Federal Court  Cour fédérale

Date: 20110429

Docket: T-554-10

Citation: 2011 FC 501

Ottawa, Ontario, April 29, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TRENT CHAYTOR

Applicant

and

ATTORNEY GENERAL OF CANADA

First Respondent

and

VETERANS REVIEW AND APPEAL BOARD

Second Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Trent Chaytor (the "Applicant") seeks judicial review of a decision made by the Veterans Review and Appeal Board (the "Board"), sitting as an Entitlement Appeal Panel, pursuant

to the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the "Act" or the "*Veterans Review and Appeal Board Act*"). In that decision, dated March 12, 2010, the Board dismissed the Applicant's appeal from the decision of the Entitlement Review Panel dated January 3, 2005.

Background

[2] The Applicant joined the Canadian Armed Forces in 1984 as a naval technician. Because he suffered from sea sickness, the Applicant became a Vehicle Technician at Canadian Forces Base Gagetown. He began on-the-job training in May 1992. He served until 1996 at CFB Gagetown in that capacity, that is as a Vehicle Technician.

[3] In July 1996, the Applicant was transferred to Canadian Forces Station St. John's, still working as a Vehicle Technician, primarily in Building #202. In February 1998, he collapsed with chest pain, which required emergency assistance and a four-day period of hospitalization. According to the Applicant, these seizures have continued intermittently since that time.

[4] The Applicant was placed on medical restrictions in July 1998. In the beginning, he was diagnosed with atypical seizures. A CAT scan in 2001 disclosed a bilateral calcification of the Applicant's basal ganglia.

[5] In February 2002, the Applicant's neurologist, Dr. Mark Stefanelli, expressed the opinion that this may have been related to carbon monoxide exposure. The Applicant was put on a course of anti-epileptic medications, but an EEG conducted in May 2002 showed no evidence that suggested

epileptic abnormalities. The Applicant sought an extension of his medical restrictions in July 2002 that had begun in July 1998.

[6] The Applicant also consulted Dr. Anne Williams, a cardiologist, to whom he was referred in April 2001, but was primarily treated by Dr. Stefanelli. Dr. Stefanelli provided a number of letters and reports to Veterans Affairs Canada ("VAC") and to the Board. The most recent correspondence in the Board's Record is a letter dated May 8, 2009 from Dr. Stefanelli. While he said that he could not make a definite conclusion, Dr. Stefanelli expressed the opinion that, having ruled out other possibilities, the Applicant's basal ganglia calcification was likely related to chronic exposure to carbon monoxide.

[7] In his Affidavit, the Applicant says that he was exposed to noxious gases, including carbon monoxide, throughout his career. The "Environmental" portion of his job description includes exposure to noxious odours and toxic gases. During his training at CFB Gagetown, five of the Applicant's routine duties exposed him to carbon monoxide.

[8] At CFS St. John's, the Applicant was primarily exposed to carbon monoxide in Building #202.

[9] In April 1993, three years before the Applicant arrived at CFS St. John's, a Preventative Medicine Inspection Report for CFS St. John's was prepared. In the section entitled "Noise and Emissions Survey Vehicle Workshop, Building #202", concerns were expressed regarding the workers' exposure to fumes. That report made recommendations to reduce the exposure to carbon

monoxide and nitrogen dioxide. The report noted that one worker had been complaining of symptoms of carbon monoxide over-exposure.

[10] In 1999, Lieutenant Steve Taylor reported that the air quality in Building #202 was very poor. He provided a statement to this effect in May 2003.

[11] In March 2002, Health Canada conducted a workplace inspection and found that Building #202 had acceptable levels of carbon monoxide when ventilation equipment was in use. The Applicant submits that the testing done on that day was not representative of the ordinary operating conditions in that building.

[12] On September 9, 2002, the Applicant applied for a disability pension pursuant to paragraph 21(2)(a) of the *Pension Act*, R.S.C. 1985, c. P-6. He made this application because he believed that the Career Medical Review Board would likely decide that he should be discharged. The Applicant was not released from service until May 2004. On November 27, 2003, VAC decided that the Applicant had provided insufficient evidence of exposure and denied his pension application. This decision was confirmed by a Departmental Review on March 3, 2004.

[13] The Applicant appealed this negative decision to an Entitlement Review Panel of the Board. On January 13, 2005, that Panel affirmed the Department's decision and held that there was no medical evidence to link the Applicant's seizures or basal ganglion calcification to carbon monoxide exposure.

[14] The Applicant appealed this decision to the Board. On March 12, 2010, the Board denied the Applicant's appeal. The majority held that the only scientific evidence of exposure of carbon monoxide was the Health Canada Workplace Investigation. The majority of the Panel was not convinced that chronic exposure to low levels of carbon monoxide could lead to the Applicant's claimed condition. The majority found that Dr. Stefanelli's conclusions amounted only to speculation and were not supported by the medical literature.

[15] The dissenting member of the Panel found that it was reasonable to infer that the Health Canada Workplace Investigation did not reflect typical operating conditions. Having regard to the totality of Dr. Stefanelli's reports, the minority member concluded that the Applicant's evidence showed that his symptoms were caused by the basal ganglion calcification which in turn was caused by his exposure to carbon monoxide in the course of his military service.

Issues

[16] This application for judicial review raises the following issues:

(i) What is the appropriate standard of review?

(ii) Did the Board fail to observe a principle of natural justice or procedural fairness relative to the oral finding of the Entitlement Review Panel that there was a factual link between the Applicant's service and exposure to noxious gas?

(iii) Did the Board err by restricting its assessment of the Applicant's exposure to noxious gases solely to his service as a Vehicle Technician at Building #202, CFS St. John's?

(iv) Did the Board make an erroneous finding of fact by failing to give sufficient weight to other evidence regarding exposure to carbon monoxide?

(v) Did the Board err by failing to give appropriate weight to the complete, uncontradicted medical opinion of Dr. Stefanelli?

Discussion and Disposition

[17] The first matter to be addressed is the appropriate standard of review. According to the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, decisions of statutory decision-makers are reviewable either on the standard of correctness or of reasonableness.

[18] According to the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 43, the standard of correctness will apply to questions of procedural fairness. The standard of reasonableness will apply to questions of fact and questions of mixed fact and law; see *Dunsmuir* at para. 53.

[19] Where the prior jurisprudence has already established the appropriate standard of review, that standard can be used; see *Dunsmuir* at para. 57. Subsequent to the release of the decision in *Dunsmuir*, the Federal Court has held that decisions of the Board, involving questions of fact and the weighing of evidence, should be reviewed on the standard of reasonableness; see *Goldsworthy v. Canada (Attorney General)*, 2008 FC 380 and *Dugré v. Canada (Attorney General)*, 2008 FC 682.

[20] The second issue, as stated above, raises an issue of procedural fairness and is reviewable on the standard of correctness. The remaining issues raise matters of fact and questions of mixed fact

and law, and are accordingly reviewable on the standard of reasonableness. The application of the standard of reasonableness must take into account the particular statutory context that applies here, that is pursuant to the *Pension Act* and the *Veterans Review and Appeal Board Act*.

[21] The Applicant's pension application is governed by both the *Pension Act* and the Act. Paragraph 21(2)(a) of the *Pension Act* is relevant and provides as follows:

(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,	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) 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;	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;

[22] Section 31 provides that decisions of the Board are final and binding.

[23] The purpose of the Act is to establish the Board as an independent body to review decisions by the Minister or his delegates regarding pension applications made pursuant to the *Pension Act.* The right to appeal to the Board is conferred by section 25 of the Act.

[24] The Board must determine if an applicant meets the criteria for receiving a pension or other benefits under the relevant legislation.

[25] The Applicant's application for pension benefits originated pursuant to subsection 21(2) of the *Pension Act*. Section 2 of the *Pension Act* sets out the guiding principle for the interpretation and application of that statute, as follows:

> 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.
>
> 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.

[26] A similar provision is found in section 3 of the Act, as follows:

> 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.

[27] According to the decision in *MacKay v. Canada (Attorney General)* (1997), 129 F.T.R. 286, section 3 and section 39 of the Act together guide the Board in its assessment of the evidence presented to it. Section 39 provides as follows:

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 celuici;
(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.

[28] Sections 3 and 39 of the Act have been interpreted to mean that an applicant must submit sufficient credible evidence to show a causal link between his or her injury or disease and his or her time of military service. In this regard, I refer to the decisions in *Hall v. Canada (Attorney General)* (1998), 152 F.T.R. 58, aff'd. (1999), 250 N.R. 93 (Fed. C.A.) and *Tonner v. Canada (Minister of Veterans Affairs)* (1995), 94 F.T.R. 146, aff'd. [1996] F.C.J. No. 825 (Fed. C.A.).

[29] The Board's conclusion is to be reviewed against the standard of reasonableness. Section 39 of the Act directs the Board to draw all favourable inferences from uncontradicted evidence submitted by a person seeking a pension.

[30] The Applicant argues that the Board failed to observe a principle of natural justice or procedural fairness concerning the Review Panel's oral finding that there was a factual link between the Applicant's service and exposure to noxious gas. The Applicant submits that the Review Panel accepted his evidence concerning the link between his service and exposure to carbon monoxide and that the Entitlement Review Panel breached his rights to procedural fairness by ignoring that earlier finding and re-assessing the issue.

[31] The record before the Board does not contain a transcript of the proceedings before the Review Panel. In the absence of a transcript, I am unable to conclude that the Review Panel made the finding of fact upon which the Applicant now relies. In its reasons, the Review Panel does not discuss the link between service and carbon monoxide exposure in great detail, concluding that:

> The Board finds, based on the above summary of the evidence, that there is no medical evidence to link the seizures or the basla [sic] ganglion calcification to carbon monoxide exposure.

[32] Even assuming that such an oral finding was made, the Applicant has not cited any authority to support his argument that a breach of procedural fairness occurred. Each stage of the process concerning the Applicant's pension application involved a decision *de novo*; see *Nolan v. Canada (Attorney General)* (2005), 279 F.T.R. 311 (F.C.). This suggests that each decision-maker has a duty to make independent findings. From this perspective, a re-assessment of the whole case,

including an assessment of issues not challenged by the Applicant, does not give rise to a breach of procedural fairness. In any event, the Applicant carries the burden to prove each element of this case, at each stage. If a subsequent decision-maker makes a finding that is less favourable than the previous decision-maker, this is not necessarily a breach of procedural fairness.

[33] I am satisfied that no breach of procedural fairness occurred, as alleged by the Applicant.

[34] Did the Board err by restricting its assessment of the Applicant's exposure to noxious gases solely to his service as a Vehicle Technician at Building #202, CFS St. John's?

[35] The Applicant argues that the Board restricted its assessment of his exposure to noxious gases solely to one location, that is CFS St. John's. He argues that the Board ignored his prior work at CFB Gagetown and in other buildings at CFS St. John's. He submits that in doing so, the Board made conclusions contrary to section 39 of the the Act.

[36] In response, the Respondent submits that the Applicant failed to present evidence of acute carbon monoxide exposure in the course of his military service and that only acute exposure to carbon monoxide could cause his alleged symptoms. The Board focused on the only independent medical evidence provided, that is the Health Canada study. While it was open to the Applicant to bring evidence of acute carbon monoxide exposure occurring in other buildings, the Respondent submits that it was reasonable for the Board to make findings based on the only scientific evidence available.

[37] In my opinion, the Respondent's arguments with respect to this issue are premature. The Applicant has never argued that his condition is based on acute exposure. At this stage of the analysis, concerning the link between service and exposure, it would have been unreasonable for the Board to focus only on acute exposure since this would have required a pre-determination that only acute exposure could lead to the condition of basal ganglia calcification.

[38] In their decision, the majority of the Board said the following:

> The Appellant is claiming to have been exposed to carbon monoxide while in the course of working on vehicles in the garage (Building #202) in St. John's, that said exposure has led to his basal ganglion calcification, and that he suffers a disability therefrom.

[39] In discussing "likely exposure", the majority began a discussion of the Health Canada Workplace Investigation. The Board does not mention the Applicant's prior service at CFB Gagetown. In my opinion, the Applicant presented evidence that could have supported a reasonable inference that he was exposed to carbon monoxide, at unspecified levels, during the four years that he spent at CFB Gagetown.

[40] Even if the Board preferred scientific data in the case of Building #202, it was unreasonable for the Panel to confine its consideration only to work that the Applicant carried out in that facility.

[41] In my opinion, the majority unreasonably assumed that the Applicant was only exposed to noxious gases while working in Building #202.

[42] The third issue is related to the next issue, that is whether the Board made an erroneous finding of fact by failing to give sufficient weight to other evidence regarding the Applicant's exposure to carbon monoxide.

[43] Although the decision-maker is not required to address every piece of evidence, evidence running contrary to that decision-maker's conclusion must be considered. In *Cepeda-Gutierrez et al. v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (F.C.), Justice Evans held as follows at para. 14 :

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Minister of Employment and Immigration*, (1993), 63 F.T.R. 312 (T.D.).

[44] The Board majority indicated that the Health Canada study reflected the likely exposure to which the Applicant was subject, due to the lack of credible evidence to the contrary. In my opinion, the Board erred by failing to mention two pieces of evidence that directly contradicted the Health Canada Workplace Investigation, that is the letter from Lieutenant Taylor and the 1993 Noise and Emissions Survey. It appears that the majority of the Board ignored this evidence.

[45] Further, having failed to make clear findings as to the reliability of this evidence, the majority of the Board erred by failing to draw reasonable inferences in favour of the Applicant, pursuant to sections 3 and 39 of the Act. The evidence that was overlooked by the majority of the Board would reasonably support the inference that, notwithstanding Health Canada's conclusions

about exposure to carbon monoxide over the course of one day, levels of noxious gases were sometimes higher and occasionally problematic.

[46] In my opinion, the Board erred in failing to address the evidence that was contrary to Health Canada's conclusions.

[47] Finally, the Applicant argues that the majority of the Board erred by failing to give appropriate weight to the uncontradicted medical opinion of Dr. Stefanelli. Given my conclusions on issues two and three, it is not necessary to address this argument. Either solely or cumulatively, the errors of the Board discussed above are dispositive of this application for judicial review.

[48] In the result, I am satisfied that the majority of the Board erred in its assessment of the evidence presented by the Applicant, specifically by restricting its assessment of his exposure to noxious gases only to his service as a Vehicle Technician at Building #202, CFS St. John's and by ignoring other evidence regarding the Applicant's exposure to carbon monoxide. The majority's failure to properly deal with the evidence with respect to these two issues could have affected its assessment of the medical evidence and ultimately, the determination of the appeal.

[49] In the result, the application for judicial review is allowed and the matter is remitted to a differently constituted Board for re-determination. The Applicant shall have his taxed costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, the decision of March 12, 2010 is set aside, the matter is remitted to a differently constituted panel of the Board, the Applicant to have his taxed costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-554-10
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