Federal Court  Cour fédérale

Date: 20120124

Docket: T-589-11

Citation: 2012 FC 93

Ottawa, Ontario, January 24, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

RICHARD CARNEGIE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Richard Carnegie, is seeking judicial review of a decision of the Veterans Review and Appeal Board (the Board) dated February 10, 2011. The Board found that he was not entitled to a pension because his condition, alopecia areata leading to alopecia universalis, was not attributable to or incurred during service in a Special Duty Area (Cyprus) under subsection 21(1) of the *Pension Act*, RSC 1985, c P-6.

[2] For the following reasons, this application is allowed.

I. Background

[3] The Applicant is a 58 year old veteran of the Canadian Armed Forces. He served with the Canadian Airborne Regiment from November 16, 1971 until retiring with the rank of Corporal on April 3, 2000.

[4] The Applicant was deployed to Nicosia, Cyprus (a Special Duty Area) from July to December 11, 1974 as part of a relief back up force. He served during the Turkish invasion in what he claims were difficult hygienic conditions. In patrolling the "Greenline" separating both sides, he was subjected to indirect fire from time to time. Servicemen deployed with the Applicant also described being exposed to either "orange smoke" or a "strange smoke substance." Following this deployment, the Applicant was based at Canadian Forces Base (CFB) Edmonton.

[5] Prior to joining the Armed Forces, the Applicant was in good health. In April 1976 after returning from Cyprus, however, he was diagnosed with alopecia areata that later developed into alopecia universalis. This condition causes complete hair loss on the scalp and other areas of the body. The dermatologists that treated the Applicant believed the problem was "likely of autoimmune origin" and there was no well-documented treatment to change its course.

[6] On April 25, 1988, the Applicant first applied for a pension claiming that the condition was attributable to poor hygienic conditions he experienced during his military service in the Special

Duty Area of Cyprus. The Canada Pension Commission (the Commission) refused his application. Apart from the Applicant's statement, there was no other medical evidence to confirm that his condition started during his service in Cyprus. Moreover, the cause of his condition was unknown and likely to be autoimmune.

[7] Despite the presentation of additional evidence, the Commission's decision was affirmed by an Entitlement Review Panel of the Board on March 29, 2000. The Applicant had not been diagnosed with the condition until after he returned from Cyprus and its cause was unknown. There was no objective medical evidence to show that the condition was the result of the Applicant's military service.

[8] On July 13, 2000, an Entitlement Appeal Panel of the Board was also unable to conclude that the Applicant's medical condition began during his military service. Despite the obligation to resolve doubts in favour of the Applicant, the medical evidence on file indicated the cause of his condition was unknown.

[9] On December 31, 2010, the Applicant requested a Reconsideration of an Entitlement Appeal and submitted new evidence in support of his position. Nevertheless, the Board's decision in reconsideration confirmed the findings of the Entitlement Appeal Panel. This Court is now tasked with reviewing that decision.

II. Decision Under Review

[10] The Board considered the new evidence submitted by the Applicant. This consisted of four statements from former members of the 1974 Airborne Regiment Contingent in Cyprus who served with the Applicant and a new medical extract from *The Merck Manual*, Eighteenth Edition.

[11] This evidence was assessed against the criteria established in *MacKay v Canada (Attorney General)*, [1997] FCJ no 495 as to whether it was in the interests of justice to reopen the case based on the new evidence (due diligence); credibility; relevance; and the effect of the evidence on the case. The Board found that the evidence met the first three criteria, but would not change the result of the case.

[12] While there was no issue with the four witness statements, they did not provide proof that the claimed condition had its onset while in Cyprus. *The Merck Manual*, Eighteenth Edition, indicated that emotional distress was one of the many causes which could cause the claimed condition; however, there was no evidence in the file, nor any medical evidence whatsoever to show that the Applicant did, in fact, suffer emotional distress which caused the claimed condition. Emotional distress had not been mentioned until a more recent period.

[13] There was also no evidence to corroborate that the claimed condition had its onset during service in Special Duty Area Cyprus between July, 1 1974 and December 1, 1974. Complaints of symptoms related to the claimed condition were subsequent to the Applicant's return from Cyprus not prior to or during his deployment. The earliest record of treatment in the file referred to

March 1976. The evidence seemed to point to an onset of the condition in 1975 and was insufficient to support the contention that this had occurred during the five-month deployment.

[14] The Board summarized its position as follows:

> In conclusion, the Board takes no issue with the four statements of the Applicant's colleagues nor any issue with *The Merck Manual*, Eighteenth Edition, extract. However, the totality of the evidence is insufficient to establish a causal linkage between the claimed condition and service factors pursuant to subsection 21(1) of the *Pension Act*. The evidence also does not support that the claimed condition had its onset or that it was incurred as a result of service in a Special Duty Area (Cyprus). The medical evidence on file relates it to an autoimmune disease and there are absolutely no references to emotional distress as one of the causes. For these reasons, the Entitlement Appeal decision dated 13 July 2000 is confirmed.

III. Relevant Provisions

[15] The Applicant's pension entitlement must be determined based on subsection 21(1)(a) of the *Pension Act*, that provides:

21. (1) In respect of service rendered during World War I, service rendered during World War II other than in the non-permanent active militia or the reserve army, service in the Korean War, service as a member of the special force, and special duty service,	**21.** (1) Pour le service accompli pendant la Première Guerre mondiale ou la Seconde Guerre mondiale, sauf dans la milice active non permanente ou dans l'armée de réserve, le service accompli pendant la guerre de Corée, le service accompli à titre de membre du contingent spécial et le service spécial :
(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that was attributable	a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I

to or was incurred during 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;	pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — survenue au cours du service militaire ou attribuable à celui-ci;

[16] Section 2 of the *Pension Act* ensures that this provision is given a liberal interpretation to reflect the obligation of Canadians to compensate those disabled during military service. It dictates:

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.

[17] An analogous provision reflecting these principles is contained in section 3 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 (*VRAB Act*) that states:

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	**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

people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

[18] In assessing pension entitlement, the Board must also follow distinct rules of evidence contained in the *VRAB Act* under section 39:

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 celui-ci;
(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

IV. Issue

[19] This application raises the following issue:

(a) Did the Board err in determining that the Applicant was not entitled to a pension under subsection 21(1)(a)?

V. Standard of Review

[20] This Court confirmed following the decision of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 that the appropriate standard to be applied to decisions of the Board is reasonableness as the assessment of pension entitlement raises questions of mixed fact and law (see *Bullock v Canada (Attorney General)*, 2008 FC 1117, [2008] FCJ no 1529 at paras 11-13; *Boisvert v Canada (Attorney General)*, 2009 FC 735, [2009] FCJ no 1377 at paras 33-36; *Zeilke v Canada (Attorney General)*, 2009 FC 1183, [2009] FCJ no 1481 at paras 38-40).

[21] I cannot accept the Applicant's suggestion that the rejection of medical evidence under section 39 of the *VRAB Act* amounts to a jurisdictional error requiring the correctness standard based on the determination in *Rivard v Canada (Attorney General)*, 2001 FCT 704, [2001] FCJ no 1072 at paras 42-44. This position is not supported by subsequent jurisprudence.

[22] *Wannamaker v Canada (Attorney General)*, 2007 FCA 126, [2007] FCJ no 466 at para 13 clarified that the "[t]he proper application of section 39 results in a decision on a question of mixed fact and law" requiring the reasonableness standard. In a more recent case, this Court reiterated that

"the interpretation of medical evidence and the assessment of an applicant's disability are determinations that fall within the Board's specialized jurisdiction and should be approached with deference" (*Beauchene v Canada (Attorney General)*, 2010 FC 980, [2010] FCJ no 1222 at para 21).

[23] Applying the reasonableness standard, this Court must determine whether the Board's decision accords with the principles of "justification, transparency and intelligibility within the decision-making process." Unless the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law", intervention is unwarranted (*Dunsmuir*, above at para 47).

VI. Analysis

[24] As a preliminary matter, I must address submissions related to the standard of proof required at the Board in light of sections 3 (the obligation of liberal interpretation) and 39 (the distinct rules of evidence in the Applicant's favour) of the *VRAB Act*.

[25] While the Applicant relies on *John Doe v Canada (Attorney General)*, 2004 FC 451, [2004] FCJ no 555 at para 36 in his written submissions to suggest that a standard of proof lower than the balance of probabilities could be applied, this is no longer the prevailing approach. In *Wannamaker*, above at paras 5-6, the Federal Court of Appeal stated that while section 39 ensured evidence is "considered in the best light possible" it does not relieve the applicant of the burden of

"proving on a balance of probabilities the facts required to establish entitlement to a pension." Moreover, the Board is not required to automatically accept all evidence presented by the applicant.

[26] With this in mind, I will consider the reasonableness of the Board's decision regarding the Applicant's pension entitlement based on both components of the legislation. This includes the conclusion that the Applicant's condition was not (i) incurred during his military service; or (ii) attributable to his military service in Special Duty Area Cyprus.

(i) Incurred During Military Service

[27] The Applicant disputes the Board's conclusion that his condition was not incurred during military service on the basis that there was insufficient evidence to corroborate his claims. He insists the Board failed to apply the presumption in subsection 39(a) to make this inference based on his own statements that he first noticed bald spots during his deployment and the letters of four servicemen attesting to significant hair loss immediately following the return to Cyprus. Although the Board found the servicemen's evidence credible, it also failed to reach a favourable conclusion in accordance with subsection 39(b) that this uncontradicted evidence must be accepted.

[28] The Applicant further contends that the Board failed to resolve any doubts and weigh the evidence regarding the timing of onset in the Applicant's favour despite the progression of the alopecia from 1974 to 1979. Various medical reports dated the onset of the condition to sometime shortly after the Applicant's return from Cyprus and arrival at CFB Edmonton. Subsection 21(1)

does not imply as strict a timeline as to preclude a difference of a couple of weeks from being weighed in the Applicant's favour.

[29] The Respondent maintains that the Applicant failed to establish his condition was incurred during military service on a balance of probabilities (as emphasized in *Wannamaker*, above at paras 5-6; *Elliot v Canada (Attorney General)*, 2003 FCA 298, [2003] FCJ no 1060 at para 46). The Board reasonably concluded that the letters of servicemen and medical evidence point to the onset of hair loss shortly after the Applicant's return in 1975 and did not provide proof of onset while in Cyprus. It is still required to weigh the evidence and determine whether a reasonable inference can be drawn in the Applicant's favour. Despite the Applicant's belief that the condition began during his deployment, the Board weighed contradictory evidence and concluded that this was not the case.

[30] While the Applicant is not relieved of the burden of establishing his case on a balance of probabilities, I find the Board's decision is unreasonable in so far as it claimed there is insufficient evidence to support the Applicant's contention that his condition had its onset while in Cyprus. The Board concluded that the evidence pointed "to an onset of the claimed condition in 1975" but this appears to be at odds with the timeline it recognized in the medical reports suggesting a previous history of symptoms in the period from 1974 to 1976. The significance of this evidence to the timeline in question and its proximity to the Applicant's military service in Cyprus was not adequately considered by the Board.

(ii) Attributable to Military Service

[31] The Applicant also asserts the Board erred in finding that his alopecia was not attributable to his military service in Cyprus based on the evidence. His enlistment record disclosed no pre-existing health problems. There were concerns raised regarding difficult hygienic conditions, his being subjected to indirect fire and exposure to some form of smoke substance. The medical evidence relied on by the Board dates from 1975 to 1979 when little was known about the causes of alopecia. Recent medical advances, however, as evidenced in *The Merck Manual*, Eighteenth Edition, cite "emotional stress" as a cause. According to the Applicant, the Board should have resolved any doubts in his favour based on subsection 39(c).

[32] The Respondent contends that the cause of the Applicant's condition is unknown. The Board could not reach the conclusion that events in his service likely triggered the condition. Although *The Merck Manual*, Eighteenth Edition, recognizes environmental triggers such as emotional stress as possible causes of alopecia areata, the Board noted that the Applicant never submitted any evidence to confirm that he experienced such triggers leading to the onset of his condition. The Applicant's personal belief is insufficient to establish on a balance of probabilities that his condition is attributable to his military service.

[33] Given my finding above that it was unreasonable for the Board to conclude that the Applicant's condition was not incurred during military service based on the evidence, however, it is unnecessary for me to address the arguments presented regarding the other component of the

legislation governing pension entitlement and assess whether the Board erred in determining that there was no causal connection to the Applicant's military service.

VII. Conclusion

[34] In light of the evidence, it was unreasonable for the Board to determine that the Applicant's condition was not incurred during his military service in the Special Duty Area of Cyprus under subsection 21(1)(a) governing pension entitlement under the *Pension Act*.

[35] For this reason alone, the application for judicial review is allowed and the decision of the Board in Reconsideration of an Entitlement Appeal is set aside. The matter is remitted back to the Board for a re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the decision of the Board in Reconsideration of an Entitlement Appeal is set aside. The matter is remitted back to the Board for a re-determination.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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