Federal Court  Cour fédérale

Date: 20100930

Docket: T-2156-09

Citation: 2010 FC 980

Vancouver, British Columbia, September 30, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JOSEPH BEAUCHENE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Veterans Review and Appeal Board (the "Board") pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7 confirming the Applicant's entitlement to a one-fifth pension entitlement for hearing loss.

Factual Background

[2] The Applicant, Joseph Beauchene, served with the Canadian Armed Forces from February 1967 to June 1993. The Applicant was a physical education instructor for his entire career and was regularly in noisy environments as part of his job functions.

[3] At the time of enlistment and throughout his service, the Applicant received regular physical examinations, including audiograms to assess his hearing. The Applicant's discharge audiogram shows diminished hearing in March 1992. Following his discharge, he noticed ongoing hearing loss and underwent additional audiograms which demonstrated increasing hearing loss.

[4] The Applicant applied for a pension, pursuant to the *Pension Act*, R.S.C. 1985, c. P-6, for the hearing loss and associated tinnitus in February 1997. That application was denied on the grounds that the Applicant had not suffered his hearing loss disability until after discharge. He applied for a review of the decision and the claims for tinnitus and hearing loss were treated separately. For the tinnitus, the Applicant received a full pension and, after a review, his disability rate was increased from 6 to 11% on December 1, 2009.

[5] For the hearing loss claim, he was awarded a one-fifth pension entitlement with a disability rate of 5% on November 6, 2008. The Applicant requested a review of the decision, but it was upheld on March 17, 2009, as it was concluded that only a portion of the hearing loss was attributable to military service. Dissatisfied with the result, he appealed the decision with the Board. In a decision dated November 24, 2009, the Board confirmed the entitlement and maintained the one-fifth pension.

[6] The Applicant now seeks judicial review of the Board's decision regarding his pension entitlement for his hearing loss.

Impugned Decision

[7] In its decision dated November 24, 2009, the Board identifies the issue as whether or not the Applicant provided sufficient evidence to establish that his hearing loss warrants a higher pension entitlement than the previously awarded one-fifth. The Board goes on to note that the Hearing Loss Entitlement Eligibility Guidelines establish standards for the recognition of hearing loss as a "lesser degree of hearing" or as a "disabling hearing loss".

[8] With regard to the evidence, the Board finds that the audiograms on file show a lesser degree of hearing loss from January 1986 to March 1992 at the time of the Applicant's discharge. Further, the post-service audiogram of December 2007 shows a disabling hearing loss.

[9] The Board's analysis and reasons on the appropriateness of the pension entitlement are contained in the following paragraph:

> While the [Board] is not necessarily bound by the Departmental policy that has provided one-fifth pension entitlement to the [Applicant], it is not convinced that it should vary the entitlement award in this case. The [Board] finds the policy was appropriately applied based on the audiograms on file. Further, the [Board] finds there is no evidence to establish that the policy is in contravention of the *Pension Act*.

[10] The Board then goes on to address issues that are not relevant to this judicial review.

Questions at issue

[11] The Applicant raises the following issues:

a. Did the Board err in the consideration of the medical evidence?

b. Did the Board err in finding that the Policy is not in contravention of the *Pension Act*?

c. Did the Board err in applying the Policy?

Relevant Legislation

[12] All relevant legislation is attached as an appendix to these reasons.

Applicant's Submissions

[13] The Applicant submits that he provided further medical documentation on the issue of causation of his hearing loss to the Board – an updated audiogram and a medical report from Dr. Longridge. This evidence was not mentioned in the Board's reasons. The Applicant refers to sections 38 and 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the "VRAB Act") which create a unique statutory scheme that allows for the favourable consideration of evidence for the benefit of a pension applicant. The Applicant argues that, in light of these provisions, the Board had a duty to consider the new evidence. He also argues that he provided uncontradicted evidence showing a causal link between his hearing loss and his service and this should have guided the Board's decision instead of the Policy. He reasons that the Board failed to consider all of the relevant evidence and rendered a decision that is contrary to the VRAB Act.

[14] The Applicant further submits that the conflict between the *Pension Act* and the Policy, which was addressed by this Court in *Nelson v. Canada (Attorney General)*, 2006 FC 225, 289 F.T.R. 183, still exists despite the decision in that case. He submits that partial entitlement granted

to him and the application of the Policy ignores the rationale of that decision by distinguishing between a lesser degree of hearing and a disabling hearing loss.

[15] In the alternative, should the Court find that the Policy is not contrary to the *Pension Act*, the Applicant submits that the Board erred in concluding that the Policy was correctly applied. The Applicant refers to the Entitlement Eligibility Guidelines which state that "[t]he cause of the hearing loss cannot be determined from an audiogram alone. The history from the patient, the physical examination and relevant test results must be considered along with the audiogram findings". The Applicant contends that it was an error to rely solely on the audiograms and not look to the other evidence.

Respondent's Submissions

[16] Contrary to the Applicant's contention, the Respondent submits that the decision rendered by the Board is consistent with sections 3 and 39 of the VRAB Act. The Respondent argues that the Board accepted that the Applicant has a disability and the issue was whether or not a higher pension entitlement was warranted.

[17] The Respondent further submits that a tribunal is presumed to have considered all of the material before it, and is not obligated to refer to each and every document, particularly if the evidence does not contradict its findings (*Murphy v. Canada (Attorney General)*, 2007 FC 905, [2007] F.C.J. No. 1184, at paras. 13 and 14). In the Respondent's view, the additional evidence submitted by the Applicant confirmed rather than contradicted the Board's findings. The

Respondent contends that the updated September 2008 audiogram is consistent with the earlier audiogram which established a disabling hearing loss as of December 2007. As for the letter from Dr. Longridge (page 132 of the Applicant's Record), the Respondent argues that it is consistent with the Board's finding that the Applicant's current hearing loss condition is not entirely attributable to military-related noise exposure.

[18] The Respondent highlights that the Policy acknowledges that for some physical acts such as hearing, there will be a range of what is considered to be normal. Where it is established that an applicant's hearing falls outside the defined range, the extent of the loss is rated as either disabling hearing loss or lesser degree of hearing. The Respondent holds that the question of whether an applicant has a hearing loss disability is governed by the definition of "disability" in section 3(1) of the *Pension Act*. The Respondent advances that this is consistent with the decision in *Nelson*, and that the application of the definition necessarily requires a standard or measure of what constitutes normal hearing.

Analysis

Standard of review

[19] Since the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, there are two standards of review – reasonableness and correctness. In view of *Dunsmuir*, it is not necessary to conduct the standard of review analysis if jurisprudence has already determined the degree of deference to be accorded to a question (at paras. 62 and 63).

[20] The question as to whether the definition of "disability" applied pursuant to a departmental policy to be consistent with the *Pension Act* has been held to be a question of law reviewable on the correctness standard (see: *Nelson* at paras. 37 and 38).

[21] This Court has held that the interpretation of medical evidence and the assessment of an applicant's disability are determinations that fall within the Board's specialised jurisdiction and should be approached with deference (*Yates v. Canada (Attorney General)*, 2003 FCT 749, 237 F.T.R. 300). Such issues are questions of fact or mixed fact and law and subject to review on the standard of reasonableness (*Dunsmuir*, at para. 51).

[22] In applying the standard of reasonableness, the Court will only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at para. 47).

Did the Board err in the consideration of the medical evidence?

[23] The Applicant's pension entitlement in respect of his military service is pursuant to section 21(2) of the *Pension Act*. Section 35 provides that the amount of the pension for a disability shall be determined in accordance with the assessment of the extent of the disability, which shall be based on the instructions and a table of disabilities to be made by the Minister.

[24] The instructions and the table of disabilities specific to hearing loss are set out in the *Entitlement Eligibility Guidelines: Hearing Loss* and the *Table of Disabilities – Chapter 9: Hearing*

Loss and Ear Impairment, to which I will refer collectively as the Policy. The Policy establishes normal hearing as being where there is a decibel loss of 25 dB or less at all frequencies between 250 and 8000 hertz (page 2). A disabling hearing loss is "when there is a Decibel Sum Hearing Loss (DSHL) 100 dB or greater at frequencies of 500, 1000, 2000 and 3000 Hz in either ear, or 50 dB or more in both ears at 4000 Hz" (page 2). Whereas a lesser degree of hearing exists where the decibel loss is "greater than 25 dB at frequencies between 250 and 8000 hertz, and this loss is not sufficient to meet VAC's definition of disabling hearing loss" (page 2). Partial entitlement will be awarded where a disabling hearing loss is not entirely attributable to military service. The Policy provides that "[a] disabling hearing loss can be considered to be partially caused by service factors, when there is decibel loss greater than 25 dB evident on the discharge audiogram in at least one of the frequencies between 250 and 8000 Hz; and a disabling hearing loss is established after discharge" (page 2). The presence of a hearing loss and the type of hearing loss may be determined from an audiogram. The Policy further provides the cause of the hearing loss cannot be determined from an audiogram alone. The history from the patient, the physical examination and relevant test results must be considered along with the audiogram findings (page 2).

[25] In the case at bar, it is well accepted that the Applicant has a disability, the dispute arises from the assessment of the pension determined in accordance. The one-fifth entitlement stems from the fact that it has been determined that the Applicant did not have a disabling hearing loss at the time of discharge, as demonstrated by the 1992 audiogram, and the disabling hearing loss was only established in 2007 (Applicant’s Record at page 71).

[26] The Applicant submits that he provided new evidence to the Board which shows that his disabling hearing loss is directly linked to his military service and reasons that he is entitled to an increased pension. Each party has presented their own interpretation of this medical evidence, however, I would specify that it is not the role of this Court to interpret the evidence in relation to the claim, but rather to review whether or not the Board erred by not referring to it. Bearing in mind that the Board is presumed to have considered all of the material before it and is not obliged to refer to every document, particularly if the evidence does not contradict its findings (see: *Murphy* at paras. 13 and 14).

[27] With regard to the September 2008 audiogram not mentioned by the Board, I find that it is consistent with the earlier audiogram which established a disabling hearing loss as of December 2007, and the Board accepted that the Applicant's disabling hearing loss occurred after his discharge. It is not contrary to the Board's findings and the Board did not err by failing to mention it.

[28] As for the letter from Dr. Longridge, I note that this was a new piece of evidence and it was not provided to the previous levels of decision-makers, and there is no similar letter in the certified tribunal record. The letter contains the following statement:

> […] Hearing is at a mild to moderate sensorineural loss in the high tones. He has a history of noise exposure in the military, had never done anything significant in the way of noise exposure since, so the changes are the progressive effect of his existing sensorineural damage. The beginning of aging hearing loss is probably compounded by the already existing noise damage from noise. (Applicant's Record, page 132)

[29] As explained above, the Policy provides for a partial entitlement in cases where disabling hearing loss is not present at the time of discharge, but manifests itself later on. It also provides that the cause of hearing loss cannot be determined by audiogram alone, but should also include the patient's history and other information. Here we have medical evidence advancing the opinion that the Applicant's current state of hearing loss is a progression of the effects caused by earlier damage and that he has lived a relatively noise-free life since his discharge. In light of the Policy, this evidence should have been analysed by the Board in reaching its decision as to whether or not the evidence justified an increase in the Applicant's pension entitlement and a departure from the Policy. The Board erred by not considering this medical evidence and relying solely on the audiograms.

Did the Board err in finding that the Policy is not in contravention of the Pension Act?

[30] In *Nelson*, it was found that there was an inconsistency between the definition of "disability" in subsection 3(1) of the *Pension Act* and chapter 9 of the Table of Disabilities (see also *Nelson v. Canada (Attorney General)*, 2007 FCA 200, 365 N.R. 267 [*Nelson* (F.C.A.)]). At the time, chapter 9 of the Table of Disabilities required that:

> A disability is established:
>
> (i) When the Pure Tone Average (PTA)1 over the 500, 1000, 2000 and 3000 hertz frequencies is 25 decibels or more for either ear;
>
> or
>
> (ii) when the above criteria is not met, and there is a loss of 50 decibels or more at the 4000 hertz frequency in both ears.
>
> Once a disability is established, the type of hearing loss and its relationship to service must be determined.

> Generally, entitlement will be awarded for bilateral hearing loss unless there is compelling evidence of disability in one ear only that is attributable or directly connected to service. (Reproduced in *Nelson*, at para 33.)

[31] In that case, the Board found that an applicant who did have hearing loss, but did not meet the above definition, was not entitled to a pension as he did not have a disability in accordance with the definition. The application of that definition of disability instead of the definition under the *Pension Act* was found to be an error of law.

[32] The Policy has been revised since the decision in *Nelson* (Applicant's Record, pages 173 to 178), and now sets out a range for normal hearing and establishes ranges for disabling hearing loss and a lesser degree of hearing. The Applicant submits that the current Policy is still in contravention of the *Pension Act* and ignores the rationale in *Nelson*.

[33] Subsection 3(1) of the *Pension Act* defines disability as "the loss or lessening of the power to will and to do any normal mental or physical act". Once the disability is established, the extent of it must be assessed in order to determine the amount of the pension. That assessment of the extent of the disability must be based on the guidelines and a table of disabilities to be made by the Minister for the guidance of persons making those assessments (s. 35(2)).

[34] In my view, the application of the definition of disability under the *Pension Act* necessarily requires that a standard be set out as to what constitutes normal hearing. The definition states that there will be a disability if there is a loss or lessening "of the power to will and to do any <u>normal</u>

mental or physical act" [emphasis added]. In setting out such a standard, the Policy does not set out a different or contrary definition of disability. Rather, it defines a range for normal hearing which is necessary to show that there has been a loss or a lessening of it and thus, a disability which entitles an applicant to a pension. This is necessary in order to provide some frame of reference for adjudicators deciding claims. This is not contrary to the *Pension Act* or the decision in *Nelson*. Furthermore, the Policy clearly sets out that it is not binding. Accordingly, there is discretion for the adjudicator deciding the claim to depart from the standard under the Policy.

[35] As for the distinction between a lesser degree of hearing and hearing loss, the *Pension Act* provides that an assessment of the extent of the disability is to be conducted in order to decide the pension entitlement. These categories are part of the assessment process and do not replace the definition of disability under the *Pension Act*. There is no question that the Minister can establish guidelines as to the assessment of the extent of a disability (*Nelson*, at para. 38).

Did the Board err in applying the Policy?

[36] In view of my conclusion on the first question at issue and the consideration of the evidence, it is not necessary for me to answer this question which essentially deals with the same issue.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be granted. The matter is remitted for redetermination by a newly constituted Board. Costs are awarded to the Applicant by way of a lump sum in the amount of $1,500.

"Michel Beaudry"
Judge

APPENDIX

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

3. (1) In this Act,

"disability"
« invalidité »

"disability" means the loss or lessening of the power to will and to do any normal mental or physical act;

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

35. (1) Subject to section 21, the amount of pensions for disabilities shall, except as provided in subsection (3), be determined in accordance with the assessment of the extent of the disability resulting from injury or disease or the aggravation thereof, as the case may be, of the applicant or pensioner.

(…)

(2) The assessment of the extent of a disability shall be based on the instructions and a table of

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

3. (1) Les définitions qui suivent s'appliquent à la présente loi.

« invalidité »
"disability"

« invalidité » La perte ou l'amoindrissement de la faculté de vouloir et de faire normalement des actes d'ordre physique ou mental.

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

35. (1) Sous réserve de l'article 21, le montant des pensions pour invalidité est, sous réserve du paragraphe (3), calculé en fonction de l'estimation du degré d'invalidité résultant de la blessure ou de la maladie ou de leur aggravation, selon le cas, du demandeur ou du pensionné.

(…)

(2) Les estimations du degré d'invalidité sont basées sur les instructions du ministre et sur une table des invalidités qu'il établit pour aider

disabilities to be made by the Minister for the guidance of persons making those assessments.

quiconque les effectue.

Veterans Review and Appeal Board Act, S.C. 1995, c. 18

Loi sur le tribunal des anciens combatants (révision et appel), L.C. 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 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.

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 ceux qui ont si bien servi leur pays et des personnes à leur charge.

38. (1) The Board may obtain independent medical advice for the purposes of any proceeding under this Act and may require an applicant or appellant to undergo any medical examination that the Board may direct.

38. (1) Pour toute demande de révision ou tout appel interjeté devant lui, le Tribunal peut requérir l'avis d'un expert médical indépendant et soumettre le demandeur ou l'appelant à des examens médicaux spécifiques.

Notification of intention:

Avis d'intention :

(2) Before accepting as evidence any medical advice or report on an examination obtained pursuant to subsection (1), the Board shall notify the applicant or appellant of its intention to do so and give them an opportunity to present argument on the issue.

(2) Avant de recevoir en preuve l'avis ou les rapports d'examens obtenus en vertu du paragraphe (1), il informe le demandeur ou l'appelant, selon le cas, de son intention et lui accorde la possibilité de faire valoir ses arguments.

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

39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, 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) 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.

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Vancouver, British Columbia
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APPEARANCES:

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