Federal Court  Cour fédérale

Date: 20161109

Docket: T-407-16

Citation: 2016 FC 1246

Ottawa, Ontario, November 9, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

PHILIP M. RYAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to subs. 18.1(3) of the *Federal Courts Act*, RCS 1985, c F-27, of a January 13, 2016 decision [Decision] of the Veterans Review and Appeal Board [the Board]. The Board upheld the Entitlement Review Panel's 2011 decision, which denied the Applicant's disability award request based on his spondylosis lumbar spine

[Spondylosis]. After considering both oral and written submissions, I find the Decision to be reasonable, and accordingly dismiss this judicial review.

II. Background

[2] The Applicant dutifully served Canada as an artilleryman in the Canadian Forces from 1975 to 1979 [Service]. The Applicant's Service was physically demanding as it included physical training, parachute jumping, and artillery training.

[3] During his Service, the Applicant suffered four injuries, for which he is currently receiving disability award entitlements: disc disease, right immersion foot injury, left immersion foot injury, and tinnitus. His claim compensation for Spondylosis was, however, refused in the 2011 and 2016 decisions noted above.

[4] The Applicant incurred these injuries as a result of two accidents.

[5] First, on September 10, 1976, the Applicant was injured during a low-level parachute jump when his feet and legs became entangled in his parachute risers, causing him to hit the ground head and shoulders first.

[6] Second, on January 28, 1978, the Applicant was injured when assisting to push a mortar toboggan up an embankment, which then slid back downward, pushing the Applicant against the snow with his body bent backwards, and coming to a stop on top of him. The Applicant also sustained severe frostbite on both legs and feet.

[7] The Applicant did not report any back pain during his medical examination when released from the Canadian Forces in 1979, but indicated other injuries, including frostbitten feet.

[8] After leaving the Canadian Forces, the Applicant worked for Canada Post during which time he made four Workers' Compensation Board back injury claims related to his employment:

(1) In 1982, the Applicant injured his back when he fell from a height of four feet onto a rubber conveyor belt;

(2) In 1983, the Applicant lifted a mail bag weighing seventy pounds and injured his back;

(3) In 1988, the Applicant attempted to prevent six mail boxes from falling off a forklift palate and injured his lower back;

(4) In 1988, the Applicant injured his back in a motor vehicle accident.

[9] The Applicant's Spondylosis was first diagnosed in 1992.

[10] In 2010, the Applicant applied for a disability entitlement for Spondylosis per s 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [the Act]. He alleged that this injury was attributable to the 1976 parachute and 1978 toboggan accidents described above, in addition to over one hundred parachute jump exercises carried out during his Service.

[11] On February 24, 2011, a Veterans Affairs Canada Official denied the application [VAC Decision] on the basis that the Applicant's Spondylosis neither arose out of, nor was directly connected to his Service.

[12] The Applicant appealed. On July 5, 2011, the Entitlement Review Panel affirmed the VAC Decision denying the Applicant entitlement to a disability award. The Applicant then appealed the Entitlement Review Panel's decision to the Board, which was also dismissed. That appeal is the subject of this judicial review.

III. Decision Under Review

[13] The Board considered whether the Applicant's Spondylosis arose out of or was directly connected with his Service (per s 45 of the Act), providing a detailed review of the Applicant's evidence and arguments. The Board also noted that it applied the statutory requirements under s 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [VRAB Act], which requires it to draw reasonable inferences and resolve any evidentiary weight issues in favour of the Applicant, as well as accept any uncontradicted evidence from the Applicant where credible.

[14] The Board upheld the 2011 Entitlement Review Panel decision, denying a disability award entitlement for the Applicant's Spondylosis lumbar spine due to a lack of objective, contemporaneous medical evidence needed to substantiate sustained significant specific trauma to his back, allegedly causing Spondylosis. The Board also found that the 1976 parachuting incident led to the Applicant's cervical spine injury, which resulted in compensation for cervical disc disease.

[15] Further, the Board found the following:

> Although he [the Applicant] may have hurt his back as a result of the toboggan incident, there is simply no objective contemporaneous medical evidence to ascertain that he sustained a

> back injury during the toboggan incident. As well, there are no complaints of back injury in the Applicant's service medical file from 1975 to 1979 to such an extent as to cause spondylosis of the lumbar spine and absolutely no complaints of back pain in his medical examination at release in 1979 (Certified Tribunal Record at 129 [CTR]).

[16] The Board considered the Applicant's four Workers' Compensation Board back injury claims that occurred during his employment with Canada Post, which all transpired after his discharge from the Canadian Forces. The Board found that the medical reports relied on by the Applicant did not exclude these four separate back injuries as possible causes of the Applicant's current condition. The Board also noted that the four post-discharge Workers' Compensation claims resulted in significant time off, whereas the 1976 parachute and 1978 toboggan injuries did not.

[17] The Board further noted that the earliest diagnosis of the Applicant's condition was in 1992, well over a decade after his Service, and subsequent to the various Canada Post-related injuries.

[18] Finally, the Board discounted the medical opinions contained in the medical reports tendered by the Applicant as not credible for entitlement purposes, as they did not persuasively establish that the two Service-related incidents led to the Spondylosis, particularly in light of the significant post-discharge injuries.

IV. Preliminary Issues

[19] Two preliminary issues were addressed at the hearing, as follows.

A. Should this Court exercise its discretion to allow the late filing of the Applicant`s judicial review application?

[20] The Applicant filed this judicial review application six days past the thirty-day deadline set by subs. 18.1(2) of the *Federal Courts Act*.

[21] I have considered four questions in exercising my discretion to extend the thirty-day deadline, per *Exeter v Canada (Attorney General)*, 2011 FCA 253 at para 4:

(1) Does the moving party have a continuing intention to pursue an application for judicial review?

(2) Has the responding party suffered any prejudice as a result of the moving party's delay?

(3) Has the moving party offered a reasonable explanation for the delay?

(4) Does the intended application for judicial review have any prospect of success?

[22] As this judicial review application was only delayed by six days, it was presumed – particularly given the length of time that the Applicant patiently awaited the outcome of his appeal before the Board – that he had a strong and continuing intention to pursue this matter. The Respondent suffered no prejudice due to the short delay. As for the third and fourth questions, both were answered in the affirmative as the Applicant represented himself and put forward a strong case, given the constraints and passage of time.

[23] In view of the short delay, and the Respondent's position, the time extension is granted.

B. Should this Court strike paragraphs 4-77 of the Applicant's Affidavit?

[24] The Respondent objected to this large portion of the Applicant's Affidavit, submitting that this Court should solely rely on material before the Board, with additional evidence only being admissible when addressing questions of procedural fairness or jurisdiction (*Peles v Canada (Attorney General*), 2013 FC 294 at paras 11-13).

[25] As a general rule, the evidentiary record before this Court on judicial review is restricted to that which was before the administrative decision-maker (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42; *Assn of Universities & Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19 [*Access Copyright*]). Any exception to this rule must (i) not usurp the administrative decision-maker's role as a merits-decider and (ii) further the reviewing role of this Court (*Bell Canada v 7262591 Canada Ltd*, 2016 FCA 123 at para 20). As explained by the Court of Appeal in *Access Copyright* at para 20, such exceptions include affidavits that:

(1) provide general background that might assist the Court in understanding relevant issues;

(2) bring procedural defects to the attention of the Court (such defects are limited to those that cannot be found in the evidentiary record before the administrative decision-maker); and

(3) highlight a complete lack of evidence before the administrative decision-maker when making a particular finding.

[26] I agree that in this case much of the Affidavit evidence was not before the decision-makers below, and cannot be considered given that it goes to the merits of the matter before the Board. The Affidavit evidence does not raise matters that fall into any of the three exceptions identified above. To consider such evidence would offend the demarcation of roles between this Court as a judicial review court, and the Board as a fact-finder and merits-decider.

[27] However, even if all of the evidence in the Affidavit is considered, that still does not change any of the following analysis regarding the reasonability of the Decision.

V. Issues and Standard of Review

[28] The sole issue before this Court is whether the Board committed a reviewable error in finding that the Applicant did not qualify for a s 45 disability award entitlement. The Applicant raises four issues, namely did the Board:

A. Fail to consider the Applicant's evidence that he injured his back in the 1976 parachuting and 1978 toboggan incidents?

B. Err in concluding that the Applicant's Workers' Compensation injuries most likely caused his Spondylosis?

C. Err in ignoring its Entitlement Eligibility Guidelines?

D. Err in rejecting uncontradicted medical evidence?

[29] The standard of reasonableness applies to decisions of the Board such as the one under review, which was based on factual findings and questions of mixed fact and law (*Ouellet v Canada (Attorney General)*, 2016 FC 608 at paras 23-24). To be reasonable, the Board's decision must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para 47). While there might well be more than one reasonable outcome, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to this Court to substitute its own view of a preferable outcome" (*Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 at para 59).

VI. Analysis

[30] Section 45 of the Act requires the Minister to determine the cause of the disability for which compensation is sought. If the Minister's determination is appealed, as it was in this case, the Board is then required make its own finding on the cause of the Applicant's disability (*Newman v Canada (Attorney General)*, 2014 FCA 218 at para 14 [*Newman*]).

[31] The burden of proof lies on the Applicant, who must submit sufficient credible evidence establishing, on a balance of probabilities, a causal link between his injury and the incidents that transpired during his Service. In other words, the injury must be sufficiently proximate to the Applicant's Service to justify a disability award: it must arise out of, or be directly connected with, the Applicant's service in the Canadian Forces (*Ben-Tahir v Canada (Attorney General)*, 2015 FC 881 at para 62 [*Ben-Tahir*]).

[32] In proving the causal link between his Service and his injury, the Applicant benefits from the various statutory presumptions provided by s 39 of the VRAB Act, discussed above.

[33] Subsection 50(f) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50 [Regulations] provides that, in the absence of contrary evidence, a veteran has established that an injury or disease is service-related if s/he demonstrates that it was incurred in the course of any military operation, training or administration.

[34] Finally, in light of the nation's great moral debt to those who have served this country (*MacKay v Canada (Attorney General)*, [1997] FCJ No 495 at paras 20-21 (FCTD)), s 3 of the VRAB Act mandates a liberal and purposive approach by the Board regarding claims for disability awards for veterans.

[35] However, while the legislative scheme provides various mechanisms that favour the claimant in entitlement claims and appeals, it does not provide a carte blanche to the Applicant to the effect that any submission must automatically be accepted. Rather, evidence presented must be credible and reasonable (*Weare v Canada (Attorney General)*, [1998] FCJ No 1145 at para 19 (FCTD)). Evidence is credible when "it is plausible, reliable and logically capable of proving the fact it is intended to prove" (*Wannamaker v Canada (Attorney General)*, 2007 FCA 126 at para 6).

A. Did the Board fail to consider the Applicant's evidence that he injured his back in the 1976 parachuting and 1978 toboggan incidents?

[36] The Applicant alleges that the Board disregarded (i) his account of how he injured his back in the 1976 parachuting and 1978 toboggan incidents, (ii) evidence provided by his work colleagues, and (iii) his Statement contained in his Application for Disability Benefits signed on October 5, 2010.

[37] I do not find that the Board overlooked evidence. Rather, it simply found that there was an absence of contemporaneous evidence regarding the back injury that gave rise to the

Spondylosis. I further find that the Board was aware of its obligations and evidentiary presumptions in favour of the Applicant under the relevant legislation.

[38] The Board's reasons for its decision establish that the Advocate for the Applicant referred to the Applicant's Statement contained in his 2010 Application for Disability Benefits, which describes in detail the 1976 parachuting and 1978 toboggan incidents. The Board also states that it considered the Applicant's Statement, as well as the other evidence on the record, finding that it supported the conclusion that the Spondylosis neither arose out of, nor was directly connected to his Service, but rather to the post-Service events that occurred during his employment with Canada Post.

B. Did the Board err in concluding that the Applicant's Workers' Compensation injuries were the most likely cause of his Spondylosis?

[39] In *Cole v Canada (Attorney General)*, 2015 FCA 119 at para 97, the Court of Appeal held in a related (pensions) matter that the causality must be "directly related" to service:

> Thus, an applicant's military service will provide a sufficient causal connection with his or her claimed condition, such that the claimed condition is "directly connected with" such military service, where he or she establishes that his or her military service was a significant factor in bringing about that claimed condition.

[40] Here, I do not agree with the Applicant that the Board erred by improperly relying on certain evidence and concluding that the Applicant's back injuries at Canada Post were the most likely cause of his Spondylosis, as opposed to military-related incidents. The Applicant's evidence supporting his claim was before the Board, and clearly considered, but ultimately rejected. In its Decision, the Board acknowledged that the Applicant "may have hurt his back as

a result of the toboggan incident" but noted the lack of any corroborative contemporaneous medical evidence. Even with the benefit of s 39 of the VRAB Act I find that the Board was nonetheless reasonable in finding that, in light of the intervening evidence from the Canada Post years and the four back-related claims arising therefrom, the Applicant's evidence failed to establish a causal connection between his Spondylosis and the Service-related incidents.

[41] The Board specifically noted that the first indication of his Spondylosis occurred years after his release from the Canadian Forces. Furthermore, there was little time taken off work for the two accidents while in the Forces, and no evidence of any follow-up treatment. During his Service, there was only one brief notation about lower back pain, but he was considered fit for duty. Had there not been compelling evidence to the contrary, then I would agree with the Applicant that he could have benefitted from the presumption of subs. 50(f) of the Regulations.

[42] In short, there were several intervening incidents during the course of the Applicant's Canada Post employment, including a car accident, which resulted in significant time off work and treatment, unlike the injuries resulting from the 1976 parachute and 1978 toboggan accidents with the Forces. Indeed, the earliest (1992) diagnosis of the Applicant's condition occurred years after his discharge (1979) and subsequent to all four Canada Post injuries, the last of which took place in 1988.

[43] In making its findings – all reasonable and available based on the evidence before them – the Board reasonably rebutted the subs. 50(f) presumption.

C. Did the Board err in ignoring its own Entitlement Eligibility Guidelines?

[44] I do not agree with the Applicant's argument that the Board erred in ignoring its own Entitlement Eligibility Guidelines [Guidelines]. These Guidelines are neither mandatory nor binding on adjudicators, although in *Manuge v Canada (Attorney General)*, 2015 FC 540 at para 13, Justice Barnes agreed that they:

> […] represent an available diagnostic shortcut. However, the Guidelines explicitly state they are "not intended to be a textbook of medicine or of causation" nor are they "mandatory or binding" on adjudicators. Policy guidelines are, of course, just that; they do not fetter the discretion of a decision-maker.

[45] Departure from the Guidelines can be indicative of an unreasonable decision. However, the lack of consideration of (or reliance) on the Guidelines does not itself constitute an error. The Board provided its own assessment of causation and proximate cause of the condition – conclusions which were not in conflict with the Guidelines.

D. Did the Board err in rejecting uncontradicted medical evidence?

[46] I cannot accept the last of the Applicant's arguments – that the Board erred by rejecting uncontradicted medical evidence. The Applicant states that the lack of contemporaneous medical evidence is explained by the Canadian Forces' culture in his years of Service which dissuaded members from seeking medical help. As explained by Justice Mosley in *Powell v Canada (Attorney General)*, 2005 FC 433 at para 33 [*Powell*], seeking such help could be perceived as complaining:

> [The Applicant's] explanation for the lack of documentation - that he did not want to be perceived to be a complainer - was apparently given no credit by the Board as they made no mention of it in their reasons. On its face, the explanation would seem to be reasonable. One 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.

[47] However, the Board does not err when it relies on the lack of objective, contemporaneous medical evidence to justify its decision (*Stevenson v Canada (Attorney General)*, 2014 FC 1130 at para 47). And unlike in *Powell*, the Board in this case considered the Applicant's reasons for not reporting an injury to his lower back (in stating that it had taken into consideration the Advocate's submissions).

[48] As for the post-military service period, the Applicant contends previous doctors failed to properly diagnose the Spondylosis.

[49] I find nothing unreasonable about the Board's conclusions in this regard, based on its explanation of why the Applicant's medical evidence lacked credibility in light of the intervening injuries. While taking no issue with the doctors' qualifications, the Board wrote that:

> […] these medical opinions do not address or rule out other significant potential factors, such as the four Workers Compensation back injury claims sustained by the Appellant in the post-discharge period while employed at Canada [P]ost. These injuries and claims were not addressed in the medical opinions and were not ruled out as possible factors in the development of the claimed condition (CTR at 130).

[50] Indeed, similar findings based on comparable circumstances have been endorsed by this Court in the past. In *Lunn v Canada (Veterans Affairs)*, 2010 FC 1229 at paras 58-65, Justice Russell held that the Board can properly weigh against establishing a causal link between the injury and the Applicant's Service, when a degenerative disease has gone undetected for many

years. There, like in the present case, no diagnosis occurred until thirteen years after service. Justice Russell also held that the Board can rely on medical evidence upon discharge to contradict subsequent medical evidence, when there was a lack of evidence of causal relation.

[51] It is not this Court's role to reweigh the medical evidence or to remake the decision, where the evidence was comprehensively considered by the Board, and its reasons were reasonable (*Ben-Tahir* at paras 41-42).

VII. Conclusion

[52] In sum, the Board offered justified, intelligible, and transparent reasons to support its conclusion that the Applicant's Spondylosis was not caused by his injuries during Service. While it may have been possible to arrive at a different conclusion, the role of this Court on judicial review is not to substitute that of the Board's with its own view of a possible or preferable outcome. The Decision was reasonable and the Application is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. There is no order as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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