Federal Court  Cour fédérale

Date: 20120627

Docket: T-1397-11

Citation: 2012 FC 820

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 27, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SYLVIE LAPALME

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application to review the legality of a decision dated July 7, 2011, by the Veterans Review and Appeal Board [Board], denying an application for reconsideration submitted by the applicant under section 32 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [VRABA].

[2] Let us begin by pointing out that, under subsection 21(2) of the *Pension Act*, RSC 1985, c P-6 [PA], where a member of the Canadian Forces [the Forces] suffers disability resulting from an

injury or disease or an aggravation thereof that arose out of or was directly connected with military service, pensions are, on application, awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule 1.

[3] Subsection 34(3) of the PA permits the Minister of Veterans Affairs [Minister] to award a pension to a member of the Forces in respect of a dependent child. Section 3 of the PA defines the word "child" as including, *inter alia*, the child of a common-law partner of a member of the Forces. However, under section 43 of the PA, certain conditions must be satisfied:

Additional pension for disability shall not be paid to a member of the forces in respect of a spouse or a dependent child unless the person in respect of whom additional pension is payable lives with the pensioner or maintains, or is maintained by, the pensioner to an extent that, in the opinion of the Minister, is at least equal to the amount of the additional pension.	Il ne sera versé une pension supplémentaire d'invalidité à un membre des forces à l'égard d'un conjoint ou d'un enfant à charge que si cette personne demeure avec le membre ou, selon le cas, subvient à ses besoins ou est à sa charge dans une mesure que le ministre estime au moins égale au montant de la pension supplémentaire.

[Emphasis added]

[4] In this case, the applicant, who served in the Forces for 22 years, already receives a disability pension as well as an additional pension in respect of her common-law partner and a first dependent child. The applicant has been living with her common-law partner since August 1, 2002. Her partner has two sons, born in 1987 and 1993, Samuel and Marc-André. Samuel lives with the applicant and her partner while Marc-André has been living with his father since 2001, the date his parents separated, and spends every other weekend and his summer vacation with the applicant and her common-law partner.

[5] In July 2007, the applicant applied for an additional pension in respect of Marc-André. If her application is accepted, the applicant can expect to receive an additional monthly pension for a second dependent child. According to the evidence in the record, Marc-André currently lives with the applicant for approximately 114 days out of a possible total of 365 days per year.

[6] Projected over a 12-month period, we are talking about an additional pension of $495.12 in 2006, $506.40 in 2007, and $516.60 in 2008, based on the rates set out in Schedule 1 of the PA (Table A, category: 17, scale: 18-22, percentage: 20%). However, no additional pension is payable in respect of Marc-André after the last day of the month in which he reaches 18 unless the applicant proves that one of the two situations described in paragraphs 34(1)(*a*) and 34(1)(*b*) of the PA exists. Marc-André turned 18 in 2009.

[7] In October 2007, the Department of Veterans Affairs [Department] denied the application for an additional pension in respect of Marc-André on the ground that he resided primarily with his father and did not live with the applicant full-time. In June 2008, this initial denial was upheld on a ministerial review on the ground, this time, that Marc-André [TRANSLATION] "would need to live with [the applicant] full-time or [the applicant would have to] submit proof of [her] legal obligation to provide support on his behalf". Dissatisfied with the result, the applicant turned to the Board, which has exclusive jurisdiction on review and appeal to hear and determine the Department's refusal to award a pension or an additional pension to a member of the Forces. Both the review panel and the appeal panel of the Board decided that the departmental refusal was justified in this case.

[8] In support of her review application, the applicant filed with the Board a declaration of Marc-Andre's father, which confirmed that there is no legal custody agreement regarding Marc-André and that it is mutually agreed that all his living expenses are paid 50-50 by his mother (the applicant's common-law partner) and him. In another declaration, the applicant's common-law partner confirmed that the applicant herself has recognized Marc-André as a dependant child in her dealings with her former employer, National Defence, and continues to pay the premiums for Marc-André's medical and dental insurance from her pension cheque. In addition, the applicant's common-law partner pointed out that, since she herself has been unemployed since 2004, the applicant assists Marc-André financially.

[9] As permitted under the VRABA, the applicant also testified before the review panel. The applicant explained that Marc-André is like her child because he is her common-law partner's child. She stated that the orthodontic costs for Marc-André were estimated at $5,400 over a three-year period and that the work began in August 2007. Accordingly, the applicant has to pay the difference between the total cost and the maximum amount eligible under the insurance plan, i.e. $2,900 since the insurance company has agreed to reimburse $2,500. This amount of $2,900 is spread over three years. She did not ask Marc-André's father, through her common-law partner, to help with the orthodontic costs, as he does for other things. The applicant points out that, for school expenses, everything is divided 50-50 with the father, and since her common-law partner has not been working for four years, it is the applicant who covers half the expenses. The applicant estimates that the annual amount she has to cover for the child is $2,000 to $3,000, and the father reimburses half of that. Accordingly, she herself covers $1,000 to $1,500 per year in addition to the orthodontic care.

[10] In its negative decision of March 12, 2009, the review panel considered Marc André to be a "child" under the definition in subsection 3(1) of the PA. However, it determined [TRANSLATION] "that [subsection 34(3) of the PA] was not met" and that the requirements of section 43 of the PA were not met every year.

> [TRANSLATION]
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> With respect to section 43, the Board believes that the requirements of this section are met, based on the applicant's declaration. However, with the evidence in the record regarding the invoices submitted (RD-L1), the Board has concerns about the regularity of the applicant's payments, taking into consideration that the child has been in this situation since the year after the common-law relationship began in 2001, therefore, since 2002. Moreover, the Board was not provided with documents showing that the requirements of section 43 were met every year.

[11] The review panel also noted in its decision that under the Department's policies Marc-André does not live with the applicant more than 50% of the time. On the other hand, the review panel noted that the conditions for a parent-child relationship were not completely satisfied with the exception (it appears) of the requirement in subsection (e) of item 4 of the Department's policies. This latter requirement states: [TRANSLATION] "the pension recipient maintains the child to an extent that is at least equal to the amount of the additional pension."

[12] The applicant appealed. On September 22 , 2010, the eligibility appeal panel confirmed the review panel's decision. Thus, although the Act must be interpreted "liberally," as required under section 2 of the PA, the eligibility appeal panel did not accept the arguments made by counsel for the applicant concerning subsections 34(3), 21(2) and section 43 and found them to be [TRANSLATION] "exaggerated to the point that the Board did not consider them valid".

[13] On the one hand, subsection 34(3) of the PA [TRANSLATION] "is an integral part of any question involving the awarding and payment of a disability pension to a member of the Forces in respect of a dependent child." On the other hand, the Department's policies apply, and the only issue is whether there was sufficient evidence to establish that the applicant maintains Marc-André on an [TRANSLATION] "ongoing, uninterrupted basis":

> [TRANSLATION]
>
> The Board understands from the evidence already available in the record that, from time to time, the appellant may have maintained [Marc-André] for short periods, but never on an ongoing and sufficient basis to clearly establish that she has guardianship of [the child], who lives with his father most of the time. Unfortunately, the Board cannot find any evidence or additional arguments to change this understanding of the appellant's situation because the appeal panel was not provided with this at the hearing. Based on the evidence, her situation is the same as it was at the hearing before the review panel.
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> [Emphasis added]

[14] Although the decision of September 22, 2010, is final and binding, subsection 32(1) of the VRABA gives the Board the power to reconsider if the appeal panel finds that an error was made with respect to findings of fact or the interpretation of the law, or if it is presented with new evidence. In this case, the applicant's application for reconsideration was denied on July 7, 2011, hence this application for judicial review.

[15] The applicant asserts three grounds for judicial intervention: (1) the requirement that the applicant must provide the necessities of life for her common-law partner's child "on an ongoing, uninterrupted basis" goes directly against section 43 of the PA; (2) contrary to section 39 of the VRABA, the Board disregarded the applicant's uncontradicted testimony and did not draw the most

favourable inferences from the evidence in the record; and (3) the Board did not provide adequate reasons for its decision.

[16] We note that the question of whether the Board complied with the rules of procedural fairness is subject to the correctness standard. Otherwise, assessing the legality of the reconsideration appeal panel's refusal to review a decision of an appeal panel of the Board is subject to the reasonableness standard (*Cossette v Canada (Attorney General)*, 2011 FC 416 at paragraph 12; *Bullock v Canada (Attorney General)*, 2008 FC 1117 at paragraphs 12-13). The same is true for the appeal panel's interpretation and application of its home statute and of the provisions of the PA regarding pensions and additional pensions (*Ladouceur v Canada (Attorney General)*, 2011 FCA 247 at paragraphs 8-9).

[17] The Supreme Court of Canada's decision in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] confirmed that, in determining whether a decision is reasonable, the inquiry for a reviewing court is about "justification, transparency and intelligibility within the decision-making process." In this case, the Board's duty to provide reasons for its decisions arises not only from the principles laid down in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], but also from section 7 of the *Veterans Review and Appeal Board Regulations* (SOR/96-67).

[18] As the Supreme Court recently pointed out in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland and Labrador Nurses' Union*], it is an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws

in the reasons fall under the category of a breach of the duty of procedural fairness. Thus, any challenge to the reasoning/result of the decision should be made within the reasonableness analysis.

[19] On this point, the reasons for a decision must contain enough information to enable a party to decide whether it is appropriate to have the decision judicially reviewed, on the one hand, and to enable the supervising court to assess whether the tribunal met minimum standards of legality, on the other hand. That being said, the decision is justified and intelligible when a basis for it has been given and the basis is understandable, rational and logical (*Ralph v Canada (Attorney General)*, 2010 FCA 256 at paragraphs 17-19 [*Ralph*]). The reasons need not refer to all the arguments or details that the reviewing judge would have liked. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met (*Newfoundland and Labrador Nurses' Union*, at paragraph 16).

[20] I will begin with the applicant's allegations about the intelligibility and adequacy of the reasons provided in support of the reconsideration appeal panel's refusal to review the decision of March 12, 2009. On the one hand, the applicant says, the reasons in the decision of September 22, 2011, do not explain why the application for reconsideration was denied in this case. On the other hand, according to the applicant, neither of the two decisions of the (eligibility and reconsideration) appeal panel really addresses the question of law regarding the legality of the departmental requirements in light of the statutory requirements in sections 21 and 47 of the PA. For his part, the respondent submits that the reconsideration panel justified its refusal to intervene and that the reasons provided earlier by the eligibility appeal panel are also adequate because they meet the

fundamental objectives of the duty to provide reasons, in accordance with the Federal Court of Appeal's pronouncements in the *Ralph* decision.

[21] In this case, the applicant's allegations with respect to the adequacy and intelligibility of the reasons for the impugned decision are not justified. I hasten to say that the reconsideration appeal panel's decision must be read in light of the previous decisions of the eligibility appeal panel and the review panel (*Caswell v Canada (Attorney General)*, 2004 FC 1364 at paragraphs 18-19).

[22] First, the reconsideration appeal panel recognized in the impugned decision that it would exercise the discretion vested in it by section 32 of the VRABA if it were satisfied that the appeal panel's decision on eligibility was [TRANSLATION] "influenced" by a [TRANSLATION] "significant or material" error of law or fact or if there was new proper evidence that met the jurisprudential tests (*MacKay v Attorney General of Canada*, [1997] FCJ 495 at paragraph 26). In this regard, I note that in her application for reconsideration dated January 14, 2011, the applicant did not rely on new evidence in applying for a review of the eligibility appeal panel's decision but on errors of fact and law.

[23] In the impugned decision, the reconsideration appeal panel stated that [TRANSLATION] "an error of fact" may be an error made by the eligibility appeal panel regarding a [TRANSLATION] "relevant fact" while there may be various errors of law, *inter alia*, failing to apply the proper statutory provisions, a breach of natural justice or non-compliance with section 39 of the VRABA.

[24] The applicant invokes non-compliance with this provision as a ground for setting aside the impugned decision. We will come back to that later. We point out here that section 39 of the VRABA establishes specific rules about the way the Board is required to assess the evidence submitted to it by the applicant or appellant :

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.

[25] In the impugned decision, the reconsideration appeal panel also said that it had conducted a [TRANSLATION] "full review" of the applicant's documentation and arguments but did not mention them specifically. Let us say that they were essentially the same arguments that were made to the review panel and the eligibility panel.

[26] I note that in her application for reconsideration, the applicant submitted that the eligibility appeal panel should only have asked whether Marc-André was living with the applicant or whether she was maintaining him in an amount that was at least equal to the amount of the additional pension set out in Schedule 1 to the PA. In addition, the requirement that the applicant must have [TRANSLATION] "guardianship" of Marc-André is contrary to the very wording of section 43 of the PA, whereas the right to receive an additional pension is [TRANSLATION] "automatic" under subsection 21(2) of the PA where the child lives with the pensioner. Last, the applicant criticizes the eligibility appeal panel for not explaining why the arguments submitted by counsel for the applicant concerning subsections 34(3), 21(2), and section 43 of the PA, were [TRANSLATION] "exaggerated" and not [TRANSLATION] "valid".

[27] It is clear from reading the impugned decision that the reconsideration appeal panel did not agree with any of the review arguments made by the applicant. Essentially, it confirmed the eligibility appeal panel's earlier interpretation. Be that as it may, the reconsideration appeal panel explicitly referred to section 43 of the PA and endorsed the interpretation made by the Department in its policies. In summary, according to the reconsideration appeal panel, the payment of an additional pension in respect of a dependent child will be authorized if the child lives with the pensioner or is maintained by the pensioner to an extent that is at least equal to the amount of the additional pension set out in Schedule 1 to the PA.

[28] Thus, in the impugned decision, the reconsideration appeal panel for all practical purposes endorsed the Department's interpretation that sufficient maintenance will be taken to have provided if the pensioner, spouse or dependent child, as the case may be,

> (a) makes monthly payments of a sum of money equivalent to the additional pension for the spouse or dependent child, as applicable, or
>
> (b) pays for the cost of, or provides, one of those items which goes to make up the necessities of life (e.g. shelter, food, clothing, and medical services including medical insurance and prescriptions) provided the cost equates to the amount of additional pension for the spouse or dependent child, as applicable. The payment for such items as rent, mortgage, property taxes, the cost of clothing, food, medical insurance or prescriptions qualifies as the provision of maintenance or support for such purposes of Section 43.

[29] In this case, noting that the applicant had not presented any new evidence and in light of all the information in the record, the reconsideration appeal panel concluded that the eligibility appeal panel had not erred in fact or in law in its decision dated September 22, 2010, which confirmed the reconsideration review panel's decision dated March 12, 2009. It is clear that the reasons provided by the reconsideration appeal panel, read together with the Board's previous decisions, enabled the applicant to bring an application for judicial review and that the reasons are intelligible and enable the supervising court to understand the decision-makers' reasoning. Given the deference that must be shown to the Board's decisions, it is not appropriate to intervene in this case—since the reconsideration appeal panel's conclusion is an acceptable outcome in respect of the facts and law.

[30] On the one hand, the reconsideration appeal panel's finding that the eligibility appeal panel did not err in fact or in law can only be understood if one refers to the reasons that the Board already provided. Thus, in finding that the only question to answer was whether the applicant provided sufficient evidence to establish that she maintained her common-law partner's child "on an ongoing, uninterrupted basis", did the Board impose a requirement that is not in section 43 of the PA, as the applicant argues?

[31] Section 43 of the PA expressly provides that, to be entitled to an additional pension, the applicant must establish that the dependent child "lives" with him or her or "maintains, or is maintained by" the applicant to an extent that is at least equal to the amount of the additional pension set out in Schedule 1 to the PA. The French version of this provision uses, respectively, the terms "*demeure*" and "*subvient à ses besoins ou est à sa charge*" which, at the very least, may reasonably assume that there is a certain continuity and regularity in time. I therefore cannot agree with the applicant's submission that the appeal panel added a criterion foreign to the conditions set out in the Act by framing the question it had to deal with in this way.

[32] On the other hand, I agree with the applicant that the Department's policies are unenforceable, non-binding guidelines. That said, they refer to relevant criteria that enable the decision-maker to determine whether a child is a dependent child of the person applying for an additional pension.

[33] With respect to Marc-André, because of the payment of monthly amounts on his behalf, the appeal panel agreed that he was a "dependent child", which does not appear unreasonable to me in this case. The appeal panel also agreed that the applicant's voluntary payment of part of the costs for shelter, food, clothing and medical services (including medical insurance and prescriptions) that Marc-André's father and mother must assume for his maintenance may give rise to an additional pension if the amounts paid annually are at least equal to the amount of the additional pension payable under Schedule 1 of the PA. This also appears reasonable to me.

[34] Based on the evidence in the record, Marc-André lives less than a third of the year with the applicant, who is not his mother or his legal guardian. Unfortunately, the applicant did not present any tangible evidence to establish the amount of Marc-André's living expenses when he lives with her on weekends and during the two summer vacation months. Even though the Board must accept any uncontradicted evidence that it considers credible, the fact of the matter is that it is quite difficult for the Board to presume that the costs incurred by the applicant on an annual basis are at least equal to the additional pension payable under Schedule 1 of the PA, in the absence of invoices to corroborate the applicant's declaration. In passing, I would like to take this opportunity to note that, based on the documentary evidence in the Board's record, other than the year 2007, the amount of costs incurred by the applicant is less than the amount of the additional pension payable for a second child at the rates set out in Schedule 1 of the PA since the invoices produced total $154.41 in 2006, $1657.74 in 2007 and $512.50 in 2008. There are no invoices for the year 2009.

[35] I am therefore of the view that, with regard to all the evidence in the record, it was reasonable for the Board to find that the applicant was not responsible for paying for the child's basic needs, other than occasionally. I find that it was not unreasonable for the reconsideration appeal panel to refuse to set aside the eligibility appeal panel's decision on the basis of a material error of fact or law.

[36] For all these reasons, I find that the impugned decision is reasonable in all respects and that it should therefore be upheld by this Court.

[37] The respondent is seeking costs. This is a case where even if a party is successful the judge may decide to not award costs in the exercise of his discretion. In practice, the amount of fees and disbursements the respondent is claiming, i.e. that may be assessed in accordance with Column III of the table to Tariff B, is more or less equivalent to the amount of the additional pension that would have been paid to the applicant from 2006 to 2009 (in part). The applicant is a pensioner with limited financial means. Furthermore, her current counsel are representing her *pro bono*. In addition, I cannot say that this application for judicial review is frivolous or vexatious. Last, the applicant raised public interest issues, and this judgment will contribute to the evolution of the jurisprudence and the law applicable in this field.

[38] Thus, the application for judicial review will be dismissed without costs.

JUDGMENT

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

”Luc Martineau”

Judge

Certified true translation
Mary Jo Egan,LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1397-11
STYLE OF CAUSE:	SYLVIE LAPALME v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 19, 2012
REASONS FOR JUDGMENT:	MARTINEAU J.
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