Federal Court  Cour fédérale

Date: 20190508

Docket: T-1285-18

Citation: 2019 FC 627

Ottawa, Ontario, May 8, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

SHARON EVERETT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Sharon Everett, was a member of the Regular Canadian Forces for about 10 years until May 1992. After she left the Regular Forces, she served as a reservist until May 2002. Two days before her release from the Regular Forces she underwent an audiogram examination which showed no significant hearing loss.

[2] Some 23 years after leaving the Regular Forces, the Applicant applied in January 2016 to the Minister of Veterans Affairs for a disability award based on hearing loss and tinnitus 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*). A benefits adjudicator at Veterans Affairs denied her application because there was no evidence to show that service factors had contributed to these conditions. She appealed this denial to the Veterans Review and Appeal Board [Board].

[3] Ultimately, in a decision dated June 1, 2018 an Entitlement Appeal Panel of the Board [Appeal Panel or Panel] concluded that the Applicant's claimed condition of hearing loss did not arise out of, nor was it directly connected with, her service in the Regular Forces. The Applicant has now applied pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the Appeal Panel's decision. She asks the Court to quash the decision and remit the matter back to a differently constituted appeal panel of the Board for redetermination.

I. Background

[4] The Applicant is 55 years old. She worked as a Mobile Support Equipment Operator during her career with the Regular Forces. She says her work exposed her to noisy running vehicles, a high-pressure vehicle washer, and large garage doors, all of which was intensified due to the echo inside the transportation building where she worked. She was exposed to these noises for 12 hours or more a day for almost 10 years, and this noise would routinely cause temporary hearing loss and ringing in her ears. She did not wear hearing protection when working. She was also exposed to gunshot and artillery noise and, although hearing protection was used on the firing range, it was not worn for practical training in the field where weapons were fired, and explosives detonated at close proximity.

[5] Over time, the Applicant's temporary hearing loss became more and more prolonged and the ringing in her ears took longer to stop. The Applicant claims she has suffered from hearing loss and tinnitus since the late 1980s and that she did not have any hearing problems prior to joining the Canadian Forces.

[6] The Applicant underwent numerous audiogram examinations during her military career, the last of which on April 29, 1992 (two days before her release from the Canadian Forces) showed no significant hearing loss. Audiograms conducted in November 2015 and October 2017 after her discharge from the Regular Forces showed asymmetrical hearing loss, with hearing loss in the right ear.

[7] After a benefits adjudicator at Veterans Affairs denied the Applicant a disability award, she appealed to the Board. In November 2016, an Entitlement Review Panel of the Board [Review Panel] affirmed the adjudicator's decision with respect to the claimed condition of hearing loss but granted an award for the Applicant's tinnitus. The Review Panel found there was no evidence to show service factors were the sole cause of the Applicant's hearing loss, nor was there a disabling loss measured at the time of her discharge. The Review Panel noted that, although one of the audiograms conducted during the Applicant's time with the Regular Forces in 1989 showed some minor hearing loss in her right ear, that loss resolved, and normal levels of hearing were recorded thereafter (including in the release audiogram).

II. The Appeal Panel's Decision

[8] The Applicant appealed the Review Panel's decision to an appeal panel of the Board. In a decision dated June 1, 2018, the Appeal Panel affirmed the Review Panel's decision to deny a pension based on the condition of hearing loss. The Appeal Panel accepted the diagnosis of hearing loss and that the condition is a disability as defined by the legislation. It did not, however, find that the medical evidence contemporaneous to the Applicant's service, the medical opinions, or the Applicant's testimony connected the disability to service-related causes.

[9] The Panel reviewed the various audiograms, starting with the normal result upon the Applicant joining the Canadian Forces. It noted an episode of hearing loss reported by the Applicant in February 1985 but that an October 1985 audiogram demonstrated normal hearing. The Panel also noted that a December 1989 audiogram revealed some hearing loss in the Applicant's right ear which appeared to resolve as subsequent audiograms, including the discharge audiogram, showed hearing in a normal range. The Panel further noted that the first post-discharge audiogram and report in November 2015 showed right ear hearing loss and observed this was when the Applicant was 51-years-old, 23 years after her discharge from the Regular Canadian Forces.

[10] The Appeal Panel then reviewed an October 2017 report by Dr. James Ruddy, an ENT specialist. In order to find medical reports credible, the Panel stated it looked to eight factors, namely, whether the physician:

1. was an expert in the claimed condition;
2. provided unbiased evidence;
3. provided all aspects relating to the condition, including information that was helpful and not helpful to the claim;
4. stated when something was outside their area of expertise;
5. provided a detailed history of treatment of the condition;
6. had reviewed and commented on the contemporaneous medical report;
7. provided a full analysis explaining how the conclusion was reached; and
8. provided reference to any resources used in preparing the medical report.

[11] The Panel accepted Dr. Ruddy's credentials but found it was not entirely clear he had conducted a full review of the Applicant's medical history, including the numerous audiograms during her military service, and had not addressed the sudden hearing loss experienced in 1985. The Panel noted Dr. Ruddy did not dispute or offer an explanation as to why the Entitlement Eligibility Guidelines on Hearing Loss [Guidelines] should not be utilized in the Applicant's case. The Appeal Panel also noted Dr. Ruddy's opinion that hearing tests conducted by the military are "screening tests" and their error rate is generally around 10 decibels but found that no scientific research was provided to support this opinion.

[12] The Panel stated that even if it was presented with such research, Dr. Ruddy's conclusions were not supported by the Guidelines and, although the Panel acknowledged the Guidelines were not mandatory or binding, Dr. Ruddy had not provided objective and compelling evidence in support of the Applicant's claim. The Panel further stated that it

preferred the Guidelines, noting that: “there was no hearing loss recorded at release and no complaint of hearing loss by the Appellant at the time of release from military service”. The Panel concluded by stating that the Applicant’s hearing loss was post-discharge in origin and was not caused, contributed to, or aggravated by her military service.

III. Analysis

[13] The primary issue raised by this application for judicial review is whether the Appeal Panel’s decision was reasonable.

A. *Standard of Review*

[14] The parties agree, as do I, that the standard of review is reasonableness (*Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at para 13 [*Wannamaker*]). This standard applies to all issues in this application, including the Panel’s assessment of the medical evidence (*Balderstone v Canada (Attorney General)*, 2014 FC 942 at para 17 [*Balderstone*]).

[15] 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). 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).

[16] 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).

B. *Was the Appeal Panel's assessment of Dr. Ruddy's report reasonable?*

(1) The Parties' Submissions

[17] The Applicant contends that by relying on eight factors to assess the credibility of medical reports the Panel created a "test" for credibility which is not in keeping with the framework of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*Act*]. In the Applicant's view, the Panel should have considered that Dr. Ruddy's report had been introduced to address the concerns raised by the Review Panel.

[18] According to the Applicant, there are various reasons why all eight factors may not be able to be met, including financial restraints, since a comprehensive medical report would be an expensive requirement. The Applicant notes that, if an appeal panel requires a medical report which meets these strict guidelines it may obtain one pursuant to section 38(1) of the *Act*. If a higher threshold is required, the Applicant argues an appeal panel should bear this expense.

[19] The Applicant says the Appeal Panel was unreasonable in not considering the circumstances of the new evidence as a whole when assessing its credibility and effectively considered each factor to be a distinct legal test. In the Applicant's view, application of the eight factors in this case improperly restricted the Panel's discretion pursuant to the *Act* and rendered its decision unreasonable.

[20] The Respondent says the Appeal Panel did not list a mandatory set of conditions for Dr. Ruddy's report to be deemed credible. In the Respondent's view, it looked to these factors as a guideline to assist in its assessment of the report's credibility. The listed factors are, the Respondent says, potentially relevant to credibility and they can all bear on the elements of plausibility, reliability, and logical relevance that are part of the credibility standard articulated by the Federal Court of Appeal in *Wannamaker*.

[21] According to the Respondent, the Appeal Panel did not present or apply the eight factors as if they were mandatory requirements. It never stated that the factors constituted a "test", that they were legally binding, that all had to be met, or that they were exhaustive. The Respondent points out that the Panel did not apply all eight factors to Dr. Ruddy's report.

[22] The Respondent notes the Panel's concerns with Dr. Ruddy's evidence and says it arrived at a reasonable conclusion that his report did not provide objective and compelling evidence in support of the Applicant's claim.

C. *The Appeal Panel reasonably assessed Dr. Ruddy's medical evidence*

[23] In my view, the Appeal Panel reasonably assessed Dr. Ruddy's medical evidence. I disagree with the Applicant that the Panel created an eight-part "test" for credibility which is not in keeping with the framework of the *Act*.

[24] The Board's role as a finder of fact is guided by section 39 of the *Act*, which provides that:

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.

[25] The Federal Court of Appeal in *Wannamaker* remarked as follows on the purpose and scope of section 39:

> [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: [citations omitted].
>
> [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: [citation omitted]. Evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove.

[26] The eight factors listed by the Appeal Panel in this case to assess the credibility of medical reports emanate from this Court's jurisprudence; they do not, as the Applicant contends, constitute a "test", nor were they used as a test in this case. In several decisions of this Court it can be seen that these factors are utilized by the Board to assess medical reports.

[27] For example, in *Brown v Canada (Attorney General)*, 2018 FC 976 at para 24, the Board found numerous aspects of the new medical evidence lacked credibility because: the family doctor was not an expert in assessing traumatic brain injuries or anosmia; he had not considered alternate causes of the anosmia even though the Merck Manual of Diagnosis and Therapy before the Board identified aging and sinus infections as possible causes; and he had not provided any contemporaneous clinical notes indicating when the anosmia began despite having been the applicant's family doctor for over 15 years. A second medical report by another doctor lacked credibility because the physician had not reviewed the applicant's full medical history and had

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.

[28] In *Balderstone*, the Board (at para 24) questioned the reliability of a medical report because the loss of the applicant's teeth was significantly more remote in time to his period of military service than the doctor understood and the doctor's inability to read French meant he did not have a complete picture of the applicant's dental situation or the treatment provided to him while in the military.

[29] In *Woo Estate v Canada (Attorney General)*, 2002 FCT 1233 at para 62, the Board dismissed a medical opinion because it did not contain a valid and complete medical or psychiatric patient history; and it did not accept another doctor's diagnosis of post-traumatic stress disorder because it was not supported by an evaluation according to the criteria of the DSM-IV or a medical examination of the applicant.

[30] In *Bradley v Canada (Attorney General)*, 2004 FC 996 at para 23, the Court found it was open to the Board to prefer the objective medical evidence provided at and around the time of the applicant's accident over that of the opinions given by three doctors many years later which were based on the applicant's version of the accident which differed from the medical reports at the time of the accident.

[31] In *Nisbet v Canada (Attorney General)*, 2004 FC 1106 at para 23, the Board rejected a medical opinion because it was mostly based on subjective information provided by the applicant

and failed to address what impact his non-duty motor vehicle accidents had on his knees and shoulders.

[32] In *McLean v Canada (Attorney General)*, 2011 FC 1047 at para 31, the absence of details about the applicant's injuries led the Board to conclude that the medical opinion was not supported by the evidence, and that the doctor had to consider that osteoarthritis is a natural degenerative condition experienced by a large number of individuals in the absence of trauma.

[33] In this case, the Panel clearly expressed its concerns about Dr. Ruddy's medical evidence and explained why it lacked credibility. Its conclusion that his report did not provide compelling evidence in support of the Applicant's claim was reasonable. It was also reasonable for the Panel to prefer the Guidelines over his report and to fault the report for not providing secondary sources as to why military audiograms were unreliable. Given the dearth of detail about the kind, nature, or extent of errors in military audiograms, I cannot conclude that the Appeal Panel erred in its treatment of Dr. Ruddy's evidence.

D. *Did the Appeal Panel give improper weight to the Entitlement Eligibility Guidelines?*

[34] The Guidelines provide that:

- normal hearing exists where there is a loss of 25 decibels or less at all frequencies between 250 and 8000 hertz
- hearing loss exists when there is a loss greater than 25 decibels at frequencies between 250 and 8000 hertz and this loss is not sufficient to meet the definition of disabling hearing loss
- a hearing loss disability exists when there is a Decibel Sum Hearing Loss of 100 decibels or greater at frequencies of 500, 1000, 2000 and 3000 hertz in either ear, or 50 decibels or more in both ears at 4000 hertz

[35] The Applicant says the Appeal Panel erred by employing the definition of “hearing loss” contained in the Guidelines, rather than the definition of “disability” contained in the *Act*, as the threshold test for granting entitlement to a disability award. By finding she was not disabled at the time of discharge, the Applicant complains that the Panel unreasonably fettered its own discretion since the Guidelines are not binding.

[36] The Applicant maintains that the facts in this case are remarkably similar to those in *Nelson v Canada (Attorney General)*, 2006 FC 225 [*Nelson*]. That case determined that the appropriate definition for a disability was found in section 3 of the *Pension Act*, RSC 1985, c P-6, which is the same as the definition of “disability” contained in section 2 of the *Act*. According to the Applicant, this means an applicant would have a disability if his or her ability to hear was lessened or lost.

[37] The Respondent says the Applicant’s reliance on *Nelson* is misguided. *Nelson* has been distinguished in *Beauchene v Canada (Attorney General)*, 2010 FC 980, where the Court accepted that, once a disability has been made out, the extent of the disability and corresponding benefit entitlement can be assessed with reference to the “lesser hearing” and “disabling hearing loss” categories set out in the Guidelines.

[38] In this case, an assessment of the extent of the Applicant’s disability was not required, the Respondent notes, because the Panel reasonably found she had failed to establish a significant causal connection between her disability and military service.

[39] In my view, the Appeal Panel gave appropriate weight to the Guidelines. It did not, as the Applicant argues, unreasonably fetter its discretion by utilizing the Guidelines. It was reasonable for the Panel to look to the Guidelines to assess the Applicant's level of hearing at the time of discharge from the Regular Forces. The Panel reasonably applied the Guidelines in finding that the Applicant did not suffer from a loss of hearing when she left the Regular Forces.

E. *Did the Applicant meet her burden of proving that service factors played a significant role in her hearing loss?*

[40] The Applicant says the Appeal Panel improperly assessed the credibility of Dr. Ruddy's medical report and unreasonably rejected his evidence which supports her claim. The Applicant notes the Guidelines state that an acceptable audiogram should test hearing in both ears at 250, 500, 1000, 2000, 3000, 4000, 6000 and 8000 hertz, and that not all of her military audiograms included testing at these frequencies. According to the Applicant, hearing loss first manifests at higher frequencies and the failure of the Canadian Forces to test her hearing at 8000 hertz has prejudiced her ability to prove her claim.

[41] The Respondent references *Cole v Canada (Attorney General)*, 2015 FCA 119 [*Cole*], where the Federal Court of Appeal set out the test for establishing entitlement to a disability pension:

> [37] Establishing entitlement to a disability pension under paragraph 21(2)(*a*) of the *Pension Act* is a four-step process:
>
> a) Step one requires the applicant to demonstrate that he or she has a claimed condition – an injury or disease, or an aggravation thereof.
>
> b) Step two requires the applicant to demonstrate that the claimed condition "arose out of or was directly

connected with" his or her service as a member of the forces.

c) Step three requires the applicant to establish that he or she suffers from a disability.

d) Step four requires the applicant to establish that his or her disability resulted from a military service-related claimed condition.

[42] The Respondent says it is the Applicant's burden to show why her in-service audiograms cannot be used as evidence of normal hearing. The Applicant's argument that the tests were faulty since they did not test at 250 hertz and 8000 hertz is, in the Respondent's view, not persuasive because no evidence was presented to show why they were inaccurate or not in line with standards in place at the time. According to the Respondent, the 23-year delay eliminates any value the 2015 audiogram might have in questioning the accuracy of the 1992 discharge audiogram which showed no hearing loss.

[43] In my view, it was reasonable for the Appeal Panel to find the Applicant's hearing loss was post-discharge in origin and not caused, contributed to, or aggravated by her military service. As the Court in *Lunn v Canada (Veterans Affairs)*, 2010 FC 1229 at para 63, observed: "The fact that the hearing loss … [was] not detected until many years after his release from the military makes causation that much harder to establish".

[44] In this case, the Applicant has failed to step over the second step of the test in *Cole*. She did not establish to the Appeal Panel's satisfaction that "a significant causal connection" existed between her hearing loss and her military service that would be sufficient to establish the level of

causal connection required by the phrase “directly connected with” in paragraph 21(2)(a) of the *Pension Act* (*Cole* at para 98).

IV. Conclusion

[45] In conclusion, the Appeal Panel of the Board reasonably concluded that the Applicant’s hearing loss was post-discharge in origin and not caused, contributed to, or aggravated by her military service. The Appeal Panel’s reasons provide an intelligible and transparent explanation for its decision and the outcome is defensible in respect of the facts and the law. The Applicant’s application for judicial review is, therefore, dismissed.

[46] The Respondent states in its Memorandum that he does not seek costs and, consequently, there is no order as to costs.

JUDGMENT in T-1285-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and costs are not awarded.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Natasha Gulati	FOR THE APPLICANT
Andrew Kinoshita	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT