Federal Court Cour fédérale

Date: 20150624

Docket: T-2054-14

Citation: 2015 FC 785

Ottawa, Ontario, June 24, 2015

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MRS CAROL NICOL, WIDOW OF FLYING OFFICER ROBERT DONALD NICOL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Veterans Review and Appeal Board (the VRAB) dated September 3, 2014. The impugned decision denied the Applicant's request for reconsideration of an earlier decision of the Pension Review Board dated December 6, 1978, which confirmed the May 25, 1977 decision of the Entitlement Board. The request for reconsideration to the VRAB was made by the Applicant's widow pursuant to section

111 and subsection 32(2) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 (the Act) on the basis of new evidence and that the Pension Review Board made errors of fact and law.

[2] This case is somewhat unusual in that the events giving rise to the Applicant's claim occurred over sixty years ago. Mr. Nicol was unsuccessful in his many attempts between October 1958 and December 1978 to obtain a disability pension in proceedings before the Canadian Pension Commission, the Canadian Pension Commission Appeal Board, the Entitlement Board and the Pension Review Board. Unfortunately, Mr. Nicol passed away in 2003, and it is his widow who sought reconsideration of the 1978 Pension Review Board's decision before the VRAB and who brings this application.

[3] The sole issue in all of these proceedings was whether the Applicant and her husband had established that his disability arose out of or was directly connected to his military service. While I sympathize with the Applicant and her late husband's circumstances, I have not been convinced that the VRAB erred in denying the Applicant's request for reconsideration.

I. Facts

[4] There is no dispute in this case as to the main facts that led to the injuries of the Applicant's late husband. Mr. Nicol was stationed at Zweibrücken, Germany with the 3 Fighter Wing of the Air Force (RCAF). On July 1, 1954, Mr. Nicol, then aged 20, attended a squadron picnic to celebrate the Canadian National Holiday, Dominion Day. The picnic was held approximately 30 miles from the base. While arrangements were made for the use of RCAF transport for other ranks and their families, the officers were expected to make their own

arrangements for travel. Mr. Nicol and several other officers, including his commanding officer, were passengers in a vehicle driven by Mr. Alexander.

[5] The group departed the picnic at approximately 6:00 or 7:00 p.m. They stopped at a Gasthouse for a snack and then drove to a casino to see a show. They left the casino at approximately 11:30 p.m. to return to the base. The accident occurred a few minutes past midnight.

[6] A Board of Inquiry was convened on July 5, 1954 to investigate and make findings and recommendations regarding the accident while Mr. Nicol was still in hospital. In sworn testimony, Mr. Nicol, Mr. Alexander and Mr. Waldorf, another passenger in the vehicle, indicated that they were not on Air Force duty at the time of the accident.

[7] In October 1958, Mr. Nicol submitted an application to the Canadian Pension Commission for a disability pension on account of the injuries he sustained in the accident. On October 27, 1958, the Commission ruled that his injuries were "not pensionable", because the evidence did not indicate that his injuries arose out of or were otherwise directly connected with service.

[8] In November 1959, the Canadian Pension Commission held a second hearing regarding the injuries sustained by Mr. Nicol. He argued before the Commission that because Germany was still being occupied, he assumed he was considered to be on duty at all times, which would include returning from an Air Force organized picnic that he was required to attend. He also

stated that, in answering the Board of Inquiry's questions shortly after the accident, he had not been fully aware of what he was saying or the implications of those statements. On November 13, 1959, the Commission ruled that there was no new evidence that warranted a change in its earlier decision and it confirmed its finding that his injuries were "not pensionable".

[9] Mr. Nicol appealed the Canadian Pension Commission's second hearing decision to the Appeal Board of the Commission. On March 7, 1960, the Appeal Board agreed with the Commission that Mr. Nicol's injuries were not pensionable.

[10] In 1974, Mr. Nicol again requested that the Canadian Pension Commission reconsider whether his injuries were pensionable on the basis of statutory changes to the pension legislation brought about by the *Pension Act*, RSC 1970, c P-7 as amended. Subsection 12(2) of the *Pension Act* stated that, in respect of military service in peacetime, pensions shall be awarded to or in respect of members of the force who have suffered disability when the injury resulting in disability arose out of or was directly connected with such military service. Subsection 12(3) deemed disability to have arisen out of or have been directly connected with military service in certain enumerated circumstances. On October 6, 1975 the Canadian Pension Commission again ruled that Mr. Nicol's injuries were not pensionable as they neither arose out of, nor were they directly connected with, service in peacetime.

[11] In 1976, Mr. Nicol applied to the Entitlement Board for review of the October 6, 1975 decision by the Canadian Pension Commission. Mr. Nicol gave oral evidence in which he reiterated his belief that he was on duty at the time of the accident. The Entitlement Board ruled

on May 25, 1977 that Mr. Nicol was not on duty at the time of the accident. It stated that there was no evidence that Mr. Nicol's attendance at the picnic was compulsory. It therefore concluded that his injuries were not pensionable within the meaning of subsections 12(2) and (3) of the *Pension Act*.

[12] On July 1, 1977 Mr. Nicol filed a notice of appeal to the Pension Review Board. On December 6, 1978, the Pension Review Board confirmed the Entitlement Board's decision. It made the following findings:

> The pensions advocate submitted that it was clearly to be presumed that the picnic event was properly authorized since transportation had been layed on for other ranks and their dependants and it was apparent the appellant had an obligation to attend, then the provisions of subsection 12(3) should apply and since the disabilities were incurred in connection with this affair it should be deemed they arose out of or were directly connected with Regular Force service as provided by this subsection. This Board, on the basis of this evidence, finds that there were no restrictions placed on the appellant or his companions to return directly to their base and that after the picnic they were free to act on their own and chose to proceed on another adventure entirely of their own. In this matter, the circumstances are clearly distinguishable from those in the GLOVER case.
>
> The question that subsection 12(3) would have applied had the injuries occurred during the picnic or had occurred had the appellant returned directly to his base, is academic since these circumstances did not apply in this case. This Board finds that the injuries suffered by the appellant, while obviously incurred during Regular Force service, occurred in an auto accident at a time and under circumstances when he was not engaged in any military function and the resultant disabilities did not arise out of nor were they directly connected with Regular Force service.

[13] On October 3, 2013 the Applicant made an application to the VRAB to reconsider the December 6, 1978 decision of the Pension Review Board. The request for reconsideration to the

VRAB was made pursuant to section 111 and subsection 32(2) of the Act, on the basis of new evidence and that the Pension Review Board made errors of fact and law.

[14] With respect to the new evidence, the Applicant submitted a document entitled "3(F) Wing Historical Narrative: 1 Jun 5 – 30 Nov 54", where reference is made to the picnic and ensuing accident as follows:

> 1 Jul 54
>
> A stn picnic was held at a small lake and recreation ground near Pirmasens. Attendance was good even though considerable rain was falling. Competition was keen in all the races and ended with 413 Sqns victorious in the tug-of-war.
>
> 2 Jul 54
>
> 202340 Robert Donald Nicol, a pilot from 413 Sqn was seriously injured and F/O Alexander and F/O Waldorf were slightly injured when F/O Alexander's car struck a tree on the road from Pirmasens to the station. All personnel were taken to 320th General hospital at Landsthul.

[15] In written submissions to the Board, the Pensions Advocate for the Applicant submitted that the very fact that the Historical Narrative mentioned the picnic and the accident is "tantamount to accepting that the whole activity was service related". With respect to the alleged error of fact, the Applicant stated that the Pension Review Board failed to properly apply the facts to the legislation by "fail[ing] to make the connection of the matter arising out of or directly connected with Service, namely attending a squadron picnic". As for the alleged error of law, the Applicant referred back to the alleged error of fact.

II. The impugned decision

[16] In a decision with very sparse reasons dated September 3, 2014, the VRAB denied the Applicant's request for reconsideration. To determine whether the new evidence should be accepted, the VRAB applied the test set out in *MacKay v Canada* (1997), 129 FTR 286, [1997] FCJ No 495 [*MacKay*], at para 26 and *Canada (Chief Pensions Advocate) v Canada (Attorney General)*, 2006 FC 1317, 302 FTR 201 at para 6, aff'd on other grounds 2007 FCA 298, 370 NR 314. Justice Teitelbaum in *MacKay* set out the four-part test for all new evidence in the following way:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decision or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[17] The Board concluded that the Applicant's fresh evidence, although relevant and credible, would not change the outcome of its decision even if it was admitted. It then concluded that the Pension Review Board did not make any errors of fact and law. Lastly, it confirmed the Pension Review Board's finding that the injury did not arise out of service "as the Appellant was not under any directions or orders to attend the picnic".

III. Issue

[18] The sole issue raised in this application for judicial review is whether the VRAB's decision denying the Applicant's application for reconsideration of the Pension Review Board's decision and confirming its finding that Mr. Nicol's injuries did not arise out of service was reasonable.

IV. Relevant legislation

[19] Section 111 of the VRAB Act sets out the VRAB's authority to reconsider decisions of predecessor bodies such as the Pension Review Board:

111. The Veterans Review and Appeal Board may, on its own motion, reconsider any decision of the Veterans Appeal Board, the Pension Review Board, the War Veterans Allowance Board, or an Assessment Board or an Entitlement Board as defined in section 79 of the *Pension Act*, 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, in the case of any decision of the Veterans Appeal Board, the Pension Review Board or the War Veterans Allowance Board, do so on application if new evidence is presented to it.	111. Le Tribunal des anciens combattants (révision et appel) est habilité à réexaminer toute décision du Tribunal d'appel des anciens combattants, du Conseil de révision des pensions, de la Commission des allocations aux anciens combattants ou d'un comité d'évaluation ou d'examen, au sens de l'article 79 de la *Loi sur les pensions*, et soit à la confirmer, soit à l'annuler ou à la modifier comme s'il avait lui-même rendu la décision en cause s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; s'agissant d'une décision du Tribunal d'appel, du Conseil ou de la Commission, il peut aussi le faire sur demande si de nouveaux éléments de preuve lui sont présentés.

[20] Sections 3 and 39 of the VRAB Act indicate that the provisions of the Act, any other Act of Parliament or regulations conferring jurisdiction on the Board, and any evidence presented to the Board shall be liberally construed in favour of the applicant or appellant:

3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	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.
[…]	[…]
39. In all proceedings under this Act, the Board shall	39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

> applicant or appellant has established a case.

[21] At the time of the Pension Review Board's decision, subsection 12(2) of the *Pension Act*, RSC 1970, c P-7 (now Section 21(2)(a) of the current *Act*) provided as follows:

12(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, pension shall be awarded to or in respect of members of the forces who have suffered disability [...] when the injury or disease or aggravation thereof resulting in disability or death in respect of which the application for pension is made arose out of or was directly connected with such military service. [Emphasis added]	12(2) À l'egard du service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la seconde guerre mondiale et à l'egard du service militaire en temps de paix, des pensions sont accordées aux membres des forces, ou relativement aux membres des forces, qui ont subi une invalidité [...] lorsque la blessure ou maladie ou son aggravation ayant occasionne l'invalidité ou le décès que vise la demande de pension, était consécutive ou se rattachait directement à ce service militaire. [Je souligne]

V. **Analysis**

[22] The issue of whether or not a service member's injuries arose out of or were directly connected with his or her military service is one of mixed fact and law. For that reason, this Court has determined on several occasions that the applicable standard of review to be applied to a VRAB reconsideration decision is that of reasonableness: see *McAllister v Attorney General of Canada*, 2014 FC 991, at para 38; *Frye v Canada (Attorney General)*, 2004 FC 986, at para 14, aff'd 2005 FCA 264 [*Frye*], at para 11; *Fournier v Attorney General of Canada*, 2005 FC 453 at

paras 26-27, aff'd 2006 FCA 19 [*Fournier*]; *Bullock v Canada (Attorney General)*, 2008 FC 1117, at paras 11-14.

[23] As established in *Dunsmuir v New Brunswick*, 2008 SCC 9 (at para 47), reasonableness is a deferential standard concerned with the existence of justification, transparency and intelligibility within the decision-making process. The Court's concern is whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] The Applicant submits that the Board erred in not considering the new evidence that she relied upon – the Historical Narrative of the Wing – to establish that her husband was on duty when he attended the picnic on July 1, 1954. She argues that the fact that the picnic is mentioned in the Narrative is proof that the attendance was mandatory.

[25] Having carefully considered the record in its entirety and more particularly the Historical Narrative relied upon by the Applicant, I am unable to find that the VRAB erred in rejecting that "new evidence". All the previous decisions held that attendance at the picnic was not compulsory, and in noting that "attendance was good despite the weather", the Historical Narrative would indeed tend to confirm that Mr. Nicol was not required to attend the picnic.

[26] Furthermore, the VRAB could reasonably conclude that this Historical Narrative does not satisfy the fourth criterion set out in *Mackay* for the reception of new evidence. It must be remembered that the Pension Review Board had already found that the picnic was held for

"dependents of serving personnel". The Historical Narrative, in and of itself, was insufficient to reconsider that finding.

[27] Even if one were to accept the Applicant's argument that the officers were expected to attend the picnic and that the purpose of the picnic was to relieve some of the pressure under which service men were operating at the time, it would be insufficient to support the conclusion that Mr. Nicol's injuries arose out of service. The test to determine Mr. Nicol's entitlement to a disability pension, as already mentioned, is not whether attendance at the picnic was mandatory, but rather whether the injury arose out of or was directly connected with service.

[28] It is clear that the first condition for entitlement to a pension pursuant to subsection 12(2) of the *Pension Act*—that the injury or disease resulted in disability or death—is met in the case at bar. There is no dispute between the parties that the severe medical disabilities that afflicted the Applicant's husband flowed from his injuries sustained in the car accident that occurred on July 1, 1954. The only real issue is whether these injuries "arose out of or [were] directly connected" with military service. It has been held in a number of cases that the words "arising out of" call for a broader interpretation than "directly connected with" and must be interpreted in a more liberal manner: see, for example, *Amos v Insurance Corp of British Columbia*, [1995] 3 SCR 405, at para 21; *Fournier*, at para 30; *Cole v Canada (Attorney General)*, 2014 FC 310, at para 34. Having carefully considered similar wording found in subsection 21(1)(b) of the *Pension Act*, the Federal Court of Appeal stated in *Frye* at para 29:

> Consequently, since the purpose of the *Pension Act* is to provide pensions in defined circumstances, which must be interpreted liberally and generously, a broad interpretation of paragraph 21(1)(b) is required in order to facilitate entitlement. Hence, we are

> of the view that a claimant may fall within paragraph 21(1)(b) by establishing that death or injury arose out of military service, whether or not there was a direct connection between them. In other words, while it is not enough that the person was serving in the armed forces at the time, the causal nexus that a claimant must show between the death or injury and military service need be neither direct nor immediate.

[29] Each case obviously turns on its own facts, and a number of factors can be considered to determine whether there is a sufficient causal connection between the injuries and the military service. In *Fournier*, Justice Mosley identified the following factors as relevant to that inquiry:

> [35] It is clear from the jurisprudence that factors such as the location where the accident occurred, the nature of the activity being carried on by the applicant at the time, the degree of control exercised by the military over the applicant when the accident occurred and whether she was on duty at the time are all relevant to the determination that the Board must make that the injury arose out of or was connected to the applicant's military service. However, it is also clear from the cases that no one factor is determinative.

[30] In the case at bar, there is no evidence that attendance at the picnic was required. When questioned by the Board of Inquiry, all three passengers of the vehicle indicated that they were not on duty at the time of the accident. I appreciate that the Applicant's husband may still have been in a state of shock when the interview took place, four days after the accident, and may not have fully grasped the consequences of his statement, but his testimony and that of his fellow passengers is nevertheless very relevant in determining whether attendance was compulsory.

[31] That being said, the Applicant's husband indicated in his statutory declaration dated November 1, 1974 that he attended the picnic on orders from his commanding officer. Pursuant to section 39 of the Act set out above, the Board is required to accept any uncontradicted

evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances, and to 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.

[32] I accept, moreover, that military service goes beyond the mere giving and obeying of orders, and that officers were at least implicitly encouraged to attend social events such as a picnic on Canada Day, especially during such a stressful period of time as the Cold War where officers were under significant pressure. Indeed, the Pension Review Board went so far as to suggest that the decision might well have been different had the injuries suffered by the Applicant's husband occurred during the picnic or on his return trip, had he returned directly to his base.

[33] The Pension Review Board found, however, that any potential connection with military service was severed when the Applicant's husband and his fellow comrades stopped on the way back for a snack at the Gasthouse and a show at the casino. In my view, the VRAB could reasonably confirm that decision and find that these intervening events disrupted any causal link that may have existed between Mr. Nicol's military service and his injuries.

[34] The Applicant counters that her husband was carpooling with other officers, including his commanding officer, and had no other available means of transportation to convey him back to the base. As a passenger, it was not up to him to decide whether the car would stop at the Gasthouse or the casino. Unfortunately, there is very little evidence in that respect beyond the fact that officers were expected to make their own travel arrangements to attend the picnic; we

do not even know whether Mr. Nicol made the return trip with the same officers with whom he had travelled on his way to the picnic.

[35] Had Mr. Nicol driven his own car to go to the picnic and stopped on the way back to eat, drink and go to the casino, there is no doubt in my mind that the required connection between his injuries and his military service would have been lacking. In my view, the fact that he had the misfortune to hitch a ride with fellow officers in a car whose driver dozed off and had an accident does not make up for this lack of connection. The Armed Forces played no role in Mr. Nicol's choice to come to the picnic as a passenger in another officer's car or in his decision to go with the particular officers he was with as opposed to any others. The officers were expected to make their own travel arrangements, and no directions were given in that respect.

[36] The facts of this case fall into a grey zone, with some supporting the Applicant's claim while others do not. At the end of the day, a line has to be drawn as to whether a particular situation meets the causal connection required to establish entitlement to a pension. As much as I sympathize with the plight of the Applicant and her deceased husband resulting from the most unfortunate car accident that took place on July 1, 1954, and even if I might have been inclined to come to a different conclusion from that of the VRAB had I been in its position, I am unable to conclude that its conclusion was unreasonable.

VI. Conclusion

[37] For all of the foregoing reasons, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2054-14
STYLE OF CAUSE:	MRS CAROL NICOL, WIDOW OF FLYING OFFICER ROBERT DONALD NICOL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	NANAIMO, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 4, 2015
JUDGMENT AND REASONS:	DE MONTIGNY J.
DATED:	JUNE 24, 2015

APPEARANCES:

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Shannon Fenrich	FOR THE RESPONDENT

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