Federal Court  Cour fédérale

Date: 20150429

Docket: T-1082-14

Citation: 2015 FC 556

Montréal, Quebec, April 29, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

ROBERT SANDERS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the April 2, 2014 Veterans Review and Appeal Board Canada decision [Review Board] denying Mr. Sanders' application for reconsideration of the April 27, 1994 Veterans Appeal Board Canada decision [the 1994 Appeal Board decision] having upheld the decision to deny him a pension under subsection 21(2) of the *Pension Act*, RSC 1985, c P-6 [Pension Act].

I. Background

[2] Mr. Robert Sanders joined the Canadian Forces in May 1981. He was posted in Cold Lake, Alberta, from March 1989 to mid-June 1990 and worked there as an Airframe Technician. He was assigned in the component shop from August to December 1989.

[3] In October 1989, Mr. Sanders sought medical attention with complaints of a sore neck and was admitted to the hospital a few days later. On examination, some right-sided weakness was observed and he was diagnosed with cervicalgia. Mr. Sanders sought medical attention again a few months later, and his condition was investigated over several years.

[4] After consulting a number of experts, the diagnosis of dementia was suggested in 1990 and Mr. Sanders was diagnosed with "early dementia with anxiety overlay" in January 1992.

[5] In September 1991, Mr. Sanders applied for a pension before the Canadian Pension Commission [the Commission], alleging that his dementia was related to his overexposure to chemicals during his military service.

[6] On November 23, 1992, the Commission denied him a pension, concluding that his dementia was not pensionable as neither the condition, nor any aggravation thereof, arose out of, or was directly connected with his military service in peacetime, pursuant to subsection 21(2) of the *Pension Act*, a copy of which is attached in Annex. The Commission could not find evidence that Mr. Sanders suffered an overexposure to chemicals during the relevant period of time.

[7] On August 11, 1993, the Entitlement Board confirmed the Commission's decision as it found that there was insufficient evidence "to relate [Mr. Sander's] exposure to toxic chemicals during his work as an Airframe Technician in 1989".

[8] Mr. Sanders brought the decision before the Veterans Appeal Board Canada [Appeal Board] who, on April 27, 1994, confirmed the decision denying the pension. The Appeal Board examined the evidence and concluded namely that "insufficient" evidence existed to support the claim that Mr. Sanders' dementia was attributable to his service in the regular force in peacetime.

[9] The Appeal Board also found that "the medical evidence provided no basis whatsoever for a positive conclusion", that "a toxic chemical cause of dementia is, in all probability, speculative at this time in history", that there was no "acceptable evidence of exposure", and that there was a lack of "convincing evidence".

[10] On January 17, 2014, the Review Board received Mr. Sanders' application for a reconsideration of the 1994 Appeal Board decision. Mr. Sanders claimed that the Appeal Board committed an error in law, and he also submitted new evidence alleged to be sufficiently persuasive as to require the case to be reconsidered.

[11] On April 2, 2014, the Review Board denied Mr. Sanders' application for reconsideration. It was unable to conclude that an error of law had been made in this case, it agreed with the Appeal Board that a lack of credible evidence had been submitted in the matter of exposure, and, as it did not admit the new evidence, was unable to conclude that the matter should be reopened

for further determination on the merits. This decision is under review in the present judicial review.

[12] The Court is sensitive to Mr. Sanders' situation; however, for the reasons below, this application for judicial review will be dismissed.

II. Preliminary issue

[13] Mr. and Mrs. Sanders have each submitted an affidavit in support of the present judicial review. In his affidavit, Mr. Sanders refers to documents not contained in the Certified Tribunal Record [CTR] and asks the Court to accept them on the basis that they were most probably before the Review Board, but have not been included in the CTR for reasons unknown.

[14] The Court relies on the CTR as evidence of the documents that were before the decision-maker (*McAllister v Canada (Attorney General)*, 2013 FC 689 at para 48) and cannot accept Mr. Sanders' proposition that the CTR is incomplete in the absence of clear explanations and demonstration. Therefore, Mr. Sanders' exhibits that were not part of the CTR and Mrs. Sanders' affidavit will not be considered in the present judicial review.

III. Issue

[15] As outlined by Mr. Sanders, the Court must decide if the Review Board properly applied section 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [the Act].

IV. Standard of review

[16] The Court agrees with the parties that the issue is one of mixed fact and law, and thus attracts the reasonableness standard (*Quann v Canada (Attorney General)*, 2013 FC 460 at para 21).

V. Submission of the parties

A. *Mr. Robert Sanders*

[17] Mr. Sanders submits that the Review Board unreasonably upheld the 1994 Appeal Board decision, and that, contrary to section 39 of the Act, failed to draw the required inferences in Mr. Sanders' favour, thus denying him the pension to which he is entitled.

[18] In regards to the facts, Mr. Sanders submits that he was fit at the time of his assignment in Cold Lake, Alberta, that the evidence shows he was then exposed to chemicals, and that this exposure caused his dementia.

[19] Mr. Sanders submits that the evidence regarding the causal linkage is uncontradicted as it showed that the origin of his medical condition is either unknown or linked to exposure to chemicals.

[20] Mr. Sanders submits that the evidence has been considered credible, as none of the decision-makers determined otherwise, that there is no mention of the evidence being "not credible" and that the Review Board thus erred when it qualified it as such.

[21] In particular, Mr. Sanders contends that the Appeal Board had made findings with regards to the sufficiency of the evidence and to the weight to be given to the various pieces of evidence, but had not made negative credibility findings with regards to the evidence. Mr. Sanders thus submits that the Review Board confused the Appeal Board's discussion of sufficiency with a finding on credibility, when it stated that "it agrees with the previous decision regarding the absence of same [credible evidence] in this case".

[22] Therefore, having provided uncontradicted and credible evidence establishing his dementia, and also establishing that his dementia was caused by chemical exposure while he was employed as an Airframe Technician, Mr. Sanders satisfied subsection 39(b) of the Act and engaged subsection 39(c), thus requiring any doubt to be resolved in his favour.

[23] As evidence of the chemical exposure, Mr. Sanders in particular directs our attention to the following documents: the Exposure profile report by Shawn Mulvenna dated February 20, 1992 [Mulvenna report]; the Medical opinion by Dr. D.A. Salisbury dated August 31, 1992 [Salisbury medical opinion]; the Canada Labour Code Part II Inspection report, dated June 1, 1993 [Labour Canada report]; the Medical opinion by Dr. Ted Haines set out in the letter dated May 7, 1993 [Haines medical opinion]; the Medical opinion by Dr. John Molot in the letter dated March 31, 1994 [Molot medical opinion]; the DND Industrial Hygiene Report on an industrial

Hygiene Walk-through Survey – BAMEO Operations – CFB Cold Lake [DND report]; an article entitled : "Skin Absorption of Solvents" [Skin Absorption of Solvents article]; and an extract from a Solvent Neurotoxicity textbook [Solvent Neurotoxicity textbook]. I will examine these documents in the analysis section.

[24] Finally, as for remedy, Mr. Sanders submits that if his application is successful, the decision of the Court can only lead to one result, a pension award, and that the Court should return the matter to the Review Board with directions.

B. *The Respondent*

[25] The Respondent points out to Mr. Sanders' personal medical history of headaches, concussions and head injury, and submit that his health concerns started as far back as 1980.

[26] The Respondent submits that the Review Board's decision is reasonable in that the Appeal Board made a negative credibility finding regarding the evidence tendered to establish causation, and that the evidence was in any event insufficient to prove, on a balance of probabilities, that Mr. Sanders' condition arose out of his military service. The Respondent submits that the Appeal Board had therefore fulfilled its obligation under subsection 39(c) of the Act.

[27] The experts' opinions identifying the origin of Mr. Sanders' dementia were not neutral and the Appeal Board's finding that the opinions expressed lacked a factual foundation on causation constituted, in fact, a negative credibility finding.

[28] The Respondent submits that even if subsection 39(c) of the Act provides that any benefit of the doubt in weighing of the evidence must be resolved in favour of an applicant, Mr. Sanders still had to establish a causal link between his claimed condition and military service.

[29] The Respondent further submits that the Review Board properly found that the new material tendered by Mr. Sanders was not acceptable as "new evidence".

[30] Finally, the Respondent submits that this Court does not have jurisdiction to direct the Review Board to grant Mr. Sanders a pension.

VI. Analysis

A. *General principles*

[31] In order to be entitled to a pension, Mr. Sanders had to establish that the requirements set out in paragraph 21(2)(a) of the *Pension Act* were met, the text of which is attached in Annex.

[32] As per these requirements, Mr. Sanders had to present evidence to establish on a balance of probabilities, that his condition arose out of or was directly connected with his military service; he had to establish causal linkage (*Boisvert v Canada (Attorney General)*, 2009 FC 735 at para 24; *Lunn v Canada (Veterans Affairs*), 2010 FC 1229 at para 67).

[33] In turn, sections 3 and 39 of the Act, reproduced in Annex, provide directions on how the evidence must be considered. Under the terms of these sections, every inference should be drawn

and any reasonable doubt resolved in an applicant's favour where uncontradicted and credible evidence is presented, unless a lack of credibility finding is made. However, these sections do not obviate the requirement for an applicant to demonstrate the causal linkage between his or her condition and military service.

B. *Causal linkage*

[34] The Review Board confirmed the Appeal's Board finding that there was no evidence of exposure, and thus no causal linkage between Mr. Sanders' military service and his condition. After a review of the evidence, I find this conclusion to be reasonable.

[35] In his memorandum, Mr. Sanders pointed out to some medical evidence in support to his submission that causation has been established. It is worthy to outline the relevant excerpts of the medical reports he relies on to establish causation :

> 1. Mulvenna report
>
> Mr. Sanders worked with a number of chemical products. Of these, varsol was the most frequently used. Often, if Mr. Sanders was not using the varsol directly, he was exposed to the vapours from a neighbouring source. This was the case during aircraft degreasing in the service bays and quite possibly during all times while in the component shop due to the varsol degreasing tank.
>
> The exposure profile indicates that the two primary routes of entry into the body in Mr. Sanders case [*sic*] are inhalation and skin absorption. Skin absorption may have been particularly significant in for jet fuel and hydraulic fluid.
>
> 2. Salisbury medical opinion
>
> It is plausible that the symptoms experienced by Cpl Sanders could be caused by such an exposure. The difficulty now exists of establishing whether they were caused by such an exposure or not.

The symptoms fit what we know of solvent exposure. So the diagnosis is biologically plausible.

In fact one would have to postulate that Cpl Sanders is unusually susceptible to these chemicals if one were to accept them as the cause of his problems.

On balance, while it is possible that Cpl Sanders problems were caused by a toxic exposure, it is not probable. [*Emphasis added*]

3. Labour Canada report

Appropriate gloving for the various types of chemicals, particularly solvents has not been supplied.

The employee education program is not adequate in MSDS/HMDS are not being used or are not understood sufficiently for employees to protect their health from chemical exposure.

4. Haines medical opinion

The lack of significant confounding factors, his very high premorbid function, the lack of alternative specific diagnoses, and the levelling off of his neuropsychological status following withdrawal from exposure, all support the work-relatedness of his condition.

The one area where the opinions of Dr. Salisbury and myself appear to diverge has to do with exposure. He states that « the dosage received is minimal […]». My information differs and it is clear by the accounts I have received that skin and airborne exposure to solvents was substantial.

In view of the above, I consider that Mr. Sanders' neurocognitive deficits are plausibly related to his solvent exposure at work as an airframe technician." [*Emphasis added*]

5. Molot medical opinion

It is my impression, evaluating the history and the information provided in Mr. Sander's medical file that Mr. Sanders has indeed suffered significant central nervous system damage secondary to the chronic and repeated exposure to volatile organic compounds via the respiratory system as well as the skin. [*Emphasis added*]

6. DND report

Cpl Sanders was exposed to a number of chemical products while employed in Cold Lake. Varsol was the only chemical agent to

> which there was potentially a significant exposure, because of the absence of local exhaust ventilation at the worksites and the inappropriate protective gloves in use. [*Emphasis added*]
>
> 7. Skin Absorption of Solvents article
>
> The potential for skin absorption is high where hands are immersed in solvent, where clothes or cloth gloves become soaked or where mist wets the skin.
>
> 8. Solvent Neurotoxicity textbook
>
> Following occupational exposure to solvent mixtures as well as during abuse, acute neuropsychiatric symptoms are experienced.
>
> Mild impairment of a number of psychological functions indicates diffuse chronic toxic encephalopathy, which may be stationary if exposure is stopped at least for a 2- to 3-year period. Cerebral atrophy has been demonstrated in some of the patients with chronic complaints.

[36] The assertion contained in the Mulvenna report that Mr. Sanders was exposed to chemical products is based on telephone interviews with Mr. Sanders, on a document prepared by Mr. Sanders outlining his work history while at Cold Lake, on a hand drawn sketch of the component shop by Mr. Sanders and on material safety data sheets provided by the military. Mr. Mulvenna specified that his report is based on the information provided by Mr. Sanders, that the analysis does not include much empirical data and that the components of varsol, jet fuel and hydraulic fluid are not known. Since there was a lack of information with regards to the composition of those chemicals, Mr. Mulvenna expressly stated that more research would be necessary, and that some conclusions reached were based on assumptions.

[37] I find the Salisbury medical opinion not to be in favour of Mr. Sanders as it concluded that it is "not probable" that his problems were caused by chemical exposure. As for the Haines

medical opinion, Dr. Haines wrote a letter dated March 31, 1992, which indicated that his opinion was based on the Mulvenna report, itself based solely on Mr. Sanders' information. Dr. Haines also pointed out in his May 7, 1993 medical opinion, that his opinion differs from Dr. Salisbury on the level of exposure to chemical products Mr. Sanders suffered from, and that his opinion on this point was based on the accounts he received. The Molot medical evidence also relies on the Mulvenna report with regard to the evidence of exposure.

[38] The only reports that are fact based are the Labour Canada report, indicating that appropriate gloving for the various types of chemicals, particularly solvents had not been supplied and the DND report concluding that Mr. Sanders had been potentially exposed to varsol. As for the two articles, while they are helpful in providing information on the damages that chemical exposure may cause, they cannot establish that there has been in fact an exposure and that it caused Mr. Sanders' condition.

[39] A factual foundation for opinion evidence is necessary for an expert opinion to have "any weight" (*R v Abbey*, [1982] 2 SCR 24 at para 52). In the present case, the opinion evidence is, for the most part, based on Mr. Sanders' testimony, without any other properly admissible evidence to establish its basis. The situation is similar to the one the Federal Court of Appeal faced when it stated in *Wannamaker v Canada* (*Attorney General*), 2007 CAF 126 [*Wannamaker*] at para 31:

> [t]he only evidence of injury came from Mr. Wannamaker himself, either directly or indirectly through the medical opinions and the Board found his evidence not to be reliable, for the reasons stated above.

Moreover, even where the evidence was not only based on Mr. Sanders' testimony, it remained non conclusive. For instance, the DND report only referred to a "potentially […] significant exposure".

C. *Credibility finding*

[40] The Federal Court of Appeal in *Wannamaker* at para 6 gave some instruction as to the definition of credible evidence: "[e]vidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove".

[41] In its analysis of the alleged error of law, the Review Board cited an excerpt from the 1994 Appeal Board decision, where the Appeal Board indicated that it "still found no acceptable evidence which could establish the doubt of a connection between any such possible exposure and the development of the Appellant's dementia disease". This excerpt illustrates that "not only was the Board not in doubt, but it was satisfied that there was no proof to support the appellant's argument that there was a link" between Mr. Sanders' condition and his military service. The evidence tendered was not sufficient to raise doubts (*Elliot v Canada* (*Attorney General*), 2003 FCA 298 at paras 40-43 [*Elliot*]).

[42] Mr. Sanders argues that the Review Board failed to give him the benefit of the doubt, and erroneously stated that the evidence was not credible as the Appeal Board had not arrived at such a finding. Mr. Sanders takes issue with the following statement of the Review Board :

> While the Panel appreciates the comments regarding burden of proof, it must point out that that doesn't obviate the need for credible evidence and, in this case, the Panel agrees with the

> previous decision regarding the absence of same in this case.
> [*Emphasis added*]

[43] The Appeal Board concluded, *inter alia*, that "[w]hile this Board is required to resolve any doubt in the appellant's favour, pursuant to subsection 10(5) of the *Veterans Appeal Board Act*, this Board is not required to yield to the proposition that speculative opinions constitute evidence sufficient to raise doubt." I find that the words used by the Appeal Board when it qualified the evidence as "speculative" and not "convincing", as well as the Appeal Board statement that there was no "acceptable evidence of exposure to chemical agents" and that the medical evidence provided "no basis whatsoever for a positive conclusion", amount to a determination that there was no credible evidence (See *Elliott* at para 40).

[44] Mr. Sanders asserts that "[a]ccepting that the evidence before the Review Board was credible and that it accepted the evidence as it was required to under subsection 39(b), an inference as to causation in favour of Mr. Sanders was reasonable and required under subsection 39(a)".

[45] I already found that the Appeal Board's qualification of the evidence amounts to a determination that it was not credible. I would add that sections 3 and 39 of the Act do not result in an automatic pension award on the basis of injury submissions (*Weare v Canada (Attorney General) (1998)*, 153 FTR 75 at para 19). As stated in *Hall v Canada (Attorney General) (1998)*, 152 FTR 58 at para 19 :

> While the applicant correctly asserts that uncontradicted evidence by him should be accepted unless a lack of credibility finding is made, and that every reasonable inference should be drawn and any reasonable doubt resolved in his favour, he still has the

> obligation to demonstrate that the medical difficulty from which he now suffers arose out of or in connection with his military service; that is, the causal linkage must be established.

[46] Even if section 39 requests that the evidence presented by the veteran be assessed under the "best light possible", the Board may still find that the veteran is not entitled to a pension when he has not proven, on a balance of probabilities, the facts required to establish entitlement (*Wannamaker*, at para 5).

[47] In *Bremner v Canada (Attorney General)*, 2006 FC 96 at para 23, this Court concluded that speculative evidence does not trigger the application of subsection 39(b) of the Act :

> First, paragraph (b) requires the Board to "accept any uncontradicted evidence" presented by the applicant "that it considers to be credible in the circumstances". In my view evidence is not "contradicted" unless there is inconsistent physical evidence or a conflicting opinion which is properly assessed in accordance with the requirements of the Act to be clearly more credible. In the present case there was no such evidence. What the Board had before it was inconsistent opinions, all of them speculative. [*Emphasis added*]

[48] Hence, I find that the Review Board made no reviewable error. The evidence tendered could not raise a doubt as to causation and the Review Board decision must be upheld.

VII. Conclusion

[49] This application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. Costs are awarded to the Respondent.

"Martine St-Louis"
Judge

ANNEX

***Pension Act*, RSC, 1985, c P-6**	***Loi sur les pensions*, LRC, 1985, c P-6**
21. […]	21. […]
Service in militia or reserve army and in peace time	Milice active non permanente ou armée de réserve en temps de paix
(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,	(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :
(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with 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;	a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire
***Veterans Review and Appeal Board Act*, SC 1995, c 18)**	***Loi sur le Tribunal des anciens combattants (révision et appel)*, LC 1995, c 18)**
Construction	Principe général
3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other	3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs

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 people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

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 reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

Rules of evidence

Règles régissant la preuve

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.

FEDERAL COURT
SOLICITORS OF RECORD

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