Federal Court  Cour fédérale

Date: 20130605

Docket: T-285-12

Citation: 2013 FC 602

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 5, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MAURICE ARIAL (veteran - deceased)
MADELEINE ARIAL (surviving spouse)

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision by a reconsideration panel of the Veterans Review and Appeal Board of the Department of Veterans Affairs (the Board) dated January 4, 2012, which determined that the applicants were sufficiently compensated for the breaches of duty committed by the Department of Veterans Affairs Canada [VAC].

[2] Specifically, the applicants want this Court to order the Board to refer the issue to the Minister, and this order, they say, arises out of a judgment issued on July 8, 2011, by Mr. Justice Shore (*Arial v Attorney General of Canada*, 2011 FC 848 [*Arial Estate*]).

[3] This application for judicial review cannot be allowed for the following reasons.

Facts

[4] The factual background in this case is complex because of the multiplicity of proceedings. I believe that the following summary will suffice for the purposes of this judicial review.

[5] It should be noted that, parallel to the proceedings that are before this Court regarding a disability pension for stomach problems, the applicants brought a series of proceedings with respect to an application for an attendance allowance and an application for a disability pension for hearing loss. The application for an attendance allowance was the subject of an application for judicial review; Madam Justice Danièle Tremblay-Lamer's decision is found at *Arial v Attorney General of Canada*, 2010 FC 184. We are concerned here only with the saga of the disability pension for stomach problems.

[6] The veteran, Maurice Arial, was born on January 8, 1916. He enrolled in the Royal Canadian Navy in June 1940. From July 1940 to July 1945, on different ships, he was responsible for both machinery maintenance and the supply of ammunition located in the holds of the ships. He was demobilized at the end of the war. In his service records, there are two

medical reports dated May 7, 1944, and February 19, 1945. Apart from being rather general, they deal with weight loss, nervousness, fatigue and seasickness.

[7] On December 27, 1946, Mr. Arial married Madeleine Arial (his surviving spouse). They subsequently had a daughter, Sonia Arial (collectively, "the applicants").

[8] On March 7, 1996, Mr. Arial filed an application for a disability pension for stomach ulcers. A number of incidents ensued concerning the filing of a medical report required by the authorities at the time and necessary for considering whether to grant such a pension. In the absence of a medical report, Mr. Arial's file was closed on September 27, 1996. The service documents did not reveal any specific problem other than the seasickness Mr. Arial suffered.

[9] On October 13, 1999, Mr. Arial appointed his daughter as his designated representative. That day, she contacted VAC and filed a new application on her father's behalf for a disability pension based on stomach problems. A few days later, a pension officer sent a form to Mr. Arial asking him to submit a recent medical report. On November 18, 1999, Sonia Arial sent the pension officer a cover letter, the pension application form and a statement from one Dr. Lepage indicating the diagnosis of gastroesophageal reflux [GER]. These documents indicate, *inter alia*, that Mr. Arial had been under doctor's care for stomach problems since returning from the war.

[10] On December 29, 1999, the pension application was denied. An analysis of Mr. Arial's service documents led to the conclusion that they did not reveal [TRANSLATION] "any impairment or condition arising from military service or any injury resulting from a service-related accident."

[11] Mr. Arial passed away on September 25, 2005.

[12] On December 19, 2005, Sonia Arial contacted VAC and asked that an official decision be made concerning the disability pension application for various stomach problems that had been submitted in 1999. Additional information was provided at that time.

[13] On August 8, 2006, VAC, by ministerial decision, denied this application on the ground that the medical service documents did not reveal any impairment and that no relevant dispute had been submitted in Mr. Arial's file for many years following his demobilization. Sonia Arial disputed this decision.

[14] On January 24, 2007, a review panel of the Veterans Review and Appeal Board confirmed the ministerial decision of August 8, 2006. The review panel found that there was no causal connection between Mr. Arial's stomach problems and his military service. Sonia Arial also disputed that decision.

[15] On October 30, 2007, an appeal panel of the Veterans Review and Appeal Board granted the applicants a pension entitlement for the Second World War service. The appeal panel recognized that Mr. Arial had suffered from a recurring duodenal ulcer since 1940 and that the

GER diagnosis was the manifestation of the ulcer. The appeal panel established the effective date of the pension retroactively to November 9, 2005, the date the application was considered to be complete. No additional award was granted.

[16] The issue that gave rise to this application for judicial review concerns the commencement date of the pension that the applicants say they are entitled to. They disputed the date of November 9, 2005.

[17] On June 24, 2008, a reconsideration panel of the Veterans Review and Appeal Board refused to change the effective date of the pension on the ground that the application was not completed until that date under the *Award Regulations*.

[18] This issue was heard again before a second reconsideration panel. On May 14, 2009, this second reconsideration panel agreed that a pension application was made in 1996. It established the effective date as October 30, 2004, the day three years prior to the day on which the pension was awarded, invoking paragraph 56(1)(*a.1*) of the *Pension Act*, RSC 1985, c P-6 (the Act), and granted an additional award of 24 months under subsection 56(2) of the Act because of delays beyond the applicants' control. These provisions read as follows:

56. (1) Pensions awarded with respect to the death of a member of the forces shall be payable with effect as follows:	**56.** (1) La pension accordée par suite du décès d'un membre des forces est payable comme il suit:
. . .	[…]
(*a.1*) to or in respect of the member's survivor or child, or to the member's parent or any person in place of a parent who was wholly or to a substantial extent maintained by the member at	*a.1*) dans le cas où le membre ne recevait pas, à son décès, une pension supplémentaire visée aux alinéas 21(1)*a*) ou (2)*a*) à l'égard de cette personne ou dans le cas où une pension est

the time of the member's death, if no additional pension referred to in paragraph 21(1)(*a*) or (2)(*a*) was at the time of death being paid in respect of that person or that person is awarded a pension under section 48, from the later of
(i) the day on which application for the pension was first made, and
(ii) a day three years prior to the day on which the pension was awarded with respect to the death of the member;

accordée en vertu de l'article 48, à cette personne, ou à l'égard de celle-ci, à compter de la date précédant de trois ans celle à laquelle la pension a été accordée ou, si elle est postérieure, la date de présentation initiale de la demande de pension;

56. (2) Notwithstanding subsections (1) and (1.1), where a pension is awarded with respect to the death of a member of the forces, or an increase to that pension is awarded, and the Minister or, in the case of a review or an appeal under the *Veterans Review and Appeal Board Act*, the Veterans Review and Appeal Board is of the opinion that the pension or the increase, as the case may be, should be awarded from a day earlier than the day prescribed by subsection (1) or (1.1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension or two years increase in pension, as the case may be.

56. (2) Malgré les paragraphes (1) et (1.1), s'il est d'avis que, en raison soit de retards dans l'obtention des dossiers militaires ou autres, soit d'autres difficultés administratives indépendantes de la volonté du demandeur, la pension ou l'augmentation devrait être accordée à partir d'une date antérieure, le ministre ou, dans le cadre d'une demande de révision ou d'un appel prévus par la *Loi sur le Tribunal des anciens combattants (révision et appel)*, le Tribunal peut accorder au pensionné une compensation supplémentaire, à concurrence d'un montant équivalant à deux années de pension ou d'augmentation.

That decision was, in turn, disputed by Sonia Arial.

[19] On December 2, 2010, a third reconsideration panel denied Sonia Arial's application for reconsideration because there were no grounds warranting a new examination under section 32 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18.

[20] That decision was subsequently the subject of an application for judicial review (*Arial Estate, supra*). Justice Shore set aside the decision of December 2, 2010, and referred the case back to a differently constituted panel.

[21] As a result of Justice Shore's decision, a new hearing was held before the Board on November 1, 2011. A decision was finally issued on January 4, 2012, the decision that is the subject of this judicial review.

Context of this application for judicial review

[22] To understand the decision for which judicial review is sought, it is important to first identify the *ratio decidendi* of the Court's judgment by Mr. Justice Shore because that decision for which review is sought was intended to be the follow-up ordered by the Court.

[23] On the basis of the minister's duty under subsection 81(3) of the Act to "on request, provide a counselling service to applicants and pensioners with respect to the application of the Act to them; and assist applicants and pensions in the preparation of applications", Justice Shore ordered that the issue of the retroactivity of the pension be examined again. Paragraph 65 of the decision is instructive:

> [65] Moreover, it is not this Court's role to determine if the pension should be retroactive to May 7, 1996, or not; rather, the Court must determine whether the case should be referred back to a new panel so that the facts and law can be reconsidered should an error in fact or in law have been committed. It will be up to this new panel to determine whether the retroactive effect of the award should be extended back to March 7, 1996. Clearly, Parliament does not speak in vain. Since Parliament has provided that VAC pension officers owe veterans certain obligations to provide them with the

> information they seek about pension applications, a breach of these obligations must carry consequences.
>
> (Justice Shore's emphasis)

[24] Thus, the Court did not pre-order a conclusion by the reconsideration panel. Pointing to the spirit of the Act , which is intended to be generous and which should be interpreted that way, the Court referred the case back so that the facts and law could be re-examined. Paragraph 76 appears to me to capture the essence of the Court's decision:

> [76] VAC's breach of the duty owed to Mr. Arial degraded the quality of life of this veteran. The Court refers the case back to the Veterans Review and Appeal Board so that the Board can review its responsibilities toward the Arial family. It will be up to the Board to determine what a major breach of its duty to inform is worth, in accordance with the legislation and the case law and bearing in mind that fact that it is not merely suggested but is explicitly stated in the PA itself that VAC must provide a counselling service to applicants and pensioners "with respect to the application of this Act to them . . . and . . . assist applicants and pensioners in the preparation of applications" (subsection 81(3) of the PA). The Board has an obligation to stay true to its mandate to respect this statement and not treat it like a superficial public relations ploy.

[25] Faced with this order, the Board reviewed the issue of the date on which the pension should be paid in light of the law and the facts. In its decision, the Board stated that it was unable to do better than the final decision already made. The pension could be paid effective October 30, 2004, three years prior to the date of the decision to award a pension. An additional award of 24 months was granted under subsection 56(2) of the Act.

[26] Essentially, the Board submitted to this Court's decision and concluded that, in accordance with the clear wording of the Act, it confirmed the previous decision.

Developments since the decision for which judicial review is sought

[27] In fact, the applicants abandoned, correctly in my view, their request that the Board should have ordered the payment of a pension prior to October 30, 2004. Both section 39 of the Act and section 56 are unambiguous. Their effect is to limit the liability for the payment of a pension. Earlier, I reproduced section 56. For ease of reference, I reproduce subsection 39(1) here:

39. (1) A pension awarded for disability shall be made payable from the later of	**39.** (1) Le paiement d'une pension accordée pour invalidité prend effet à partir de celle des dates suivantes qui est postérieure à l'autre:
(*a*) the day on which application therefor was first made, and	*a*) la date à laquelle une demande à cette fin a été présentée en premier lieu;
(*b*) a day three years prior to the day on which the pension was awarded to the pensioner.	*b*) une date précédant de trois ans la date à laquelle la pension a été accordée au pensionné.

Parliament limited the state's liability by using similar wording that has the same effect.

[28] Consequently, the concession made by the applicants was received, the Court acknowledges it, and the Board's decision in this regard is unassailable. I reproduce paragraph 55 of the applicants' memorandum:

> [TRANSLATION]
>
> The applicants are no longer insisting on the first remedy. A strict interpretation of the Act leads to the conclusion that, despite the breaches by the VAC officers towards Mr. and Mrs. Arial, the Act does not permit a retroactive award that goes back more than three years; an additional award of two years may be added to that, which has been done.

It is therefore agreed that the Board awarded the applicants the maximum under the Act.

The specific application before the Court

[29] Instead, the applicants fall back on section 85 of the Act. They argue that the harm they suffered as a result of the failure to provide assistance to the applicants is quantifiable and that they could be granted an award for it if only the matter were referred to the Minister. They rely on subsection 85(1), which reads as follows:

85. (1) The Minister may not consider an application for an award that has already been the subject of a determination by the Veterans Review and Appeal Board or one of its predecessors (the Veterans Appeal Board, the Pension Review Board, an Assessment Board or an Entitlement Board) unless	**85.** (1) Le ministre ne peut étudier une demande de compensation déjà jugée par le Tribunal ou un de ses prédécesseurs — le Tribunal d'appel des anciens combattants, un comité d'évaluation, un comité d'examen ou le Conseil de révision des pensions — que si le demandeur a obtenu l'autorisation du Tribunal ou si celui-ci lui a renvoyé la demande pour réexamen.
(*a*) the applicant has obtained the permission of the Veterans Review and Appeal Board; or	
(*b*) the Veterans Review and Appeal Board has referred the application to the Minister for reconsideration.	

Analysis

[30] The solution proposed by the applicants faces a major obstacle: the Act. As we have just seen, the Act expressly limits liability for pension payments. Unless that provision is unconstitutional, it must be applied.

[31] In *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40, it was the *Department of Veterans Affairs Act* that had been amended. The amendments came into force in January 1990 and limited the state's liability for interest paid, with respect to pensions paid to disabled veterans, on monies held by the state beginning on that date. The result was that no interest was payable prior to that date.

[32] The Supreme Court of Canada concluded that the *Canadian Bill of Rights*, RSC 1985, App. III, cannot defeat a statutory provision even where it is expropriative. It will suffice to reproduce paragraph 62 of the decision:

> The respondent and the class of disabled veterans it represents are owed decades of interest on their pension and benefit funds. The Crown does not dispute these findings. But Parliament has chosen for undisclosed reasons to lawfully deny the veterans, to whom the Crown owed a fiduciary duty, these benefits whether legal, equitable or fiduciary. The due process protections of property in the *Bill of Rights* do not grant procedural rights in the process of legislative enactment. They do confer certain rights to notice and an opportunity to make submissions in the adjudication of individual rights and obligations, but no such rights are at issue in this appeal.

[33] It is difficult to see how the Minister could do more under the Act that what is permitted pursuant to that Act. What was awarded to the applicants—a pension retroactive to October 30, 2004, and an additional award of 24 months—is the maximum permitted under the Act. Section 85 itself is very limited. The jurisdiction conferred on the Minister can be exercised only where an application for an award has already been the subject of a determination by the Board. This Board, a creature of statute, has jurisdiction only with respect to pensions. To the extent that there was fault that could give rise to an award because the assistance the applicants claim was not given, the award could not be made under section 85.

[34] A provision such as section 85 cannot be read as allowing a minister to do whatever he or she wants as if the Act did not exist. Parliament chose to limit the state's liability for pension payments in legislation that deals with pensions. The power under section 85 must be read on the basis of this express limitation. Section 85 cannot be interpreted as giving the minister the outrageous power of ignoring the Act such as providing an award for an alleged fault that the

Board itself cannot consider. The very wording of subsection 56(2) seems to describe the situation in this case, and the Board has already awarded the maximum that the Act provides for these cases.

[35] Indeed, the Act expressly limits the minister's power to considering an application for an award, this term being defined as "a pension, compensation, an allowance or a bonus payable under this Act" (my emphasis). Both the terms "pension" and "compensation" are also defined in the Act. With respect, the minister's power is very limited, and it is highly doubtful that he or she could rely on this section to go beyond what the Act has set out so explicitly. Furthermore, I fail to see how the Board could send to the minister what it does not have the authority to deal with itself. The application must be for an award, this term itself being defined and limited by the Act. It is one of two things: either the fault is in the range of what is described in subsection 56(2), and the Act establishes its own remedy or the fault is of a different kind, and we are then in the area of civil liability where the Board has no jurisdiction.

[36] In any event, the only matter before the Court is reviewing the Board's decision to not refer the case to the Minister. Not only does the Board's decision comply with the judgment of this Court, which ordered it to reconsider the case, but the Board confirmed what the applicants now admit, i.e. that the Act does not permit the Board to go beyond what the Act allows with respect to the date on which a pension may be paid.

[37] With respect to the power conferred in section 85, there was no mention of it in Justice Shore's judgment. The rejection of this possibility by the Board arises, in my view, from

the reasonable decision, the standard of review applicable to a discretionary decision that is squarely within the jurisdiction of the administrative tribunal that has expertise in the matter. The refusal to use section 85 was entirely reasonable; in my opinion, it was necessary because the Act provides for a possible remedy in the applicants' situation. If another fault was committed, other than an administrative difficulty beyond the control of the applicants (subsections 39(2) and 56(2) of the Act), it must be adjudicated in another forum since it does not come under the Board or the minister. Despite the sympathy the Court feels for the applicants, subsection 56(2) of the Act is an insurmountable barrier to their application for judicial review.

[38] Consequently, the application for judicial review is dismissed without costs.

JUDGMENT

The application for judicial review of the decision by a reconsideration panel of the Veterans Review and Appeal Board of the Department of Veterans Affairs dated January 4, 2012, is dismissed without costs.

"Yvan Roy"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-285-12
STYLE OF CAUSE:	MAURICE ARIAL (veteran – deceased) and MADELEINE ARIAL (surviving spouse) v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
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