

CANADA / JUDGMENT

Milligan v. Canada (Attorney General)

2004 FC 1112

COURT

Federal Court

DECIDED

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Milligan v. Canada (Attorney General) Court (s) Database Federal Court Decisions Date 2004-08-11 Neutral citation 2004 FC 1112 File numbers T-1885-03 Decision Content Date: 20040811 Docket: T-1885-03 Citation: 2004 FC 1112 EDMONTON, ALBERTA, AUGUST 11th , 2004. PRESENT: THE HONOURABLE KONRAD VON FINCKENSTEIN BETWEEN: JEWLIE MILLIGAN Applicant and THE ATTORNEY GENERAL OF CANADA Respondent REASONS FOR ORDER AND ORDER

- [1] This is an application for judicial review under sections 18 and 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7, as amended, of a decision of the Veterans Review and Appeal Board (the Board), dated August 14, 2003, which confirmed, on reconsideration, its decisions dated November 5, 2002 and August 9, 2002 denying the Applicant's application for pension entitlement relating to her right knee pursuant to subsection 21(2) of the Pension Act, R.S.C. 1985, c. P-6.

BACKGROUND

- [2] The Applicant served in the Canadian Forces, Regular Force from February 21, 1991 to January 7, 2004.
- [3] On February 12, 2001, the Applicant made an application for a disability pension relating to:
- (i) osteoarthritis in her right knee (allegedly related to a 1995 skiing accident); (ii) osteoarthritis in her left knee (allegedly aggravated by a 1992 skiing accident); and (iii) rotator cuff syndrome in her right shoulder (allegedly related to the Applicant's basic training in 1997). The Minister of Veterans Affairs denied the application with respect to all claimed conditions on the basis that the injuries did not arise out of, nor were they directly connected with, the Applicant's service in peacetime in the Regular Force.
- [4] In a decision dated August 9, 2002, a review panel of the Board determined that the Applicant's left knee injury was service related, and awarded a 4/5 pension entitlement for the left knee injury.[1] The review panel determined that the right knee injury could not be linked to a service related activity, and therefore denied pension entitlement for the right knee injury.[2] The review panel also declined pension entitlement for the right shoulder injury.

- [5] The Applicant appealed the review panel's decision regarding her right knee to an appeal panel of the Board. On November 5, 2002, the appeal panel upheld the review panel's decision, and found that the Applicant's right knee injury did not arise out of, nor was it directly connected with, service in peace time in the Regular Force. The Board noted that while the Applicant may have been a member of the CFB Chilliwack Ski Club,[3] she had failed to provide evidence that she was participating in an organized/authorized sporting event at the time of her right knee injury in 1995.
- [6] On March 17, 2003, the Applicant submitted further documentation and requested a reconsideration of the appeal panel's decision.
- [7] The appeal panel declined to re-open its decision of November 5, 2002, since it found no errors of fact or law. Moreover, the appeal panel found that the further documentation submitted by the Applicant was not relevant, in that it did not bear upon the decisive issue in the case - i.e. the new documentation did not provide evidence that the Applicant was participating in an authorized, organized sports event at the time of the injury to her right knee. ISSUE
- [8] Did the Board commit a reviewable error in its decision of August 14, 2003, when it refused to reconsider its previous decisions regarding the Applicant's pension entitlement?
STANDARD OF REVIEW
- [9] It is well established that the standard of review applicable to decisions of the Board is that of patent unreasonableness: *MacDonald v. Canada (Attorney General)* (1999), 164 F.T.R. 42 (T.D.); *Elliot v. Canada (Attorney General)*, 2003 FCA 298.

ANALYSIS

- [10] The relevant statutory provisions are: Veterans Review and Appeal Board Act, S.C. 1995, c. 18 as amended: s.3. The provisions of the 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.
- s. 32. (1) Notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.

- s. 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. Pension Act, R.S.C. 1985, c. P-6:
- s. 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.
- s. 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; (2.1) Where a pension is awarded in respect of a disability resulting from the aggravation of an injury or disease, only that fraction of the total disability, measured in fifths, that represents the extent to which the injury or disease was aggravated is pensionable.
 - (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
 - (a) any physical training or any sports activity in which the member was participating that was authorized or organized by a military authority, or performed in the interests of the service although not authorized or organized by a military authority;
- 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.
- 32. (1) Par dérogation à l'article 31, le comité d'appel peut, de son propre chef, réexaminer une décision rendue en vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.

39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
- a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
 - b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
 - c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande
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; (2.1) En cas d'invalidité résultant de l'aggravation d'une blessure ou maladie, seule la fraction -- calculée en cinquièmes -- du degré total d'invalidité qui représente l'aggravation peut donner droit à une pension.
- (3) Pour l'application du paragraphe (2), une blessure ou maladie -- ou son aggravation -- est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce paragraphe si elle est survenue au cours :
- a) d'exercices d'éducation physique ou d'une activité sportive auxquels le membre des forces participait, lorsqu'ils étaient autorisés ou organisés par une autorité militaire, ou exécutés dans l'intérêt du service quoique non autorisés ni organisés par une autorité militaire;
- [11] The Board's conclusion rests on its evidentiary finding that the Applicant did not lead sufficient evidence to establish that the osteoarthritis in her right knee was caused by a service-related injury suffered while on a CFB Chilliwack Ski Club outing in 1995. As this is a fact-based question, the Board's decision is entitled to deference, unless it can be shown that the Board reached a patently unreasonable decision.
- [12] The onus is on the Applicant to establish that the osteoarthritis in her right knee arose out of or was directly connected to her service, i.e., the Applicant must establish the causal linkage: *Hall v. Canada* (1998), 152 F.T.R. 58 (T.D.), affirmed in (1999) 250 N.R. 93 (F.C.A.).
- [13] The Applicant in her application for reconsideration presented evidence:
- a) that squash and raquetball were approved fitness activities at Chilliwack during the Applicant's time there;

- b) a team photograph of a 1993 based squash team of which the Appellant was a member; and
- c) an e-mail from the pay accounting Officer at CFB Chilliwack confirming that the Applicant did participate in squash in 1993. There is no Report on Injuries or a witness statement as required by the Board.

[14] The Board in its previous decision had indicated that it had accepted that the Applicant was a member of CFB Chilliwack. On reconsideration the Board found that there was still no causal connection between the injury and a military organized or authorized sporting event. The new evidence provided for the reconsideration did not change that fact.

[15] Given that the Applicant claims her knee injury was caused by skiing, it is difficult to see how the Board could have come to another conclusion. There is no evidence that the skiing activity that caused her injury was part of a military authorized or approved activity. By her own admission (Tribunal record, p.145) she does not know when and under what circumstances the injury occurred. There is also evidence that it 'popped' during a squash game (Tribunal record

p. 75) and that it was seriously aggravated by jumping off a merry-go-round (Tribunal record p.78) . The two references in the medical reports to skiing injuries related to the right knee (Tribunal record , pp. 75 and 76) do not give any dates nor shed any light on the circumstances under which the skiing took place; i.e., whether it was recreational skiing or military approved or sponsored skiing.

[16] The Board accepted that the Applicant was a member of the CFB Chilliwack Ski Club. However, mere membership in the Ski Club does not in any way prove that the skiing injury was part of a military organized or authorized activity.

[17] In light of this sparse evidence the Board's decision on reconsideration was not patently unreasonable. Even applying the presumptions of ss. 2 and 21(3) of the Pension Act in the most liberal fashion does not lead to a different conclusion. Accordingly this application cannot succeed. ORDER THIS COURT ORDERS that this application be dismissed. "Konrad W. von Finckenstein" Judge FEDERAL COURT NAME OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1885-03 STYLE OF CAUSE: JEWLIE MILLIGAN v. AGC PLACE OF HEARING: EDMONTON, AB DATE OF HEARING: AUGUST 10, 2004 REASONS FOR ORDER: VON FINCKENSTEIN J. DATED: AUGUST 11, 2004 APPEARANCES: Jewlie Milligan FOR APPLICANT Stacey Dej FOR RESPONDENT SOLICITORS OF RECORD: Self-represented FOR APPLICANT Morris Rosenberg, Deputy Attorney General of Canada Ottawa, Ontario Ottawa, Ontario FOR RESPONDENT [1]The review panel found that "the major portion of the Applicant's current condition could have had its origins in the 1992 skiing accident which the Panel finds to be related to the Applicant's military service. ____ As a result a four-fifths aggravational award for that portion of the condition arising out of military service appears appropriate with the one-fifth withheld because the initial problem respecting the left knee has not been established by evidence or recollection of the Applicant or in any documentation as being service-related." [2]The review panel found that, "Unlike the

condition involving the left knee, there is no Report of Injuries, background witness statement or superior officer's statement which would enable the Panel to find that the activity in which the Applicant was engaged at the time of the incident was related to her service. ____ There is no factual background information which would indicate that the Applicant was on an activity authorized by, sponsored by, or dealing with the Canadian Forces Base Chilliwack Ski Club when this accident occurred and in this regard the Applicant herself was unable even to recall the location in British Columbia where the incident occurred." [3]In support of her membership, the Applicant provided a letter from Major Robert T. Walker (the former Base Comptroller), dated October 3, 2002 stating that the Canadian Forces Base Chilliwack Ski Club was an authorized sports activity from May 1, 1994 until August 31, 1998, and a letter from R.K. St.John, Colonel (Retired), dated October 23, 2002, which stated that the CFB Chilliwack Ski Club was fully sanctioned by him as Base Commander between 1994 and 1998, and that the Applicant was an active participant in the Ski Club during his tenure as Base Commander.

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