

Federal Court



Cour fédérale

**Date: 20130409**

**Docket: T-926-12**

**Citation: 2013 FC 354**

**Ottawa, Ontario, April 9, 2013**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**KIMBERLY NEWMAN**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Overview**

[1] Ms Kimberly Newman served in the Canadian Forces for 25 years, rising through the ranks to become a Captain in the Air Force. She took on numerous difficult challenges and performed admirably. Throughout much of her military career, she silently endured the stresses of her job while seeking out help from time to time from military health care providers for the mental health challenges she faced.

[2] After her retirement in 2009, Ms Newman applied for disability benefits under s 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [CFMVRCA] (see Annex for provisions cited), having been diagnosed as experiencing chronic dysthymia (depression). She was initially turned down by Veterans Affairs Canada but, ultimately, an appeal panel of the Veterans Review and Appeal Board was satisfied that Ms Newman was entitled to a one-fifth disability pension.

[3] Ms Newman asked the appeal panel to reconsider its conclusion, suggesting that it had made both an error of fact and an error of law. She also attempted to tender new evidence before the panel. The appeal panel rejected her request, finding that its earlier conclusion was not erroneous and rejecting the putative new evidence.

[4] Ms Newman now asks the Court to quash the appeal panel's decision on her request for reconsideration. She argues that the appeal panel erred by finding that her mental health issues prior to enrolment in the military had played a major role in her subsequent depression. She also maintains that the appeal panel failed to apply the proper legal principles to her claim – namely, that she should be presumed not to have had a pre-enrolment condition (citing s 51 of the *Canadian Forces and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50 [the Regulations]).

[5] In my view, the appeal panel made no reviewable errors of fact or law. It reasonably concluded that Ms Newman's pre-enrolment experiences showed that her mental health issues began before she became a member of the Canadian Forces and that they were aggravated to some

extent while she was in the military. In addition, the appeal panel applied the applicable legal principles properly. Ms Newman does not challenge the appeal panel's treatment of the alleged new evidence, so I need not address that aspect of its decision.

[6] Accordingly, the issues that arise on this judicial review are:

1. Did the appeal panel make an unreasonable error of fact about Ms Newman's pre-enrolment experiences?
2. Did the appeal panel apply the wrong legal principles?

## II. The Appeal Panel's Decision

[7] Ms Newman asked the appeal panel to reconsider its decision primarily on two grounds.

[8] First, she disputed the appeal panel's finding that she experienced pre-enrolment depression. The panel noted that there was evidence of episodes of depression prior to her enrolment in the military.

[9] Second, she suggested that the appeal panel had erred in law by finding that her condition existed prior to her enrolment without regard to s 51 of the Regulations. That provision creates a presumption that a person was in the medical condition noted in his or her enrolment medical examination unless there is evidence showing that a disability was diagnosed within three months of

enrolment, or medical evidence establishes beyond a reasonable doubt that the disability existed before enrolment.

[10] The appeal panel responded to Ms Newman's request by noting that it had made no error of fact given that she had acknowledged having episodes of depression prior to her enrolment. Further, the appeal panel agreed that Ms Newman was presumed fit upon her enrolment. However, it found that pre-enrolment factors contributed to the symptoms that manifested themselves later during her military service. Accordingly, it concluded that Ms Newman had failed to demonstrate any errors of fact or law.

III. Issue One – Did the appeal panel make an unreasonable error of fact about Ms Newman's pre-enrolment experiences?

[11] Ms Newman argues that the main cause of her mental health issues was her employment in the military. The evidence shows that she was consistently expected to deal with high levels of stress and anxiety, beyond her qualifications. Medical professionals concluded that workplace demands likely contributed to her symptoms. Further, for many years of services she had to deal with the fact that she had to keep her sexual orientation a secret.

[12] However, there is little evidence that Ms Newman's work experience alone caused her condition. The medical evidence, which is considerable, pointed to a number of contributing factors – pre-existing depression, family history, personality traits, and workplace stress. The appeal panel

acknowledged the aggravating role of work-related stress, and found that it accounted for one-fifth of Ms Newman's disability.

[13] Given that the appeal panel's conclusion was supported by the medical evidence, I cannot conclude that it made an error of fact.

IV. Issue Two – Did the appeal panel apply the wrong legal principles?

[14] Ms Newman argues that the presumption of fitness set out in s 51 of the Regulations can only be rebutted where a disability is diagnosed within three months of enrolment or there is medical evidence establishing a pre-existing condition beyond a reasonable doubt. In the absence of either of those circumstances, Ms Newman contends that the appeal panel was bound to conclude that she had no pre-enrolment disability.

[15] I disagree.

[16] Ms Newman benefited from the presumption that she was not experiencing chronic dysthymia at the time of her enrolment. However, that presumption did not prevent the appeal panel from reviewing the evidence, both pre- and post-enrolment, in determining Ms Newman's entitlement to a disability award. Indeed, the panel had to consider the degree to which her condition has been caused or aggravated by her military service (CFMVRCA, ss 45(1), (2)). It concluded that one-fifth of her disability was the product of aggravating circumstances during her service. That conclusion necessarily had to take into account the evidence relating to her pre-existing depression

and any pre-enrolment factors that caused or contributed to her condition.

[17] Therefore, I see no error of law arising from the appeal panel's decision.

V. Conclusion and Disposition

[18] The panel made no error of fact or law in its response to Ms Newman's request for reconsideration. Therefore, I must dismiss this application for judicial review, with costs.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial review is dismissed with costs.

“James W. O’Reilly”

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Judge

## Annex

***Canadian Forces Members and Veterans Re-establishment and Compensation Act, SC 2005, c 21***Eligibility

**45.** (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from

- (a) a service-related injury or disease; or
- (b) a non-service-related injury or disease that was aggravated by service.

Compensable fraction

(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.

***Canadian Forces Members and Veterans Re-establishment and Compensation Regulations, SOR/2006-50***

**51.** Subject to section 52, if an application for a disability award is in respect of a disability or disabling condition of a member or veteran that was not obvious at the time they became a member of the forces and was not recorded on their medical examination prior to enrolment, the member or veteran is presumed to have been in the medical condition found on their enrolment medical examination unless there is

- (a) recorded evidence that the disability or disabling condition was diagnosed within three months after enrolment; or

***Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes, LC 2005, ch 21***Admissibilité

**45.** (1) Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :

- a) soit par une blessure ou maladie liée au service;
- b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.

Fraction

(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une indemnité d'invalidité.

***Règlement sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes, DORS/2006-50***

**51.** Sous réserve de l'article 52, lorsque l'invalidité ou l'affection entraînant l'incapacité du militaire ou du vétéran pour laquelle une demande d'indemnité a été présentée n'était pas évidente au moment où il est devenu militaire et n'a pas été consignée lors d'un examen médical avant l'enrôlement, l'état de santé du militaire ou du vétéran est présumé avoir été celui qui a été constaté lors de l'examen médical, sauf dans les cas suivants :

- a) il a été consigné une preuve que l'invalidité ou l'affection entraînant l'incapacité a été diagnostiquée dans les



(b) medical evidence that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to enrolment.

trois mois qui ont suivi l'enrôlement;

b) il est établi par une preuve médicale, hors de tout doute raisonnable, que l'invalidité ou l'affection entraînant l'incapacité existait avant l'enrôlement.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-926-12

**STYLE OF CAUSE:** KIMBERLY NEWMAN  
v  
THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Winnipeg, Manitoba

**DATE OF HEARING:** February 5, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** April 9, 2013

**APPEARANCES:**

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