

Federal Court



Cour fédérale

Date: 20190513

Docket: T-1095-18

Citation: 2019 FC 662

Ottawa, Ontario, May 13, 2019

PRESENT: Mr. Justice Ahmed

BETWEEN:

JOSEPH THOMPSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Joseph Thompson (Mr. “Thompson”), suffers from hearing loss and tinnitus. He believes his hearing loss and tinnitus are related to his 32 years of service in the Canadian Armed Forces (“CAF”) because he was exposed to loud rocket fire, explosions, and other loud noises. Although he was not diagnosed until his retirement, he says he experienced hearing loss during his service. He did not report it because his hearing always returned.

[2] Mr. Thompson applied to Veterans Affairs Canada for disability benefits under section 45 of the *Canadian Forces Members and Veterans Re-Establishment and Compensation Act*, SC 2005, c 21 [*Compensation Act*]. His application was denied. He then appealed to the Entitlement Review Panel (the “Review Panel”) of the Veterans Review and Appeal Board (“VRAB”) and this was also dismissed. On December 17, 2013, Mr. Thompson appealed to the VRAB Entitlement Appeal Panel (the “Appeal Panel”). The Appeal Panel conducted a *de novo* review and upheld the Review Panel’s decision, finding that Mr. Thompson had failed to establish that his hearing loss and tinnitus was caused by his military service. The Appeal Panel’s decision was communicated to Mr. Thompson on May 12, 2018, and he filed for judicial review on June 7, 2018. For the reasons that follow I am granting the application for judicial review.

II. **Background**

[3] Mr. Thompson is 75 years old. He served in the CAF for 32 years in a number of locations including: Shilo, Gagetown, Ottawa, UN Headquarters New York, Calgary and St. Hubert. His Regular Forces service began on September 25, 1962. He also served in Special Duty Area in Syria from July 20, 1987 to August 30, 1990. He retired with the rank of Major on December 31, 1994.

[4] Mr. Thompson’s CAF experience exposed him to loud noises such as explosions, loud truck engines, and loud weapon fire. During the Lebanon civil war, he was exposed to loud noises from rocket fire, small arms fire, and explosions. Throughout this time, Mr. Thompson says that he did not always wear hearing protection because his peers and superiors frowned upon it and saw it as a sign of weakness. In 2013, he was diagnosed with hearing loss and

tinnitus (ringing in the ears). He believes the loud noise exposure during his CAF service caused his hearing problem.

[5] While serving in the CAF, Mr. Thompson underwent nine audiograms (the “In-service Audiograms”). The In-service Audiograms took place from August 2, 1966 to August 23, 1994 and tested his hearing in a range of hertz between, but not including 250 to 8000 hertz. Each of Mr. Thompson’s In-service Audiograms demonstrates some decibel (“dB”) loss over time (except for one report that contains no recordings). For example, Mr. Thompson’s November 12, 1968 In-service Audiogram shows decibel loss in his left ear of: 15 dB at 500 hertz, 10 dB at 1000 hertz, and 5 dB at 2000, 3000, 4000 and 6000 hertz. None of the In-Service Audiograms recorded a decibel loss of more than 15 dB.

[6] Mr. Thompson’s additional evidence is that he sometimes lost hearing after exposure to a loud noise. He did not inform the military because his hearing would return. By 2008, his symptoms became constant and he experienced a high-pitched ringing in both ears.

[7] In April of 2013, Judith Heal, Doctor of Audiology, Audiologist (“Dr. Heal”) diagnosed Mr. Thompson with hearing loss in both ears. In particular, she determined that he suffers from “moderate to moderately severe sensorineural hearing impairment in his left ear, and mixed hearing loss – mild sloping to severe – in his right ear” and tinnitus. Accordingly, on April 16, 2013 Mr. Thompson applied to Veterans Affairs Canada for disability benefits under section 45 of the *Compensation Act*:

Eligibility

45. (1) The Minister may, on application, pay a disability

Admissibilité

45. (1) Le ministre peut, sur demande, verser une

award to a member or a veteran who establishes that they are suffering from a disability resulting from	indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :
(a) a service-related injury or disease; or	a) soit par une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service.	b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.

[8] On May 22, 2013 Veterans Affairs Canada denied Mr. Thompson's application. On December 13, 2013 Mr. Thompson appealed the Veterans Affairs Canada decision to the Review Panel. On December 17, 2013, after conducting a *de novo review*, the Review Panel dismissed his appeal.

[9] Mr. Thompson's hearing began to rapidly decrease. So on December 23, 2016, he returned to Dr. Heal for a third assessment. This third assessment revealed that he suffers from severe sensorineural hearing loss above 3000 Hz in the left ear. It also revealed moderate to severe mixed hearing loss in the right ear. Dr. Heal opined that his hearing loss "is consistent damage due to exposure to loud sound." Her report included information about tinnitus and hearing loss including Peter M. Rabinowitz's article titled "Noise-Induced Hearing Loss" and five pages from a book about hearing loss resulting from military noise.

[10] On the advice of the Pensions Advocate, Mr. Thompson also saw Dr. Glenn D. Thornley, a doctor of Otolaryngology. Dr. Thornley assessed Mr. Thompson and prepared a report dated February 3, 2017.

[11] Mr. Thompson appealed the Review Panel’s decision to the Appeal Panel. His appeal occurred on November 1, 2017 and proceeded in writing. Mr. Thompson’s application included two reports from Dr. Heal (dated April 16, 2013 and December 23, 2016), a report from Dr. Thornley dated February 3, 2017, a tinnitus questionnaire dated April 12, 2013, an article titled “Occupational Noise-Induced Hearing Loss” dated January 2012 from the Journal of Occupational and Environmental Medicine, and an article titled “Adding Insult to Injury: Cochlear Nerve Degeneration after “Temporary” Noise-Induced Hearing Loss” dated November 11, 2009 from the Journal of Neuroscience.

[12] On November 1, 2017 the Appeal Panel conducted a *de novo* review of the record. The Appeal Panel expressly noted that section 39 of the *Veterans Review and Appeal Board Act, SC 1995, c 18* (the “VRAB Act”) imposes a special duty on the Appeal Panel when it examines evidence:

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’appellant, 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	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

established a case.

[13] The Appeal Panel also set out Mr. Thompson's evidentiary burden of proving, on a balance of probabilities, that he has a disability and that it is linked to his military service in a significant way. According to Federal Court jurisprudence, this means that the military service must have more than 1% but less than 49% contribution to the condition.

[14] Although the Appeal Panel concluded that Mr. Thompson did establish that he suffers from a hearing disability, it rejected his appeal finding that he did not prove that his hearing loss was caused by his military service. It determined that it was not "presented with any persuasive credible medical evidence identifying the cause and/or aggravation of the claimed conditions, specifically during the Appellant's Regular force and/or Special Duty (Syria) service". In reaching this decision, the Appeal Panel rejected both Dr. Heal's report and Dr. Thornley's report, finding they were not credible on the basis that Mr. Thompson did not provide them with his In-Service Audiograms. The Appeal Panel also rejected the scholarly articles filed by Mr. Thompson because they contradicted the information contained within the standard article on hearing loss authored by Dr. John Rutka dated December 2011.

[15] The Appeal Panel then examined the evidence in light of the Veterans Affairs Canada Entitlement Eligibility Guidelines ("EEGs"). The EEGs, published in 2006, contain definitions of "normal hearing", "hearing loss disability", and a "non-disabling hearing loss" as follows:

For VAC purposes, normal hearing exists where there is decibel loss of 25 dB or less at all frequencies between 250 and 8000 hertz.

For VAC purposes, a hearing loss disability exists when there is a Decibel Sum Hearing Loss (DSHL) 100 dB or greater at

frequencies of 500, 1000, 2000 and 3000 Hz in either ear, OR 50 dB or more in both ears at 4000 Hz.

For VAC purposes, a non-disabling hearing loss exists when there is a decibel loss greater than 25 dB at frequencies between 250 and 8000 hertz (inclusively), and this loss is not sufficient to meet VAC's definition of a hearing loss disability.

[16] The Appeal Panel concluded that no evidence satisfied the EEG criteria. It noted that the first diagnosis of hearing loss was 19 years after he retired, and Mr. Thompson's own testimony was that his tinnitus first became continuous in 2008, which was 14 years after he retired. In its decision (communicated to Mr. Thompson May 12, 2018), the Appeal Panel affirmed the Review Panel's decision and dismissed the appeal. On June 7, 2018 Mr. Thompson applied to this Court for judicial review of the decision.

III. Issue and Standard of Review

[17] The Appeal Panel's assessment of the evidence and determination about whether Mr. Thompson satisfied section 45 of the *Compensation Act* is reviewed for reasonableness (*Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21; *Brown v Canada (Attorney General)*, 2018 FC 976 at para 16).

IV. Analysis

A. *Was the Appeal Panel's assessment of the evidence reasonable?*

[18] Mr. Thompson argues that, contrary to the Appeal Panel's finding, his In-service Audiograms could not demonstrate that he has "normal hearing" because the military never tested him at all frequencies. For instance, the military did not test Mr. Thompson at 250 hz or 8000 hz. In addition, he argues that the EEGs state that audiograms should not be accepted

unless 250, 500, 1000, 2000, 3000, 4000, 6000, and 8000 hertz are tested—therefore he submits all of his audiograms are unacceptable because none of them tested his hearing at 250 or 8000 hertz. Mr. Thompson argues that this is significant because the evidence is that his hearing loss began at higher frequencies. In addition, he argues that the issue was whether his hearing was lessened or lost as per the definition of disability in section 2(1) but the Appeal Panel wrongly considered whether he suffered more than a loss of 25 dB in each ear as per the EEGs.

[19] Mr. Thompson also submits that the Appeal Panel unreasonably determined that his doctor's reports are not credible on the basis that he did not provide the experts with his In-service Audiograms. He submits that the In-service Audiograms are not necessary for the reports to be credible because the reports are "plausible, reliable, and logically capable of proving the fact it is intended to prove" (*Leroux v Canada (Attorney General)*, 2012 FC 869 at para 53). He also argues that when there is no contradictory evidence before the Appeal Panel, section 39 of the *VRAB Act* mandates that the Appeal Panel must accept his evidence.

[20] The Respondent argues that the plausibility, reliability, and logical relevance of Mr. Thompson's evidence was impacted by his failure to provide his doctors with his In-service Audiograms. The Respondent also argues that the Appeal Panel's credibility finding is reasonable because in *Woo Estate v Canada (Attorney General)*, 2002 FCT 1233 at paras 62, 72 this Court held that medical history is a factor related to credibility. The Respondent also points out that neither expert came to a conclusive opinion on the cause of Mr. Thompson's hearing loss. For example, Dr. Thornley speculated that if Mr. Thompson's In-service Audiograms were normal, it would be difficult to attribute his hearing loss to noise exposure in the military.

[21] It is helpful to first clarify that the EEGs do not state that all audiograms are not acceptable if they are not tested at 250 to 8000 hertz. Rather, they state that audiograms submitted from other sources are not acceptable unless completed at those ranges and co-signed by an audiologist or physician. The EEGs also state that audiograms not meeting the standards can still be considered on a case by case basis.

[22] I do, however, agree with Mr. Thompson that the Appeal Panel's credibility finding was unreasonable. *Woo Estate* stands for the proposition that the availability of anamnesis is a factor that may impact a medical report's credibility, and it does not follow that the Appeal Panel could reasonably automatically negate credibility on the sole basis of the In-service Audiograms. Each case must be determined on its own facts. The facts in *Woo Estate* involved a reconsideration decision involving a deceased Royal Canadian Air Force member. The applicant of that judicial review was Mr. Woo's surviving spouse. His original 1956 diagnosis was schizophrenia, but new medical opinion evidence presented to the Board after his death was that he had actually suffered from post-traumatic stress disorder ("PTSD"). The board rejected the new medical evidence for a number of reasons, including the lack of a complete anamnesis, and insufficient medical evidence of PTSD:

72 The applicant's argument that the Board applied a variable standard with regard to the medical evidence is also without merit. Firstly, the opinion of Dr. Déziel was not relied upon by the Board in its decision of June 26, 2001. **Secondly, the Board did not reject Dr. Frank's assessment simply because he had not examined Mr. Woo. Rather, it rejected Dr. Frank's assessment based on a number of factors, including the lack of a valid and complete anamnesis, and the fact that there was insufficient medical evidence to show that Mr. Woo suffered from post-traumatic stress disorder.** Thirdly, the Board members did not conduct their own medical assessment of Mr. Woo. Rather, they assessed the new evidence submitted by the applicant, and

considered whether it was sufficient to overturn the previous diagnosis of schizophrenia.

[Emphasis added.]

[23] In the context of the facts of *Woo Estate*, the anamnesis (defined as “a patient’s account of his or her medical history” (*The Oxford English Dictionary*, 2nd ed, *sub verbo* “anamnesis”)) was important for the new report of PTSD. But the board also relied on other factors, such as insufficient medical evidence of PTSD, to make its negative credibility finding. Accordingly, I cannot agree that the VRAB Panel in this matter reasonably rejected the medical reports. The sole basis for this finding was that the experts did not have Mr. Thompson’s In-Service Audiogram—but in this case, unlike *Woo Estate*, the doctors did have the patient’s account. Mr. Thompson’s evidence is that his CAF service took place around loud noises such as artillery fire and explosions, and that he experienced sporadic hearing loss during his service. His uncontradicted evidence is also that he did not wear hearing protection because it was frowned upon. Further, he did not report his sporadic hearing loss because it would later return. As Justice Mosley so rightly put it, “[o]ne does not have to be steeped in military culture to understand that proud members of the armed forces do not wish to be perceived as complainers or malingerers” (*Powell v Canada (Attorney General)*, 2005 FC 433 at para 33). The lack of In-service Audiograms, without more, cannot reasonably negate credibility of the medical reports in this case.

[24] I find that the Appeal Panel unreasonably dismissed Mr. Thompson’s appeal on the basis of a lack of persuasive credible medical evidence. Again, unlike *Woo Estate*, the doctors were able to assess and speak to Mr. Thompson, and their reports contain relevant evidence of his hearing that the Appeal Panel was required to assess. This is so especially in light of their

special duty under section 39 of the *VRAB Act*. In fact, Dr. Thornley wrote a letter dated February 3, 2017 that speaks to credibility. In this letter, he frankly states that the failure to provide him with the military audiograms affected his opinion in that he was unable to look at the progression of hearing loss:

Unfortunately, I do not have audiograms that were reported during Mr. Thompson's time of service and, therefore, cannot compare them to look at the progression of hearing loss.

[25] Dr. Thornley's frankness cannot detract from his report's credibility. Furthermore, the EEGs clearly state that a variety of factors are required to determine the cause of hearing loss:

The presence of a hearing loss and the type of hearing loss may be determined from an audiogram...

The **cause** of the hearing loss cannot be determined from an audiogram alone. The **history from the patient, the physical examination and relevant test results** must be considered along with the audiogram findings.

[Emphasis added.]

[26] Following the reasoning in the EEGs, these reports, even without the In-Service Audiograms, contained relevant evidence necessary for the Appeal Panel to reasonably reach its decision about the relationship between Mr. Thompson's hearing loss and his many years of CAF service and exposure to loud noises. Accordingly, I agree with Mr. Thompson that his doctors' reports were unreasonably rejected on the basis of credibility, especially considering the statutory presumptions governing the Appeal Panel in section 39 of the *VRAB Act*.

V. Conclusion

[27] This application for judicial review is granted.

[28] I will award costs in favour of Mr. Thompson in the amount of \$500.00.

JUDGMENT in T-1095-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is to be re-determined by a differently constituted panel.
2. Costs are awarded to Mr. Thompson in the amount of \$500.00.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1095-18

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PLACE OF HEARING: OTTAWA, ONTARIO

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DATED: MAY 13, 2019

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