Federal Court  Cour fédérale

Date: 20170525

Docket: T-1907-16

Citation: 2017 FC 521

Ottawa, Ontario, May 25, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

HAROLD NORTHRUP

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Harold Northrup seeks judicial review of a decision of the Entitlement Reconsideration Panel [Reconsideration Panel] of the Veterans Review and Appeal Board [Board]. The Reconsideration Panel found that Mr. Northrup is not entitled to a pension pursuant to s 21(2) of the *Pension Act*, RSC 1985, c P-6.

[2] For the reasons that follow, I have concluded that the Reconsideration Panel misapprehended key evidence offered by Mr. Northrup in support of his application for a pension. I am unable to say whether the result would have been the same if the Reconsideration Panel had properly understood this evidence. The application for judicial review is therefore allowed.

II. Background

[3] Mr. Northrup is 86 years old. He served with the Canadian Forces from 1949 to 1957, and again from 1961 to 1967. His service included a period of time at Canadian Forces Base [CFB] Gagetown, New Brunswick when the Canadian Forces conducted test sprays of a toxin commonly referred to as Agent Orange. Agent Orange is a herbicide and defoliant chemical infamously used by the United States army during the Vietnam War. While he was stationed in New Brunswick, Mr. Northrup's primary responsibility was transporting soldiers between training areas.

[4] In 1997, Mr. Northrup was diagnosed with prostate cancer. He was diagnosed with leukemia in 2003, and in 2006 the Board confirmed that he had chronic lymphatic leukemia. He also suffered hearing loss.

[5] In November 2005, Mr. Northrup applied to Veterans Affairs Canada [VAC] for a disability pension based on his prostate cancer, leukemia and hearing loss. He attributed the cancers to exposure to Agent Orange while at CFB Gagetown. His pension was approved on November 28, 2005, but only for his hearing loss. He appealed to the Entitlement Review Panel

[Review Panel] of the Board. On November 17, 2009, the Review Panel confirmed the refusal of his pension due to the absence of evidence that Mr. Northrup in fact served at CFB Gagetown during the testing of Agent Orange.

[6] Mr. Northrup appealed the Review Panel's decision to the Entitlement Appeal Panel, which dismissed the appeal because there was no official record of Mr. Northrup's service with the Canadian Forces after February 1966. Mr. Northrup appealed this decision to the Reconsideration Panel.

[7] Through a process unrelated to his pension application, in January 2006 Mr. Northrup received a tax-free *ex gratia* payment of $20,000 based on his service at CFB Gagetown during the testing of Agent Orange. It was not necessary for Mr. Northrup to demonstrate exposure to Agent Orange in order to qualify for the *ex gratia* payment.

III. Decision under Review

[8] Mr. Northrup submitted new evidence to the Reconsideration Panel. This consisted of a memorandum from VAC dated September 18, 2015 confirming his military service at CFB Gagetown during the relevant times, and a letter dated September 16, 2015 in which he recounted his exposure to Agent Orange. The Reconsideration Panel accepted that Mr. Northrup had served at CFB Gagetown during the 1967 Agent Orange spray testing and afterwards. It also accepted that Mr. Northrup had been diagnosed with prostate cancer and chronic lymphocytic leukemia, and that these were permanent disabilities associated with exposure to Agent Orange.

[9] The Reconsideration Panel nevertheless dismissed Mr. Northrup's appeal:

> Under section 39 of the *Veterans Review and Appeal Board Act*, the Board must draw every favorable inference, which appears reasonable, in the evidence and circumstances of the case. However, the Applicant is also under an obligation to provide sufficient evidence to support the favorable inference being sought. The Panel is not in a position to draw a favorable inference unless it has some evidence presented on the case that would reasonably support or raise the inference. The evidence in this case does not provide any basis from which the Panel may reach the conclusion the Applicant's claimed conditions arose out of, or are directly connected with, his Regular Force service or Militia service. These are the reasons:
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> - The lack of objective credible evidence that shows the Applicant had direct contact with Agent Orange at CFB Gagetown, including during the June 1967 Agent Orange spray period;
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> - The lack of evidence showing the Applicant was experiencing indirect exposure to Agent Orange during his service in Gagetown in the 1960s, when he was transporting troops. The areas sprayed were closed for exercises during the spraying and remained closed for training purposes after the spraying was completed;
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> - The medical research evidence found in the Task 3A-1, Tier 1 Final Report of July 2006 indicates individuals stationed at CFB Gagetown between 1952 and 2004 were not at risk for long term health effects from the herbicides used at CFB Gagetown as a part of the annual spraying program;
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> - The lack of a credible medical opinion supporting the Applicant's contention that his claimed conditions developed as a result of exposure to Agent Orange or other chemical during his service at CFB Gagetown;
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> - The lack of any credible scientific or medical evidence contradicting the scientific findings in the Furlong Report;

- The lack of evidence showing that the Applicant was in the Agent Orange spray area within 24 hours of the critical testing period in 1967; therefore, the Applicant does not benefit from the presumptions available in paragraph 21(3)(g) of the *Pension Act*;

- The facts of the *McAllister* case are distinguishable from the facts of the Applicant's case.

IV. Issues

[1] This application for judicial review raises the following issues:

A. Was the Reconsideration Panel's decision reasonable?

B. What is the appropriate remedy?

V. Analysis

[2] The Board's decisions under the *Pension Act* involve questions of mixed fact and law, and are subject to review by this Court against the standard of reasonableness (*McAllister v Canada (Attorney General)*, 2014 FC 991 at paras 38-40 [*McAllister*]). The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Was the Reconsideration Panel's decision reasonable?*

[3] A hearing before the Reconsideration Panel is not intended to be an adversarial process (*Woo Estate v Canada (Attorney General)*, 2002 FCT 1233 at para 71). Pursuant to s 39 of the

Veterans Review and Appeal Board Act, SC 1995, c 18 [VRABA], the Reconsideration Panel is required to apply modified rules of evidence that favour the applicant or appellant:

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'appelant, 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 established a case.	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[4] The Reconsideration Panel must accept any uncontradicted evidence presented by the applicant that it considers to be credible. It may reject this evidence only if there is evidence to the contrary, or if it provides reasons (VRABA, s 39(b); *Rivard v Canada (Attorney General)*, 2001 FCT 704 at para 22).

[5] Mr. Northrup argues that the Reconsideration Panel failed to comply with s 39(b) of the VRABA by refusing to draw every favourable inference from the following uncontradicted

evidence: (a) his work at CFB Gagetown required him to transport soldiers to CFB Gagetown and within the training area; (b) he was constantly exposed to the elements, as his sleeping quarters during training exercises usually consisted of an open patch of ground; (c) he supplemented his military rations by eating berries picked from shrubs or drinking water found in brooks throughout the training area; (d) he frequently observed airplanes and helicopters spraying overhead in the vicinity of the training, and the soldiers' clothes and equipment were often covered by dust and chemicals sprayed from the planes; and (e) he was never told to stay out of any specific areas.

[6] Mr. Northrup also relies on an affidavit sworn by his former commanding officer, Douglas Spinney, in which Mr. Spinney deposed that "Harold Northrup was in contact with the spraying of Agent Orange while he was transporting troops and waiting for their return trip out of Camp Gagetown."

[7] Mr. Northrup challenges the Reconsideration Panel's use of the *CFB Gagetown Herbicide Spray Programs 1952 – 2004: Fact-Finders' Report* authored by Dr. Dennis Furlong in 2007 [Furlong Report]. Mr. Northrup relies on the observations of Justice Yves de Montigny in *McAllister* at paragraph 53:

> […] considering that these studies were performed 40 years after the fact, the Board could not reasonably come to the conclusion that the Furlong Report is the best evidence and that none of the new evidence offered by the Applicant to the Board withstands the credibility test. The Applicant provided statements from witnesses who were serving with him in CFB Gagetown. These witnesses were found credible, yet the Board questioned their knowledge about what was sprayed and where, as well as the intensity of the exposure to Agent Orange. In light of the fact that there is nothing in the Furlong Report or in the Fact-finding reports to suggest that

> the military personnel training in CFB Gagetown in 1966-1967 were prohibited from entering the sprayed area, and of the Applicant's Platoon Commander's statement that they were never instructed to not enter the spraying areas, I believe that the Applicant was entitled to the benefit of the doubt pursuant to section 39 of the *VRAB Act*. […]

[8] Mr. Northrup maintains that the Reconsideration Panel committed a similar error in this case by preferring the general conclusions of the Furlong Report to his personal statements and the sworn testimony of his commanding officer.

[9] The Attorney General argues that the rules of evidence found in s 39 of the VRABA do not relieve Mr. Northrup of his burden of proving his claim on a balance of probabilities: he must show that it is more likely than not that his injury or disease "arose out of or was directly connected with his military service" (citing the *Pension Act*, s 21(2) and *Lunn v Canada (Veterans Affairs)*, 2010 FC 1229 at para 43).

[10] The Attorney General defends the Reconsideration Panel's reliance on the Furlong Report. According to the Furlong Report, the spraying of Agent Orange was conducted under controlled conditions in a remote area of CFB Gagetown, comprising 83 acres or approximately 0.03% of the base's total area, and an individual's presence on the base during the testing did not constitute exposure that would place him at risk for any long term health effects. The Attorney General notes that this Court in *McAllister* made no adverse comments regarding the scientific conclusions or the validity of the information contained in the report (at para 54). It was therefore incumbent on Mr. Northrup to demonstrate that he was in the area sprayed with Agent Orange during the relevant time-frame. The Attorney General says that the Reconsideration

Panel construed this liberally, and would have awarded Mr. Northrup a pension if he could establish that he was within 800 metres of a test site within 24 hours after a spraying.

[11] The Attorney General also defends the Reconsideration Panel's rejection of the affidavit of Mr. Northrup's former commanding officer, Mr. Spinney. The Reconsideration Panel dealt with Mr. Spinney's affidavit as follows:

> […] when Mr. Douglas Spinney states the Applicant came in contact with Agent Orange in Gagetown, the Panel asks questions concerning how he knows the Applicant came in contact with Agent Orange. The Panel is not aware of any physical characteristic of Agent Orange that would allow a person to distinguish it from any other spray. The Panel has also not been provided with any basis upon which the authors of the statements would know whether Agent Orange was being sprayed upon them. Without this sort of information, the Panel finds Mr. Spinney's statement is not credible.
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> Furthermore, in a previous statement dated 30 January 2009 (pg. 65 SOC), Mr. Spinney acknowledged he did not remember Agent Orange testing in 1966 and 1967. The Panel therefore finds his March 2009 statement that the Applicant came in contact with Agent Orange in Gagetown not credible for pension purposes.

[12] The Reconsideration Panel rejected Mr. Spinney's affidavit on two distinct grounds. The first ground was that Mr. Spinney had provided insufficient information to establish the basis for his knowledge that Mr. Northrup was exposed to Agent Orange. While Mr. Spinney's affidavit was not contradicted by other evidence, the Reconsideration Panel nevertheless declined to accept it because it was not considered to be "credible in the circumstances" (VRABA, s 39(b)).

[13] The second ground upon which the Reconsideration Panel rejected Mr. Spinney's affidavit was that he had previously acknowledged he did not remember Agent Orange testing in 1966 and 1967. This is clearly an error. The Reconsideration Panel appears to be referring to a letter dated January 30, 2009 from Charles Spinney, Douglas Spinney's son. In the letter, which was submitted in support of Douglas Spinney's application for the *ex gratia* payment mentioned above, Charles Spinney wrote that his father had been very ill, and he was acting on his father's behalf. Charles Spinney's letter concluded as follows:

> My father continues to battle various cancers of the prostate, colon, skin and lungs that doctors have stated are consistent with his exposure to Agent Orange. Although he cannot remember the testing, he was there both in the summer of 1966 and 1967.

[14] This error may have played a significant role in the Reconsideration Panel's decision. Citing *McAllister*, the Reconsideration Panel acknowledged that the Furlong Report "should not be used to rebut claims of exposure when those claims can be substantiated with credible witness statements." However, the Reconsideration Panel held that in Mr. Northrup's case, "there is no credible witness statement showing the Applicant was exposed to Agent Orange in June 1967 and it is therefore distinguishable from the facts of the *McAllister* case."

[15] The Attorney General characterizes the Reconsideration Panel's misapprehension of Douglas Spinney's evidence as immaterial. I disagree. It is one thing for Mr. Northrup's commanding officer to contradict his own affidavit by stating that he does not remember the spraying of Agent Orange at CFB Gagetown in 1966 and 1967. It is quite another for Mr. Spinney's son to report that his father is in poor health and does not recall the spraying, despite asserting that his father is suffering from the effects of exposure to Agent Orange.

[16] I am therefore persuaded that the manner in which the Reconsideration Panel rejected the affidavit of Douglas Spinney was unreasonable. I am unable to determine the extent to which the Reconsideration Panel's erroneous finding that Mr. Spinney had contradicted himself may have influenced its decision, and the matter must therefore be examined anew.

B. *What is the appropriate remedy?*

[17] Mr. Northrup asks this Court to find that he is entitled to a full pension. He requests that the pension be granted retroactively pursuant to s 39(1) of the *Pension Act* (citing *Cundell v Canada (Attorney General)*, [2000] FCJ No 38 at paras 61-63 (TD); *Frye v Canada (Attorney General)*, 2005 FCA 264 at paras 36-37). He notes that his pension application has been ongoing since 2005, and an additional hearing would prolong the process and add to the hardship he has suffered. In the alternative, Mr. Northrup submits that the Reconsideration Panel's decision should be quashed and referred to a new panel with directions.

[18] The Attorney General says that the only appropriate remedy is to return the matter to the Reconsideration Panel for redetermination. This is because the success or failure of Mr. Northrup's claim will turn on findings of fact. Directions should be issued only where a case is straightforward, and the decision of the Court is dispositive of the matter before the tribunal. This will rarely be the case where the issue in dispute is factual in nature (citing *Freeman v Canada (Citizenship and Immigration)*, 2013 FC 1065 at paras 79-80; *McAllister* at para 56).

[19] I have found that Mr. Northrup's pension application must be reconsidered based upon a proper understanding of the evidence of Douglas Spinney and Charles Spinney. This is a factual

determination, and I therefore decline to make a finding regarding Mr. Northrup's entitlement to a pension or to issue directions regarding the manner in which his application should be reconsidered. However, given Mr. Northrup's advanced age and the time it has taken to process his application to date, I will direct that the reconsideration be completed within three months of the date of this Judgment and Reasons.

VI. Costs

[20] Mr. Northrup has been represented by counsel on a *pro bono* basis. Costs may be awarded to *pro bono* counsel, provided that this is contemplated in the retainer agreement with the client (*Abdelrazik v Canada (Foreign Affairs)*, 2009 FC 816 at paras 31-33).

[21] Counsel have represented Mr. Northrup with considerable skill, and in keeping with the best traditions of the bar. They have submitted a copy of their retainer agreement, which provides that any disbursements awarded by the Court shall be payable to Mr. Northrup, and any legal fees awarded by the Court shall be payable to Borden Ladner Gervais LLP [BLG].

[22] BLG has prepared a draft bill of costs in accordance with Column III of Tariff B. They have claimed disbursements in the amount of $870.87 (including taxes), and legal fees in the amount of $4,620.00.

[23] The Attorney General does not take serious issue with the draft bill of costs submitted by BLG, questioning only the number of units claimed for originating documents and other pleadings.

[24] In the interests of simplicity and efficiency, I award legal fees to BLG in the amount of $3,500.00, and disbursements to Mr. Northrup in the amount of $870.87 (including taxes).

VII. Conclusion

[25] The application for judicial review is allowed. The matter is remitted to a differently-constituted panel of the Board for reconsideration, to be completed within three (3) months of the date of this Judgment and Reasons. Legal fees are awarded to BLG in the amount of $3,500.00, and disbursements are awarded to Mr. Northrup in the amount of $870.87 (including taxes).

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter is remitted to a differently-constituted panel of the Board for reconsideration, to be completed within three (3) months of the date of this Judgment and Reasons. Legal fees are awarded to Borden Ladner Gervais LLP in the amount of $3,500.00, and disbursements are awarded to Harold Northrup in the amount of $870.87 (including taxes).

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1907-16
STYLE OF CAUSE:	HAROLD NORTHRUP v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 18, 2017
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	MAY 25, 2017

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