

Federal Court



Cour fédérale

Date: 20100301

Docket: T-1388-07

Citation: 2010 FC 233

Ottawa, Ontario, March 1, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**ROBERTSON, HELEN (deceased) and
ROBERTSON, ROY (surviving spouse)**

Applicants

and

**HER MAJESTY THE QUEEN,
THE MINISTER OF VETERANS AFFAIRS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Veterans Review and Appeal Board (VRAB) Appeal Board dated February 28, 2007, wherein the VRAB Appeal Board upheld the findings of the VRAB Entitlement Review Panel dated July 21, 2006, denying further retroactivity of Mrs. Robertson's disability benefits to November 7, 2001. Mrs. Robertson's disability benefits remain retroactive to September 20, 2002.

Factual Background

[2] The Applicants are both veterans of World War II and their health had deteriorated in recent years. Mrs. Robertson suffered a broken back in January 2000 and was in poor health and Mr. Robertson was her primary caregiver until he had to undergo quadruple bypass cardiac surgery in December 2002.

[3] Section 39 of the *Pension Act*, R.S., 1985, c. P-6, sets out how the retroactivity of a pension is to be determined. The benefits currently offered by Veterans Affairs Canada (VAC) are organized into four groups: disability pensions; war veterans allowance; benefits under the *Veterans Health Care Regulations (VHCRs)*, SOR/90-594 and benefits pursuant to the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, 2005, c. 21.

[4] Disability pensions are provided pursuant to the *Pension Act* and may be provided to serving Members or former Members of the Canadian Forces who have suffered a service-related medical condition.

[5] On October 16, 2001, the Applicants' daughter, Dr. Judith Robertson, wrote to Dr. Mike Morris at Campbellford Hospital, stating her parents wanted to move into a long term care facility as soon as possible because of their deteriorating health. The letter was forwarded to VAC and was received on November 7, 2001. VAC considered this letter as an application for a Priority Access Bed (PAB) under long term care.

[6] On January 15, 2002, VAC denied Mrs. Robertson long term care as she had not served overseas and was not in receipt of a wartime disability pension whereas Mr. Robertson was qualified as he had served overseas during World War II. The Applicants did not appeal this decision.

[7] On September 20, 2002, an Intake Form was completed by David Stewart, a Pension Officer in the Peterborough District Office. This form initiated an application for a disability pension for Mrs. Robertson relating to hearing loss and a nervous condition which was not yet diagnosed at the time of the application.

[8] On January 16, 2003, VAC granted Mrs. Robertson a disability pension for hearing loss, pursuant to subsection 21(1) of the *Pension Act*. Pursuant to subsection 39(1) of the *Pension Act*, Mrs. Robertson's disability pension was made effective September 20, 2002, the date of her application to VAC for a disability pension.

[9] On February 18, 2003, Mrs. Robertson submitted an application for a disability pension pursuant to subsection 21(1) of the *Pension Act* for a bladder condition called Gilliam's Suspension of Uterus and for Incontinence relating to the removal of an ovary while she was a Member of the Canadian Forces.

[10] On June 25, 2003, VAC granted Mrs. Robertson a disability pension for Post Traumatic Stress Disorder and Right Overectomy. This disability pension was made effective September 20, 2002, the date of Mrs. Robertson's first contact with VAC for a disability pension.

[11] Mrs. Robertson passed away on July 28, 2003.

[12] On September 15, 2003, VAC granted Mrs. Robertson a disability pension for Gilliam's Suspension of Uterus. Mrs. Robertson's disability pension for Gilliam's Suspension of Uterus was made effective February 18, 2003, the date she first contacted VAC regarding a disability pension for this condition.

[13] On October 11, 2005, VAC denied a request from Mr. Robertson for reimbursement of medical equipment purchased for Mrs. Robertson prior to September 20, 2002, the effective date of Mrs. Robertson's disability pension and her entitlement to certain benefits, including long term care.

[14] On July 21, 2006, following a request for review of the effective date of Mrs. Robertson's disability pensions, the VRAB Entitlement Review Panel (the Review Panel) ruled that VAC properly applied the *Pension Act* when it determined that Mrs. Robertson's disability pension should be made retroactive to September 20, 2002 and denied retroactivity of the effective date of Mrs. Robertson's pension benefits to November 7, 2001, the date at which they claim a request for long term care was received by VAC.

[15] The Applicants appealed the Review Panel decision and on February 28, 2007, a VRAB Appeal Board (the Appeal Board) upheld the findings of the Review Panel.

[16] On July 27, 2007, the Applicants filed a Notice of Application to commence judicial review of the VRAB Appeal Board's decision dated February 28, 2007, claiming an effective date of November 7, 2001, the date at which they claim a request for long term care was received by VAC.

Impugned Decision

[17] The Appeal Board found there is no legal duty upon the Minister or the Minister's staff to recommend or make an application for an award under section 81 of the *Pension Act*. The *Pension Act* indicates that the application in each case must be made to the Minister and not by the Minister. It is clearly the obligation of the Applicant or the Applicant's representative to make the application and it is not the Minister's responsibility to make the application on behalf of the veteran.

[18] Subsection 81(3) of the *Pension Act* states that the Minister must provide a counselling service with respect to the application of the *Pension Act* to a pensioner and must assist in the preparation of applications. The Appeal Board notes this duty arises upon request from the veteran, meaning that once a request is made, the Minister has a duty to respond to a request for assistance or counselling on the legislation. However, the Minister is not responsible for anticipating or raising a possible claim for entitlement before a veteran requests information or assistance with a matter. The Appeal Board did not find any evidence the normal procedures for the application process had not been strictly followed in the case at bar.

Issues

[19] This application raises the following issues:

1. Can the affidavit of Janet Struss form part of the Applicant's Record?
2. What is the applicable standard of review of decisions of the VRAB Appeal Board?
3. Was VAC required to respond to the Applicants' request for assistance by providing specific notice as to the benefits which were available to them?
4. Did the VRAB Appeal Board err in not awarding further retroactivity to the effective dates of Mrs. Robertson's disability pensions?

Relevant Legislative Provisions

[20] *Pension Act*, R.S., 1985, c. P-6:

[...]

Construction

2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

[...]

No award payable

3.1 (1) Despite any other provision of this Act, no award is payable under this Act in respect of any application made

[...]

Règle d'interprétation

2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

[...]

Aucune compensation

3.1 (1) Malgré les autres dispositions de la présente loi, aucune compensation ne peut être versée relativement à une

by or in respect of a member of the forces after the coming into force of section 42 of the Canadian Forces Members and Veterans Re-establishment and Compensation Act unless

demande présentée par un membre des forces ou à son égard après l'entrée en vigueur de l'article 42 de la Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes, sauf dans les cas suivants :

(a) the application is in respect of a disability for which a pension has been granted or is an application under section 36 in respect of such a disability;

a) la demande est relative à une invalidité pour laquelle une pension a déjà été accordée ou elle est présentée au titre de l'article 36 à l'égard de cette invalidité;

(b) the application is in respect of the death of a member of the forces, if the death occurred before the coming into force of section 42 of the Canadian Forces Members and Veterans Re-establishment and Compensation Act or is the result of an injury or a disease, or the aggravation of an injury or a disease, for which a pension has been granted;

b) la demande est relative au décès d'un membre des forces qui est survenu avant l'entrée en vigueur de cet article 42 et qui résulte d'une blessure ou maladie ou de l'aggravation d'une blessure ou maladie pour laquelle une pension a déjà été accordée;

(c) the application is in respect of an injury or a disease that was attributable to or was incurred during, or arose out of or was directly connected to, service in the Canadian Forces on or before April 1, 1947, or was attributable to or was incurred during service in the Korean War or is an application under subsection 21(5) in respect of such an injury or a disease;

c) la demande est relative à une blessure ou maladie qui est soit survenue au cours du service dans les Forces canadiennes accompli avant le 2 avril 1947 ou attribuable, consécutive ou rattachée directement à celui-ci, soit survenue au cours du service accompli pendant la guerre de Corée ou attribuable à celui-ci ou elle est présentée au titre du paragraphe 21(5) à l'égard d'une telle blessure ou maladie;

(d) the application is in respect of an aggravation of an injury or disease, if the aggravation was attributable to or was incurred during, or arose out of or was directly connected to, service in the Canadian Forces on or before April 1, 1947 or was attributable to or was incurred during service in the Korean War or is an application under subsection 21(5) in respect of such an aggravation;

d) la demande est relative à l'aggravation d'une blessure ou maladie et l'aggravation est soit survenue au cours du service dans les Forces canadiennes accompli avant le 2 avril 1947 ou attribuable, consécutive ou rattachée directement à celui-ci, soit survenue au cours du service accompli pendant la guerre de Corée ou attribuable à celui-ci ou elle est présentée au titre du paragraphe 21(5) à l'égard d'une telle aggravation;

(e) the Minister has determined under the Canadian Forces Members and Veterans Re-establishment and Compensation Act that the injury or disease, or the aggravation of the injury or disease, for which the application is made is inseparable — for the purpose of assessing the extent of disability — from an injury or a disease, or the aggravation of an injury or a disease, for which a pension has been granted; or

e) le ministre a établi en application de cette loi que la blessure ou maladie ou l'aggravation d'une blessure ou maladie qui fait l'objet de la demande est indissociable, pour l'estimation du degré d'invalidité, de la blessure ou maladie ou de l'aggravation d'une blessure ou maladie pour laquelle une pension a déjà été accordée;

(f) the application is made under section 38 by a pensioner.

f) la demande est présentée par un pensionné au titre de l'article 38.

Exception

(2) Subsection (1) does not apply in respect of an application for compensation made under Part III.1 if the application relates to a period spent as a prisoner of war that began before the coming into

Exception

(2) Le paragraphe (1) ne s'applique pas à la demande d'indemnité présentée au titre de la partie III.1 à l'égard d'une période de captivité qui a débuté avant l'entrée en vigueur de l'article 64 de la Loi sur les

force of section 64 of the Canadian Forces Members and Veterans Re-establishment and Compensation Act.

mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes.

[...]

[...]

Powers of the Minister

5. (1) Subject to this Act and any other Act of Parliament and to the regulations made under this or any other Act of Parliament, the Minister has full power to decide on all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension or other payment under this Act and to the recovery of any overpayment that may have been made.

Ministre

5. (1) Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale ou de leurs règlements, le ministre a tout pouvoir de décision en ce qui touche l'attribution, l'augmentation, la diminution, la suspension ou l'annulation de toute pension ou autre paiement prévu par la présente loi ainsi que le recouvrement de tout versement excédentaire.

Additional duties

(2) The Governor in Council may, by order, confer on the Minister duties like those under subsection (1) in respect of pensions or other payments authorized by any other Act of Parliament or by the Governor in Council.

Pouvoir équivalent

(2) Le gouverneur en conseil peut, par décret, conférer au ministre un pouvoir équivalent au sujet des pensions ou autres paiements autorisés au titre de toute autre loi ou par lui-même.

Benefit of doubt

(3) In making a decision under this Act, the Minister shall

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

Décisions

(3) Lorsqu'il prend une décision, le ministre :

a) tire des circonstances portées à sa connaissance et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible au demandeur ou au pensionné;

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

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

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

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

[...]

[...]

Date from which disability pension payable

Date à partir de laquelle est payable une pension d'invalidité

39. (1) A pension awarded for disability shall be made payable from the later of

39. (1) Le paiement d'une pension accordée pour invalidité prend effet à partir de celle des dates suivantes qui est postérieure à l'autre :

(a) the day on which application therefore was first made, and

a) la date à laquelle une demande à cette fin a été présentée en premier lieu;

(b) a day three years prior to the day on which the pension was awarded to the pensioner.

b) une date précédant de trois ans la date à laquelle la pension a été accordée au pensionné.

Additional award

Compensation supplémentaire

(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

(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

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 pension.

[...]

Application made to Minister

81. (1) Every application must be made to the Minister.

Consideration of applications

(2) The Minister shall consider an application without delay after its receipt and shall

(a) where the Minister is satisfied that the applicant is entitled to an award, determine the amount of the award payable and notify the applicant of the decision; or

(b) where the Minister is not satisfied that the applicant is entitled to an award, refuse to approve the award and notify the applicant of the decision.

Counselling service

(3) The Minister shall, on request,

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.

[...]

Première étape

81. (1) Toute demande de compensation doit être présentée au ministre.

Examen par le ministre

(2) Le ministre examine la demande dès sa réception; il peut décider que le demandeur a droit à la compensation et en déterminer le montant payable aux termes de la présente loi ou il peut refuser d'accorder le paiement d'une compensation; il doit, dans tous les cas, aviser le demandeur de sa décision.

Service de consultation

(3) Le ministre fournit, sur demande, un service de consultation pour aider les demandeurs ou les pensionnés

(a) provide a counselling service to applicants and pensioners with respect to the application of this Act to them; and

(b) assist applicants and pensioners in the preparation of applications.

Review of decisions

82. (1) Subject to subsection (2), the Minister may, on the Minister's own motion, review a decision made by the Minister or the Commission and may either confirm the decision or amend or rescind the decision if the Minister determines that there was an error with respect to any finding of fact or the interpretation of any law, or may do so on application if new evidence is presented to the Minister.

Exception

(2) Subsection (1) does not apply with respect to a decision made by an Assessment Board or Entitlement Board under the former Act.

[...]

en ce qui regarde l'application de la présente loi et la préparation d'une demande.

Nouvel examen

82. (1) Le ministre peut, de son propre chef, réexaminer sa décision ou une décision de la Commission et soit la confirmer, soit l'annuler ou la modifier, s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si de nouveaux éléments de preuve lui sont présentés.

Exception

(2) Le paragraphe (1) ne s'applique pas aux décisions rendues, en vertu de la loi antérieure, par un comité d'évaluation ou un comité d'examen.

[...]

[21] *Award Regulations*, SOR/96-6:

[...]

3. An applicant for an award shall provide the Minister with

[...]

3. Le demandeur de compensation doit fournir au ministre :

(a) any documentation necessary to substantiate the applicant's claim;	a) tout document nécessaire à l'appui de sa demande;
(b) information on the applicant's domestic status;	b) des renseignements sur sa situation de famille;
(c) any other relevant information; and	c) tout autre renseignement pertinent;
(d) an affidavit or statutory declaration attesting to the truth of the information provided.	d) un affidavit ou une déclaration solennelle attestant la véracité des renseignements fournis.
[...]	[...]

[22] *Veterans Review and Appeal Board Act*, 1995, c. 18:

[...]	[...]
<u>Construction</u> 3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of	<u>Principe général</u> 3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de
Canada to those who have served their country so well and to their dependants may be fulfilled.	ceux qui ont si bien servi leur pays et des personnes à leur charge.
[...]	[...]

Rules of evidence

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.

[...]

Règles régissant la preuve

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.

[...]

[23] *Veterans Health Care Regulations (VHCRs)*, SOR/90-594.:

[...]

22. (1) Veteran pensioners, civilian pensioners and special duty service pensioners are eligible to receive, in respect of a war-related pensioned condition, the cost to them of chronic care

[...]

22. (1) L'ancien combattant pensionné, le pensionné civil et le pensionné du service spécial sont admissibles, à l'égard d'un état indemnisé lié à la guerre, au paiement de ce qu'il leur en coûte pour recevoir les soins prolongés suivants :

(a) received in Canada in a community facility, other than in a contract bed; and

a) ceux fournis dans un établissement communautaire au Canada, s'ils n'occupent pas de lit réservé;

(b) received in a health care facility outside Canada that is of a standard equivalent to the care that would have been provided under paragraph (a), provided that the cost of such care does not exceed the usual cost of chronic care in the jurisdiction in which the care is received.

b) ceux fournis dans un établissement de santé à l'étranger et équivalents à ceux qu'ils auraient reçus dans un établissement visé à l'alinéa a), pourvu que leur coût n'excède pas le coût habituel des soins prolongés dans le territoire en cause.

[...]

[...]

1. *Can the affidavit of Janet Struss form part of the Applicant's Record?*

Applicants' Arguments

[24] The Applicants argue the evidence contained in Janet Struss's affidavit was excluded from full disclosure by the Respondents throughout the proceedings and that this evidence is relevant as it relates to the main issue of retroactivity and it pinpoints the Applicants' first contact requesting assistance from VAC, which is determinative in relation to the beginning of Mrs. Robertson's potential entitlement to benefits.

[25] The decisions of the Review Panel and the Appeal Board rely on a letter by the Applicants' daughter to Dr. Morris dated October 16, 2001, which was found to be insufficient evidence to trigger VAC's duty to assist and counsel the Applicants. However, the Applicants argue the fax received by VAC on November 9, 2001 is a detailed request supporting their daughter's letter which should have received a thorough response and not merely a letter of refusal.

[26] The Applicants submit that in spite of its late discovery and whether or not the Appeal Board has seen it, this evidence must be brought to the attention of this Court to rule on its admissibility.

Respondents' Arguments

[27] The Respondents note that as per Rule 306 of the *Federal Court Rules*, SOR/98-106, an applicant must file their supporting affidavit 30 days after the issuance of a Notice of Application and as per Rule 312, supplementary affidavits can only be filed with leave of the Court. Moreover, pursuant to Rule 84(2), a party who has cross-examined a deponent may not subsequently file an affidavit in that application except with the consent of all parties or with leave of the Court.

Analysis

[28] In an application for judicial review, the Court must determine whether the decision-maker, in this instance, the Appeal Board, committed a reviewable error. This is not an appeal and the Court is not entitled to replace the Appeal Board's findings with their own (*Figurado v. Canada (Solicitor General)*, 2005 FC 347, 138 A.C.W.S. (3d) 146).

[29] It is trite law that on judicial review, the Court can only consider the evidence which was before the board, commission or other tribunal whose decision is being reviewed (*Via Rail Canada Inc. v. Canada (Human Rights Commission)*, [1998] 1 F.C. 376, 135 F.T.R. 214; *Lemieche v. Canada (Minister of Citizenship and Immigration)*, (1993), 72 F.T.R. 49, 46 A.C.W.S.

(3d) 321). However, an exception exists where it is alleged that the federal board, commission or other tribunal breached a principle of procedural fairness (*Ontario Association of Architects v. Association of Architectural Technologists of Ontario*), 2002 FCA 218, [2003] 1 F.C. 331. In summary, in a judicial review, the Court cannot consider new or fresh evidence in determining whether the federal board's decision can stand on its merits, but the Court can consider such evidence in determining whether the board breached the principles of procedural fairness in arriving at that decision.

[30] In the case at bar, the three documents contained in Janet Struss's affidavit sworn October 2, 2009 (an Inter-PCS Referral Form sent to VAC in a fax dated November 9, 2001; a Request for Verification of Records by VAC dated January 4, 2002; and the hospital record of a surgical operation performed on Mrs. Robertson on April 21, 1945) are not contained in the certified tribunal record. As such, this information was not before the decision-maker and should not be considered by this Court in this application for judicial review.

[31] The Court also finds the Applicants suffered no undue prejudice and the Appeal Board did not breach principles of procedural fairness by not including these documents in the tribunal record as they do not change the outcome of the proceeding. The Court is of the view that there has been no failure by the Appeal Board to disclose relevant evidence in the case at bar. The Applicants have attempted to supplement their record by introducing a supplementary affidavit without leave to the Court. According to Rule 312 of the *Federal Court Rules*, a motion to file a supplementary affidavit

and evidence must be filed. The Court therefore rules the affidavit of Janet Struss cannot form part of the Applicants' Record.

2. *What is the applicable standard of review of decisions of the VRAB Appeal Board?*

[32] The parties agree the applicable standard of review to the discretionary decisions of the Appeal Board is reasonableness (*Atkins v. Canada (Attorney General)*, 2009 FC 939, [2009] F.C.J. No. 1159 (QL) at par. 19; *Bullock v. Canada (Attorney General)*, 2008 FC 1117, 336 F.T.R. 73 at par. 13).

[33] However, the issue of retroactivity is a question of statutory interpretation not within the VRAB's particular area of expertise and is subject to a correctness standard (*Atkins* at par. 20; *Canada (Attorney General) v. MacDonald*, 2003 FCA 31, 238 F.T.R. 172; *Dugré v. Canada (Attorney General)*, 2008 FC 682, 170 A.C.W.S. (3d) 643; *Lenzen v. Canada (Attorney General)*, 2008 FC 520, 327 F.T.R. 12).

3. *Was VAC required to respond to the Applicants' request for assistance by providing specific notice as to the benefits which were available to them?*

Applicants' Arguments

[34] The Applicants note that Mr. Robertson's personal benefits are not part of this application because he served overseas during World War II, which automatically qualified him to the Veterans Affairs Priority Access Bed (PAB) program. Mrs. Robertson also volunteered to serve overseas but she only served in Canada. Mrs. Robertson suffered illness and injuries during her years of service

and underwent major surgery in 1945, which qualifies her for various disability benefits which were awarded to her by VAC in 2003 after formal applications were filed.

[35] The Applicants submit Mrs. Robertson's qualification for disability benefits is evident from the information contained in her record at VAC, due to her surgery during service. The Applicants allege that when they were made aware of Mrs. Robertson's needs in 2001, VAC had a duty to assist and advise her in filing the required formal application for her disability benefits, which they neglected to do.

[36] On January 15, 2002, VAC refused Mrs. Robertson's eligibility to a PAB because she had not served overseas and/or she was not in receipt of a wartime disability pension. The Applicants note that VAC's decision does not indicate Mrs. Robertson appears to qualify for disability pension benefits and she did not fully understand she was required to submit an application for a disability. The Applicants further submit it is not suggested to contact an agent in order to complete an application, there is no mention that the filing date is critical and determinative of immediate benefits and there is no indication this decision must be responded to or appealed by the veteran in order to preserve her rights.

[37] The Applicants argue they have met the threshold of subsection 81(3) of the *Pension Act* and VAC's disregard for their statutory obligations under the *Pension Act* has caused them and particularly Mrs. Robertson, irrecoverable harm in terms of physical and psychological stress and suffering.

Respondents' Arguments

[38] Subsection 81(3) of the *Pension Act* clearly sets out that VAC is only required to provide counselling services or to assist applicants with their pension applications where such a request is made. The Respondents submit VAC must not take it upon themselves to counsel all individuals who may possibly be eligible for a pension. However, once a potential client requests assistance or counselling regarding a pension application, VAC is obligated to provide such assistance and/or counselling.

[39] The Respondents submit VAC makes all reasonable efforts to ensure information about its benefits, programs and services are accessible to potential clients, their survivors, family and caregivers. Information about VAC's programs and benefits are available through the media, district offices, pamphlets, and Service Canada, among others, and VAC provides specific information to individuals upon request.

[40] On January 15, 2002, VAC advised Mrs. Robertson that she could only receive long term care benefits if she was in receipt of a disability pension. If Mrs. Robertson believed she qualified for a disability pension, she only had to advise VAC in order to begin the application process, but she chose to wait until September 2002 to contact VAC to inquire about a disability pension. The Respondents submit VAC cannot be held responsible for Mrs. Robertson's failure to contact VAC sooner in regard to a disability pension.

Analysis

[41] Although VAC has an obligation to make arrangements for the care of veterans depending on their needs and circumstances, the Court notes not all veterans in all circumstances are to be given every benefit. The Court observed in *Krasnick Estate v. Canada (Veterans Affairs)*, 2007 FC 1322, 321 F.T.R. at par. 25 that “[t]here is nothing in the [*Pension Act*] or the [*Award Regulations*] or other Acts or Regulations that requires [VAC] to make specific benefits known to everyone or to certain persons or to be prescient and determine from signs, signals or inferences that some persons may be in need of benefits and if so, what benefits and when”. Hence, the Court finds that VAC was not required to provide specific notice pursuant to subsection 81(3) of the *Pension Act* to the Applicants that Mrs. Robertson may have been eligible for a disability pension.

[42] VAC provided general information to the public and appears willing to make specific information available to persons who identify themselves as clients, upon request. For example, in the case at bar, when the Applicants made a specific request for disability benefits for Mrs. Robertson’s hearing loss on September 20, 2002, VAC promptly acted upon that request and granted disability benefits approximately three months later on January 16, 2003.

[43] As noted by the Respondents, Mrs. Robertson waited until September 2002 to apply for a disability pension. VAC could not adduce from the October 16, 2001 letter from the Applicants’ daughter to Dr. Morris that Mrs. Robertson could have been eligible for a disability pension. A formal application was required to be filed by the Applicants with the assistance of a Pension

Officer, which was done on September 20, 2002. In this regard, the Court finds that VAC did not breach any duty imposed by the *Pension Act* or *Award Regulations*.

4. *Did the VRAB Appeal Board err in not awarding further retroactivity to the effective dates of Mrs. Robertson's disability pensions?*

Applicants' Arguments

[44] The Applicants argue VAC uses a narrow interpretation of the facts and definition relating to the concept of "first contact". VAC calculates Mrs. Robertson's disability benefits from the time the Applicants filed a formal application in September 2002 but the Applicants submit VAC received a written request and was made aware of the Applicants' needs on November 7, 2001 when they received a copy of their daughter's letter to Dr. Morris dated October 16, 2001.

[45] The Applicants argue a careful review of Mrs. Robertson's documents would have revealed that requesting a PAB and long term care implied requesting a disability pension. According to the Applicants, the Review Panel and the Appeal Board erred in their application of the *Pension Act* and the *Veterans Review and Appeal Board Act*.

Respondents' Arguments

[46] The Respondents note the legislative and regulatory schemes which enable VAC to provide programs and benefits do not permit long term care and disability pension applications to be considered interchangeably. Disability pensions are regulated by the *Pension Act* and associated Regulations, whereas long term care benefits are provided pursuant to the *VHCRs*. The Respondents also submit the Applicants did not properly substantiate their claim.

Analysis

[47] The Court notes that the power of the Appeal Board to alter the effective date of a pension is very circumscribed. Pursuant to subsection 39(1) of the *Pension Act*, there are two ways by which the retroactive effect of a pension can be established: a pension is payable on the later (not the earlier) of the day on which the application is made and a day three years prior to the day the pension is awarded (*Atkins* at par. 32). The practical anticipated effect of the provision is that any award should be made within three years of an application being filed (*Atkins* at par. 32; *Leclerc* at par. 18).

[48] Upon reading the evidence, this Court is not convinced the Appeal Board disregarded the operation of section 39 of the *Pension Act*. The legislative intent of subsection 39(1) of the *Pension Act* is to establish a time limit on the retroactive effect of awarding a pension (*Leclerc v. Canada (Attorney General)*, (1998) 150 F.T.R. 1, 80 A.C.W.S. (3d) 1254 at par. 19). As noted in *Leclerc* at par. 20: “The fact that the cause of the delay is not attributable to the applicant does not mean that subsection 39(1) may be disregarded, as it applies to any pension regardless of the circumstances in which it is awarded” (see also *Cadotte v. Canada (Department of Veterans Affairs)*, 2003 FC 1195, [2003] F.C.J. No. 513 (QL) at paras. 20-21).

[49] Furthermore, in interpreting this statutory provision, E.A. Driedger, in *The Composition of Legislation* (1976) at p. 107 states:

[...]if the statute is clear and unambiguous it will operate according to its terms whether or not vested rights are prejudicially affected.

[...]

[...]There is a presumption that a statute does not apply retrospectively so as to affect rights unless an intention to do so is clearly expressed or arises by necessary implication [...]

[50] In my opinion, the Appeal Board correctly interpreted the retroactivity of Mrs. Robertson's disability benefit application. The Review Panel and the Appeal Board could not have reasonably inferred the letter from the Applicants' daughter to Dr. Morris dated October 16, 2001 constituted an application for disability benefits. The letter does not meet the requirements established by the VAC Internal Policy, section 81 of the *Pension Act* and section 3 of the *Award Regulations*. For instance, the letter was not sent or addressed to the Minister; the information contained in the letter does not refer to new medical evidence; and the letter simply constitutes a request to a third party (Dr. Morris) for the completion of the two required medical reports.

[51] For these reasons, the Court finds the letter does not request specific assistance to file an application for disability benefits and therefore, does not constitute an "application" as per subsection 81(1) of the *Pension Act*.

[52] Hence, there is no error which warrants this Court's intervention and the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without costs.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1388-07

STYLE OF CAUSE: Robertson et al v. Her Majesty the Queen et al.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 23, 2010

REASONS FOR JUDGMENT: BOIVIN J.

DATED: March 1, 2010

APPEARANCES:

Claude-Alain Burdet FOR THE APPLICANTS

Talitha A. Nabbali FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nelson Street Law Offices FOR THE APPLICANTS
Ottawa, Ontario

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