

Federal Court



Cour fédérale

Date: 20110415

Docket: T-861-10

Citation: 2011 FC 449

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 15, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

STÉPHANE DESCHÊNES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision dated January 5, 2010, by the Veterans Review and Appeal Board (Board) rejecting the application for reconsideration of the appeal panel's decision to refuse the applicant's entitlement to a pension in accordance with subsection 21(2) of the *Pension Act*, R.S.C., 1985, c. P-6, on the basis of a hemorrhoids condition.

[2] For the following reasons, the application will be allowed.

Facts

[3] Mr. Deschênes (applicant) has worked in the Regular Force since 1988.

[4] On November 18, 2005, he submitted his application with respect to his hemorrhoids. He contends that they were caused by the nature of his service as an infantryman and sniper. To carry out his duties, he had to assume certain positions that consequently increased intra-abdominal pressure and thus contributed to the development of hemorrhoids.

[5] His application was rejected by a delegate of the Minister, in review, by the Board's appeal panel, and in reconsideration.

[6] The issue below was whether the applicant's military duties had played a determinative role in the development of his hemorrhoids.

Impugned decision

[7] The Board reviewed the appeal panel's decision dated May 27, 2009, and found that no error in law and in fact had been demonstrated and that, consequently, the application for reconsideration was unjustified.

[8] The Board was of the view that the appeal panel had not erred by obtaining additional information after the hearing. In fact, the appeal panel had specifically used certain passages from

medical texts, namely, the documents *Merck Manuel Home Edition* (Tribunal Record, volume 1, page 209) and *Australian Statements of Principles* (Tribunal Record, volume 1, page 212) on the web site to explain the reasons it believed that the report by the applicant's medical specialist, Dr. Pierre Hallé, did not constitute credible evidence for the granting of an award.

[9] Despite the fact that the applicant raised several grounds for judicial review, that is, an error in the interpretation of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, and an error in that the appeal panel had exceeded its authority, the Court believes that one alone is sufficient for disposing of this case. This is a breach of procedural fairness or a breach of the principles of natural justice.

[10] In similar cases, the standard of review has been correctness (*Marshall Johnston v. Canada (Attorney General)*, 2010 FC 348).

[11] In the case at bar, the applicant filed a medical report from his gastroenterologist, Dr. Hallé, which stated the following: [TRANSLATION] "The review of the detailed exercises that he reported to us since 1993 confirms numerous exercises in the squatting position for several hours, increasing intra-abdominal pressure and contributing to prolapsed hemorrhoids. The presence of internal hemorrhoids was confirmed by a short colonoscopy done at the CHUL in January 2006 by Doctor Valéry Lemelin. . . .".

[12] The specialist's report concludes with the following: [TRANSLATION] "The training requirements for Stéphane Deschênes in carrying out his military duties played an integral role in the development of internal hemorrhoids and related symptoms."

[13] The respondent argues that the appeal panel was completely justified in consulting external sources, meaning the *Merck Manuel Home Edition* and the *Australian Statements of Principles*, in order to contradict and set aside the medical report by the applicant's specialist. This justification is based on two arguments: the appeal panel's jurisdiction to consult sources other than those in the record, and the fact that other contemporaneous evidence in the record suggests that hemorrhoids may be caused by other factors, including constipation.

[14] The Court cannot support this reasoning. The respondent is entirely correct when he argues that the appeal panel may consult sources other than those in the record. However, with respect, it cannot use this evidence to contradict a medical report by a specialist as it did in this case, without giving the applicant the opportunity to make additional submissions or, if he so desired, to supplement the medical evidence he had already submitted.

[15] The evidence here clearly demonstrates that the above-mentioned external sources consulted by the appeal panel had not been provided to the applicant before the decisions of May 27, 2009, and January 5, 2010. Reference was made to them previously, but to then use them to state that Dr. Hallé's report is not credible seems unreasonable to me.

[16] According to the Court, the appeal panel should have at least clearly stated and discussed with the applicant the external sources on which it wanted to rely before setting aside the report by the gastroenterologist, Dr. Hallé, who found that the applicant's hemorrhoids were [TRANSLATION] "very likely related to the exercises he had to perform in all of his periods of training, especially as a sniper".

[17] Moreover, Dr. Hallé had considered the applicant's history in his expert's report (Stella Aucoin's affidavit, volume 1, page 97). To issue his opinion, the specialist had relied not only on what the applicant said, but also on his file and the clinical examination done by Dr. Lemelin.

[18] The Court is not claiming that Dr. Hallé's report cannot be contradicted, but that, to do so, more was required than merely referring to an external source and finding that the most obvious cause for the applicant's condition was not the one determined by Dr. Hallé. The respondent could have, if so desired, obtained expertise to the contrary pursuant to section 38 of the *Veterans Review and Appeal Board Act*.

[19] The intervention of the Court is warranted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed. The decision dated January 5, 2010, is set aside. The matter is referred back to a differently constituted panel of the Veterans Review and Appeal Board for redetermination. The respondent will pay costs in the form of a lump sum of \$1,500 to the applicant.

“Michel Beaudry”

Judge

Certified true translation
Janine Anderson, Translator

ANNEX

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

14. The Board and each member have, with respect to the carrying out of the Board's duties and functions under this Act, all the powers of a commissioner appointed under Part I of *the Inquiries Act*.

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.

Notification of 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.

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.

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.

14. Le Tribunal et chacun de ses membres ont, pour l'exercice des fonctions que leur confie la présente loi, les pouvoirs d'un commissaire nommé au titre de la partie I de la Loi sur les enquêtes.

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'appellant à des examens médicaux spécifiques.

Avis d'intention

(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'appellant, selon le cas, de son intention et lui accorde la possibilité de faire valoir ses arguments.

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.

Inquiries Act (R.S.C., 1985, c. I-11)

4. The commissioners have the power of summoning before them any witnesses, and of requiring them to

- (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and
- (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

4. Les commissaires ont le pouvoir d'assigner devant eux des témoins et de leur enjoindre de :

- a) déposer oralement ou par écrit sous la foi du serment, ou d'une affirmation solennelle si ceux-ci en ont le droit en matière civile;
- b) produire les documents et autres pièces qu'ils jugent nécessaires en vue de procéder d'une manière approfondie à l'enquête dont ils sont chargés.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-861-10

STYLE OF CAUSE: Stéphane Deschênes
v. Attorney General of Canada

PLACE OF HEARING: Fredericton

DATE OF HEARING: April 11, 2011

REASONS FOR JUDGMENT: BEAUDRY J.

DATED: April 15, 2011

APPEARANCES:

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Nicole Arsenault

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