

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170217

Docket: A-86-16

Citation: 2017 FCA 27

**CORAM: PELLETIER J.A.
STRATAS J.A.
WEBB J.A.**

BETWEEN:

JAMES ALAN MACDONALD

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on November 10, 2016.

Judgment delivered at Ottawa, Ontario, on February 17, 2017.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**STRATAS J.A.
WEBB J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. MacDonald, a retired member of the Royal Canadian Mounted Police (RCMP) has been attempting, since 2003, to obtain disability benefits for injuries suffered as a result of his RCMP service. For various reasons, his entitlement to benefits was not settled until 2009. The governing legislation, the *Pension Act*, R.S.C. 1985 c. P-6 (the Act), provides that benefits will be payable from the date of the application for benefits or 3 years prior to the date of the order granting benefits, whichever is later, subject to the possibility of a further two years of retroactivity under certain circumstances. The order granting Mr. MacDonald benefits was made

retroactive to a date three years prior to the date of that order but his request for an additional 2 years of retroactive benefits was refused. Mr. MacDonald brought an application for judicial review of the denial of the additional retroactive benefits but that application was dismissed by the Federal Court, for reasons reported as 2016 FC 186.

[2] Mr. MacDonald now appeals to this Court. For the reasons which follow, I would dismiss the appeal.

[3] Mr. MacDonald was a member of the RCMP from 1973 to 1986. In the course of his career, he served in the Musical Ride where he suffered various injuries. In 2003, he applied for a disability pension, alleging that his time with the Musical Ride had resulted in sciatica, osteoarthritis of the cervical spine and biomechanical dysfunction in his cervical, thoracic and lumbar spine.

[4] Mr. MacDonald first filed his application for benefits in June 2003. In March 2004, his attending physician, Dr. Clarke, provided Veterans Affairs Canada (VAC) her written opinion as to his neck, thoracic and lumbar pain and the possible link to his RCMP service. This report was not satisfactory as it did not establish that Mr. MacDonald suffered from one or more of the conditions for which he claimed a pension. Mr. MacDonald was asked to provide a further medical report but this proved to be difficult since Dr. Clarke had closed her practice. Mr. MacDonald had to find a new physician, Dr. MacAulay, who had to review his medical records in order to provide a medical report. Dr. MacAulay provided a report which was filed in December 2004. In April 2005, the Minister of Veterans Affairs dismissed Mr. MacDonald's

claim for benefits because the evidence provided did not support the claim: see Appeal Book at 80-85.

[5] Following the dismissal of his claim for benefits, Mr. MacDonald asked the Bureau of Pension Advocates (BPA) for assistance and in July 2005, counsel was appointed to represent him. Various steps were taken with respect to Mr. MacDonald's appeal, including the provision of fresh medical evidence, until it was heard in January 2009. At that time, the Review Panel awarded Mr. MacDonald disability benefits for some of the conditions he suffered and awarded him retroactivity to January 2006 *i.e.* 3 years prior to the date of the decision granting him benefits. It found that there were no grounds to grant him the additional retroactivity provided in subsection 39(2) of the Act.

[6] It is perhaps useful to set out here s. 39 of the Act:

39 (1) A pension awarded for disability shall be made payable from the later of

(a) the day on which application therefor was first made, and

(b) a day three years prior to the day on which the pension was awarded to the pensioner.

(2) Notwithstanding subsection (1), where a pension is awarded for a disability and the Minister or, in the case of a review or an appeal under the *Veterans Review and Appeal Board Act*, the Veterans

39 (1) Le paiement d'une pension accordée pour invalidité prend effet à partir de celle des dates suivantes qui est postérieure à l'autre :

a) la date à laquelle une demande à cette fin a été présentée en premier lieu;

b) une date précédant de trois ans la date à laquelle la pension a été accordée au pensionné.

(2) Malgré le paragraphe (1), lorsqu'il est d'avis que, en raison soit de retards dans l'obtention des dossiers militaires ou autres, soit d'autres difficultés administratives indépendantes de la volonté du

Review and Appeal Board is of the opinion that the pension should be awarded from a day earlier than the day prescribed by subsection (1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension.

demandeur, la pension devrait être accordée à partir d’une date antérieure, le ministre ou le Tribunal, dans le cadre d’une demande de révision ou d’un appel prévus par la *Loi sur le Tribunal des anciens combattants (révision et appel)*, peut accorder au pensionné une compensation supplémentaire dont le montant ne dépasse pas celui de deux années de pension.

[7] Mr. MacDonald appealed to the Veteran Review and Appeal Board (the Board) from the Review Panel’s dismissal of his request for additional retroactivity. He argued that the Review Panel erred in finding that the difficulties he experienced in obtaining the necessary medical reports were not grounds for granting him additional retroactivity. He also argued that inadequate funding of the Bureau of Pension Advocates (BPA) resulted in the advocate provided to him by the BPA failing to prosecute his appeal so as to bring it to a timely conclusion.

[8] In June 2014, the Board dismissed Mr. MacDonald’s application for additional retroactivity. This decision was the subject of an application for judicial review which was eventually settled by a consent order quashing the Board’s order and remitting the matter for a fresh decision. The Board held a hearing in December 2014 and released its decision in January 2015.

[9] Mr. MacDonald’s complaints about delays in “securing service or other records” or “other administrative difficulties” beyond his control relate to the period between the filing of his application in June 2003 and the Review Panel’s decision in January 2009. The Board’s January

2015 decision dealt only with that time period and not with the course of events following the Review Panel's decision.

[10] Before the Board, Mr. MacDonald argued that the delay he incurred in supplying the necessary medical reports was a delay in "securing service or other records". The Board found that the delay in processing his application was not due to any delay in obtaining service medical records. It held that before an application could be forwarded for adjudication, three necessary elements had to be assembled: a completed application for a disability pension, service medical records and a completed physician's statement. In Mr. MacDonald's case, the last of these elements to be provided was the completed physician's statement. His application could not be processed until he provided the physician's statement. As a result, the delay was not the result of obtaining "service or other records." The Board went on to hold that a medical report was not a record within the meaning of subsection 39(2) so that any delay in obtaining a medical report from a physician did not open the door to increasing the retroactivity period. Finally, the Board held that if Mr. MacDonald had provided appropriate evidence to support his claim in December 2004, a VAC decision in April 2005 approving his claim would have been retroactive to the date of application pursuant to subsection 39(1) of the Act.

[11] The Board also rejected Mr. MacDonald's argument that the Minister's failure to adequately fund the BPA prevented it from representing claimants in a timely manner. The Board's view was that Mr. MacDonald had a number of choices as to his manner of representation, including retaining a lawyer in private practice to represent him, so that it could not be said that the delay in prosecuting his claim was beyond his control. In any event, it was

not clear that any delay was due to administrative difficulties as Mr. MacDonald continued to gather evidence to improve his case until shortly before the date of the hearing. The Board went on to say that to the extent that claims of inordinate delay in the prosecution of Mr. MacDonald's claim raised issues of professional negligence on the part of lawyers or advocates employed by the BPA, those were matters beyond its jurisdiction. In the result, the Board found that Mr. MacDonald had not established that he was entitled to an additional period of retroactivity.

[12] Mr. MacDonald brought an application for judicial review of the Board's decision. The Federal Court dismissed his application on the basis that the Board had not erred in its interpretation of subsection 39(2) of the Act. The Court found that the Board required proof of either delays in securing records or administrative delays and, in any event, periods of delay beyond the normal processing time of a file. In the Court's view, subsection 39(2) gives the Board discretion to award a further period of retroactivity but does not oblige it to do so. The Federal Court found that the Board's exercise of its discretion in Mr. MacDonald's case was reasonable.

[13] The Court rejected Mr. MacDonald's argument that the Board had failed to consider the evidence in the light most favourable to him. It found that the Board's weighing of the evidence was entitled to deference and that the Court was not entitled to reweigh the evidence. In particular, the Court rejected Mr. MacDonald's argument as to inadequate or inefficient representation by the BPA. The Court found that Mr. MacDonald had a choice as to counsel and could have changed counsel at any time. Whether or not BPA counsel pursued the appeal with diligence was not an administrative difficulty beyond Mr. MacDonald's control.

[14] Before this Court, Mr. MacDonald raises the same arguments as he did before the Board. He alleges that the difficulties he had obtaining a medical report due to his family physician closing her practice and the resulting necessity of finding another family physician to prepare a report caused delays beyond his control. He disputes the Board's conclusion that a medical report is not a record within the meaning of ss. 39(2) of the Act, so that difficulties in obtaining such a report would be a basis upon which an additional period of retroactivity could be awarded.

[15] Mr. MacDonald also alleges that the Board erred in failing to recognize that the inefficiencies in the BPA's handling of his file were also matters beyond his control and that the Board erred in finding that his argument required it to decide questions of professional negligence that were beyond its jurisdiction. In his view, the Board erred in considering, first, whether the problems with the Bureau's representations were administrative difficulties and, secondly, whether they were beyond his control.

[16] In deciding whether there were grounds to award an additional period of retroactivity, the Board was bound to apply the criteria that Parliament set out, namely whether there were "delays in securing service or other records" or "other administrative difficulties," one or both of which were "beyond the control of the applicant". In assessing the evidence led with respect to those facts, the Board was bound by section 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, to draw every reasonable inference in favour of the applicant, to accept the applicant's uncontradicted evidence and to resolve any doubts in the weighing of the evidence in favour of the applicant.

[17] The Board's reasons for dismissing Mr. MacDonald's application were set out earlier in these reasons. They can be summarized as follows:

- i. Difficulties in obtaining "service or other records" did not delay the processing of Mr. MacDonald's application because the latter could not proceed until a medical report from his physician was filed and that report is not a record.
- ii. Even if a medical report is a record within the meaning of subsection 39(2) of the Act, Mr. MacDonald was responsible for obtaining a medical report and providing it to the VAC so that any delay in doing so was his responsibility, and therefore not a matter beyond his control.
- iii. Even if a medical report is a record within the meaning of subsection 39(2) of the Act, and even if the delay in producing a medical report was due to difficulties beyond Mr. MacDonald's control, the effective cause of the delay in establishing Mr. MacDonald's entitlement to a pension was the insufficiency of the first medical report he submitted to VAC. Had he initially submitted a medical report which supported his claim, the VAC would have allowed the claim instead of dismissing it in April 2005, which would have permitted his period of retroactivity to begin as of the date of his application.

[18] When the whole of the Board's reasoning is considered, it is clear that the definition of a "record" and the locus of the "administrative difficulties" that Mr. MacDonald may have experienced are not the central issues in its reasoning. The Board focussed on the reasons for the VAC's refusal of his original application, namely an inadequate medical report. When one compares the VAC's 2005 decision and the Review Panel's January 2009 decision granting him pension benefits, it is clear that the VAC decision turned on the absence of evidence tying Mr. MacDonald's injuries to his service, an evidentiary gap which was remedied in proceedings before the Review Panel. As the Board found, the insufficiency of the first medical report Mr. MacDonald submitted to VAC caused the delay.

[19] Accordingly, when considering the standard of review, we are not really dealing with the Board's interpretation of terms such as "delays in securing service or other records" or "other administrative difficulties" or "beyond the control of the applicant." Instead, we are dealing with

the Board's assessment of the evidence before it and its fact-base findings as to the real cause of his delay.

[20] Thus, reviewing the Federal Court's decision in accordance with *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2.S.C.R. 559 at paras. 45-46. I agree with the Federal Court that the standard of review is reasonableness and that the Board's decision was reasonable. Its fact-base findings were within the range of the acceptable and defensible.

[21] The second branch of Mr. MacDonald's argument is that the inadequate funding of the Bureau of Pension Advocates compromises the ability of advocates to represent their clients in a timely manner which, in Mr. MacDonald's view, is an administrative difficulty beyond his control. Furthermore, the failure of the advocate appointed to represent him to pursue his appeal to the Review Panel with more diligence is a manifestation of this same administrative difficulty which is beyond his control.

[22] The Board rejected these contentions for a variety of reasons that, in my view, pass muster under reasonableness review. The Board found that the choice to use a member of the Bureau of Pension Advocates involves an implicit acceptance of the conditions under which such advocates work. If an applicant is unwilling to accept those constraints, then his or her remedy is to represent himself or herself or to seek assistance from a member of the private bar. Because the applicant has a readily available alternative, this constraint does not amount to administrative difficulties beyond an applicant's control.

[23] Mr. MacDonald challenges this conclusion saying that applicants are not advised of these-trade-offs and in any event, the Board's position is an implicit recognition that representation by the Bureau of Pension Advocates does involve additional delay.

[24] The Board went on to note that much of the delay was devoted to the collection of evidence and that once Mr. MacDonald's evidence gathering was complete, his matter proceeded to a hearing relatively quickly. Mr. MacDonald challenges this by pointing out that the evidence gathering was contingent on the availability of a hearing date. An earlier date would have resulted in the later evidence being produced sooner.

[25] It is undeniable that a 4 year delay between the VAC's decision and the Review Panel's decision is a lengthy delay. While there are competing theories about why the delays occurred, the critical issue is whether the delays were beyond Mr. MacDonald's control. The Board's approach was to consider whether Mr. MacDonald had alternatives to the situation in which he found himself as opposed to why the periods of delay occurred. The Board appears to have had in mind that whether an applicant is represented by a member of the Bureau of Pension Advocates or by a member of the private bar, the applicant is not obliged to accept poor service. Clients are entitled to demand that their representative deal with their matter in a timely fashion, failing which another representative can be chosen. To that extent, the decision to put up with poor service can be seen as a matter which is not beyond an applicant's control. I consider the Board's conclusions in this regard to be within the range of the acceptable and defensible and thus, reasonable.

[26] This is not a case where “the reasons for decision are non-existent, opaque or otherwise indiscernible”, or one in which, “the record before the administrative decision maker does not shed light on the reasons why the administrative decision maker decided or could have decided in the way it did”: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766, at para. 121. Having regard to the record and to the result, I am satisfied that the outcome reached by the Board is reasonable.

[27] In the result, I am of the view that the appeal should be dismissed.

"J.D. Denis Pelletier"

J.A.

“I agree.
David Stratas J.A.”

“I agree.
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-86-16
STYLE OF CAUSE: JAMES ALAN MACDONALD v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: NOVEMBER 10, 2016

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: STRATAS J.A.
WEBB J.A.

DATED: FEBRUARY 17, 2017

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