

Federal Court



Cour fédérale

Date: 20101223

Docket: T-1259-09

Citation: 2010 FC 1331

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ROGER ACREMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review concerns a June 25, 2009 decision of the Veterans Review and Appeal Board Canada denying the Applicant's appeal of the Entitlement Review Panel's decision to refuse a disability award to the Applicant for his condition of scleroderma.

[2] For reasons that follow, I am allowing this application for judicial review.

Background

[3] Colonel Roger Acreman (the Applicant) served in the Canadian Militia from March 31 to August 12, 1958, the Canadian Forces from January 6, 1959 to September 14, 1961, and in the Regular Forces from September 1961 until his official discharge on January 10, 1997.

[4] In 1981, the Applicant was diagnosed with scleroderma, which was at the time characterized by severe hypertension and renal failure. Scleroderma is a rare and chronic autoimmune disease which causes normal tissue to be replaced by dense, thick fibre tissue. Scleroderma has no known cause and can be life threatening. Medical restrictions were placed on his military service, limiting him to sedentary duties in Canada because of his medical condition. These restrictions were changed in June 1982, and again in May 1989 to continue his service but restrict him to his present rank.

[5] Despite his medical setbacks, the Applicant continued to work, serving in Ottawa, Gagetown (where he was promoted to Colonel in 1989), Montreal, and South Korea where he was posted from 1992 to 1996. There he held the positions of Canadian Forces Attaché, Chief of the Canadian Liaison Group, and the Canadian Member of the United Nations Military Armistice concurrently.

[6] The Applicant complains that the workload at this post was particularly demanding, as he was required to work many hours, some of them while standing for long periods of time, which was a challenge given his medical condition. When the Applicant returned from South Korea, he was deemed disabled and unfit for his classification and otherwise unemployable, although he has not

provided a copy of his medical release form. The Applicant was discharged from the Canadian Forces. His release records were later changed to indicate that he had been discharged for medical reasons.

[7] On May 16, 2006, the Applicant applied to the Minister of Veterans Affairs Canada for a disability award for scleroderma, peripheral cardiovascular disease, hypertension, renal impairment, ischemic colitis, femoral bypass, and Raynaud's phenomenon. The Applicant alleged that his military service adversely aggravated his health.

[8] The Department of Veterans Affairs (the Department) denied his application for disability based on his scleroderma on November 8, 2006, on the basis that there was no evidence that this condition was caused or permanently aggravated by his military service. In coming to this conclusion, the Department relied on the medical advisory opinion of Dr. Verma, the Department's medical advisor, who noted that the cause of scleroderma was not known, and that stress had not been mentioned either as a cause or an aggravating factor in the development of this disease. The Department found that hypertension, renal insufficiency and Reynaud's phenomenon were "part and parcel" of the scleroderma condition and therefore rejected the claims for these conditions. The Department also rejected the Applicant's claims for peripheral vascular disease and ischemic bowel disease.

[9] The Applicant sought a Departmental Review of this decision on March 20, 2007, with new submissions and evidence, but this was denied on May 7, 2007, on the basis that the Applicant had

failed to provide specific medical evidence to demonstrate that his scleroderma was caused or permanently worsened by stress during his military factor.

[10] The Applicant then applied to the Entitlement Review Panel for a review of the Department's decision regarding his scleroderma claim, although he did not seek review of the decisions regarding his peripheral vascular disease and ischemic bowel disease. On February 5, 2008, the Entitlement Review Panel denied a disability award to the Applicant, finding that the medical opinions of Dr. Verma, and Dr. Henderson (the Applicant's rheumatologist since 1988) as well as the documentary evidence were not sufficiently conclusive to establish that a disability award should ensue for the Applicant's claim.

[11] The Applicant appealed this decision to the Veterans Review and Appeal Board Canada (the Board).

Decision Under Review

[12] In a letter dated June 25, 2009, the Applicant was informed that the Board would not render a favourable decision. The Board was not persuaded that stress was a factor in the Applicant's condition. In determining this, the Board noted that while stress was mentioned in many of the sources submitted, the weight of the medical literature suggested that it was of an unknown etiology.

[13] The Board noted the Applicant's medical history and his submissions of a number of Internet medical literature suggesting that stress played a role in the etiology of his condition. The

Board also acknowledged the medical opinion of Dr. Jamie Henderson, the rheumatologist who had helped supervise care of the Applicant's scleroderma since 1988, asserting that stress aggravates the condition. However, the Board also noted that Dr. Henderson did not provide any medical literature for that opinion. The Board also did not find the articles were sufficient credible medical sources to conclude that stress played a role in the onset and continuance of the condition.

[14] The Board found that even if it was to find that stress was a factor in the Applicant's condition, the evidence before it indicated that his condition was not worsened by stress relating to the military environment. This evidence listed included medical opinions that his disease seemed relatively stable, despite working long and full days, that he was not a medical burden and he was able to cope with stress. The Board found that in light of this, the Applicant's submission that stress played a role in the onset or worsening of his condition was a "leap of faith". The Board found that "if anything, the Appellant's condition appears to have stabilized subsequent to his diagnosis and it would appear that this promotional ability was not at all stymied by this condition."

[15] The Board therefore concluded that there was no link established between the Applicant's service factors and the claimed condition of scleroderma. As such, the Board affirmed the ruling of the Entitlement Review Panel.

Legislation

The *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, 2005, c. 21.

2.(1) The following definitions apply in this Act.

...

“disability”

« invalidité »

“disability” means the loss or lessening of the power to will and to do any normal mental or physical act.

...

“service-related injury or disease”

« liée au service »

“service-related injury or disease” means an injury or a disease that

(a) was attributable to or was incurred during special duty service; or

(b) arose out of or was directly connected with service in the Canadian Forces.

45. (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from

(a) a service-related injury or disease; or

(b) a non-service-related injury or disease that was aggravated by service.

46. (1) An injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of

(a) a service-related injury or disease;

2. (1) Les définitions qui suivent s’appliquent à la présente loi

...

« invalidité »

“disability”
« invalidité » La perte ou l’amointrissement de la faculté de vouloir et de faire normalement des actes d’ordre physique ou mental.

...

« liée au service »

“service-related injury or disease”

« liée au service » Se dit de la blessure ou maladie :

a) soit survenue au cours du service spécial ou attribuable à celui-ci;

b) soit consécutive ou rattachée directement au service dans les Forces canadiennes.

45. (1) Le ministre peut, sur demande, verser une indemnité d’invalidité au militaire ou vétéran qui démontre qu’il souffre d’une invalidité causée :

a) soit par une blessure ou maladie liée au service;

b) soit par une blessure ou maladie non liée au service dont l’aggravation est due au service.

46. (1) Est réputée être une blessure ou maladie liée au service la blessure ou maladie qui, en tout ou en partie, est la conséquence :

a) d’une blessure ou maladie liée au service;

- | | |
|---|---|
| <p>(b) a non-service-related injury or disease that was aggravated by service;</p> <p>(c) an injury or a disease that is itself a consequence of an injury or a disease described in paragraph (a) or (b); or</p> <p>(d) an injury or a disease that is a consequence of an injury or a disease described in paragraph (c).</p> | <p>b) d'une blessure ou maladie non liée au service dont l'aggravation est due au service;</p> <p>c) d'une blessure ou maladie qui est elle-même la conséquence d'une blessure ou maladie visée par les alinéas a) ou b);</p> <p>d) d'une blessure ou maladie qui est la conséquence d'une blessure ou maladie visée par l'alinéa c).</p> |
|---|---|

The Veterans Review and Appeal Board Act, S.C. 1995, c.18 (VRAB Act)

- | | |
|--|---|
| <p>3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other 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.</p> <p>38. (1) The Board may obtain independent medical advice for the purposes of any proceeding under this Act and may require an applicant or appellant to undergo any medical examination that the Board may direct.</p> <p>Notification of intention</p> <p>(2) Before accepting as evidence any medical advice or report on an examination</p> | <p>3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs 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.</p> <p>38. (1) Pour toute demande de révision ou tout appel interjeté devant lui, le Tribunal peut requérir l'avis d'un expert médical indépendant et soumettre le demandeur ou l'appelant à des examens médicaux spécifiques.</p> <p>Avis d'intention</p> <p>(2) Avant de recevoir en preuve l'avis ou les rapports d'examens obtenus en vertu du</p> |
|--|---|

obtained pursuant to subsection (1), the Board shall notify the applicant or appellant of its intention to do so and give them an opportunity to present argument on the issue.

39. In all proceedings under this Act, the Board shall

- (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;
- (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
- (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.

paragraphe (1), il informe le demandeur ou l'appellant, selon le cas, de son intention et lui accorde la possibilité de faire valoir ses arguments.

39. Le Tribunal applique, à l'égard du demandeur ou de l'appellant, les règles suivantes en matière de preuve :

- a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
- b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
- c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

Issue

[16] I would pose the issue as follows:

1. Did the Board err in dismissing the Applicant's evidence on the connection between stress and his condition of scleroderma?

Standard of Review

[17] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court of Canada established two standards of review: reasonableness and correctness. A reviewing court may consider and apply past jurisprudence which has already established the standard of review for a particular case.

[18] This Court has dealt with the standard of review applicable to a decision of the Board many times. A question regarding the Board's assessment or interpretation of contradictory evidence determining whether an injury was caused or aggravated by military service is a question of fact and should be reviewed on a standard of reasonableness: *Boisvert v Canada (Attorney General)*, 2009 FC 735 at paras 33-35.

[19] Section 3 of the *Veterans Review and Appeal Board Act* (the Act) requires that the provisions of the Act 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." Section 39 further requires that the Board draw every reasonable inference in favour of the Applicant, accept any uncontradicted evidence presented to it by the Applicant that it considers credible in the circumstances, and resolve in favour of the Applicant any doubt, in weighing of evidence, as to whether the Applicant has established a case.

Analysis

[20] The Applicant makes three main submissions with regard to the Board's decision. First, the Applicant submits that the Board confused the issue of stress as a cause of scleroderma with stress

as an aggravating factor. Although the etiology of scleroderma is unknown, the Applicant had been claiming that the military service exacerbated his condition.

[21] Second, the Applicant takes issue with the way the Board considered the medical evidence before it, particularly the Board's preference of the opinion of Dr. Verma, a general practitioner, over the opinion of Dr. Henderson, a rheumatologist who had supervised care of the Applicant since 1988.

[22] Third, the Applicant submits that in highlighting the evidence that showed the Applicant could still function despite his condition, the Board confused the issue of whether the Applicant could function in spite of the stress with the issue that stress contributed to the exacerbation of his condition, which was the only issue that had to be determined.

[23] The Respondent submits that the Board's decision was reasonable and that its findings that the Applicant's condition of scleroderma had not been caused nor aggravated by his military service are entirely consistent with the evidence before the Board.

[24] The Respondent points out that the Board reviewed all of the evidence. In particular, the Respondent says that the materials submitted by the Applicant merely confirmed that it was possible that his medical service aggravated his condition; however, the Applicant failed to adduce specific evidence that related to his condition to his military service.

[25] The Respondent further submits that although s.3 and 39 of the VRAB act creates liberal and purposive guidelines, the Board was not obliged to accept evidence presented by the Applicant if the Board found that the evidence was not credible, even if it was not contradicted. In the present case, the Board had found that much of the evidence was not credible, and contradictory evidence had been placed before it.

[26] On one hand, the Applicant carries the burden of proving his claim, which, in this case, is his claim that military service aggravated his condition of scleroderma: *Hall v Canada (Attorney General)*, [1998] 152 FTR 58 at para 28. On the other hand, the Board's decision must be made in a way that is justified, transparent, and intelligible, falling within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, as required in *Dunsmuir* at para 47.

[27] Section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* provides that the Minister may pay a disability award to a member suffering from a disability resulting from certain types of injuries. Subsection 45(1)(b) expressly provides that this injury may be a non-service related one that was aggravated by service. This would indicate that the injury does not have to be caused by the military service.

[28] I am not convinced by my reading of the Board's decision that the Board confused the question of the stress as a cause of scleroderma and stress as an aggravating factor. Although the Board noted that medical literature indicates that scleroderma is of an unknown etiology, the Board did go on to analyze stress as a factor in the condition, including stress as a continuing or worsening factor.

[29] However, I am not convinced that the Board weighed the medical evidence before it in a manner that was reasonable, considering the direction provided by sections 3 and 39 of the *Act*.

[30] I note that Dr. Henderson had physically examined and worked with the Applicant since 1988, and yet the Board preferred the opinion of Dr. Verma, who had not done so. It would seem to me that the opinion of a medical specialist, a rheumatologist, especially one who has examined a patient, should be carefully considered.

[31] Dr. Henderson had not provided any medical literature but he did reference the Applicant's researched medical articles. Dr. Henderson wrote in May 24, 2006:

In my experience in treating connective tissue diseases over the years, it has been my firm belief that stress aggravates the underlying condition. This gentleman with his military career with relocations, increasing responsibilities certainly placed him under stress and would have probably aggravated the underlying condition. I am sure his involvement in the military had an impact in his eventual outcome.

He then referred to the Applicant's medical literature later in January 24, 2007:

I have read some of the articles that Mr. Acreman has researched through the world literature and it would certainly seem to substantiate my impression that stress can play a negative role in exacerbating underlying autoimmune conditions.

[32] Dr. Verma, the medical advisor, wrote: "The cause of scleroderma is not known and it has a worldwide distribution...Stress of any kind has not been mentioned either as a cause or an aggravating factor in the development of this disease..." Dr. Verma did not refer to any medical literature along with his opinion.

[33] There was contradictory evidence before the Board: Dr. Verma's opinion that stress had not been mentioned as a factor and Dr. Henderson's opinion that stress was a factor. However, there were also the medical articles submitted by the Applicant which advocated the reduction of stress in the treatment of the condition. The Board is obligated to weigh this evidence in coming to its determination.

[34] The Board did not accept Dr. Henderson's opinion, noting that he did not provide any medical literature for his opinion. On the other hand, the Board also rejected the medical articles submitted by the Applicant, finding that they were not sufficiently credible medical sources to conclude that stress played a role in the onset and continuance of the condition. One of the medical articles was from the *Annals of Oncology* (which appears to be a reputable publication by Oxford), focusing on the topic of stress and scleroderma.

[35] The Board shows very little appreciation or consideration for any of the submitted articles nor does it offer an adequate explanation for its credibility findings for rejecting the medical articles. It is difficult to follow the Board's reasoning in rejecting the evidence of the medical articles.

[36] Given that section 3 of the *Act* requires the provisions be "liberally construed and interpreted" and section 39 requires the Board draw every reasonable inference in favour of the Applicant, accept any uncontradicted evidence presented to it by the Applicant that it considers credible in the circumstances, and resolve in favour of the Applicant any doubt, in weighing of evidence, the Board has to properly scrutinize the credibility of the journal articles and provide cogent reason for rejecting the medical literature.

[37] The Applicant relied in part on these articles to prove his claim that the stress he experienced in military service had exacerbated his scleroderma. No other medical literature on scleroderma was before the Board. The Board's failure to explain its credibility findings with respect to the Applicant's evidence is an error that falls outside of the reasonableness requirement of justification, transparency and intelligibility.

Conclusion

[38] For the above reasons, I allow this application for judicial review of the Board's decision.

[39] On the matter of costs, the Applicant requested the question of costs be addressed after the decision issued. Accordingly, the parties may make submissions on the question of costs within 30 days of the issuance of this decision.

JUDGMENT

THIS COURT ORDERS and adjudges that:

1. The application for judicial review is allowed and the matter is remitted back for redetermination.
2. The Applicant may submit such further evidence and materials that relate to his scleroderma.
3. The parties may make submissions on costs within 30 days of this order.

"Leonard S. Mandamin"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1259-09

STYLE OF CAUSE: ROGER ACREMAN v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: May 12, 2010

REASONS FOR JUDGMENT AND JUDGMENT: MANDAMIN J.

DATED: DECEMBER 23, 2010

APPEARANCES:

Yehuda Levinson FOR THE APPLICANT

Rosyln Mounsey FOR THE RESPONDENT

SOLICITORS OF RECORD:

Yehuda Levinson FOR THE APPLICANT
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada