

Date: 20080624

Docket: T-1798-07

Citation: 2008 FC 796

Ottawa, Ontario, June 24, 2008

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

JAMES MACDONALD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Veterans Review and Appeal Board of Canada (the Board) was required to determine the entitlement, if any, of James MacDonald, a 17-year retiree from the RCMP, to a pension for disabilities allegedly resulting from his service as a member of the RCMP Musical Ride.

[2] This judicial review of the Board's decision turns on the analysis provided by the Board in its reasons for rejecting Mr. MacDonald's claim. More specifically, it is concerned with whether the Board's decision exhibits the existence of justification, intelligibility and transparency.

[3] For the reasons that follow, I conclude that the matter must be returned to the Board because its determination lacks a proper analysis.

Background

[4] Synoptically, Mr. MacDonald served as a member of the RCMP for 13 years (1973-1986). In 1980, he was posted to the RCMP Musical Ride. Upon completion of the Musical Ride assignment, he was transferred to the Federal Policing Branch Headquarters in Ottawa and then to the Commercial Crime Section in Toronto.

[5] Mr. MacDonald applied for a disability pension, pursuant to section 32 of the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 (the RCMPSPA), claiming that his foot conditions (pes planus and plantar fasciitis) as well as his nasal conditions (chronic rhinitis and chronic sinusitis) arose as a result of injury or aggravation directly connected with his service in the Musical Ride.

[6] In particular, Mr. MacDonald attributes his foot problems to riding boots, foot positioning while riding, dismounting (onto a concrete floor) and carrying heavy tack boxes while on tour. He traces his nasal conditions to an experience at the RCMP breeding ranch. Apparently, Mr. MacDonald sustained a severe reaction when he was tasked to pile hay inside a storage building. In subsequent years, the “allergies” worsened. Mr. MacDonald repeatedly used “over the counter” medications to ameliorate his breathing problems. Eventually, he developed polyps in his nasal passages. The polyps severely compromise his breathing and sense of smell. The foot conditions significantly limit his capacity to engage in physical activity.

[7] Dr. Ian Dempsey examined Mr. MacDonald in 1997 and again in 2003. In correspondence, dated February 16, 2006, Dr. Dempsey describes the “exposure to hay with high levels of airborne particulate matter” as being a “trigger” for some of Mr. MacDonald’s symptoms.

[8] In accordance with the statutory regime, the first-level decision with respect to claims of this nature is rendered by a first-level decision-maker, a ministerial delegate. The ministerial delegate denied the claim essentially on the basis that the service records did not substantiate the conclusion that the alleged disabilities were causally related to past RCMP service.

[9] Pursuant to section 18 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the VRAB Act), Mr. MacDonald requested that an Entitlement Review Panel (ERP) review the ministerial delegate’s decision. The ERP examined the evidence and determined, notwithstanding the medical reports, that pension entitlement was not indicated primarily for the reasons enunciated by the ministerial delegate, i.e., service records do “not provide medical evidence to determine a causal relationship between factors associated with the applicant’s RCMP service and the development of his claimed conditions in the post-discharge period”.

[10] Under section 25 of the VRAB Act, Mr. MacDonald appealed the ERP’s decision to the Board. The Board dismissed his appeal. It is the Board’s decision that is the subject of this judicial review.

The Relevant Statutory Provisions

[11] The text of the relevant statutory provisions is attached to these reasons as Schedule “A”.

The Decision

[12] The Board concluded that the available facts and evidence do not support the claim on the foot conditions. The medical opinions are not supported by evidence. Regarding the nasal conditions, the Board concluded that the medical opinion is not supported by the facts available throughout the statement of the case. Specifically, there is no report of a problem immediately following the exposure to the hay dust and no recorded complaints during Mr. MacDonald’s service in the Musical Ride.

The Standard of Review

[13] Although the decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) was released subsequent to the filing of the written submissions, both parties incorporated *Dunsmuir* into their oral arguments. They agree, and I concur, that the applicable standard of review regarding the Board’s decision is reasonableness.

[14] *Dunsmuir* directs that where the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question, there is no need to engage in what is now referred to as a “standard of review analysis”.

[15] With respect to the determination as to whether an award should be made under section 32 of the RCMP SA, the Federal Court of Appeal established in *Wannamaker v. Canada* (*Attorney*

General) (2007), 361 N.R. 266 (F.C.A.) (*Wannamaker*) that the standard of review is reasonableness. The Court concluded, with respect to whether there is a causal connection between an injury and a disability, that the Board's assessment attracted the more deferential standard of patent unreasonableness. Since this standard has now been collapsed under the reasonableness standard of review, this issue is also subject to review on the reasonableness standard: *Goldsworthy v. Canada (Attorney General)*, 2008 FC 380 at para. 13 (*Goldsworthy*).

Analysis

[16] Mr. MacDonald had to satisfy the Board that he sustained an injury as a result of his service and that a causal connection exists between the injury and the disability. At the time of his application, he had been out of the RCMP for 17 years.

[17] It is beyond dispute that the Board is not required to accept a medical opinion that is speculative. Nor is it required to accept a medical opinion where the medical specialist is not in a position to know whether the patient's account of the injury is correct: *Wannamaker; Goldsworthy; Comeau v. Canada (Attorney General)* (2005), 284 F.T.R. 107 (F.C.) aff'd. (2007), 360 N.R. 323 (F.C.A.) (*Comeau*).

[18] Section 39 of the VRAB Act requires the Board, when weighing the evidence, to resolve any doubt in favour of the applicant. However, it 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. Nor does it require the Board to accept all evidence presented by the applicant if it finds

that evidence not to be credible, even if it is not contradicted. Evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove: *Wannamaker*.

[19] Mr. MacDonald provided a lengthy chronology with respect to what he considered to be the onset of his injuries. The Board does not make a negative credibility finding. Nor does it address Mr. MacDonald's evidence. Perhaps the Board did not find it plausible, or reliable, or logically capable of proving the injury or the casual connection between the injury and the disability. Or, perhaps the Board simply did not believe him. It was open to the Board to reject Mr. MacDonald's evidence for all or even one of these reasons. It does not do so.

[20] The Board refers to Dr. Somerfield's opinion and notes that he "did not include any medical evidence to support his opinion". Nothing further is stated. Perhaps, by implication, this constitutes, or is intended to constitute, a rejection of Dr. Somerfield's opinion. Or, perhaps it constitutes an observation.

[21] In the "introduction" portion of its decision, the Board states that it has examined all of the testimony and documented evidence in addition to four exhibits, one of which is an excerpt from Mr. MacDonald's service records regarding physiotherapy treatments for right Achilles tendonitis in 1985 and 1986. There is no further reference to this evidence. It is clear that Mr. MacDonald considered the excerpt to be an important one with respect to substantiating his claim. It was open to the board to find otherwise. It does not do so.

[22] Instead, the Board states that it has taken everything into account and finds that “the claim is not supported by the facts and the evidence available to the board”. In *Whitehead v. Canada (Attorney General)* (2003), 227 F.T.R. 57 (F.C.T.D.) (*Whitehead*), Mr. Justice Gibson, in addressing reasons of a similar nature, concluded that while the decision of the Board may have been reasonably open to it, its decision was not supportable on the basis of its reasons. Regarding the statement that it had “carefully reviewed all the evidence”, Justice Gibson found that such “proclamations are simply not good enough”.

[23] In relation to the nasal conditions, the Board cites an excerpt from the medical opinion of Dr. Dempsey dated 18 January 2007 and then, without commenting on that evidence, proceeds to summarize the ERP’s conclusion that there was no medical evidence to causally connect the factors associated with Mr. MacDonald’s RCMP service and the development of the claimed conditions in the post discharge period. The Board then affirms the ERP decision.

[24] The hearing before the Board is a *de novo* hearing. There was new evidence before the Board that was not before the ERP. It is not apparent to me that the Board conducted its own assessment prior to affirming the decision of the ERP. Rather, it appears to have relied on the ERP assessment. Dr. Dempsey’s opinion of January 18, 2007 is relevant to Mr. MacDonald’s claim. Although the Board acknowledges its existence, it does not assess it. Further, it is not accurate to say that there was no evidence in Mr. MacDonald’s service records relating to sinusitis.

[25] The deficiency in the Board’s reasons lies with the analysis proffered to support its conclusion. Sections 7 and 8 of the *Veterans Review and Appeal Board Regulations*, SOR/96-67

(the VRAB Regulations) require the Board to provide reasons for its decision. *Dunsmuir* cautions that the concept of deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. It requires a respectful attention to the reasons offered or which could be offered in support of a decision. *Dunsmuir* also instructs that a court conducting a review for reasonableness “inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes”. Reasonableness is concerned mostly with the “existence of justification, transparency and intelligibility within the decision-making process”. 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 (my emphasis).

[26] The process of articulating reasons that provide justification, transparency and intelligibility for a conclusion is important because it allows for a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The reasons must demonstrate that the submissions were considered and provide a basis for understanding why those submissions were rejected. A conclusion will not be rational or defensible if the tribunal has failed to carry out the proper analysis: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23. The reasons and, more specifically, the analysis in this matter fall short of that test.

[27] At the end of the day, it is for the Board, not the Court, to determine if Mr. MacDonald qualifies for a pension. These reasons do not constitute an expression of an opinion regarding the merits of Mr. MacDonald’s application. They relate solely to the Board’s failure to provide a rational or defensible conclusion for want of a proper analysis.

JUDGMENT

The application for judicial review is allowed and the matter is remitted to a differently constituted Appeal Board for determination.

“Carolyn Layden-Stevenson”

Judge

SCHEDULE “A”
to the
Reasons for Judgment dated June 24, 2008
in
JAMES MACDONALD
and
ATTORNEY GENERAL OF CANADA

T-1798-07

*Royal Canadian Mounted Police
Superannuation Act,
R.S., 1985, c. R-11,*

*Loi sur la pension de retraite de la Gendarmerie
royale du Canada,
L.R. (1985), ch. R-11*

32. Subject to this Part, an award in accordance with the Pension Act shall be granted to or in respect of

32. Sous réserve des autres dispositions de la présente partie, une compensation conforme à la Loi sur les pensions doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l’invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service de l’intéressé dans la Gendarmerie, à toute personne, ou à l’égard de celle-ci :

(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability or has died, or

a) visée à la partie VI de l’ancienne loi à tout moment avant le 1er avril 1960, qui, avant ou après cette date, a subi une invalidité ou est décédée;

(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died,

b) ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

in any case where the injury or disease or aggravation thereof resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person’s service in the Force.

*Veterans Review and Appeal Board Act,
1995, c. 18*

*Loi sur le Tribunal des anciens combattants
(révision et appel), 1995, ch. 18*

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

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

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.

25. An applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.

39. In all proceedings under this Act, the Board shall

(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and

(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

Pension Act, R.S., 1985, c. P-6

21. (2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in

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.

25. Le demandeur qui n'est pas satisfait de la décision rendue en vertu des articles 21 ou 23 peut en appeler au Tribunal.

39. Le Tribunal applique, à l'égard du demandeur ou de l'appellant, les règles suivantes en matière de preuve :

a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;

b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;

c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

Loi sur les pensions, L.R., 1985, ch. P-6

21. (2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :

a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas

respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;

(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

(c) where a member of the forces is in receipt of an additional pension under paragraph (a), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner dies, except where an award is payable under subsection 34(8), the additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in respect of another spouse or common-law partner is awarded to the member commencing during that period, until the date that it so commences; and

(d) where, in respect of a survivor who was living with the member of the forces at the time of that member's death,

(i) the pension payable under paragraph (b) is less than

(ii) the aggregate of the basic pension and the additional pension for a spouse or common-law partner payable to the member under paragraph (a), subsection (5) or section 36 at the time of the member's death,

a pension equal to the amount described in subparagraph (ii) shall be paid to the survivor in lieu of the pension payable under paragraph (b) for a period of one year commencing on the effective date of award as provided in section 56 (except that the words "from the day following the date of death" in subparagraph 56(1)(a)(i) shall be read as "from the first day of the month

d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

c) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa a), du paragraphe (5) ou de l'article 36 continue d'être versée pendant l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui il cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

d) d'une part, une pension égale à la somme visée au sous-alinéa (ii) est payée au survivant qui vivait avec le membre des forces au moment du décès au lieu de la pension visée à l'alinéa b) pendant une période d'un an à compter de la date depuis laquelle une pension est payable aux termes de l'article 56 — sauf que pour l'application du présent alinéa, la mention « si elle est postérieure, la date du lendemain du décès » à l'alinéa 56(1)a) doit s'interpréter comme signifiant « s'il est postérieur, le premier jour du mois suivant celui au cours duquel est survenu le décès » — d'autre part, après cette année, la pension payée au survivant l'est conformément aux taux prévus à l'annexe II, lorsque, à l'égard de celui-ci, le premier des montants suivants est inférieur au second :

(i) la pension payable en application de l'alinéa b),

following the month of the member's death"), and thereafter a pension shall be paid to the survivor in accordance with the rates set out in Schedule II.

...

(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of

(a) any physical training or any sports activity in which the member was participating that was authorized or organized by a military authority, or performed in the interests of the service although not authorized or organized by a military authority;

(b) any activity incidental to or directly connected with an activity described in paragraph (a), including the transportation of the member by any means between the place the member normally performed duties and the place of that activity;

...

Veterans Review and Appeal Board Regulations, SOR/96-67

7. Every decision of the Board shall

(a) state the issue on review, reconsideration or appeal, or the question of interpretation;

(b) state the reasons for the decision;

(c) state the names of the members who took part in the decision;

(d) include the signature of at least one of the

(ii) la somme de la pension de base et de la pension supplémentaire pour un époux ou conjoint de fait qui, à son décès, est payable au membre en application de l'alinéa a), du paragraphe (5) ou de l'article 36.

[...]

(3) Pour l'application du paragraphe (2), une blessure ou maladie — ou son aggravation — est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce paragraphe si elle est survenue au cours :

a) d'exercices d'éducation physique ou d'une activité sportive auxquels le membre des forces participait, lorsqu'ils étaient autorisés ou organisés par une autorité militaire, ou exécutés dans l'intérêt du service quoique non autorisés ni organisés par une autorité militaire;

b) d'une activité accessoire ou se rattachant directement à une activité visée à l'alinéa a), y compris le transport du membre des forces par quelque moyen que ce soit entre le lieu où il exerçait normalement ses fonctions et le lieu de cette activité;

[...]

Règlement sur le Tribunal des anciens combattants (révision et appel), DORS/96-67

7. Le Tribunal incorpore à sa décision les renseignements suivants :

a) l'énoncé de la question faisant l'objet de la révision, du réexamen ou de l'appel, ou l'énoncé de la question d'interprétation;

b) les motifs à l'appui de sa décision;

c) le nom des membres qui ont rendu la décision;

d) la signature d'au moins un des membres ayant

members who took part in the decision;

(e) in the case of a review panel decision, inform the applicant that the applicant has the right to appeal to the Board and that, in pursuing this right of appeal, the applicant may be represented, free of charge, by the Bureau of Pensions Advocates or a service bureau of a veterans' organization or, at the applicant's own expense, by any other representative;

(f) in the case of an appeal panel decision, annex to the decision the reasons for dissent, if any, signed by the dissenting members of the appeal panel.

8. The Board shall send written notice of its decision

(a) in the case of an application for review or an application for reconsideration pursuant to subsection 32(1) of the Act, to the applicant and to the Minister;

(b) in the case of an appeal, to the appellant and to the Minister;

(c) in the case of a question of interpretation raised by the appellant,

(i) to the persons referred to in paragraph (b), and

(ii) to the persons and organizations named in section 2 of the Prescribed Persons and Organizations Regulations;

(d) in the case of a referral of a question of interpretation to the Board

(i) to the person or organization who referred the question to the Board, and to the Minister, and

(ii) to the persons and organizations named in section 2 of the Prescribed Persons and Organizations Regulations, other than the person or organization referred to in subparagraph (i);

rendu la décision;

e) dans le cas d'une décision d'un comité de révision, la mention que le demandeur a le droit d'interjeter appel auprès du Tribunal et d'y être représenté, sans frais, par le Bureau de services juridiques des pensions ou par le service social d'une organisation d'anciens combattants ou, à ses frais, par tout autre représentant;

f) dans le cas d'une décision d'un comité d'appel, le cas échéant, l'exposé des motifs de dissidence signé par tout membre dissident du comité d'appel

8. Le Tribunal avise par écrit de sa décision :

a) dans le cas d'une demande de révision ou d'une demande de réexamen visée au paragraphe 32(1) de la Loi, le demandeur et le ministre;

b) dans le cas d'un appel, l'appelant et le ministre;

c) dans le cas d'une question d'interprétation soulevée par l'appelant :

(i) les personnes visées à l'alinéa b),

(ii) les personnes et organisations mentionnées à l'article 2 du Règlement sur la désignation de personnes et d'organisations;

d) dans le cas d'une question d'interprétation déferée au Tribunal :

(i) la personne ou l'organisation qui a saisi le Tribunal de la question ainsi que le ministre,

(ii) les personnes et les organisations mentionnées à l'article 2 du Règlement sur la désignation de personnes et d'organisations, autres que la personne ou l'organisation visée au sous-alinéa (i);

(e) in the case of an application for a compassionate award under subsection 34(1) of the Act or an application for reconsideration pursuant to subsection 34(7) of the Act, to the applicant and to the Minister; and

(f) in the case of a reconsideration by the Board on its own motion pursuant to subsection 23(1), 32(1) or 34(7) of the Act, to the applicant or appellant and to the Minister.

e) dans le cas d'une demande d'allocation de commisération visée au paragraphe 34(1) de la Loi ou d'une demande de réexamen visée au paragraphe 34(7) de la Loi, le demandeur et le ministre;

f) dans le cas d'un réexamen par le Tribunal de son propre chef en vertu des paragraphes 23(1), 32(1) ou 34(7) de la Loi, le demandeur ou l'appelant et le ministre.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1798-07

STYLE OF CAUSE: JAMES MACDONALD
v.
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: June 5, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Layden-Stevenson J.

DATED: June 24, 2008

APPEARANCES:

Kathleen E. Naylor FOR THE APPLICANT

Corinne Bedford FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kathleen E. Naylor FOR THE APPLICANT

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada