Federal Court  Cour fédérale

Date: 20160211

Docket: T-235-15

Citation: 2016 FC 186

Halifax, Nova Scotia, February 11, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

JAMES ALAN MACDONALD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. James Alan MacDonald (the "Applicant") seeks judicial review pursuant to section 18.1 of the *Federal Courts Act* ("the Act") of a decision made by the Veterans Review and Appeal Board (the "Board"), dated January 20, 2015. In that decision, the Board dismissed the Applicant's motion to remove certain documents from the Statement of Case and determined that the Applicant had not shown an entitlement to an additional two years of pension benefits, on the

basis of administrative difficulties, pursuant to subsection 39(2) of the *Pension Act*, R.S.C., 1985, c. P-6 (the "Pension Act").

[2] The Applicant is a former member of the Royal Canadian Mounted Police (the "RCMP"). Pursuant to section 32 of the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 (the "Royal Canadian Mounted Police Superannuation Act"), as a former member of the RCMP, the Applicant is entitled to seek a disability pension if the injury or disease, or the aggravation of the injury or disease, resulting in the disability arose out of, or was directly connected with, his service in the RCMP.

[3] Pursuant to subsection 303(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), the Respondent to this application is the Attorney General of Canada (the "Respondent").

II. BACKGROUND

[4] The following facts are taken from the Certified Tribunal Record.

[5] The Applicant joined the RCMP in 1973. He was initially stationed on Prince Edward Island where he performed general policing duties.

[6] From March 1980 on until December 1982, the Applicant was posted to the RCMP Musical Ride in Ottawa. The Musical Ride is an equestrian show team that performs for the public.

[7] While posted with the Musical Ride, the Applicant sustained several incidents, including back spasms while cleaning stalls; a travel injury leading to hospitalization and use of a neck brace; injury to his left knee resulting from kick from a horse; and general spinal compression resulting from constant horseback riding. He was also thrown from horses.

[8] From December 1982 to December 1983 the Applicant held an administrative position at the RCMP Federal Policing Branch.

[9] The Applicant continued to experience back and knee related issues after he completed the posting to the Musical Ride**.** His next posting, in 1983, was to the Commercial Crime Section in Toronto when his health issues included vertigo and chest pains radiating to his left arm.

[10] In 1993, the Applicant relocated to Nova Scotia with his family. In 1995, he met with Dr. Wanda MacPhee, a chiropractor, who advised him that a problem with his spine was causing the chest and arm pain, and a nerve group in his neck may cause vertigo symptoms.

[11] The Applicant submitted his application for benefits to the Department of Veterans Affairs on May 23, 2003. His application was divided in two by the Department of Veterans Affairs as the internal computer system, the "CNDS", would not allow five disabilities to be claimed on one file.

[12] On December 18, 2003, a pension officer at Veterans Affairs Canada wrote to the Applicant advising of receipt of his application and noting that it had not received any supporting

documentation. It requested current medical information within 60 days of the date of the letter, advising further that if such information was not received, his application will be discontinued on February 16, 2004. The pension officer also advised that if there was no reasonable explanation for delay in submitting the documentation, the original date of contact may not be recognized as the date of the application.

[13] The Applicant submitted a report, dated March 29, 2004, from Dr. Clarke. His Physician's statement from Dr. McAulay was received on December 5, 2004. One of the Applicant's files was withdrawn on August 24, 2004 and reopened in February 2005.

[14] The Applicant claimed a disability pension for Osteoarthritis Cervical Spine, Chronic Biomechanical Cervical Spine Dysfunction, Biomechanical Thoracic Spine Dysfunction, Biomechanical Lumbar Spine, Sciatica and Vertiginous Disorder.

[15] By a decision dated April 18, 2005, the Department of Veterans Affairs found that none of the Applicant's claimed injuries were pensionable under the Royal Canadian Mounted Police Superannuation Act and the Pension Act.

[16] The Applicant applied to the Board for an Entitlement Review in July 2005.

[17] The Entitlement Review Panel issued the Entitlement Review decision on January 15, 2009, granting the Applicant benefits in the full amount for his Chronic Biomechanical Cervical Spine Dysfunction, Biomechanical Thoracic Spine Dysfunction, and Biomechanical Lumbar

Spine Dysfunction. No entitlements were granted for the Sciatica and Osteoarthritic Cervical Spine claims.

[18] The entitlements granted were effective January 15, 2006, three years before the date of the award, pursuant to subsection 39(1) of the Pension Act.

[19] By letter dated February 13, 2012, the Applicant initiated a restricted appeal of the Board's decision concerning the effective date of retroactivity granted by the entitlement review panel. The appeal was taken pursuant to section 25 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the "VRAB Act") and subsection 39(2) of the Pension Act, which provides for an additional two year retroactivity. In circumstances where there have been delays or administrative difficulties beyond the control of the Applicant. In this case, that period is for January 15, 2004 to January 15, 2006.

[20] In its decision dated June 2, 2014, the Board found that there was no evidence upon which to grant an additional award.

[21] The Applicant sought judicial review of that decision. That proceeding was resolved between the parties and the consent order, dated September 16, 2014, set aside the decision of June 2, 2014 and remitted the matter back to the Board for redetermination by a differently constituted panel.

[22] The hearing before the new panel took place on December 4, 2014. The Applicant was represented by counsel. Prior to the hearing, on November 23, 2014, the Applicant made a motion to exclude 9 documents from the record. He presented written submissions in support of his motion. At the hearing, he was advised that the Board would rule on the motion in its written decision, and not at the time of the hearing.

[23] In its decision dated January 20, 2015, the Board dismissed the Applicant's motion to exclude certain documents and found that there was no evidence upon which to pay an additional award under subsection 39(2) of the Pension Act.

[24] In considering the motion to exclude documents, the Board noted that the non-adversarial nature of the Board means that the rules of evidence are relaxed. It commented that it rarely excludes evidence, and that procedural fairness requires that applicants have the opportunity to consider and make submissions on any document. The Board found that the Applicant had all the documents he sought to exclude as of June 2, 2014, and as such, had sufficient time to know and make arguments on the case against him. It found that the requirements of procedural fairness had been met.

[25] In considering the merits of the claim, the Board observed that the Applicant alleged two delays in the processing of his claim. The first delay is for the period between May 2003, when the application was submitted, and April 2005, when the claim was decided. The second delay was for the period between April 2005 and the Entitlement Review Decision in 2009.

[26] The Board found that subsection 39(2) of the Pension Act does not allow for retroactivity for administrative delays; rather, additional retroactivity is available if there is a delay in securing service records or other administrative difficulties beyond the control of an applicant. In respect of the first delay, it observed that the forwarding of an application requires a completed application, service medical records and a completed physician's statement establishing a diagnosis of the condition. The physician's statement for the Applicant was not provided until December 2004. The burden lay with the Applicant to contact his physician to obtain the necessary supporting evidence and he was aware of this burden. Any difficulty that arose was not beyond his control.

[27] In respect of the second delay, the Applicant had argued that the Bureau Pensions Advocate (the "BPA") failed to bring his case forward in a timely manner. He submitted that the slow progression of his case was due to underfunding of the BPA by the Minister of Veterans Affairs (the "Minister").

[28] The Board found that the Applicant chose to be represented by the BPA which has limited resources, rather than engaging private counsel. The Board also noted that the Applicant was engaged in gathering evidence until just two weeks before the Entitlement Review hearing, and in these circumstances, there was no merit to his argument that there was administrative difficulty that delayed the progression of his file.

[29] The Board found that:

> To the extent that the Appellant is alleging his gathering of evidence was unduly delayed by advice from BPA, the Panel finds this is a matter beyond its consideration. Such an allegation is close to one of professional negligence. The Panel has not been provided with evidence which would support such a conclusion. …

[30] In the result, the Board upheld the Entitlement Review Panel decision of January 15, 2009.

[31] This application for judicial review raises the following issues:

1. What is the applicable standard of review?

2. Did the Board breach procedural fairness by not ruling on the motion at the hearing?

3. Did the Board err in its interpretation of subsection 39(2) of the Pension Act?

4. Is the Board's decision unreasonable because it failed to consider evidence or failed to resolve doubt in favour of the Applicant?

III. SUBMISSIONS

A. The Applicant's Submissions

[32] The Applicant argues that his motion before the Board, to exclude certain documents in the Statement of Case, was made on the basis that the challenged documents were irrelevant to his appeal on the issue of retroactive pension eligibility and were prejudicial to him.

[33] He submits that the refusal of the Board to rule on the motion at the beginning of the hearing resulted in a breach of his right to procedural fairness because he did not know whether he needed to make arguments about the relevance, weight and reliability of those documents.

[34] The Applicant also argues that the Board erred in referring to the first Board decision, since that decision had been set aside by the Federal Court. He submits that the 2014 Statement of Case should have contained only a copy of the Entitlement Review decision and the documentary evidence that was before that panel.

[35] The Applicant challenges the Board's interpretation of subsection 39(2) of the Pension Act. He argues that there is no evidence about service standards at the time his appeal was being processed and says that the Board apparently assumed that three years is a normal processing period.

[36] He submits that the Board erred when it concluded that eligibility for retroactivity is calculated from the date of an application has been completed, as opposed to the date when it was first made.

[37] Finally, the Applicant argues that the Board's decision is unreasonable because the Board failed to consider evidence or resolve doubt in his favour, pursuant to section 39 of the VRAB Act.

[38] The Applicant submits that the Board failed to consider evidence about his inability to present medical evidence. He argues that he exercised due diligence in retrieving information and submitting it.

[39] The Applicant alleges error by the Board in failing to draw a reasonable inference in his favour. He claims that his chronology provided evidence of a failure to process his application in a timely manner, and of the failure of the Board to advise in that part of his claim had been withdrawn.

[40] As well, the Applicant submits that the Board erred in failing to consider the presumption of administrative difficulties associated with the handling of his appeal by the BPA. He argues that the Board failed to consider submissions that the BPA is not operationally independent of the Board, as independent counsel would be. In this regard, he points to a seven month delay with the registration of his complaint after it had been assigned to the BPA.

[41] Finally, the Applicant argues that the Board erred in failing to consider that nothing in the application form that he completed in May/ June 2003 indicated what was required by way of medical evidence, to substantiate his claim.

B. Respondent's Submissions

[42] The Respondent submits that there was no breach of procedural fairness resulting from the Board's decision denying the motion to exclude documents from the Statement of Case and in reserving its decision on the motion until it issued its decision.

[43] Relying on the decision in *Baker v. Canada (Citizenship and Immigration*), [1999] 2 S.C.R. 817, the Respondent argues that the content of the duty of fairness is to be assessed against all the relevant circumstances. The Applicant was given the opportunity to present the motion orally and in writing. The Board gave written reasons in denying the motion, in accordance with section 7 of the *Veterans Review and Appeal Board Regulations*, SOR/96-67.

[44] Further, the Respondent submits that the Applicant was represented by counsel in his hearing before the Board and counsel could have made alternate arguments, pending disposition of the motion.

[45] The Respondent argues that the Board made no error in its interpretation of subsection 39(2) of the Pension Act. She submits that the delay contemplated by this provision relates to administrative difficulties between the date of application and the date a pension is awarded. It does not contemplate delays that occurred prior completion of an application, and there must be

evidence of a delay in the processing of an application; see the decision in *Cur v. Canada (Minister of Veterans Affairs)* (2003), 236 F.T.R. 188.

[46] The Respondent submits that the Board reasonably found that there was no evidence to show that the BPA's actions contributed to a delay. The Board said it did not have jurisdiction to consider allegations of professional negligence.

[47] In any event, the Respondent argues that subsection 39(2) is permissive, not mandatory. Even if the Board found that there was a delay or administrative difficulties, it was not required to make an additional award.

[48] In response to the Applicant's arguments about Board's application of section 39 of the VRAB Act, the Respondent submits that this argument challenges the manner in which the Board weighed the evidence. She argues that Board weighed the evidence and concluded that the Applicant had not shown that delays in securing service or other records, or other administrative difficulties were beyond the control of the Applicant.

[49] The Respondent further submits that the effect of section 39 of the VRAB Act is to direct the Board to resolve doubts in favour of an applicant; however, that does not relieve the Applicant of his onus to establish his case. The Respondent argues that the Board's treatment of the evidence is reasonable and that its decision is within the range of possible acceptable outcomes.

IV. DISCUSSION AND DISPOSITION

[50] The first matter to be addressed in this application is the applicable standard of review.

[51] The parties correctly identified the standard of review.

[52] Questions of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43. The merits of the decision are reviewable on the standard of reasonableness; see the decision in *Phelan v. Canada (Attorney General)* (2014), 446 F.T.R. 91.

[53] I see no breach of procedural fairness resulting from the decision of the Board to dismiss the Applicant's motion for exclusion of documents from the Statement of Case. The rationale of the duty of fairness is to allow a party to know the case he or she must meet, and to put forward evidence and arguments in support. This rationale was discussed by the Supreme Court of Canada in *Baker*, *supra*, at paragraph 22 as follows:

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[54] In the present case, the Applicant knew the case he had to meet. The documents that he seeks to exclude were part of his initial appeal to the Board, they relate to the disabilities for which he seeks retroactive benefits, and there is no apparent reason for which an exclusion can be justified.

[55] I note that among the documents that the Applicant sought to exclude was the Order of Justice Harrington made on September 16, 2014, in cause number T-1511-14, setting aside the original decision of the Board dated June 2, 2014 and ordering that the matter be re-determined before a differently constituted panel.

[56] The Applicant has not provided a reasonable basis upon which this Order should be excluded. An Order made in proceedings instituted in this Court is part of the file and presumptively, part of a public record, in light of the principle of open courts in Canada.

[57] The Board committed no breach of procedural fairness by reserving its decision on the motion on till it delivered its decision on the merits of the Applicant's appeal. I agree with the submissions of the Respondent that the Applicant had the option of presenting alternate arguments in the hearing before the Board, in anticipation that his motion to exclude would not succeed. The Applicant had no right to an early determination of his motion to exclude documents.

[58] In light of the informal and expeditious nature of proceedings before the Board, it was entitled to refuse to exclude the materials. As well, the hearing before the VRAB was a *de novo*

hearing, and the Board stated in its decision it would not be relying upon the previous VRAB decision which the Applicant sought to exclude.

[59] Considering the motion and the arguments made before the Board, as well as the submissions made by both parties in this application for judicial review, I am satisfied that there was no breach of procedural fairness arising from the Board's disposition of the Applicant's motion.

[60] Did the Board err in its interpretation and application of subsection 39(2) of the Pension Act?

[61] Section 39(2) of the Pension Act provides as follows:

(2) Notwithstanding subsection (1), where a pension is awarded for a disability and the Minister or, in the case of a review or an appeal under the Veterans Review and Appeal Board Act, the Veterans Review and Appeal Board is of the opinion that the pension should be awarded from a day earlier than the day prescribed by subsection (1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years	(2) Malgré le paragraphe (1), lorsqu'il est d'avis que, en raison soit de retards dans l'obtention des dossiers militaires ou autres, soit d'autres difficultés administratives indépendantes de la volonté du demandeur, la pension devrait être accordée à partir d'une date antérieure, le ministre ou le Tribunal, dans le cadre d'une demande de révision ou d'un appel prévus par la Loi sur le Tribunal des anciens combattants (révision et appel), peut accorder au pensionné une compensation supplémentaire dont le montant ne dépasse pas celui de deux années de pension.

pension.

[62] In my opinion, and considering the arguments made by the parties, the Board did not err in its interpretation of subsection 39(2) of the Pension Act. It interpreted this provision as requiring proof either of delays in securing records, or administrative difficulties. It found that the provision requires evidence of something above and beyond the normal processing of a file.

[63] The decision in *Rivard v. Canada (Attorney General),* 2003 FC 1490, aff'd 2004 FCA 306 at paragraph 16 acknowledges the discretionary nature of the Board's decision-making authority. The Board "may" grant an additional award where it appears from the record that there were delays or administrative difficulties that arose for circumstances beyond the control of the applicant. The reference to the "record" can only be a reference to the evidence that was before the Board.

[64] The language of subsection 39(2) is permissive and there is no requirement that an additional award be automatically granted. The Board's conclusion, to decline an additional award, it is reasonable, on the basis of the evidence before it.

[65] Finally, is the Board's decision unreasonable because it failed to consider evidence or failed to resolve doubt in favour of the Applicant in this regard, the Applicant argues that the Board misinterpreted section 39 of the VRAB Act.

[66] Section 39 of the VRAB Act provides as follows:

39. In all proceedings under this Act, the Board shall	39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[67] The broad purpose of the VRAB Act is to provide a means for review of a decision upon the application for a pension. The Board may review an original decision made by the Minister or his delegate pursuant to the Pension Act. That right of review is conferred by section 84 of the Pension Act.

[68] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47 the Supreme Court of Canada described the standard of reasonableness as follows:

> … In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the

> decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[69] In my opinion, having regard to the evidence before the Board, its decision meets this standard. The Board weighed the evidence and its assessment of the evidence is entitled to deference. It is not the role of the Court to reweigh evidence upon an application for judicial review; see the decision in *Khosa*, *supra* at paragraph 61.

[70] The Applicant carried the burden of proving there were delays in obtaining service or other records, for example medical records, or that there were administrative difficulties that were beyond his control, which would justify an additional award.

[71] The Applicant did not submit the necessary evidence for the adjudication of this claim until December 2004 and a decision was made in April 2005. The Board reasonably concluded that there were no delays beyond the Applicant's control.

[72] Upon consideration of the evidence that was before the Board, I am not persuaded that there were gaps or "doubts" upon which the Board could be invited to exercise the benefit conferred by section 39 of the VRAB Act.

[73] There is no merit in the Applicant's submissions about inadequate or inefficient representation by the BPA. The Applicant had a choice about counsel and could have changed counsel at any time. The fact that counsel did not pursue the case on a schedule more preferable to the Applicant does not constitute an administrative delay beyond his control.

[74] In the result, the application for judicial review is dismissed, no order as to costs, since the Respondent did not seek costs in her memorandum.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-235-15
STYLE OF CAUSE:	JAMES ALAN MACDONALD v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	AUGUST 11, 2015
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	FEBRUARY 11, 2016

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