Federal Court

Cour fédérale

Date: 20091102

Docket: T-605-09

Citation: 2009 FC 1122

Montreal, Quebec, November 2, 2009

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

ELVIN F. ANDERSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Anderson seeks judicial review of the decision of the Veterans Review and Appeal Board (the Board) to deny his request for reconsideration of the Board's decision, dated February 21, 1991,[1] regarding the osteoarthritis in his left knee, on the basis that the new medical evidence submitted did not meet the four-prong test set out in *Mackay v. Canada (Attorney General)* (1997), 129 F.T.R. 286, 71 A.C.W.S. (3d) 270 (F.C.) (applying the Supreme Court of Canada decision in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212).

Background

[2] Mr. Anderson first applied for a disability pension in respect of several conditions, including osteoarthritis in his left knee, in August 1988. A physician's report dated December 1988 from a doctor who started treating him in June 1984 notes that there were marked degenerative changes in his left joint. At the time, Mr. Anderson also established that he injured that knee when he fell from his horse during equitation training in the spring of 1955 and reinjured it when he slipped on the snow during a storm in November 1955, while on patrol.

[3] However, a report entitled "Medical Opinion" from the Pensions Medical Advisory Division, dated September 13, 1989, concludes that "the claimed condition is thus considered late post-discharge in origin, related to aging and there is no indication that service factors were in any way causative".

[4] The application was first denied on October 16, 1989 on the basis that the Canadian Pension Commission (the Commission) considered his condition to be a degenerative condition, not abnormal for a person of his age (53 years old at that time). As there was no report of osteoarthritis on file before Mr. Anderson retired from the Royal Canadian Mounted Police (RCMP) in 1974, the Commission found that this condition was post-discharge in origin and not related to his service in the RCMP.

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[1] Mr. Anderson was granted a pension for other disabilities which include osteoarthritis in his right knee which was found to be linked to an incident that occurred in December of 1956.

[5] On July 17, 1990, the Entitlement Board, after a hearing wherein Mr. Anderson testified, also rejected his application. It noted that despite the fact that after recovering from his injuries, the applicant still had crepitation in his left knee as well as some clicking and discomfort that he allegedly complained of regularly,[2] there was no indication that the said injuries were the cause of his osteoarthritis.

[6] Mr. Anderson appealed to the Board arguing that his condition did originate in the 1955 events. In its decision of February 21, 1991, the Board clearly accepted Mr. Anderson's evidence in respect of his injuries. It was not contested that these events occurred while he was an active member of the RCMP. Nevertheless, the Board confirmed the decision of the Entitlement Board. In doing so, the Board noted that an x-ray report dated June 12, 1978, also speaks of "bilateral degenerative joint disease most marked in the region of the patello-femoral component", but that this diagnosis was made approximately 23 years after the 1955 injuries. The Board also referred to the September 13, 1989 opinion concluding that "the claimed condition cannot be said to be related to the 1955 history of knee sprain".

[7] It is in light of the Board's decision in 1991 that, as instructed by Mr. Anderson, the Senior Area Advocate (the Advocate) filed, on November 25, 2008, his request for reconsideration. This request was submitted along with written submissions that specifically refer to Dr. Irving's medical

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[2] These were not noted in his record.

opinion issued in September 2008,[3] as well as a letter from Mr. Anderson dated September 26, 2008, which was filed with all attachments thereto.

[8] As the reconsideration was sought on the basis of new evidence pursuant to section 111 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the *VRAB Act*), it is clear that the only "new" evidence submitted with the request was Dr. Irving's medical opinion, since Mr. Anderson's letter, and its attachments, focused on the events that occurred in 1955 and the evidence establishing those facts.

[9] In his submissions, the Advocate duly notes that the Board accepted that these injuries were related to his RCMP services and that the <u>only</u> remaining issue was whether or not these injuries led to the current disability. In that respect, in addition to referring to Dr. Irving's evidence, the Advocate also specifically refers to the explanation put forth by Mr. Anderson himself in his letter.

[10] On January 27, 2009, the Advocate communicated with the applicant to advise him of the date of the hearing, noting that *viva voce* evidence was not permitted in the context of a request for reconsideration, and to inquire as to any other new documentary evidence to be submitted. After the hearing on February 9, 2009, the Advocate reported on the hearing and the avenues that would be open to the applicant should his request be refused.

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[3] Essentially, Dr. Irving reached the following conclusion: "[…] It's impossible for me to say whether there is a direct relationship to his 1955 injury, but it certainly is possible that that is the case. Given that he had significant swelling, clicking, and Dr. Hollenberg noted some clicking from the medial compartment, it is possible that he now has post-

[11] On March 23, 2009, the applicant received an undated letter postmarked March 18, 2009 containing the Board's decision. The most relevant passage of the decision reads as follows:

> The Board considered that the new evidence failed to meet the criteria of due diligence, and there was no reasonable explanation why such a medical opinion was not introduced at an earlier date.
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> The Board also considered that this new evidence failed to address the decisive issues raised in the Entitlement Appeal decision dated 21 February 1991. The Board understands that the credibility of this new evidence is questionable, because the doctor indicates that this was the first time he examined the Appellant and that other than the history related to him with respect to the 1955 injury, he did not know the rest of the Appellant's history.
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> The medical opinion also failed the fourth criteria because of the way it is worded, it would not change the result of the past Appeal decision. The medical evidence states that it is impossible for the doctor to say whether there is a direct relationship to the 1955 injury, but that it is possible. The evidence is not persuasive.
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> [Emphasis added.]

Analysis

[12] In his Notice of Application, the self-represented applicant states that he seeks the reversal of the Board's decision and recognition that his condition is a direct result of an injury sustained on April 7, 1955 while he was a member of the RCMP. Mr. Anderson also filed a substantial affidavit which includes documentation that was not before the original decision-maker, particularly at tabs R to V.

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traumatic osteoarthritis from his fall in 1955. Clearly, I don't know the rest of his history since 1955, and I'm only examining him for the first time".

[13] At the hearing, the applicant was advised that the Court cannot consider this new evidence, because on judicial review the validity of the decision must be assessed on the basis of the evidentiary record that was before the original decision-maker. The applicant was also advised that the Court could not make a finding in respect of the causal link. At best, the Court could quash the decision if it contained a reviewable error and send the file back for redetermination by a different panel.

[14] That said, in his Notice of Application, his written submissions and his oral argument, Mr. Anderson raised many grounds which can be summarized as follows:

i. The decision was undated and was made too long after the hearing on February 3, 2009. It failed to refer to all of the evidence and the submissions made on his behalf. It appears to be based only on partial comments of Dr. Irving;

ii. The Board applied a four-prong test. The precise source of this is undocumented and therefore questionable. With respect to the absence of a reasonable explanation, such information is inconsequential as the presence of osteoarthritis was well-documented in the file.

iii. The Board failed to apply s. 39 of the *VRAB Act* and the Board's failure to take a closer look at his file is an indication of bias.

iv. The Bureau of Pensions Advocates failed to give him the best services, because, in his view, the Advocate should have referred the Board to additional evidence such as the two medical reports filed as exhibits N and O to Mr. Anderson's affidavit respectively dated February 11, 2005 and January 23, 1990. In his view, he should

have filed and referred to exhibit K to his affidavit (three photographs of RCMP members executing jumps and mounting horses). Also, since it is not clear to whom the said Advocate addressed his letter of November 25, 2008 (distribution unit), it is not certain that these submissions and all the evidence attached to it were effectively presented to the Board.

v. There are systemic problems with the Board and that, overall, the system is not fulfilling its mandate. The applicant noted that he was never given an opportunity to obtain an orthopedic surgeon's opinion from a member of the Board's own medical staff. Also, the Pensions Advocates Office failed to request a medical opinion at any time before he contacted them with respect to a potential request for reconsideration.

[15] As the present proceeding is limited to the review of the decision of the Board rendered in March 2009, the Court has no jurisdiction to deal with the allegations of systemic failures or with allegations concerning the services provided by the Pensions Advocates Office in 1988-1991 or any time prior to the applicant seeking the reconsideration decision under review. Furthermore, it is not necessary to discuss the allegation of bias given that there is absolutely no evidence or detailed argument to support it. One cannot simply assume bias from the denial of the application or even from the existence of reviewable errors.

[16] As to the quality of the services rendered by the Advocate in this case, the Court can only consider these submissions if the alleged "errors" amount to such an extraordinary incompetence[4] that it constitutes a breach of procedural fairness in itself, such that these errors impacted on the decision rendered. Also, normally this ground of review is not considered unless the counsel has been given notice and has had an opportunity to respond. This is not the case here.

[17] In any event, as discussed at the hearing, none of the evidence that the applicant says the Advocate should have put before the Board was of a nature that could have impacted on the decision. A simple review of the Certified record confirms that the Advocate did put before the Board the package he received from the applicant. Mr. Anderson never referred to the medical report of 2005 or to his wife's letter of 1989.

[18] The only issue before the Board was properly identified in the written representations: the link between the 1955 events which were previously accepted by the Board as being related to Mr. Anderson's service in the RCMP and his current medical condition. The photographs (exhibit K) are not relevant to the issue.

[19] The Court cannot find a breach of procedural fairness here. In fact, there is no evidence that the Advocate's services were anything but appropriate in the circumstances.

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[4] See *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1274, 302 F.T.R. 81, *Gogol v. Canada* (1999), [2000] 2 C.T.C. 302, 2000 D.T.C. 6168 (F.C.A.), *Bedoya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 505, 157 A.C.W.S. (3d) 814 at paras. 18-20, and *Quindiagan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 769, 276 F.T.R. 88 at para. 25.

[20] With respect to Mr. Anderson's argument that the decision was undated, the Court finds that the date is not crucial as the decision was effectively transmitted (postmarked on March 18, 2009) and duly received by the applicant on March 23, 2009.

[21] Turning now to the merits of the decision itself, the Court notes that it appears that Mr. Anderson never met or had a general discussion about the process and the criteria which would be applied because the Advocate assigned to his file was in a different province. This may explain why Mr. Anderson appears to be not very well-informed about the real issue left to be determined and the test that would be applied to determine if his new medical evidence should be admitted by the Board.

[22] As mentioned, there is no doubt that the Board applied the appropriate four-prong test here. In fact, the Board had no choice but to apply this test. Thus, the only issue left is whether its application of the test to the facts of this case contains any reviewable error.

[23] The standard of review applicable here has already been established by this Court in many cases, therefore, as was stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, there is no need in the present case to engage in a full standard of review analysis. As noted in *Lenzen v. Canada (Attorney General)*, 2008 FC 520, 327 F.T.R. 12 at paragraph 33, in *Bullock v. Canada (Attorney General)*, 2008 FC 1117, 336 F.T.R. 73 at paras. 11-15, and in *Rioux v. Canada (Attorney General)*, 2008 FC 991, 169 A.C.W.S. (3d) 338 at para. 17, the Court must determine if

the decision is reasonable. This means that the Court is verifying whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and the law. It also looks at the existence of justification, transparency, and intelligibility within the decision-making process. It is important to state that there may be, and often is, more than one such reasonable outcome. Judicial review is not meant to be used simply as an opportunity for the Court to substitute its own views to those of the original decision-maker.

[24] The fact that the Board did not refer to all the evidence and the submissions made on behalf of the applicant does not indicate that it did not take them into account. On the contrary, a tribunal is assumed to have considered all the evidence, even though every piece of evidence is not addressed in the reasons, unless the contrary is shown: *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (QL) (F.C.A.), *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317, 36 A.C.W.S. (3d) 635 (F.C.A.). In the present case, the Board's reasons adequately support the decision and there is no proof that it failed to consider all the evidence submitted by the Advocate.

[25] Mr. Anderson does not contest that no explanation for the delay in seeking Dr. Irving's medical evidence linking the osteoarthritis in his left knee to the 1955 events was given to the Board. Now is not the time, as mentioned, to provide such explanation. This is an essential criteria, for the admission of the evidence, that cannot simply be ignored as suggested by the applicant. It concerns the filing of evidence supporting a causal link and not the existence of prior evidence of osteoarthritis in the file. Having considered the wording of Dr. Irving's letter, it was not

unreasonable for the Board to conclude that this evidence had little probative weight and was not persuasive.

[26] Sections 3 and 39 of the *VRAB Act* do not relieve the applicant of his burden of establishing a causal link between the injuries he suffered in 1955 and the condition under review. Although the Court does not agree with the respondent's view that this must be done on a balance of probability, Mr. Anderson still had to establish more than a mere possibility. Once again, having very carefully considered Dr. Irving's letter, the Court cannot conclude that it was unreasonable to find that Mr. Anderson had done nothing more than raise a mere possibility of such link.

[27] There is no reviewable error in this case.

ORDER

THIS COURT ORDERS that:

The application for judicial review is dismissed without costs.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-605-09
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