages, a tortfeasor must take the person injured by the tort in the actual condition of that person at that time. This has been called the "thin skull" principle. In its application to psychological problems it has been called the "egg shell personality" application of the principle. In my opinion there is no basis for giving a more restrictive application to this principle in cases where psychological injuries are suffered than would be given in cases where only physical injuries are suffered. A predisposition to suffer psychological injury in circumstances such as those brought about in a particular case by a defendant's wrongful act does not relieve the defendant of the liability to compensate the plaintiff for the injuries represented by those psychological symptoms. Such relief could only occur, as I have said, if the psychological symptoms would have occurred in any event, even without the defendant's wrongful act, through an application of the cause-in-fact test.

[82] The decision in *Yoshikawa*, supra, concerned a tort unrelated to the Pension Act. As I have already stated, the requirement of proximity is not part of the "arising out of" standard applicable to the case before the Court. Even if it were to be applied under the "directly connected" half of the test, and even if the Board found the Applicant to be a 'thin skulled' claimant owing to his existing depressive condition, *Yoshikawa* indicates that this would not necessarily relieve the Canadian Forces of responsibility. And if this were a case where the jurisprudence on a thin skull were to apply, then the governing jurisprudence would not be *Yoshikawa*, it would be that of the Supreme Court in *Athey*:

¶ 34 [...] The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[83] I therefore agree with the Applicant that the Board did not take the correct approach to causation, and erred in law.

- [84] I am aware that McTague indicates that the standard of review for a finding of causation in relation to the medical evidence is patent unreasonableness. However, I do not find the Board's approach to causation to be reasonable on its face either, since it contradicted both the Board's own statements on how to determine causation and the actual contents of the jurisprudence and the statutes upon which it purports to have relied.
- [85] I would therefore come to the same conclusion regardless of which standard of review is applied. The Board's Decision will be set aside. This matter is remitted to a differently constituted panel of the Board, to be redetermined in a manner that accords with its governing statutes and these reasons. I would add that the actions of Major Burke in his dealing with the Applicant have a great deal to be desired. I am satisfied from reading the documents that Major Burke severely contributed to the Applicant's major depression.

Teitelbaum J.

JUDGE

OTTAWA, Ontario

February 9, 2005

FEDERAL COURT OF CANADA

SOLICITORS OF RECORD

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- [1] Applicant's appeal of Redress Grievance Decision, Tab 32, p. 522 of the Applicant's Record
- [2] Tab 27, p. 361 of the Applicant's Record
- [3] Tab 27, p. 370 of the Applicant's Record
- [4] Tab 27, p. 372 of the Applicant's Record
- [5] The DSM-IV is also the standard manual used by doctors to evaluate mental health problems and the Applicant's medical records show he was evaluated according to the DSM-IV model. (See Diagnostic and Statistical Manual of mental Disorders, Fourth Edition, Text Revision, DSM-IV pages 371, 373, 374, 377 & 378)
- [6] Tab 17, p. 153 of the Applicant's Record
- [7] at p. 3 of the Board's Decision
- [8] at p. 4 of the Board's Decision
- [9] at p. 2 of the Board's Decision
- [10] at p. 4 of the Board's Decision
- [11] Tab 27, p. 374 of the Applicant's Record
- [12] Tab 27, p. 383 of the Applicant's Record
- [13] Tab 27, p. 372 of the Applicant's Record
- [14] Tab 27 , p. 397 of the Applicant's Record
- [15] Tab 27, p. 427 of the Applicant's Record
- [16] Tab 27, p. 477 of the Applicant's Record
- [17] Tab 6 of the Applicant's Record
- [18] Tab 3 of the Applicant's Record
- [19] Tab 27, pp. 441-442 of the Applicant's Record
- [20] Tab 27, p. 431 of the Applicant's Record
- [21] Tab 27, p. 433 of the Applicant's Record
- [22] Tab 27, p. 437 of the Applicant's Record
- [23] Tab 27, p. 446 of the Applicant's Record

- [24] Tab 27, p. 449 of Applicant's Record
- [25] Tab 27, p. 457 of the Applicant's Record
- [26] Tab 33 of the Applicant's Record
- [27] Tab 27, p. 459 of the Applicant's Record
- [28] Tab 27, p. 465 of the Applicant's Record
- [29] at p. 3 of the Board's Decision
- [30] Tab 27, p. 479 of the Applicant's Record
- [31] at p. 3 of the Board's Decision
- [32] Tab 3 of the Applicant's Record
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