Federal Court Cour fédérale

**Date: 20120924**

**Docket: T-2087-11**

**Citation: 2012 FC 1112**

**BETWEEN:**

**TIMOTHY GILBERT**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT**

**MACTAVISH J.**

[1] This is the second time that Timothy Gilbert has come before this Court seeking judicial review of a decision of the Assessment Appeal Panel (Appeal Panel) of the Veterans Review and Appeal Board (VRAB).

[2] A previous decision made by the Appeal Panel with respect to Mr. Gilbert's claim for disability benefits was set aside by Justice Barnes. He remitted the case to the same members of the Appeal Panel for re-determination in accordance with his reasons: *Gilbert v. Attorney General of Canada*, 2010 FC 1300, 2010 CarswellNat 4904 [*Gilbert* #1]. This led to a second Appeal Panel decision which is the subject of this application for judicial review.

[3] For the reasons that follow, I have concluded that the second decision was unreasonable, as the Appeal Panel misunderstood its role and failed to re-determine the matter in accordance with the directions provided by Justice Barnes. Consequently, the application for judicial review will be granted, and the Appeal Panel’s second decision will be set aside.

**Background**

[4] Mr. Gilbert has been a member of the Royal Canadian Mounted Police since 1978, and currently holds an administrative position as a Staff Relations Representative. On July 30, 2007, Mr. Gilbert was injured in a fall which took place while he was on duty.

[5] Mr. Gilbert’s injuries included fractures to the right distal tibia and fibula and a fracture to the right calcaneus. The uncontradicted medical evidence is that these were serious fractures which were treated by surgical reduction, splinting and a lengthy course of physiotherapy. Unfortunately, the damage to Mr. Gilbert's ankle led to the onset of degenerative post-traumatic arthritis which, by 2009, was predicted to lead to a surgical fusion of the ankle joint.

[6] Mr. Gilbert applied to the Department of Veterans Affairs for a disability pension. He was granted a disability pension on September 23, 2008. His disability was assessed at 5% for the fracture of his right distal tibia and fibula, “Pilon Type B” [the “first injury”], and at 2% for the fracture of his right calcaneus [the “second injury”]. His “Quality of Life” [or “QOL”] rating was fixed at Level 1.

[7] Mr. Gilbert then sought to have this assessment reviewed by a VRAB Review Panel, arguing that he was entitled to a higher assessment rating for his First Injury and that he should have received a Level 2 QOL Rating. On May 8, 2009, the Review Panel upheld the original assessment.

[8] Mr. Gilbert appealed this decision to the Appeal Panel. In support of his appeal, Mr. Gilbert provided the Panel with a January 7, 2010 medical report prepared by Dr. Bryce Henderson, the orthopedic surgeon responsible for Mr. Gilbert's care.

[9] In his report, Dr. Henderson referred to the tables used to assess Mr. Gilbert's injury, noting that Mr. Gilbert had been given a #4 rating reflecting an "essentially normal range of motion but with pain now present on a daily basis with or without movement". According to Dr. Henderson's report, "the more accurate interpretation would be ankylosis in a position of function which would be a rating of 18" for Mr. Gilbert's first injury. Dr. Henderson noted that "an ankylosis in an unfavorable position or a flailed joint category needs to be considered which would be a rating of 26" for the first injury. Dr. Henderson also noted that Mr. Gilbert's ankle would require ankle fusion or replacement at some point in the future.

[10] It should be noted that Dr. Henderson's opinion does not just document a progressive deterioration in Mr. Gilbert's condition: it also provides what Dr. Henderson says is a more accurate interpretation of his original injury.

[11] On May 25, 2010, the Appeal Panel rendered its first decision [the "First Appeal Panel decision"] which affirmed the Review Panel's assessment of Mr. Gilbert's disability. Although the

Panel made reference to Dr. Henderson's January, 2010 opinion, it nevertheless concluded that "the Appellant's ankle is not fused and there is no clinical evidence of ankylosis".

**Justice Barnes' Decision**

[12] Justice Barnes granted Mr. Gilbert's application for judicial review from the first Appeal Panel decision and sent the matter back to the same Panel for re-determination in accordance with his reasons.

[13] Justice Barnes identified the issue before him as being "whether the Board could reasonably reject Dr. Henderson's diagnosis of ankylosis on the basis of the reasons it gave": at para. 9.

[14] Relying on *Rivard v. Canada*, [2001] F.C.J. No. 1072, 209 F.T.R. 43, Justice Barnes noted at paragraphs 10 and 11 of his decision that the Appeal Panel has no inherent jurisdiction to independently resolve medical questions. It can only rely on the medical evidence placed before it, or on independent medical evidence provided to it under section 38 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18. Justice Barnes further noted that the Appeal Panel is obligated to accept uncontradicted medical evidence in the absence of adverse credibility findings: see *MacKay v. Canada (AG),* [1997] F.C.J. No. 495, 129 FTR 286 at para. 26.

[15] Justice Barnes found that the Appeal Panel had failed to provide any explanation for its rejection of Dr. Henderson's diagnosis of ankylosis: at para. 11. He further noted that the Panel had no authority to substitute its opinion for that of Dr. Henderson. It was open to the Panel to reject Dr. Henderson's evidence if there was a rational evidentiary basis for it to do so. However, its failure to

provide intelligible reasons for rejecting the 2010 opinion apparently in favour of older and presumably less reliable evidence is a reviewable error (citing *King v. Canada (AG)*, [2000] F.C.J. No. 196, 182 F.T.R. 226 at paras. 20 to 22): at para. 14.

[16] Most importantly for our purposes, Justice Barnes concluded his analysis by stating:

> [15] Indeed, if the Board was alert to its obligation under s 39 of the *Veterans Review and Appeal Board Act*, it would have either resolved any uncertainty about the basis of Dr. Henderson's diagnosis of ankylosis in favour of Mr. Gilbert or sought out medical clarification. If it had a sound basis for its conclusion that Mr. Gilbert was not suffering from ankylosis, it had a duty to explain it so that Mr. Gilbert could understand.
>
> [16] I am satisfied that this is a matter which must be redetermined on the merits and in accordance with these reasons. There is no reason why the matter cannot be reassessed by the same members of the Board. [my emphasis]

[17] These directions were confirmed in Justice Barnes's Order

**The Appeal Panel's Second Decision**

[18] In accordance with Justice Barnes' decision, a new hearing was held on October 11, 2011 before the same Panel members and a decision was released on November 30, 2011 [the "Second Appeal Panel decision"].

[19] The Appeal Panel identified the issue for determination as being "the proper level of assessment, given the complete examination of all the evidence before it and the application of said evidence to the Table of Disabilities": at page 9. [my emphasis]

[20] It then stated that before it could address this issue, it had to decide "whether to take jurisdiction" over Dr. Henderson's January 2010 opinion. After discussing the opinion, the Appeal Panel stated that "[t]he role of the Appeal Panel is to evaluate whether the Departmental and Review Panel decisions are reasonable and correct. The Appeal Panel's role is not to replace the Department and assume the role of a first level Adjudicator, nor is it to assume the role of the Review Panel": at page 10.

[21] After reviewing the scheme of the Act, the Appeal Panel stated that it would not "seize jurisdiction" over Dr. Henderson's January 2010 opinion regarding the "worsening of [Mr. Gilbert's] symptoms that post-date the Department[..]'s decision", which was based upon a May, 2008 opinion from a Dr. Murray. The Appeal Panel then went on to state that "this Panel will confine itself solely to the evidence speaking to [Mr. Gilbert's] circumstances within a year of that assessment", noting that Mr. Gilbert could initiate a new application with the Department based upon Dr. Henderson's January 2010 opinion.

[22] It should be noted, however, that forcing Mr. Gilbert to file a fresh application would not provide him with a complete remedy as he could well suffer a financial loss as a result of the limits on the extent to which an assessment can be made retroactive.

[23] The Appeal Panel then reviewed the evidence that was before the Department and the Review Panel, the Appeal Panel upheld their assessments.

**Standard of Review**

[24] I agree with the parties that the standard of review to be applied to the Appeal Panel's interpretation of medical evidence and assessment of an applicant's disability is reasonableness: see *Gilbert* #1 and *Beauchene v. Canada (AG)*, 2010 FC 980, 375 F.T.R. 13, at para 21. In this case, the reasonableness of the Second Appeal Panel decision also has to be determined in light of the directions given to the Appeal Board by Justice Barnes.

[25] While it may be arguable that the correctness standard should apply to the Appeal Panel's understanding of its role and the extent to which it complied with Justice Barnes' directions, at the end of the day, nothing turns on this as the Appeal Panel's decision on these issues was clearly unreasonable.

**Analysis**

[26] The Appeal Panel held that "it is not the role of this Appeal Panel to assess a worsening in the Appellant's condition since the Departmental decision." Rather, the Panel understood its role as being to "focus on the actual extent of the disability at the time the [Department] made the assessment". [my emphasis]

[27] In other words, the Appeal Panel appears to have viewed its role as being essentially akin to that of this Court sitting in judicial review of a decision of an inferior Tribunal. This is evident from

its statement that "[t]he role of the Appeal Panel is to evaluate whether the Department and Review Panel decisions are reasonable and correct". This led to its understanding that it could only consider the evidence that was before either the Department or the Review Panel.

[28] However, the *Veterans Review and Appeal Board Act* specifically contemplates that Appeal Panels may receive new evidence: see, for example, sections 32(1), 38, 39(a) and 111. It was, therefore, unreasonable for the Appeal Panel to refuse to "to take jurisdiction" over Dr. Henderson's January 2010 opinion.

[29] Moreover, and in any event, Justice Barnes clearly directed the Appeal Panel to consider Dr. Henderson's January 2010 opinion. In paragraph 15 of *Gilbert* #1, Justice Barnes stated "[i]ndeed, if the Board was alert to its obligation under s 39 of the Veterans Review and Appeal Board Act, it would have either resolved any uncertainty about the basis of Dr. Henderson's diagnosis of ankylosis in favour of Mr. Gilbert or sought out medical clarification." [my emphasis]

[30] Justice Barnes then goes on to state in the very next paragraph that "I am satisfied that this is a matter which must be redetermined on the merits and in accordance with these reasons."

[31] It is thus quite clear that in re-determining Mr. Gilbert's claim, Justice Barnes expected the Appeal Panel to do one of two things. It was to either resolve any uncertainty about the basis of Dr. Henderson's diagnosis of ankylosis in favour of Mr. Gilbert or, alternatively, seek medical clarification as contemplated by subsection 38(1) of the Act. The Appeal Panel did neither of those things, thereby rendering its decision unreasonable.

**Conclusion**

[32] For these reasons, the application for judicial review is allowed. Mr. Gilbert asks me to substitute my own decision for that of the Appeal Panel. Given its disregard of Justice Barnes' order, Mr. Gilbert is concerned that the Appeal Panel will not comply with any further order of this Court.

[33] While I understand Mr. Gilbert's concern, I am not persuaded that this is an appropriate remedy. Parliament has entrusted the assessment of disability pension claims to a specialized regime which possesses an expertise not shared by this Court.

[34] In my view, the better course is to remit this matter to a differently constituted Appeal Panel with the specific direction that it is to reassess Mr. Gilbert's claim taking into account Dr. Henderson's January 2010 opinion. Echoing Justice Barnes' previous direction, the new Appeal Panel is directed do one of two things. It must either resolve any uncertainty about the basis of Dr. Henderson's diagnosis of ankylosis in favour of Mr. Gilbert <u>or</u> seek medical clarification in accordance subsection 38(1) of the Act.

[35] Although costs were not sought in either Mr. Gilbert's Notice of Application or in his memorandum of fact and law, he made submissions regarding his claim for solicitor and client costs at the hearing of his application for judicial review, and again in post-hearing correspondence. The respondent has made brief post-hearing submissions on the issue of costs, but has asked for the opportunity to make more fulsome submissions on the issue.

[36] In the circumstances, the respondent shall have 10 days from the date of this decision in which to provide written submissions on the issue of costs, following which Mr. Gilbert will have a further five days in which to respond, following which an Judgment will issue.

"Anne Mactavish"
Judge

Ottawa, Ontario
September 24, 2012

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2087-11 |
| **STYLE OF CAUSE:** | TIMOTHY GILBERT v.<br>THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Calgary, Alberta |
| **DATE OF HEARING:** | September 5, 2012 |
| **REASONS FOR JUDGMENT:** | MACTAVISH J. |
| **DATED:** | September 24, 2012 |

**APPEARANCES:**

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|---|---|
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| Angela Fritz | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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