Federal Court  Cour fédérale

Date: 20181002

Docket: T-1987-17

Citation: 2018 FC 976

Ottawa, Ontario, October 2, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ANDREW BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Andrew Brown, is now 83 years old. He served in the Reserve Force for roughly 14 years between 1955 and 2000. On November 9, 1998, in the course of his service in the Reserve Force he was involved in a car accident where his vehicle hit a deer. The impact caused his head to strike the steering wheel. He was 63 years old when this accident occurred. The Applicant claims he lost his sense of taste and smell (a condition called anosmia) because of the car accident, and that he noticed a loss of taste and smell sometime between December 1998 and January 1999.

[2] Some 12 years later, in July 2011, he applied to the Minister of Veterans Affairs for a disability award under what was then section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 (now the *Veterans Well-being Act*), on the basis that the 1998 accident caused his anosmia.

[3] In March 2012, a disability adjudicator at Veterans Affairs Canada denied the Applicant's claim for a disability award in respect of his anosmia because he had not provided evidence to show it had developed as a result of factors related to his military service.

[4] The Applicant appealed this denial to the Veterans Review and Appeal Board. Ultimately, in a decision dated November 23, 2017, an Entitlement Reconsideration Panel of the Board determined that the Applicant's claim for a disability award for anosmia would not be reopened for further consideration. The Applicant has now applied under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the Reconsideration Panel's decision.

I. Background

[5] The Applicant's pursuit of a disability award in respect of his anosmia has involved various decision-makers.

[6] The disability adjudicator at Veterans Affairs Canada who refused the Applicant's application concluded that, because there was no evidence to show his anosmia developed as a result of factors related to his military service, it did not arise out of and was not directly

connected with his Reserve Force service. The Applicant appealed this decision to an Entitlement Review Panel of the Board. The Review Panel affirmed the adjudicator's decision on the basis that the Applicant had not provided sufficient evidence to establish that his anosmia arose out of, or was otherwise directly connected with, his Reserve Force service.

[7] The Applicant then appealed the Review Panel's decision to an Entitlement Appeal Panel of the Board which, in a decision dated November 5, 2013, affirmed the Review Panel's decision.

[8] The next step in the Applicant's quest for a disability award due to his anosmia was an application for reconsideration under subsection 32(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [the *VRABA*]. This application requested the Board to reconsider the Appeal Panel's decision on the basis of new evidence; namely, a medical report from Dr. Conter, the Applicant's family physician, dated January 31, 2017, and a medical report from Dr. Christie, a neurosurgeon, dated June 6, 2016.

[9] The Board noted in its decision that a reconsideration hearing involves a two-stage process. The Board explained that the first stage is a screening stage in which a reconsideration panel considers whether there are grounds for reconsideration. At this stage, the reconsideration panel determines if the appeal panel's decision contains an error of fact, an error of law, or whether any new evidence meets a four-part test for new evidence. If none of these grounds are met, the request for reconsideration is denied. If any of the grounds are met, the reconsideration

panel proceeds to the second stage and conducts a reconsideration hearing to reconsider the appeal panel's decision.

[10] In this case, the Board dismissed the Applicant's request for reconsideration at the screening stage and did not proceed to the second stage. In addressing the Applicant's position that the case should be reconsidered based on new evidence, the Board identified and adopted a four-part test to determine whether the new evidence could be considered worthy of initiating the reconsideration of a final decision. This test provides that:

> 1. The evidence should generally not be admitted, if, by due diligence, it could have been adduced at a previous hearing.
>
> 2. The evidence must be relevant in the sense that it bears upon the decisive or potentially decisive issue in the adjudication.
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> 3. The evidence must be credible in the sense that it is reasonably capable of belief.
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> 4. It must be such that if believed, it could reasonably, when taken with other evidence adduced earlier, be expected to affect the result.

[11] After noting this test (which emanates from this Court's decision in *Mackay v Canada (Attorney General)*, [1997] FCJ No 495 at para 23, 129 FTR 286), the Board referenced section 39 of the *VRABA*. This section requires that:

Rules of evidence	**Règles régissant la preuve**
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	**a)** il tire des circonstances et des éléments de preuve qui

all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	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.

[12] The Board then proceeded to assess the medical reports of Drs. Conter and Christie in view of the test for new evidence. It found that, while the new evidence could not have been advanced at a previous hearing through the exercise of due diligence and was relevant, in that the evidence bore upon a decisive or potentially decisive issue in the adjudication, the new evidence was not credible. The Board further found that the new evidence was not sufficient to link the Applicant's anosmia to the car accident and, therefore, would not have changed the Appeal Panel's decision.

[13] In finding the new evidence not credible, the Board noted inconsistencies between a medical questionnaire completed by Dr. Conter in 2011 and his later reports. It also noted that his most recent report focused on the head injury suffered by the Applicant in the accident as the cause of the Applicant's anosmia when there were other possible causes of anosmia, such as normal aging, which were not considered. In addition, the Board observed that the Applicant's medical file had not been reviewed in Dr. Conter's report of January 31, 2017, and the report

made no reference to the Applicant's history of issues with nasal congestion prior to the accident, something which can be linked to anosmia. The Board remarked that there were no contemporaneous clinical notes to support the view that the Applicant's anosmia began between December 1998 and January 1999. In summary, the Board stated:

> …Dr. Conter is a family physician, not an expert in diagnosing anosmia. He does not appear to have reviewed the Appellant's medical file prior to providing his opinions. He does not consider other possible causes of the condition. His evidence is inconsistent. Finally, he does not provide a credible analysis of how he came to the conclusion that the Appellant's anosmia was caused by a head injury in 1998.

[14] With respect to Dr. Christie's report, the Board looked to a number of factors bearing on its credibility, including that: Dr. Christie did not have any first-hand knowledge of the traumatic head injury claimed by the Appellant or the onset of anosmia; he appeared to have assumed a relationship between the anosmia and a head injury without having reviewed medical reports of a head injury; and he did not explore other possible causes of the Applicant's anosmia.

II. Analysis

[15] This application for judicial review raises one over-arching issue - was the Board's decision not to reopen and reconsider the Applicant's claim for a disability award due to his anosmia reasonable?

A. *Standard of Review*

[16] I agree with the parties' submissions that the applicable standard of review is reasonableness. This standard applies to all issues raised by the Board's decision, including its

assessment and interpretation of the new medical evidence (see: *Moreau v Veterans Review and Appeal Board*, 2013 FC 168 at para 24, 226 ACWS (3d) 913). The Board's determinations on credibility should not be interfered with unless they are unreasonable (see: *Bradley v Canada (Attorney General)*, 2004 FC 996 at para 17, 257 FTR 73).

[17] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339).

B. *Was the Board's decision reasonable?*

[18] According to the Applicant, paragraph 39(b) of the *VRABA* stands for the proposition that the Board must accept uncontracted evidence presented by an applicant that it considers credible in the circumstances, and it may reject such evidence only if it has before it contradictory

evidence or if it states reasons which would bear on credibility and reasonableness. In the Applicant's view, if the Board wanted to dispute the new medical opinions, it should have exercised its statutory right to obtain an independent medical opinion under subsection 38(1) of the *VRABA*.

[19] In contrast, the Respondent maintains that, even though the new evidence presented by the Applicant was uncontracted, it was not automatically acceptable since the Board found it to be not credible and explained its reasons for so finding. According to the Respondent, the Board understood and applied the correct test as stated in *Wannamaker v Canada (Attorney General)*, 2007 FCA 126, 156 ACWS (3d) 929 [*Wannamaker*]).

[20] In *Wannamaker*, the Federal Court of Appeal observed that:

> [5] Section 39 ensures that the evidence in support of a pension application is considered in the best light possible. However, section 39 does not relieve the pension applicant of the burden of proving on a balance of probabilities the facts required to establish entitlement to a pension: *Wood v. Canada (Attorney General)* (2001), 199 F.T.R. 133 (F.C.T.D.), *Cundell v. Canada (Attorney General)* (2000), 180 F.T.R. 193 (F.C.T.D).
>
> [6] Nor does section 39 require the Board to accept all evidence presented by the applicant. 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), 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.

[21] Section 39 of the *VRABA* does not, as noted in *Wannamaker*, relieve an applicant of the burden to supply credible evidence to support their claim. The Board has the discretion to find

evidence to be not credible. In this case, it was reasonable for the Board to find the new medical evidence not credible and it explained why.

[22] In order to find the new medical reports to be credible, the Board looked to eight different factors, namely, whether the physician:

- is an expert in the claimed condition;
- provides unbiased evidence;
- provides all aspects relating to the condition, including information that is helpful and not helpful to the claim;
- states when something is outside their area of expertise;
- provides a detailed history of treatment of the condition;
- has reviewed and commented on the contemporaneous medical report;
- provides a full analysis explaining how the conclusion was reached, and
- provides reference to any resources used in preparing the medical report.

[23] The Applicant contends that these factors create a burden higher than that contemplated in the legislation and the jurisprudence. The Respondent says that by identifying a number of factors potentially relevant to credibility of the new medical reports the Board did not improperly fetter its discretion or depart from the *Wannamaker* credibility standard. The Respondent also points out that the Board did not apply all of these factors and, in fact, considered additional factors such as inconsistencies and assumptions made in the medical evidence.

[24] In my view, the Board reasonably assessed the new medical evidence holistically and in view of the prior medical evidence (see: *McCulloch v Canada (Attorney General)*, 2018 FC 773 at para 29, 295 ACWS (3d) 187). In this case, the Board found numerous aspects of the new medical evidence lacked credibility:

- Dr. Conter was not an expert in assessing traumatic brain injuries or anosmia;
- There was no documentation on the record at the time of the Applicant's discharge from the Reserve Force that he had any smell or taste issues noted, yet a medical questionnaire completed by Dr. Conter in December 2011 stated that the Applicant "has had loss of smell + taste since time military - noted at discharge";
- Dr. Conter did not consider alternate causes of the anosmia even though *The Merck Manual* before the Board identified aging and sinus infections as possible causes of anosmia, both of which could be causes of anosmia in the Applicant's case since the Applicant's medical records contain numerous references to sinus infections, respiratory issues, and nasal congestion prior to the 1998 accident and the Applicant is in the age range when anosmia can naturally occur;
- Dr. Conter did not provide any contemporaneous clinical notes indicating that the Applicant's anosmia began around December 1998 or January 1999, despite having been his family doctor for over 15 years;
- Dr. Christie had not reviewed the Applicant's full medical history, including contemporaneous medical reports after the accident in 1998; and
- Dr. Christie assumed a relationship between the condition and a head injury without having reviewed medical reports of a head injury and without exploring other possible causes.

[25] The Applicant's argument - that if the Board wanted to dispute the new medical evidence it should have exercised its statutory right to obtain an independent medical opinion under subsection 38(1) of the *VRABA* - is without merit. This subsection does not require the Board to obtain an independent medical opinion in order to reject a physician's opinion or to find that medical evidence is not credible (see: *Stevenson v Canada (Attorney General)*, 2014 FC 1130 at para 41, 469 FTR 49). The Board is not obliged to accept new medical evidence if it finds that evidence not to be credible and, as it did so in this case, explains why it finds the evidence to be not credible.

III. Conclusion

[26] In conclusion, the Board reasonably determined not to reopen and reconsider the Applicant's claim for a disability award due to his anosmia. The Board's reasons provide an intelligible and transparent explanation for its decision to dismiss the Applicant's application for reconsideration, and the outcome is defensible in respect of the facts and the law.

[27] The Respondent does not seek costs and, therefore, there is no order as to costs.

JUDGMENT in T-1987-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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