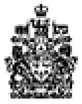

Veterans Review and Appeal Board Canada | Tribunal des anciens combattants (révision et appel) Canada

Canada

2013-349

Representatives: Brian Murphy, Bureau of Pensions Advocates
Decision No: 100001897349
Decision Type: Federal Court Order to Rehear Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 17 July 2013

The Entitlement Appeal decides:

OSTEOARTHRITIS LEFT KNEE

No entitlement granted for service in the Regular Force.
Subsection 21(2), *Pension Act*

No entitlement granted for service in a Special Duty Area (Persian Gulf).
Subsection 21(1), *Pension Act*

Before:	Brent Taylor	Presiding Member
	Richard E. Woodfield	Member
	B.T. LeBlanc	Member

Reasons delivered by:

Brent Taylor

INTRODUCTION

The Appellant is seeking reconsideration of an Entitlement Appeal Panel decision of this Board, dated 15 September 2011, that denied pension entitlement for osteoarthritis (OA) of his left knee.

PRELIMINARY MATTERS

This decision follows an order of the Federal Court of Canada to rehear the merits and make a determination.

ISSUES

This new Reconsideration Appeal Panel must determine the degree, if any, to which the Appellant's diagnosed OA left knee arose out of, or was directly connected with, the performance of his Regular Force service. We must also determine whether his left knee OA was incurred during or is attributable to his Special Duty Area service in the Persian Gulf.

EVIDENCE AND ARGUMENT

The Appellant had combined service of over 20 years in the Regular Force, releasing in February 2005 at the age of 43.

Military medical records from the Appellant's military service between 1984 and 2005 indicate that he had right knee complaints in 1996, an injury to the right knee from a volleyball game in 1998, and a lateral collateral ligament (LCL) strain to his right knee, which had resolved by 1999. There are no reports of injury to his left knee between 1996-1999, although the left knee was mentioned in a report and an x-ray in 1998 dealing with the right knee injury.

Due to health problems not related to his knees, the Appellant was placed under restrictions including: "unfit sea, field, isolated, UN, and NATO" duties in October of 2000. These restrictions became permanent in 2001. A "sick bay" medical record dated 7 January 2004, indicated that the Appellant had sustained an injury to his left knee on 6 January 2004 while playing with his children. The Appellant formally released from the military on 20 February 2005. Shortly after his release, the Appellant was diagnosed with a "bucket handle tear" of the left lateral meniscus, for which he underwent surgery on 28 July of 2005.

In a decision dated 26 May 2006 the Department awarded the Appellant full pension entitlement for "internal derangement" of his right knee, based on the evidence that was provided by the Appellant that he had suffered an injury to his right knee in October of 1998. The Departmental Adjudicator denied an additional claim for "internal derangement" of the left knee, and indicated that all of the available documentation had been reviewed and noted specifically that the date of the first knee injury or complaint was 7 January 2004. The Adjudicator referred to the fact that the knee complaint at that time arose after the Appellant twisted his left knee while he was playing with his children. The Adjudicator concluded that there was no other evidence of a service relationship between the left knee disability that could support pension entitlement for the left knee, and denied pension entitlement.

The Appellant took his left knee claim to both Review and Appeal levels of the Board, which both affirmed the denial of pension entitlement. After the Appeal decision was reached (23 October 2008), the Appellant filed for entitlement once again, this time under the diagnosis of "osteoarthritis left knee." In his application he cited injuries sustained during his time at sea, as well as the rigours of service – including sports.

Notwithstanding the common elements between the new claim and the previous claim for "internal derangement", the Department chose to rule on the new application, and denied entitlement again in a decision dated 20 October 2009. The Appellant took his claim to Review and Appeal Panels of the Board – which also denied entitlement.

The Appellant then filed an application for reconsideration of the Appeal decision under subsection 32 (1) of the *Veterans Review and Appeal Board Act*, which was heard on 8 August 2012. After the hearing, the Panel ruled to not vary its previous ruling denying entitlement.

That reconsideration decision was taken to the Federal Court on an application for judicial review.

After reviewing the Board's reconsideration decision, the Court concluded that the Panel had erred in failing to weigh the evidence before it in a manner that resolved that doubt as to causal link between the Appellant's left knee disability and military service in the Appellant's favour. The Federal Court then quashed the 8 August 2012 reconsideration decision and remitted this matter back to the Board for a rehearing and a new determination of the issues.

As a result of the Court's decision, this matter was returned to the Board, and assigned to this Panel for a rehearing of the issues related to the reconsideration.

The new hearing was held on 17 July 2013, with the Appellant's Advocate appearing by video conference from Edmonton, and the Panel convening the hearing from Charlottetown. In addition to the evidence that was previously considered before the Board when the earlier reconsideration and appeal decisions were made, this rehearing Panel was also presented with a new medical opinion letter from Dr. David O'Brien dated 7 March 2013. This new medical opinion evidence was marked as Exhibit "R2-Q1."

At the outset of the rehearing, the Panel advised the Advocate that in light of Mr. Justice Hughes' reasons and order, it would admit the new evidence and perform full reconsideration of the merits of the Appeal decision, under section 32 of the *Veterans Review and Appeal Board Act* (*VRAB Act*).

The Panel then listened to the submissions of the Advocate and sought his views in relation to various issues of fact and of law that were raised by the evidence in the case, and identified or referred to by the Court in its judgment on judicial review of the Board's previous reconsideration decision. After considering the arguments and evidence in this case, the Panel reached the conclusions on the issues that are explained in the remainder of this decision.

ANALYSIS/REASONS

In making the decision below, this Appeal Panel believes it has fully applied the favourable inferences required by section 39 of the *Veterans Review and Appeal Board Act*, which directs the Board to:

> (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.

This means that in weighing the evidence before it, the Panel will look at it in the best light possible and resolve doubt so that it benefits the Appellant. The Federal Court has confirmed, though, that this law does not relieve appellants of the burden of proving the facts needed in their cases to link the claimed condition to service. The Board does not have to accept all evidence presented by an appellant if the Board finds that it is not credible, even if it is not contradicted.[1]

The Board

We are an independent tribunal which has inquisitorial powers and a non-adversarial hearing process. At its hearings, the Board receives submissions and evidence from, or on behalf of, appellants and applicants. No other party - such as the Minister of Veterans Affairs or the Canadian Armed Forces - appear at or otherwise participate in the Board's hearings. While arguments highlighting the facts and evidence favourable to the applicant or appellant are received by the Board, there is no other party appearing before the Board to clarify issues that arise from previous decisions, or to respond to the arguments that are made at the Board's hearing. This means that the Panel hearing the case is responsible for ensuring that it properly weighs the evidence presented to it, and considers all of the issues that are relevant to the case, before it makes its decision.

The Panel hearing the case must therefore ask whatever questions are necessary to clarify the facts and issues in the case. The Board does not ask questions in order to oppose claims. Rather, the Board must ask questions in order to evaluate whether the evidence in the case can establish facts which can successfully support entitlement. We strive to view the evidence presented to the Board in the best light possible; mindful of our burden-of-proof and evidence weighing instructions as given to us by Parliament. Our objective in asking questions and weighing evidence is to ensure that we fully understand the facts of the case, so that we are in a position to draw any favourable inferences that may be reasonably raised or supported by the evidence and the circumstances of the case.

Where necessary, we also refer to any relevant instructions and guidelines that have been created by the Minister of Veterans Affairs for the purpose of providing guidance to decision-makers. We do so to ensure that the Board's decisions are based on sound medical information relating to the nature of the claimed disability or condition, and result in well-founded conclusions and decisions. We take great care to demonstrate our impartiality as we consider veterans'cases.

Where we ultimately conclude, after weighing all of the evidence, that there are sufficient facts proven to the civil standard to plausibly support a causal link between the claimed disability and military service, then we will resolve any remaining doubt in the Appellant's favour, as required by section 39 of the *VRAB Act*.

The Issue

The Board must determine whether all or part of the diagnosed disability of OA left knee is attributable to or arose out of the Appellant's military service in the Regular Force under subsections 21(1) or 21(2) of the *Pension Act*.

The Law

Section 21 of the *Pension Act* reads in part as follows:

> 21. (1) In respect of service rendered during World War I, service rendered during World War II other than in the non-permanent active militia or the reserve army, service in the Korean War, service as a member of the special force, and **special duty service**,
>
>> (a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that **was attributable to or was incurred during** 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) 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;
>
> [**our emphasis**]

Subsection 21(2.1) of the *Act* permits the apportionment to be made in fifths (one-fifth to five-fifths), representing the degree of relationship attributable to military service.

The *VRAB Act*, at section 31, establishes that an Appeal Panel's decision is "final and binding." Notwithstanding that provision, the *VRAB Act* also provides, at sections 32 and 111, a further opportunity for the Board to consider applications for reconsideration hearings where there are grounds and compelling reasons to do so.

The Court's Decision and Directions to the Board

This is a rehearing of the Appellant's application for a reconsideration of his appeal decision based on new evidence, under section 32 of the *VRAB Act*. In the reconsideration decision dated 8 August 2012 that has since been quashed by the Federal Court , the reconsideration Panel was asked to reopen the earlier "final and binding" Appeal decision of 15 September 2011, based on the argument that the Appeal decision was based on an error of law.

When the initial reconsideration hearing proceeded on 8 August 2012, the issue before that Panel was whether it had grounds to properly reopen the Appeal decision of 15 September 2011. The reconsideration Panel was not required to re-weigh and make extensive findings on all of the evidence *de novo*[2] or the merits of the conclusions reached on appeal. This is because the earlier Panel was conducting a screening of the application for the "extraordinary remedy" of a reconsideration in order to determine whether it had grounds to re-open the Appeal decision on the basis that the Appeal decision was based on an error of law in the weighing of the evidence.

However, in this rehearing, this Panel is not required to consider whether it has grounds to conduct a full reconsideration of the earlier Appeal decision. This is because Justice Hughes clearly concluded in his decision that grounds for a full reconsideration on the merits of the case were established under section 32 of the *VRAB Act* in that he determined that the Board erred in law by failing to resolve an "element of doubt" that was raised in the Appellant's favour, when weighing all of the evidence in the case.

In reaching this conclusion, Mr. Justice Hughes noted that the medical reports of Dr. Killeen and Dr. Connelly spoke of the possibility that the Appellant's left knee disability had been caused or aggravated by military service. He concluded that because there was no evidence presented by the Armed Forces to rebut or contradict these reports, those reports were sufficient to raise a doubt as to causal link that should have been resolved in the Appellant's favour. He then quashed the Board's Reconsideration decision of 8 August 2012, because he concluded that the Board had erred in failing to weigh the evidence before it at that time, in accordance with the requirements of section 39 of the *VRAB Act*.

The Court's conclusion that the Armed Forces had opportunity to provide rebuttal evidence at the Board's Appeal hearing, but had elected not to do so suggests that the facts as to the Board's inquisitorial and non-adversarial hearing process, were not clearly before the Court at the judicial review hearing. Nevertheless, the implications of the Court's decision for this rehearing are clear. The Court's determination that the previous Panel erred in law means that this Panel has grounds under section 32 of the *VRAB Act*, to reopen the Appeal decision and to enter into a full re-evaluation of the merits of that decision in light of all of the evidence that is now before this Panel.

The Panel will therefore re-open the Appeal decision and will reconsider the conclusions reached therein. No new evidence was before the Appeal Panel when it heard the appeal in September 2011 and the reconsideration in August 2012. This Panel will therefore be considering the determinations made by the Board on appeal, as well as in the VRAB Entitlement Review decision of 5 January 2011, which reviewed the decision of the Minister's delegated Disability Adjudicator dated 26 May 2006. In addition, we have considered the new evidence that has been presented by the Advocate at this rehearing. This new evidence consists of a medical opinion from Dr. O'Brien dated 7 March 2013, that has been marked as R2-Q1.

The main issue to be determined in this rehearing is whether the Appellant's claimed condition of osteoarthritis of the left knee may have been caused or aggravated by his military service under subsection 21(2) of the *Pension Act*. Osteoarthritis is a condition which is primarily associated with aging, and with the natural and progressive degeneration of joints that occurs over an individual's lifetime. However, it is also recognized that osteoarthritis can be caused or aggravated by acute injury or by cumulative injury. This Panel has reviewed the evidence before it in order to consider whether a causal connection between the Appellant's osteoarthritis and military service may be potentially established by evidence of an acute and specific injury caused by military service, or by evidence of cumulative injury caused over time as a result of the physical demands of the Appellant's military occupation or his participation in sporting activities.

Guiding Principles on the Causation of Osteoarthritis

In determining whether the evidence in the Appellant's case may be sufficient to establish causal connection between the Appellant's osteoarthritis and his military service, the Panel has considered the basic principles for causation of osteoarthritis from the Entitlement Eligibility Guidelines of the Department of Veterans Affairs Canada (the "VAC EEGs").

The VAC EEGs explain that osteoarthritis occurs over the lifetime of individuals, primarily as a result of natural processes arising from the aging and deterioration of joint tissues over time. Although medical consensus clearly recognizes that the primary cause of osteoarthritis is the aging process, medical consensus also recognizes a contribution or aggravation of osteoarthritis can result from direct injury to a joint as a result of acute and specific joint injury or due to cumulative injury, known as "cumulative joint trauma" that is associated with weight bearing. Both forms of injury – acute and specific traumatic injury or a more gradual form of joint trauma – can contribute to the development of osteoarthritis by accelerating the onset or development of osteoarthritis.

Based upon the medical consensus, the VAC EEGs on osteoarthritis provide for disability award or pension entitlement if there is evidence of specific and acute joint injury or there is cumulative trauma to the joint that can be attributed to numerous years of loading and weight-bearing on joints during an appellant's military career. Cumulative joint injury requires evidence of heavy load or weight-bearing over a specific number of years.

It is also recognized that military service may contribute to the premature onset or accelerated development of osteoarthritis where an applicant has sustained an acute or "specific trauma" or traumatic injury as a result of military service. Specific trauma is defined in the VAC EEGs as a specific physical injury to a joint, including a fracture of the intra-articular surface of the joint, but

excluding soft-tissue injury which does not cause joint instability. The VAC EEGs also indicate that the risk of developing osteoarthritis from a single major injury to joint will increase with the size and depth of the injury to the joint. The type of injury which is most strongly associated with osteoarthritis is injury that involves direct damage to the articular cartilage and underlying subchondral bone of the joint. Specific injury to ligaments and tendons may also accelerate the development of osteoarthritis in weight-bearing joints where the injury has resulted in an unstable joint.

A specific traumatic injury is associated with acute symptoms of pain, swelling, or altered mobility in the joint within 24 hours of the injury which will generally last several days following their onset unless there has been medical intervention to minimize symptoms or to treat the specific injury.

"Medical intervention" includes but is not limited to physician-recommended medication; immobilization of the joint or limb by splinting, sling or similar mechanisms; injection of corticosteroids or local anesthetics into the joint; aspiration of the joint; surgery to the joint. Finally, the VAC EEGs provide that the signs and symptoms of osteoarthritis must present in the affected joint within 25 years of the specific trauma in order to causally connect the osteoarthritis to the traumatic injury.

The other type of joint injury which can lead to pension entitlement is known as "cumulative joint trauma." There is a Discussion Paper within the VAC EEGs entitled "Cumulative Joint Trauma In the Development of Osteoarthritis of the Lumbar Spine, Hips, Knees and Ankles" which reviews and summarizes the conclusions reached in various studies and in medical literature on the subject of causation of osteoarthritis through cumulative trauma to joints.

The "Cumulative Joint Trauma" Discussion Paper reports that there is consensus arising from the studies to the effect that osteoarthritis in weight bearing joints may be accelerated by cumulative physical trauma to the joints over a period of time. Cumulative joint trauma is broadly defined as physical trauma resulting from repetitive activity which involves an increased load being placed on a specific joint of the lumbar spine, hips, knees, or ankles for a specific period of time. The cumulative joint trauma/ osteoarthritis guidelines also provide that cumulative joint trauma is an issue to be considered in a disability claim for osteoarthritis **in the absence of an identifiable (specific) injury to that joint**.

The VAC EEGs on osteoarthritis specifically define cumulative joint trauma for each joint in terms of the "increased load" or the repetitive activities. For the knees, cumulative joint trauma is defined with reference to occupational activities and with respect to sports or exercise activities. Cumulative joint trauma of the knees associated with occupations means kneeling or squatting in combination with carrying of loads of at least 35 kg on most days, or lifting of 35 kg loads in a twisted or bent position.

Cumulative joint trauma associated with sports and exercise activities is defined to mean high-intensity, acute, direct joint impact as a result of contact with other participants, playing surfaces, or equipment; or repetitive joint impact with torsional loading (twisting); or running of high intensity and high mileage, such as in marathon running or training.

The Panel notes that the VAC EEGs are reliable in that they represent the current state of medical knowledge and consensus on issues of etiology and causation of osteoarthritis. They are based on a broad cross-section of medical studies and literature respecting osteoarthritis and are intended to provide objective guidance and information to decision makers and to the public in order to identify issues that should be addressed in claims for osteoarthritis and to promote consistent and sound decision making based on the application of accepted medical principles relating to etiology and causation of osteoarthritis, under the *Pension Act.*

This Panel has therefore considered the osteoarthritis guidelines in weighing the evidence provided in the Appellant's case and in determining whether the totality of the evidence establishes a causal link between the Appellant's osteoarthritis and his military service. The Panel also notes that it is open to consideration of the possibility that there are factors present in the Appellant's case which are not specifically addressed in the VAC EEGs on causation of osteoarthritis of the knees. However, no evidence was presented in this case that would indicate that the Appellant's case involves special circumstances or issues of causation which are not addressed in the VAC EEGs.

Specific Injury - 1998

This Panel has reviewed all of the evidence before it in order to determine whether a causal nexus between the Appellant's left knee osteoarthritis and his military service could be established on the basis of an acute and identifiable injury to the knee joint that arose out of military service. The medical evidence now before the Board in this rehearing is very clear that the tear to the left lateral meniscus that was treated by Dr. Connelly in 2005 would be attributable to a specific injury.

The first issue to be resolved in considering this question is whether the evidence before the Board in this rehearing can establish that there was a specific injury to the left knee in 1998.

The Panel notes that there was some confusion in the file as to whether there was also a left knee injury in 1998, at or around the time that the right knee injury was sustained. The question of whether there were complaints in the left knee in 1998 was noted by the Federal Court in its comments at paragraphs 5 and 23 of the Court's judgment.

The same issue was referred to as well by the previous Panel, in the now-quashed Reconsideration decision dated 8 August 2012, when the Panel wrote at page 6:

> ... There are in fact three references in the medical evidence: the first, on 23 November 1988, notes pain and swelling of the left knee; the second, on 7 January 2004, notes that the Appellant twisted his left knee while playing with his children; and the third, on 21 January 2005, records left knee pain. ...

The issue of whether there was an acute and specific injury to the left knee in 1998 is a significant issue that if established, could support the inference of causal link between osteoarthritis and military service, and it therefore deserves a full evaluation of all of the evidence.

The evidence concerning the left knee is distinct from the evidence that is in the file with respect to the Appellant's right knee. There is clear documented evidence of an acute injury to the right knee in 1998 that arose from an incident playing volleyball. The acute right knee injury was the key fact that supported entitlement for the Appellant's current pension for internal derangement of his right knee.

In reviewing the evidence on the left knee, it appears from a review of the record that the reference made by the previous Panel to a report of "23 November 1988" was a typographical error. The Panel's reference should have read "1998" instead of "1988."

The more important issue, however, is whether the evidence establishes that there was evidence of a left knee complaint, or any injury to the left knee in 1998.

This Panel canvassed this issue with the Advocate in the hearing. In the hearing, we directed the Advocate's attention to page 44 of the record, from 23 November 1998, where there appeared to be conflicting references to the right and to the left knee. These appear to be in conflict, because there are three references to "Lt" when describing the knee, yet elsewhere in the same record there are references to "Rt" knee instead.

In resolving the issue of whether there was in fact a left knee injury or complaint in 1998, this Panel has considered the following points that are contained in the record:

1. When the Appellant filed his written application for pension entitlement for internal derangement of both his right and left knees, (page 6) the Appellant did not attribute his left knee disability to any injury or incident in 1998

2. a medical record on the previous page (43) from 18 November 1998 contains the impression "Rt knee strain" after "playing v ball." The Panel assumes that this stands for a reference to a volleyball injury as referenced by the Panel earlier in this decision. A two-day follow-up was advised

3. An X-ray study dated 19 November 1998 (page 46) of the right knee (with the left for comparison), with a history of "Retropatellar pain related to volleyball" on the right side

4. a medical record dated two days later, on 20 November 1998 (top, page 44), for "FU (follow-up) Rt Knee strain" with an impression of patellar tendonitis and advising a follow-up in one week

5. the aforementioned 23 November 1998 record, which notes "as above" with increased swelling and decreased range of motion, this time describing it as the "Lt" knee on three occasions, but at the end of the record on page 44 references the "Rt" knee and orders a "recheck on Friday." The top of page 45 appears to be a continuation of the 23 November record, with impression as "LCL (Rt) Knee Injury, improving" and notes an "ortho consult" and the fact the Appellant no longer needs a cane. He is advised to recheck as needed once his light duties period has concluded
6. a 25 November 1998 record (page 45), re-checking "Above" and commenting only on the right knee
7. a 29 January 1999 record (page 45) noting the Appellant is excused from having to do his EXPRES (military fitness) Test until seen by Dr. Taylor
8. a Consultation Report from Dr. Taylor, dated 4 January 1999, for the right knee only. Dr. Taylor suggests an MRI study of the right knee, which is done in March 1999 and reported at page 49
9. Dr. Connelly, writing in 2005 (page 102) that the Appellant had a two-year history of left knee pain, which would place the onset of the left knee complaints well after 1998

It is notable that there were several documented complaints, along with medical examinations of the right knee in 1998. However the same attention to the left knee is not indicated in reports from 1998.

Furthermore, the reference to "Lt" appears in one report only, and even in that report the commentary switches to the "Rt" knee before it concludes. It appears that there may have been an inadvertent error in the nature of a transposition of "right" and "left" in the medical notes that were prepared in the record dated 23 November 1998. This is understandable given that the findings are being recorded while the medical examination is proceeding on the patient.

The record does not indicate that there were injuries to both knees in 1998. The only substantive evidence concerning an injury, complaints or medical attention to the Appellant's knee area in 1998 concerns the right knee only. There is also no assertion that the Appellant suffered a left knee injury in 1998 or 1999. The only reasonable conclusion to be drawn from the evidence is that the Appellant's injury and complaints in October and November of 1998 related to the right knee and not the left. This is also consistent with conclusions reached by the Department of Veterans Affairs in its decision which granted pension entitlement for the right knee on the basis of the injury that was recorded to the right knee in 1998.

Based on the foregoing, we therefore conclude that the evidence does not establish on the balance of probabilities that the Appellant experienced a specific injury to his left knee in 1998. The Panel is unable to conclude that the osteoarthritis in the Appellant's left knee or the bucket handle tear to his left lateral meniscus arose from specific injury in 1998.

Aggravation of Osteoarthritis By Cumulative Trauma

1984-2004

In the absence of an identifiable acute or specific left knee injury caused by military service, the Panel considered whether some contribution to the Appellant's left knee osteoarthritis may be attributable in part to cumulative trauma caused by years of chronic occupational demands and physical stresses from his naval trade or from military related sporting activities.

The Panel notes also that the VAC EEGs indicate that, in the absence of evidence of any acute or specific injury, it is appropriate to consider the alternative avenue of whether the physical demands of the Appellant's military service may have contributed to his left knee injury or to the development of osteoarthritis through a non-specific or cumulative injury.

In order to sustain or support a claim based on cumulative trauma in accordance with the VAC EEGs on cumulative joint trauma requires evidence that the knee would have been subjected to specific loads or and weight-bearing demands over a specific number of years.

The "Task Statement" that is on file with respect to the occupation of "NAVCOM" (Naval Communicator), at page 99 of the material, does not indicate that the physical requirements of this

job meet the definition of cumulative trauma for the knees. Nor is there evidence of sporting activities that would meet the definition of cumulative trauma sufficient to cause or contribute to osteoarthritis over time.

As noted previously, there is no evidence that the Appellant sustained any injury to the left knee in 1998 or 1999 when his right knee was injured. There is also no evidence of knee symptoms or complaints during the time period during which the Appellant was performing his duties onboard ship as a Naval Communicator.

The facts of the case also show that the Appellant had been restricted from performing the duties of his military trade because he was on a temporary category for a significant period of time prior to the diagnosis of the bucket handle tear in 2005. On this point, the Appellant's DND records show that for a period of several years until his release in 2005 the Appellant was on employment restrictions due to medical conditions unrelated to the claim before this Panel.

From at least November 1999 he was in receipt of frequent and sometimes intensive medical care, and had been placed on "temporary" and eventually "permanent" medical categories.

We refer to specific evidence dated 31 October 2000 in which Lcdr Brittain approved geographical restrictions for the Appellant, including: "unfit sea, field, isolated, UN, and NATO" duties. He was declared "fit alongside" but required specialist medical care at least every six months (G5O5, then G4O2). On 2 May 2001 he was assigned permanent medical restrictions (G4O3).

These facts and circumstances do not reasonably support the conclusion the left knee was injured as a result of microtrauma that occurred before the Appellant being placed on a temporary medical category in 1999, or on permanent medical category in 2001.

The evidence in DND military service and health records do not, on the face of the record, suggest that the left knee became symptomatic as a result of the cumulative impact of military service, or after any specific incident arising from military service.

The medical evidence now before the Panel does not reasonably suggest that the Appellant's meniscal tear resulted from cumulative occupational trauma because the medical opinions (which we will discuss shortly) indicate that the cumulative trauma would not be the cause of a bucket-handle tear. In particular, the new evidence that is now before the Panel from Dr. O'Brien is very clear that a bucket-handle meniscal tear is not a degenerative tear, but is the result of a specific injury to the meniscus from a flexed twisted knee.

There is also no evidence before this Panel to suggest that the tear had occurred at some earlier date, but was then aggravated further by occupational duties. The medical evidence does not raise this as a distinct form of causation. The facts of the case do not support this conclusion either, by virtue of the fact that the Appellant was not performing duties onboard ship after for some time prior to onset of knee symptoms in the left knee in 2004.

Despite the fact that the new opinion evidence from Dr. O'Brien does not support the inference that the tear to the lateral meniscus was due to cumulative damage, the Panel did consider whether the information on file could support the inference evidence that the physical demands of the Appellant's military trade as a Naval Communicator could be of sufficient intensity to cause cumulative damage to the knee joint over time, and thereby contribute to osteoarthritis.

The Panel has not received any evidence or argument to indicate the circumstances of this case involve special considerations or raise specific issues that may bring this case outside of the general information provided in the VAC EEGs on cumulative knee trauma.

Accordingly, the Panel is unable to conclude on a balance of probabilities that the occupational demands or physical activities associated with the Appellant's military service were an identifiable factor in the development of osteoarthritis in his left knee.

The Injury to the Left knee in 2004

The first documented evidence of an injury to the left knee appears in a report found at page 64 of the record, indicating that the Appellant was treated at Sick Bay on 7 January 2004 for an injury to his left knee.

This record speaks of the Appellant complaining of left knee discomfort for one day, after twisting his knee while playing with his "kids" on 6 January 2004. He was noted to have considerable discomfort and swelling. The impression (page 65) is left knee strain. The Appellant was given Motrin and Gravol, and was medically excused from physical training, marching, drill, and prolonged standing; with light duties for ten days thereafter.

A report prepared over a year after this injury indicates that the Appellant did not later recall this particular Injury. On page 70, in a report prepared just prior to his release, it indicates that the Appellant reported with left knee pain, but with no history of injury. The history recollected in 2005 is not consistent with the evidence in record from the year before, at pages 64 and 65.

The contemporaneous evidence in the Sick Bay record of 7 January 2004 indicates that the Appellant sustained a twisting injury to his left knee on 6 January 2004. This is a significant fact as it is the type of injury that the medical opinions on file (including the new opinion from Dr. O'Brien) have identified as causal of the Appellant's left lateral meniscus tear. We therefore conclude that the 2004 injury is, on a balance of probabilities, the likely cause of the bucket handle tear that was subsequently diagnosed and treated in 2005 by Dr. Connelly, and then eventually caused the onset of osteoarthritis.

The key question is whether the twisting injury in 2004 arose from the Appellant's military service.

The evidence as to the circumstances around the injury is that the injury arose when the Appellant was playing with his children. Although this injury clearly occurred before the Appellant left the Regular Force, it has not been argued that this injury was caused by or arose from military service.

The courts have held that an injury suffered while enrolled in the military is not pensionable unless there is some element of military duty that has contributed to the injury. However, it is important we keep in mind that "being on duty" is not the test. As the Federal Court wrote in King[3]:

> [45] I am unable to see where in the *Pension Act* is the requirement that the injury or disease be the result of an incident occurring while the member of the Armed Forces is on duty. As pointed out by the applicant, paragraph 21(2)(a) of the *Pension Act* provides two criteria for determining whether a pension can be attributed: the disease must either (1) arise out of service or be (2) directly connected with service. It does not appear that anything else is required. Although paragraph 21(3)(*f*) of the *Pension Act* creates a presumption than an injury or disease incurred during a military operation, training or administration, is one that arises out of or is directly connected with military service, paragraph 21(2)(a) does not so limit the occurrence of the injury or the disease.

Further along in the decision, Nadon J. wrote at paragraphs 66 and 67:

> 66. Second, counsel submitted, the Board misinterpreted the *Pension Act* by importing terms not contained in the language of the statute itself, namely the distinction between "contributing cause" and "setting". In particular, it stated in its reasons that the fact that the applicant's injury occurred in the course of a working day did not provide a sufficient cause nexus to bring it within paragraph 21(2)(a). That the injury occurred during a working day was merely the "setting" not a "contributing cause".
>
> 67. It is true that these words are not in the legislation; however, the phrase "directly connected" in my opinion required the Board to consider the strength of the causal connection between the injury and the applicant's military service. In contrasting "contributing cause" with "setting", the Board was distinguishing stronger from weaker causal connections between the injury and the performance of military service. Given that it is not sufficient that, when injured, the applicant was serving in the military, I find that the Board committed no error of law here in its understanding of the statutory test.
>
> [*our emphasis*]

From the above, which still stands as good law, "being on duty" is not the test for service relationship. Furthermore, the simple fact of being injured while an "applicant was serving in the military" is also not sufficient to give rise to pension entitlement.

The facts on the file as to how the 6 January 2004 injury occurred indicate that it was not incurred during performance of military duties. As well, there is no evidence of special circumstances or factors that can be associated with this injury which could connect it to the Appellant's military service. Based on the facts that are before the Panel in relation to the 6 January 2004 twisting injury, we see no basis on which we can reasonably conclude the Appellant's 2004 knee injury either arose out of or was directly connected with his military service, within the meaning of subsection 21(2) of the *Pension Act*.

January 2004 to February 2005

Even though we concluded that the 2004 injury was not service related, we went on to consider whether the tear to the Appellant's left lateral meniscus that occurred in January of 2004 may have been further damaged or aggravated by factors arising from military service after it occurred. The remaining period of time between the 2004 injury and the end of his military service in 2005 was brief. The evidence also shows that this final period of military service did not involve sea time or any identifiable high-impact or heavy physical demands as part of the Appellant's military duties.

Only weeks before his retirement, and after the Appellant's release medical was processed on 6 January 2005, he reported his left knee as problematic. We see from this record that no additional incident appears to have been implicated in any sudden increase in symptoms. He was noted to be "not currently playing a lot of sports" and that there was no "hx (history) of left knee injury or trauma." We know, however, that the notation was not factually correct – based on page 64 from the previous year.

The medical opinions state that it was possible that occupational duties may have aggravated the Appellant's left knee problems. These opinions are clearly premised on the factual assumption that the Appellant was at sea or that he continued to perform duties which could have further damaged his knee through kneeling or squatting. The factual evidence on file from the Appellant's military service during this period of time does not support this conclusion.

We have also considered the medical consensus on the causation of osteoarthritis as explained in the VAC EEGs. However, there is no evidence on record before this Panel to establish that the Appellant's 2004-2005 military service was of sufficient physical intensity to reasonably raise the inference that military service did cause further injury or deterioration in his left knee in that one year period prior to discharge. There is also no report of further incidents or injury in the Appellant's left knee as a result of military duties between the date of the twisting injury in 2004 and his discharge in February of 2005.

The Panel is therefore unable to conclude that there was a further aggravation of the left lateral meniscus tear by military duties in the one year period after the tear occurred in 2004 and prior to discharge in 2005. The evidence is also insufficient to reasonably raise the inference that military duties in the final year were of sufficient intensity to be considered a contributing factor in contributing to, or permanently worsening the Appellant's left knee osteoarthritis.

Weighing of Evidence: Medical Opinions and Service Health Records

In this rehearing, the Panel considered and weighed all of the medical opinions presented in support of the Appellant's claim for osteoarthritis of the left knee at previous levels of redress. The Panel also considered the new opinion evidence that was presented in this rehearing from Dr. O'Brien.

The Panel also had access to and considered relevant evidence from the Appellant's military and medical records from the Department of National Defence. The Appellant's DND military service records and health records provide a reliable contemporaneous record of injuries, and of complaints and medical treatment that was provided to the Appellant by medical professionals while he was in the Canadian Forces. Assembly of such records is done preparatory to every Board decision, under section 15 of the *VRAB Act*.

The Panel has considered whether all of the foregoing evidence is capable of establishing sufficient facts on a balance of probabilities to support the conclusion that there is a causal connection between the Appellant's left knee osteoarthritis, and his military service.

The Panel has also drawn any favourable inferences that are raised by the evidence in the medical opinions, and by the evidence and the circumstances of the case relating to the nature of the Appellant's military service and its occupational demands.

The Panel has considered Dr. McCann's assessment at page 83 of both knees. The Panel has also considered various medical opinions on the issue of causal connection between the Appellant's left knee problems and his military service from three sources. This includes evidence from Dr. Killeen, Dr. Connelly, and Dr. O'Brien. Dr. O'Brien provided a new medical opinion that has not been considered by the Board. Dr. Killeen and Dr. Connelly provided several medical opinions and medical reports that were previously considered by the Board in past hearings and were considered once again in this rehearing. The key evidence considered by the Panel from Dr. Killeen, Dr. Connelly, and Dr. O'Brien includes the following evidence:

Dr. Connelly:

- Letter to Dr. Killeen, 26 July 2005 - page 102
- Report of Operation, 28 July 2005 - pages 73-74
- Veterans Affairs Canada (VAC) Physician Statement form, 24 August 2005 - page 75
- Post-op follow-up to Dr. Killeen, 24 August 2005 - page 76
- Letter to review level Advocate, 10 September 2008 - page 90
- Letter to Dr. Killeen, 24 March 2010 - pages 97-98

Dr. Killeen:

- Medical Questionnaire, 28 March 2006 - pages 77-81
- Letter to review level Advocate, 15 March 2007 - page 89

Dr. O'Brien:

- Letter to appeal level Advocate, 7 March 2013 - R2-Q1

The Panel will weigh, *de novo*, all of the evidence brought forward to date.

How the Board Evaluates Medical Evidence

There is considerable jurisprudence on the appropriate standards for the weighing of evidence and application of the benefit of doubt provisions by the Board.

The Federal Court has held that expert medical opinion evidence offered to the Board that purports to establish that a disease or injury was caused by a claimant's military service may be tested for credibility. The onus is on the claimant to establish the relationship, and demonstrate that the medical difficulty from which he or she now suffers arose out of or was directly connected with military service. (*Hall v. Canada*, see also *King v. Canada (Veterans Review and Appeal Board)*, 2001 FCT 535, *Racicot v. Canada* [1996] F.C.J. No. 1522, *Woo Estate v. Canada (Attorney General)*, 2002 FCT 1233, *Garrammone v. Canada (Attorney General)*, 2004 FC 1553).

As confirmed by Mr. Justice Hughes in his decision, the Panel is required to assess the credibility of medical opinions and other evidence presented in the cases which are heard before it, in order to determine whether the evidence proves sufficient facts on a balance of probabilities to reasonably establish that there is a causal link between a disability and military service. Credibility findings should be made on medical opinions and the other evidence presented in the case, based on whether the evidence is plausible, reliable, and logically capable of proving the facts that the evidence is intended to prove.

In weighing evidence the Panel is entitled to consider both the professional qualifications of expert along with the expert's apparent knowledge of the facts of the case. The most persuasive medical evidence would come from a well qualified physician who is a specialist in the relevant field and who demonstrates a full and accurate understanding of the patient's factual history. The Panel will give less weight to an opinion where it is apparent that medical or health care practitioner has gone beyond their field of specialized expertise or study to offer opinions which are outside of their area of specialty. The Panel will assess opinions from general practitioners, and non-physician health care professionals such as chiropractors, pedorthists, massage therapists, audiologists, etc, in consideration of the specific area of professional expertise of that expert.

The Panel will also give greater weight to medical reports and opinions which demonstrate objectivity, comprehensiveness, and candour when discussing the potential cause or causes of the claimed disability. In all cases, the Panel requires the context in which the expert opinion is written. The letter that invited or requested the opinion provides important context in terms of determining which questions the expert was invited to address. The Panel will look at whether the expert was provided with the entire file, and with all of the facts of the case, or was provided only with selected facts. The Panel will also consider whether the questions posed to the expert lead or direct the expert to particular conclusions, as well as whether remuneration is offered in order to determine the degree of weight that can be placed on the opinion, when weighing it, in light of all of the evidence.

The most recent Federal Court of Appeal case on this is *Wannamaker*[4]. The Appeal Court concluded the Board was reasonable in rejecting the medical opinions offered in that case, because they could not be lined up with the medical records created in military service. The Court in *Wannamaker* concluded the medical opinion evidence was "incapable" of proving the occurrence of claimed injuries because they were "the opinions of persons who were not in a position to know …".>

Earlier in the *Wannamaker* decision – and in a portion quoted by the Federal Court that remitted this case back to the Board – the Appeal Court wrote, in part:

> [6] … The Board is not obliged to accept evidence presented by the applicant if the Board finds that evidence not to be credible, even if the evidence is not contradicted, although the Board may be obliged to explain why it finds evidence not to be credible: *MacDonald v. Canada (Attorney General)* 1999 CanLII 7645 (FEDERAL COURT), (1999), 164 F.T.R. 42 at paragraphs 22 and 29. Evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove.

There is another case, *Carnegie*[5], in which the Federal Court wrote, considering *Wannamaker* :

> [25] While the Applicant relies on *John Doe v Canada (Attorney General)*, 2004 FEDERAL COURT 451 (CanLII), 2004 FEDERAL COURT 451, [2004] FCJ no 555 at paragraph 36 in his written submissions to suggest that a standard of proof lower than the balance of probabilities could be applied, **this is no longer the prevailing approach**. In *Wannamaker*, above at paras 5-6, the Federal Court of Appeal stated that while section 39 ensured evidence is "considered in the best light possible" it does not relieve the applicant of the burden of "**proving on a balance of probabilities the facts required to establish entitlement to a pension**." Moreover, the Board is not required to automatically accept all evidence presented by the applicant.

[*our emphasis*]

Mr. Justice Hughes confirmed in his decision in this case that the Board should assess credibility of evidence based on the test in *Wannamaker*. That requires three elements be considered:

- plausibility
- reliability
- capability of proving the fact it is intended to prove

Our evaluation of the reports of Drs. Killeen, Connelly, and O'Brien will be on that standard.

Firstly, we fully accept that all three doctors are duly-accredited members of their profession. Drs. Connelly and O'Brien are specialists in the relevant field of medicine, which is orthopaedic surgery. Thus, we believe they are well-qualified to provide credible opinions, and are – as individuals and professionals – credible.

However, the Panel is not relieved of the responsibility to assess a doctor's medical opinion for reliability, plausibility and persuasiveness, even where it is abundantly apparent that the doctor who produced the opinion possesses a high degree of professional expertise. Our responsibility to do this has been affirmed many times by the Federal Court. Perhaps the clearest expression of our duty to test the evidence is found in the case of *King*[6], where the court wrote that, "the Board cannot have been intended to simply rubber stamp any medical opinion put before it."

When the Board assesses credibility of medical evidence, it is not making a credibility finding on the credentials of a particular physician. The Panel will assess the factual reliability of the opinion by

evaluating whether the doctor was in a position to accurately appreciate all the key facts and medical factors that were present in the case. The Panel also considers whether the doctor's opinion is based on an objective and persuasive analysis of the facts of the case based on that doctor's professional medical knowledge, expertise and experience.

A doctor may be expert on medical and scientific issues, but not on legal matters – and specifically on the entitlement tests that the Board applies in trying to connect an injury or disease to military service. Only the Board has the authority to consider whether the circumstances of a claimed injury bring it within the service context.

A medical opinion that addresses legal issues rather than medical issues is not persuasive because it goes outside of the expert's area of expertise and the ultimate decision as to pension entitlement is not the expert's decision to make. A medical opinion which declares an injury is "service related" will not be entitled to great weight on that point.

We often see a doctor expressing a belief that an injury or disease is connected with military duty merely because the patient was enrolled in the Forces when it occurred. We discussed this above, and at this point will only reiterate that peacetime injuries must be sustained in circumstances that can be causally connected to military duties, before the injury and the resulting disability are considered to be pensionable.

Even if expert witnesses have a full understanding of the legal tests and the applicable jurisprudence under subsections 21(1), 21(2), 21(3) and 21(5) of the *Pension Act*, as well as section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, as well as section 50 of the *Regulations* under that *Act*, they do not have legal authority to determine the facts of the case or to apply the legislation to those facts.

Dr. Connelly

Dr. Connelly provided several pieces of evidence which were weighed by this Panel in determining whether the Appellant's military service may have been responsible for causing or aggravating osteoarthritis in the Appellant's left knee. Some of the evidence from Dr. Connelly was in medical reports that were prepared by Dr. Connelly when he treated the Appellant's bucket handle tear and performed surgery in 2005. Dr. Connelly also provided opinions in 2008 and in 2010, which spoke to the potential causal connection between the Appellant's military service and the tear to the meniscus of his left knee.

In his surgical report on 28 July 2005 (pages 73-74) Dr. Connelly described the procedure followed in conducting the arthroscopy performed on the left knee. In the VAC Physician Statement of 24 August 2005 (page 75) Dr. Connelly does not provide any opinion on the cause of the "bucket handle tear" of the left lateral meniscus. In his post-op letter to Dr. Killeen on 24 August 2005 (page 76) Dr. Connelly also makes no remarks on the causation of the left knee problems.

In his letter to Dr. Killeen on 26 July 2005 (page 102) Dr. Connelly also noted a two-year history of left knee pain, but with **no history of injury**. This aspect of Dr. Connelly's evidence is not consistent with the evidence of injury that was documented in the medical record of 7 January 2004, and which indicated that the Appellant reported to sick parade and was diagnosed with a twisting injury to his left knee.

The later opinions of 2008 and 2010 are different from Dr. Connelly's earlier reports in that the later reports were prepared for the purpose of providing evidence which could support the pension claim. The earlier reports on the other hand, are focussed on describing the diagnosis and treatment of the Appellant's torn left lateral meniscus and these reports rely on Dr. Connelly's own observations when treating the Appellant. These treatment-related medical reports do not offer any information or opinion on causation of the Appellant's left knee problem.

The later opinions relied on such facts as could be obtained on the history of knee injury and complaints from the Appellant himself. It is apparent that in preparing the later opinions Dr. Connelly was relying on such facts as could be obtained on the Appellant's history of knee injury and complaints from the Appellant directly. It is also clear that there were gaps in the information.

For example: in his letter to the review level Advocate on 10 September 2008 (page 90) Dr. Connelly notes that he is not aware of the circumstances which may have caused the Appellant's injury. It is

significant to note that he states, once again, that there "was no history of injury." He also writes, "When his bucket handle tear occurred I have no idea." However, later in the letter he writes:

> ... The injury could have occurred at the time of his serving in the military, particularly at sea. Once the injury occurred it could certainly be aggravated by physical activities such as standing on a heaving deck, climbing ladders and squatting. ...

Dr. Connolly's opinions are credible in speaking to his diagnosis and medical treatment of the Appellant's bucket handle tear. The medical evidence from Dr. Connelly is also credible in respect of the issue of general medical consensus on the known causes of bucket handle tears to the meniscus. On this point, Dr. Connelly's evidence that bucket handle tears are the result of twisting injuries is consistent with the opinion of Dr. O'Brien, who is also an orthopaedic surgeon, and of Dr. Killeen.

The aspects of Dr. Connelly's opinion which speak to the possibility that military service "could" have been responsible for the Appellant's meniscal tear do not demonstrate that Dr. Connelly had access to reliable facts such as the circumstances around the injury which caused the Appellant's torn meniscus. Here, Dr. Connelly is frank in stating that he does not know when the specific injury occurred. He is also guarded in concluding that military service may have been a possible cause of the Appellant's bucket handle tear. His opinions show no knowledge of the fact that the Appellant did have a non-service related knee injury in 2004, some years after his "at sea" time had ceased.

However, the nature of the injury in 2004 and the fact that it did not occur long before Dr. Connelly began treating the bucket handle tear would all suggest that the 2004 injury would be an obvious factor to be considered by Dr. Connelly in determining potential cause of the Appellant's bucket handle tear in the left meniscus. Here the Panel notes that the medical evidence from the DND service health records clearly indicate that the Appellant reported to sick parade requiring medical treatment for a twisting injury that occurred on 6 January 2004. Although the injury that was described in the 2004 sick parade report incident would appear to be an obvious causal factor in the bucket handle tear of the lateral meniscus, based on the opinions of Dr. Connelly (as well Dr. Killeen and O'Brien), it appears that Dr. Connelly did not refer to the 2004 injury because he was not aware of that injury. It appears that Dr. Connelly was not aware of the 2004 injury because he was not informed of it and did not have an opportunity to perform his own review of the relevant medical documents in the Appellant's DND files.

Furthermore, Dr. Connelly does not appear to be aware that the Appellant did not serve at sea for several years before or after his injury in 2004, which would indicate that there was no opportunity for an aggravation of the twisting injury after it occurred. On this point it is noted that Dr. Connelly's opinion is focussed on the cause of the meniscal tear and did not directly address any other causes of the permanent disability osteoarthritis in the left knee.

When Mr. Justice Hughes conducted a judicial review of the decision reached by the Board on the Appellant's case in the earlier application for reconsideration, he concluded that the medical opinions that were before the Board in 2012 would be considered credible and also sufficient, in the absence of evidence to the contrary, to establish a causal connection between the Appellant's osteoarthritis and military service. However, we conclude, the underlying factual assumptions on which Dr. Connelly's opinion is based are contradicted by the records from the Appellant's DND military medical files.

Dr. Connelly's opinion is credible insofar as it is based on facts or information which could be properly inferred by him based on his medical expertise and knowledge. It is also credible in terms of facts that could be gathered by Dr. Connelly based on the observations and the examination that he performed on the Appellant when he diagnosed and treated the tear in the Appellant's left knee in 2005.

Dr. Connelly's opinion is also entirely credible when he candidly indicated that he was not aware of when the Appellant actually had the left knee injury that caused the bucket handle tear.

However, it is obvious from a review of Dr. Connelly's opinion that he was not in a position to familiarize himself with objective evidence and facts of the Appellant's history of injury to the left knee, or with evidence on the nature of the Appellant's military service in the months preceding his treatment of the Appellant's meniscal tear.

Dr. Connelly's opinion is very credible in addressing issues of medical nature relating to the possible causes of the Appellant's injury as these are clearly within his medical expertise. However, his

conclusions as to the possible relationship to military service are not sufficiently credible to establish causal relationship. The factual basis on which his opinion relies in this regard is not reliable in that he does not demonstrate an accurate appreciation of the one injury that is documented in the Appellant's military health records that would be responsible for causation of the bucket handle tear. It is also clear that he was not aware of the circumstances of that injury and did not know whether that injury arose in the performance of military duties.

The use of the word "could", in Dr. Connelly's opinion is clearly based on inference drawn in the absence of fact. "Could" is only possible if all other plausible causes have been considered and successfully ruled out. Dr. Connelly was unable to do so, because by his own words he was unaware of any specific injury. He was therefore unaware of the key facts that would explain when and how the tear occurred. He was also not aware of the circumstances of the injury or that the injury may have occurred in a non-service context. As a result, we cannot conclude that Dr. Connelly's opinion, that military service possibly caused the bucket handle tear in the Appellant's left knee, is based on a credible or accurate review of the facts of the case.

In his letter to Dr. Killeen dated 24 March 2010 (pages 97-98) Dr. Connelly writes as follows:

> ... With a history of pain in both knees before any surgery, his occupation could certainly have led to the above-noted injuries. There is no way to prove that his symptoms on the left are compensatory in nature from the damage to the right, but this is a fairly common finding. The injury to his left knee also occurred during his Service time, so likely is pensionable as well as the right. ...

It is significant that Dr. Connelly's opinion refers to an injury "during his Service time" as the basis for his opinion that the left knee is "likely" pensionable. But, as we have noted above, where an injury or disability claim is based on Regular Forces service, as is the case here, the fact that an injury or disability manifested during military service is not the sole or determinative factor in the question of whether the injury arose out of military service under subsection 21(2) of the *Pension Act*. Rather, the timing and other circumstances of the injury or disability are relevant factors that must all be weighed when determining the legal issue of pension entitlement under subsection 21(2) and the "attributable to" provisions of subsection 21(1) of the *Pension Act*.

We also note that a main thrust of that letter to Dr. Killeen was to comment on the possible relationship between the already-pensioned right knee and a compensatory deterioration of the left. We note that this involves a consequential claim that would be properly raised under subsection 21(5) of the *Pension Act*. Such a claim is not before us at the moment as part of this appeal. This reconsideration is entirely focussed on whether there is evidence to credibly establish that Regular Force or Special Duty Area service caused the Appellant's left knee injury or aggravated the Appellant's left knee osteoarthritis under subsections 21(1) and 21(2).

Dr. Killeen

We have two items from Dr. Killeen. In his VAC physician's statement of 28 March 2006 (pages 77-81) he provides a diagnosis and assessment, and notes that the Appellant had a left knee injury in the past, without providing an opinion on the issue of causation by military duties.

In his letter to the review level Advocate of 15 May 2007 (page 89) he indicates that he was provided with records of some sort by the Appellant's lawyer, and also reviewed Dr. Connelly's notes. He then states that an injury occurred, but that he is "not certain" as to the date of injury. He also noted that a bucket handle tear may occur as a result of a sports injury or when climbing up and down ladders. Based upon that foregoing information, he stated that it is "possible" the Appellant's duties may have caused or aggravated the tear.

The Panel must respectfully note that Dr. Killeen's evidence is affected by the same issue as Dr. Connelly's evidence. Dr. Killeen was obviously relying on the information that was in Dr. Connelly's notes, and so it appears that Dr. Killeen had access to only the same limited amount of information as Dr. Connelly. Although Dr. Killeen indicates that he is aware of an injury, he also states that he is unaware of the date of the injury, or its circumstances. Thus, Dr. Killeen does not appear to be aware of the fact that there was a twisting injury to the left knee documented in January 2004 nor that this injury occurred while the Appellant was playing with his children.

Dr. Killeen's opinion is credible in terms of speaking in a general sense of the known medical causes of the bucket handle tear. All of the medical evidence – including Dr. Killeen's opinion – consistently points to a twisting injury as a known cause of a bucket handle tear. However, Dr. Killeen's opinion, like Dr. Connelly's, is guarded at best. His statement that military service could be a possible cause or an aggravating factor in the development of the tear must be weighed cautiously in light of the fact that Dr. Killeen shows no awareness of the twisting injury in 2004.

The fact that Dr. Killeen did not consider or even mention the twisting injury as a logical potential cause of the Appellant's bucket handle tear, suggests that he did not have access to a reliable factual history in reaching his opinion. As the opinion is not based on a reliable or accurate factual foundation, it does not persuasively support the conclusion that the tear in the left meniscus or the Appellant's left knee osteoarthritis resulted from military service.

Dr. O'Brien

For the purposes of this Appeal we have a new piece of evidence that was not seen by the previous Panel nor the Federal Court. Dr. O'Brien's letter of 7 March 2013 (R2-Q1) was precipitated by a letter from the Advocate to him.

In the hearing, noting from the Advocate's letter that it was appended with "Encl." which signifies accompanying material was attached to the request, we asked the Advocate what material was sent with the request for Dr. O'Brien's opinion. Initially, the Advocate did not believe he had sent the letter, however the Panel noted his signature appeared to be on page two. The Advocate told the Panel he did not recall what material had been sent to Dr. O'Brien.

We believe this is significant, because – like the other two doctors – Dr. O'Brien writes the Appellant's, "left knee has no documented injury while in the military."

This is not accurate, as there is a documented injury that occurred while the Appellant was in the military. However the 2004 injury was not suffered while performing military duties. We therefore conclude that whatever information that **was** sent to Dr. O'Brien did not include the 2004 record from page 64.

Inaccurate medical history aside, we do find Dr. O'Brien essentially credible on the development of an injury like the one suffered by the Appellant. We note the following paragraph from page two of his letter:

> It seems based on the timing of his left knee operation that he would most definitely have had an injury during his military service to produce a bucket-handle meniscal tear. A bucket-handle tear is not a degenerative tear it is an injured meniscus from a flexed twisted knee.

Dr. O'Brien's letter provides a credible basis on which this Panel can causally connect the 2004 injury in the Appellant's left knee to his present disability of osteoarthritis. However, Dr. O'Brien's opinion does not provide a credible basis on which the Panel can link the left knee injury or the resulting disability to military service.

The Panel finds that Dr. O'Brien's opinion credibly described the mechanism of injury that produces a bucket handle tear. His conclusion that the Appellant's tear was caused by a single and specific injury to the meniscus from a flexed twisted knee also credibly flows both from his medical expertise and from clearly established reliable facts as to the actual nature of the tear that was diagnosed in the Appellant's left lateral meniscus. Dr. O'Brien's inference that the Appellant sustained a twisting injury to his left knee while he was in the military is also credible and correct. However, his inference that the twisting injury was therefore related to military service is not credible because it was reached absent facts as to the actual circumstances of the 2004 injury. Dr. O'Brien's conclusion also appears to be based on legal considerations and turns on the assumption that a temporal relationship between the timing of the injury and military service is sufficient to establish causal nexus to a disability for purposes of the legislation.

The Panel does not accept Dr. O'Brien's opinion as to service relationship between the Appellant's injury and military service because the opinion is essentially a conclusion on the legal issue rather than an opinion on the medical issue.

Furthermore, the assumption on which the opinion is based is inconsistent with the legislative criteria for establishing causal link between an injury and military service. The Panel notes the jurisprudence which confirms that military service must be more than just the "setting" or background where the injury occurred or the disability manifested, to establish entitlement under subsection 21(2) of the *Pension Act*.

The test for establishing causal connection or causal nexus between an injury and military service under subsection 21(2) of the *Pension Act* was discussed by Mr. Justice Evans (as he then was), in his judgment in *McTague and the Attorney General of Canada (1999)* (F.C). There, Mr. Justice Evans commented that subsection 21(2) of the *Pension Act* was intended to provide a pension to members of the Armed Forces where there was a causal relationship between their injury and military service. He noted that it is not sufficient that injury be shown to have occurred when an applicant was a member of the armed forces because subsection 21(2) of the *Pension Act* requires that military service be the "contributing cause" of the disability, and not just the "setting" where the injury occurred, or the disability manifested.

Special Duty Area Service

The claim for pension entitlement also is raised under subsection 21(1) of the *Pension Act* for the Appellant's Special Duty Area (SDA) service. He sailed on one mission to the Persian Gulf between January and April of 1991.

Although the subsection 21(1) component of the claim was not the subject of any submissions from the Appellant, we still reviewed his service from that time period but could locate no complaint or issue with his left knee. Therefore, we conclude his osteoarthritis cannot be said to have been "incurred during" his SDA service.

The other test under subsection 21(1) is the "attributable to" test, and therefore follows the same medical guidance as the causal tests we have already applied under subsection 21(2).

We therefore conclude that the Appellant's left knee osteoarthritis was neither incurred during nor attributable to his 1991 SDA service in the Gulf.

Conclusion on Sufficiency of Evidence

The Panel has considered whether the evidence presented in this case is capable of establishing sufficient facts on a balance of probabilities to support the conclusion that there is a causal connection between the Appellant's left knee osteoarthritis and his military service. The Panel has drawn any favourable inferences that are raised by the facts and of the circumstances of the Appellant's history of knee problems, and his military service.

The Panel concludes that the evidence before this Panel does not establish on a balance of probabilities that the Appellant's osteoarthritis resulted from military service.

The Court instructed us in paragraph 33 of its decision, that if we find the evidence credible then we must determine whether it is sufficient. Applied against the *Wannamaker* test, the medical opinions presented on the Appellant's behalf are credible in that they are from qualified and accredited physicians with expertise on the matters to which they speak. The Panel accepted the conclusions offered in the medical opinions on the key medical issue of the causes of meniscal tears, because this issue is clearly within the doctors' expertise and their conclusions on this issue were based on credible and well-established medical principles respecting the link between meniscal tears and twisting injuries.

However, the Panel does not accept that the statements and opinions offered in the medical opinions prove the issue of service relationship between military service and the injury which caused the Appellant's torn meniscus because it is clear that the doctors did not have access to all of the facts with respect to the Appellant's past history of injury to the left knee when they provided their opinions. On this issue, the opinions are credible in stating candidly that the doctors were not aware when the Appellant suffered the injury that caused his bucket handle tear. In the absence of facts as to that injury, the doctors made assumptions as to the circumstances of that injury and its relationship to military service. The Panel concludes that the assumptions are not credible because they are related to issues of fact that are not within the doctors' expertise. The actual facts and circumstances were not made available to the doctors. Also, those assumptions are rebutted by

reliable and contemporaneous medical information in the documents from the Appellant's DND health service records concerning the twisting injury sustained by the Appellant in 2004.

A complete and accurate patient history is crucial. A statement from an expert witness that causal connection is possible must be supported by an accurate understanding of the facts of the case in order to be considered reliable, persuasive, logical and credible. An opinion that states that something is merely possible may signify that the expert did not have access to sufficient information to confirm or to rule out the existence of a medical relationship between the claimed disability or an injury and events that may have occurred in military service. The use of the words “possibly” and “could” may therefore potentially indicate that the expert was asked to draw factual inferences in the absence of a full knowledge of the actual or established facts of the case.

If the expert's opinion as to possibility of a service connection is not ultimately based on an accurate factual foundation, it cannot reliably, persuasively or credibly support a favourable inference as to causal connection; even if the expert is well-qualified and refers to credible and well-founded medical principles in the opinion.

Even when looking at all of the most favourable inferences that can be drawn from the reports and opinions presented on the Appellant's behalf, the Panel concludes that the opinions and reports are not capable of proving sufficient facts to establish a causal nexus between osteoarthritis and military service. The evidence does not support the conclusion that the Appellant's meniscal tear or the resulting disability of osteoarthritis was caused by cumulative injury.

The medical opinion evidence establishes on a balance of probabilities the lateral meniscus tear was caused by an acute and specific injury rather than as a result of cumulative damage. The new evidence from Dr. O'Brien credibly confirms the Appellant's tear and the resulting disability of osteoarthritis, would be attributable to a **single injury from a twisted and flexed knee**. The facts of the case establish that there was a twisting injury in 2004, but the facts relating to that injury do not establish on a balance of probabilities, that this injury arose from military service.

Furthermore, the evidence does not establish facts on a balance of probabilities from which the Panel can infer that the underlying tear was further aggravated or worsened after it occurred by an injury in military service. The facts of the case also establish that the Appellant was involved in relatively low impact service, especially in the later years of his career. The Panel is also unable to conclude that the Appellant's left knee osteoarthritis is due to high intensity occupational demands, as the Appellant has insufficient evidence to establish a claim based on cumulative joint trauma from his military occupation as a NavCom.

Thus, the Panel is unable to conclude that the disability of osteoarthritis left knee was caused or aggravated by injury or by contributory factors relating to his military service. As a result, the Panel must rule that the Appellant's osteoarthritis left knee did not arise out of, nor was it directly connected with, his military service in peacetime under subsection 21(2) of the *Pension Act*. Nor did his left knee sustain any injury during his Special Duty Area service in the Persian Gulf, and therefore we also conclude his osteoarthritis in that knee was not incurred during and is not attributable to his Special Duty Area service under subsection 21(1) of the *Pension Act*.

DECISION

The Entitlement Appeal Decision of 15 September 2011 is, therefore, affirmed.

Applicable Statutes:

Pension Act, [R.S.C. 1970, c. P-7, s. 1; R.S.C. 1985, c. P-6, s. 1.]

Section 2
Subsection 21(1)
Subsection 21(2)
Section 39

Veterans Review and Appeal Board Act, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3
Section 25
Section 39

Exhibit:

R2-Q1: letter from Dr. David O'Brien dated 7 March 2013 with attached letter from the Advocate to Dr. O'Brien dated 31 January 2013

Attachment:

R2-Attach-Q1: Applicant's Federal Court Decision, 2013

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1. *MacDonald v. Canada (Attorney General)* 1999, 164 F.T.R. 42 at paragraphs 22 & 29; *Canada (Attorney General)* v. Wannamaker 2007 FCA 126 at paragraphs 5 & 6; *Rioux v. Canada (Attorney General)* 2008 FC 991 at paragraph 32.
2. *Hunt v. Canada (Attorney General)*, 2009 FC1218; *Martel v.Canada*, 2004 FC 1287
3. *King v. Canada (Veterans Review and Appeal Board)*, 2001 FCT 535
4. *Canada (Attorney General) v. Wannamaker*, 2007 FCA 126
5. *Carnegie v. Canada (Attorney General)*, 2012 FC 93
6. *King v. Canada (Attorney General)*, (2000) 182 F.T.R. 226
7. *Gurzinski v. Canada (Attorney General)*, 2013 FC 594

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