Federal Court  Cour fédérale

Date: 20171023

Docket: T-2092-16

Citation: 2017 FC 943

Ottawa, October 23, 2017

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DARCY DWAYNE LIEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Appeal Board of the Appeal Panel of the Veterans Review and Appeal Board [Appeal Panel] which confirmed the decision of the Entitlement Review Panel [Review Panel] to grant Kimberley Lien a two-fifths disability entitlement under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* S.C. 2005, c. 21.

[2] This application is brought by Ms. Lien's spouse, because Ms. Lien died by suicide on December 27, 2015.

[3] The application is granted because the decision fails to meet the test of "justification, transparency and intelligibility within the decision-making process" as dictated by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, at para 47.

[4] Ms. Lien served in the Canadian Armed Forces [CAF] from July 31, 2009 until November 17, 2013, when she was medically discharged as a result of post-traumatic stress disorder, major depressive disorder, and anxiety disorder [collectively, the Conditions].

[5] At the time Ms. Lien was accepted into the CAF, it was understood that she had suffered from "symptoms" of "depression and anxiety" in the past, but that these conditions were "not significant enough to impact her acceptance in the military and her participation in basic training."

[6] While in the CAF, two events occurred that either cause the Conditions, or aggravated her previous symptoms.

[7] Ms. Lien's former boyfriend, also a member of the CAF, committed suicide by hanging in February 2010. After his death, Ms. Lien provided information and text messages he had sent to her to the Military Police. It was agreed that this information would be kept strictly confidential. However, contrary to the agreement, it was not treated as it ought to have been and

Ms. Lien's superiors and fellow CAF members quickly became aware of the information she provided. Ms. Lien described that serious impact on her ability to cope that this breached caused.

[8] Ms. Lien requested that she be transferred to a posting in Edmonton, where she had most recently resided and had a support system, including the Applicant. The CAF, however, posted her to Prince Edward Island to an area where she had lived as a child. While a child, she had suffered from physical, mental and sexual abuse by family members, including her mother and an older brother. As a consequence of living again in this area, she described how the memories of her childhood abuse came back to her causing severe mental anguish and post-traumatic stress.

[9] Notwithstanding this history and the conduct of the CAF, on April 3, 2014, Veterans Affairs Canada denied disability entitlement to Ms. Lien based on its finding that the Conditions did not arise out of CAF service.

[10] Ms. Lien appealed to the Review Panel, a hearing was held on September 4, 2015, and she was granted two-fifths disability entitlement for service in the CAF.

[11] The Review Panel's decision was appealed to the Appeal Panel. A hearing was held on October 5, 2016. Although Ms. Lien had died in the interim, her evidence from the Review Panel hearing was available, as was previously submitted medical evidence. The Appeal Panel affirmed the Review Panel's decision.

[12] The Appeal Panel found that "the most significant contributions to the state of the mental health of the then Applicant were personality disorders and life circumstances." It is submitted that this finding was not reasonable based on the evidence that was before the Appeal Panel. To the contrary, it is submitted that statements from medical professionals and Ms. Lien indicate that the most significant contributions to the state of her mental health were not "personal disorder and life circumstances," but rather the result of her military service. The Applicant relies on the following evidence from medical professionals and Ms. Lien, as found in the record.

[13] On October 16, 2012, Dr. Tran noted that Ms. Lien's condition had worsened, and attributed part of this to her being back in her hometown. On January 11, 2013, Dr. S. Tran noted that remaining in Charlottetown, Prince Edward Island "severely negatively impacted her mental health."

[14] On January 22, 2014, Dr. Ko noted the impact of Ms. Lien's former boyfriend's death, which increased her pre-existing PTSD symptoms and worsened her OCD symptoms, eventually resulting in her medical discharge from the CAF.

[15] On December 15, 2014, Dr. Miller reviewed Ms. Lien's Conditions. The doctor provided an opinion of her health prior to enrollment. Dr. Miller found "her depression was in remission and her OCD was not significant enough to impact her acceptance in the military and her participation in basic training."

[16] It was further the doctor's opinion that:

> It is my opinion that her current condition was both caused by her military service and also Ms. Lien's military service aggravated previous psychological difficulties. Receiving news while in basic training about her fellow military partner's suicide was clearly a life changing event. The subsequent treatment by various military personnel certainly was intricately involved in making this bad event so much worse. First, her desire and need for privacy regarding this event were ignored (despite repeated promises to the contrary) as this confidential information was deliberately relayed to her superiors and quickly spread to all military members and members of the general public. As a result, Ms. Lien was faced with an onslaught of personal questions about this event immediately after its occurrence. This, along with the event itself, was too much for Ms. Lien, and she could not continue on with basic training. [emphasis added]

[17] Dr. Miller also noted that posting Ms. Lien to Prince Edward Island, the place of her childhood abuse, significantly worsened her Conditions:

> Second, she was denied an attach posting to return home to Edmonton and instead she was required to stay with her sister on Prince Edward Island. Not only was she not allowed to return to her own ":safe" residence, but she was required to return to a location that made her have to deal with unsupportive family members and where she experienced previous childhood abuse. As a result of these events, Ms. Lien's past traumatic childhood memories that were "tucked away" were activated and began haunting her once again. Her PTSD, depression, anxiety and OCD all significantly worsened.

[18] Relying on this and other evidence, counsel for the Applicant made compelling submissions that the decision under review is unreasonable because the Appeal Panel failed to comply with the rules of evidence set out in section 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 which requires that the Appeal Board draw "every reasonable inference in favour of the applicant or appellant" and "accept uncontroverted evidence … that it considers to be credible in the circumstances."

[19] Because of the view I take of the decision under review, I need not address those concerns.

[20] The entirety of the Appeal Board's analysis and finding is as follows:

> The [Review] Panel fairly assessed the opinions of Dr. S. Tran, psychiatrist and Dr. W. Miller, registered psychologists.
>
> The Board concurs. The opinions of Dr. Tran (pp 14-19 and 102-103 SOC) and Dr. Miller (pp 178-179 SOC) are in agreement with the views of Dr. B. Ko, psychiatrist (pp 24-34 SOC). It is clear from all these qualified professionals that the most significant contributions to the state of the mental health of the then Applicant were personality disorder and life circumstances.

[21] I concur with counsel for the applicant, that this finding appears on its face to be at odds with some of the evidence in the record, including the opinion from Dr. Miller. However, in my view, there is a fundamental problem with the decision under review, namely that it lacks justification.

[22] The Appeal Panel described its job, as follows:

> We must divide the relevant contributing factors into those that are Military and those that are Personal, as per the [*Cole v Canada (Attorney General)*, 2015 FCA 126] decision. We must then assess those factors as to whether they are significant, in which case they will be considered further, or insignificant, in which case these factors will form no part of the decision. In the final decision, only significant Military Factors are compensated. Each case, of course, must be assessed and decided on its own, unique factual circumstances.

[23] The Appeal Panel provides no independent analysis of the medical evidence, nor does it describe how it concludes from that evidence that the major causes were "personality disorder

and life circumstances." The members of the Appeal Panel, after describing its job above, goes on to describe how the Review Panel is entitled to deference, and the Appeal Panel states that we "have done our job." They say they have done their job because:

> We have exercised our *de novo* responsibilities through a thorough review of the file. We have paid heed to the submissions and request of the Advocate. We have put our mind to the first-hand assessment of the Review Panel. We appreciate the sense-of-the-common and legal implications of the concept of deference. *Dunsmuir's* "reasonable range" was defined at its most favourable upper limit by the request of the Advocate before the entitlement Review Panel for three-fifths entitlement. The Entitlement Review Panel granted two-fifths. That certainly is within the range and very close to the requested upper parameter.

[24] The job of the Appeal Panel is not to determine if the Review Panel's decision was reasonable; it is to conduct a *de novo* hearing. That requires that it examine and analyze the evidence and form its own conclusion as to Ms. Lien's entitlement. It did not do that.

[25] In summary, the Appeal Panel completely failed to engage independently with the evidence before it; rather, it reviewed the record and the decision under appeal and held that the decision of the Review Panel "certainly is within a reasonable range and very close to the requested upper parameter." That is not a *de novo* review. The decision of this Appeal Panel cannot stand.

[26] The parties are agreed that if the Applicant is successful, he is to be awarded costs of $2,000.

JUDGMENT

THIS COURT'S JUDGMENT IS that this application is allowed and the appeal of Ms. Lien's entitlement is referred back to a differently constituted panel of the Appeal Board, and the applicant is awarded costs of $2.000.00, all in.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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