Federal Court Cour fédérale

Date: 20181127

Docket: T-1957-17

Citation: 2018 FC 1188

Ottawa, Ontario, November 27, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SYLVIA GREENE-KELLY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Sylvia Greene-Kelly, served as a civilian dispatcher with the Royal Canadian Mounted Police from July 1982 to August 1996. In the spring of 1992, the RCMP required her to attend a three month long French language training course. On May 20, 1992, while travelling to the course, she was in a motor vehicle accident. In January 1997, she applied to Veterans Affairs Canada for a disability pension on the basis that the chronic myofascial pain syndrome she suffered following the 1992 accident arose out of, or was directly connected with, her RCMP service.

[2] A disability adjudicator at Veterans Affairs Canada denied the Applicant's claim for a disability award in a letter dated February 5, 1997, because no documentation indicated that her chronic myofascial pain syndrome arose out of or was directly connected with her RCMP service. She then appealed this denial to the Veterans Review and Appeal Board [the Board]. Ultimately, in an undated decision rendered following a hearing on October 4, 2017, an Entitlement Appeal Panel of the Board [Appeal Panel] concluded that the Appellant's claimed condition of chronic myofascial pain syndrome did not arise out of, nor was it directly connected with, her RCMP service.

[3] The Applicant has now applied under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the Appeal Panel's decision. She requests from the Court:

i. an Order quashing the Board's decision;

ii. an Order granting her pension benefits pursuant to section 39(2) of the *Pension Act*, RSC 1985, c P-6;

iii. in the alternative, an Order referring the matter back to a differently constituted Appeal Panel of the Board for redetermination in accordance with the Court's decision; and

iv. an Order for costs of this Application.

I. Background

[4] At the time of the motor vehicle accident in 1992, the Applicant's supervisor, Patrick Delaney, was a passenger in her vehicle. The Applicant and Mr. Delaney, who also was attending the French language training course, would travel together to the course, and on the

morning of May 20, 1992, it was the Applicant's turn to drive from her home to the French language training centre in Cole Harbour, Nova Scotia.

[5] A few months before the Applicant was medically discharged from the RCMP, she applied in May 2016 to Veterans Affairs Canada for a disability pension on the basis that her chronic myofascial pain syndrome arose out of, or was directly connected with, her RCMP service. A disability adjudicator at Veterans Affairs denied her application for a disability pension, finding that the chronic myofascial pain syndrome did not arise out of and was not directly connected with her RCMP service. The adjudicator ruled that the Applicant was not entitled to a disability pension pursuant to section 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 [the *Superannuation Act*], in accordance with the *Pension Act*, as she had not provided documentary evidence connecting her condition to her RCMP service. The adjudicator did not make a finding as to whether the motor vehicle accident related to the Applicant's RCMP service.

[6] The Applicant appealed the adjudicator's ruling to an Entitlement Review Panel of the Board [Review Panel]. In an undated decision, the Review Panel denied her application for a disability pension and upheld the adjudicator's decision that the Applicant had not established a nexus between her RCMP service duties and the injuries she sustained while travelling to the French language course. The Review Panel determined that:

> In order for a claim to succeed under section 21(2) of the *Pension Act*, it must be demonstrated that your condition arose out of or was directly connected with Regular Force/R.C.M.P. service. A very important premise to all claims under section 21(2) is the presence of a "duty-relationship" between the claimed condition and the duties of the service.

> Subsection 21(2) of the *Pension Act* has not yet been interpreted in a way to allow the finding of a link or connection to service with injuries suffered while a member is either on his way to report for duty or returning home from a duty period in the normal course of events. In other words, 21(2) does not provide for "portal to portal coverage".

II. The Appeal Panel's Decision

[7] Following the Review Panel's decision, the Applicant appealed to an Entitlement Appeal Panel of the Board. In its decision, the Appeal Panel, like the Review Panel, found that subsection 21(2) of the *Pension Act* does not provide coverage for "portal to portal" type of situations. The Appeal Panel confirmed the Review Panel's decision denying pension entitlement for the Applicant's claimed condition of chronic myofascial pain syndrome since it did not arise out of, nor was it directly connected with, her RCMP service pursuant to section 32 of the *Superannuation Act*, in accordance with subsection 21(2) of the *Pension Act*.

[8] In considering whether the Applicant's medical condition arose out of or was connected with her RCMP service, the Appeal Panel referenced the guidance provided by *Fournier v Canada (Attorney General)*, 2005 FC 453 at para 35, 272 FTR 92 [*Fournier*] (appeal dismissed 2006 FCA 18):

> [35] It is clear from the jurisprudence that factors such as the location where the accident occurred, the nature of the activity being carried on by the applicant at the time, the degree of control exercised by the military over the applicant when the accident occurred and whether she was on duty at the time are all relevant to the determination that the Board must make that the injury arose out of or was connected to the applicant's military service. However, it is also clear from the cases that no one factor is determinative.

[9] In view of *Fournier*, the Appeal Panel determined that the Applicant's claimed condition of chronic myofascial pain syndrome did not arise out of, nor was it directly connected with, her RCMP service because she:

- was not on duty;
- was in a private motor vehicle;
- chose the route to get to her class;
- was not under command of the RCMP at the time of the accident;
- was not performing any work associated with the RCMP at the time of the accident; and
- was outside of the site of the French language course and was outside of her normal work location.

[10] The Appeal Panel thus found that the Applicant's chronic myofascial pain syndrome was not connected with, nor did it arise out of, her RCMP service as envisioned by subsection 21(2) of the *Pension Act*.

III. Issues

[11] This application for judicial review raises three primary issues:

1. What is the standard of review?
2. Did the Appeal Panel err in its interpretation of subsection 21(2) of the *Pension Act*?

3. Was the Appeal Panel's decision denying the Applicant a pension under section 32 of the *Superannuation Act*, in accordance with subsection 21(2) (a) of the *Pension Act*, reasonable?

IV. Analysis

A. *What is the Standard of Review?*

[12] The Applicant says, in view of *Cole v Canada (Attorney General)*, 2015 FCA 119, 386 DLR (4th) 549 [*Cole*], that the Appeal Panel's interpretation of paragraph 21(2)(a) of the *Pension Act* should be reviewed on the standard of correctness. According to the Applicant, the Appeal Panel erred in law when it incorrectly determined that section 21(2) (a) does not provide coverage for "portal-to-portal" type of situations.

[13] The Respondent acknowledges that a correctness standard was applied by the Federal Court of Appeal in *Cole* to review the Board's interpretation of the phrase "arose out of or was directly connected with" in subsection 21(2) (a) of the *Pension Act*. However, in view of recent Supreme Court of Canada decisions such as *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, [2018] SCJ No 31, the Respondent invites the Court to reconsider the appropriate standard of review to apply in this case. The Respondent says though, that if the Court does not agree that recent Supreme Court jurisprudence has expanded the deference owed to the Appeal Panel in respect of its interpretation of subsection 21(2), then the standard of review should remain correctness.

[14] In my view, it is not open to the Court in this case to reconsider the appropriate standard of review in respect of the Appeal Panel's interpretation of the phrase "arose out of or was directly connected with" in subsection 21(2). The decision in *Cole* is not only binding upon this Court but determinative of the appropriate standard of review for the Appeal Panel's interpretation of this phrase. In this regard, Justice Gauthier stated in *Cole*:

> [50] In *Frye v. Canada (Attorney General)*, 2005 FCA 264, [2005] F.C.J. 1316, this Court considered the question of the standard of causation that is required by the phrase "arose out of or was directly connected with" in paragraph 21(2)(b) of the *Pension Act*. The Court determined that the interpretation of this phrase was a question of law that was to be reviewed on the standard of correctness.
>
> [51] In my view, the determination by this Court in *Frye* that the correctness standard must be used in considering the interpretation of the phrase "arose out of or was directly connected with" in paragraph 21(2)(b) of the *Pension Act* can be regarded as a satisfactory determination of the applicability of the correctness standard to the interpretation of those exact words in paragraph 21(2)(a), as required in this appeal.
>
> [52] Moreover, I am of the view that the discernment of the standard of causation that was intended by Parliament when it enacted the phrase "arose out of or was directly connected with" in paragraph 21(2)(a) of the *Pension Act*, is a question of importance that extends beyond the ambit of the *Pension Act*. Questions of causation often arise in many other areas of law, including insurance, torts and workers' compensation. Additionally, it is my view that discerning degrees of causal connection – in marked contrast to applying such levels of causal connection, once discerned – is not a matter with which the Board would regularly grapple. That task, in my view, is one that courts are better suited to perform.

[15] As to the appropriate standard of review for the Appeal Panel's assessment of the medical evidence and its assessment of whether the Applicant's chronic myofascial pain syndrome arose out of or was directly connected with her RCMP service, these are questions of fact or mixed fact

and law and subject to review on the standard of reasonableness (see: *Wannamaker v Canada (Attorney General)*, 2007 FCA 126 at para 12, 361 NR 266 [*Wannamaker FCA*]; *Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21, 375 FTR 13).

[16] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a 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, [2008] 1 SCR 190). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339).

B. *Did the Appeal Panel err in its interpretation of subsection 21(2) of the* Pension Act*?*

[17] The Applicant contends that the Appeal Panel erred by incorrectly interpreting the phrase "arose out of or was directly connected with" in paragraph 21(2) (a) of the *Pension Act*. In the Applicant's view, the Appeal Panel's finding that paragraph 21(2) does not provide coverage for "portal-to-portal" type situations has no connection to either the relevant legislative framework

or established precedent. The Applicant characterizes the Appeal Panel's test as being novel and leading to a far too narrow and restrictive analysis of the phrase "arising out of or directly connected with" an applicant's service.

[18] According to the Applicant, the Appeal Panel's reasons for its determination that the Applicant was not in the performance of her RCMP duties when she was injured misapprehend the nature of the command relationship that exists in the RCMP and the Canadian Forces. In the Applicant's view, the Applicant's chronic myofascial pain syndrome arose out of her RCMP service since this condition would not have occurred if she had not been required to attend French language training. The Applicant says interpretation of paragraph 21(2) (a) of the *Pension Act* is a question of law that is of central importance to other veterans of the RCMP and the Canadian Forces who have been, or may become, injured during their service.

[19] The Respondent says that, while the provisions of the *Superannuation Act* and the *Pension Act* are to be interpreted in a broad and generous manner, this does not mean that members or former members of the RCMP or the Canadian Forces do not have to prove their entitlement to a pension. Nor does it mean that compensation for an injury will be given simply because a member was injured while they were serving with the RCMP or the Canadian Forces. The Respondent further says members must establish some causal connection between the injury and the performance of their service. The Respondent points to this Court's decision in *Fournier* as providing a non-exhaustive list of factors to consider whether an injury arose out of or was directly connected with a member's service.

[20] According to the Respondent, the Appeal Panel correctly considered the elements listed in the case law to determine whether the Applicant's injury arose out of or was directly connected with her RCMP service. The Respondent notes that the Appeal Panel did not consider a single factor but, rather, assessed the claim on many factors to determine if a causal connection to the accident and injury was established. In the Respondent's view, the Appeal Panel correctly concluded that the fact of the accident could not create a causal nexus to the Applicant's chronic myofascial pain and her RCMP service. The Respondent says the only connection between the two is the fact that the Applicant was commuting to work with her supervisor, and that is insufficient to establish a causal nexus.

[21] In my view, the Appeal Panel in this case correctly interpreted and applied the test to establish entitlement to a disability pension under paragraph 21(2) (a) of the *Pension Act*. It did not, as the Applicant suggests, adopt a novel test and incorrectly interpret the phrase "arose out of or was directly connected with" as contained in paragraph 21(2) (a). On the contrary, the Appeal Panel specifically referenced the non-exhaustive factors as stated in *Fournier* when considering whether the Applicant's medical condition arose out of or related to her RCMP service. The Appeal Panel's reliance upon *Fournier* shows that it interpreted paragraph 21(2) (a) of the *Pension Act* correctly.

[22] Before leaving this issue, it warrants note that the Applicant's reliance upon *Wannamaker v Canada (Attorney General)*, 2006 FC 400, 289 FTR 298 [*Wannamaker*], for the proposition that the act of going to work in certain circumstances relates to service, is misguided. Although the Court in *Wannamaker* did state (at para 43) that the act of going to work was an activity that

directly related to Mr. Wannamaker's military service, this statement was made in circumstances where the member had already arrived at work and was on work property when he slipped and fell on ice. This is distinguishable from the present case in which the Applicant was on a public road, in a private motor vehicle, and had yet to reach her place of work for the day.

[23] It also warrants note that this Court's decision in *Wannamaker* was overturned by the Federal Court of Appeal on the ground that the correctness standard of review had been used when the reasonableness standard should have been applied. The proposition that *Wannamaker* stands for travel to work as being connected with service is even more questionable since the Federal Court of Appeal raised, but did not answer, the question as to whether Mr. Wannamaker's fall arose out of or was directly connected with his military service as required by paragraph 21(2) (a) of the *Pension Act* (*Wannamaker FCA* at para 10).

C. *Was the Appeal Panel's decision denying the Applicant a pension under section 32 of the* Superannuation Act*, in accordance with subsection 21(2)(a) of the* Pension Act*, reasonable?*

[24] The Applicant says the Appeal Panel's decision is unreasonable since it failed to make every reasonable inference in her favour as required by section 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRABA*], which states that:

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	**a)** il tire des circonstances et des éléments de preuve qui lui sont présentés les

presented to it every reasonable inference in favour of the applicant or appellant;	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.

[25] According to the Applicant, where an applicant has presented uncontradicted evidence to the Board, it can rebut that evidence either by exercising its discretion to call contradictory evidence or by providing reasons in its decision as to why the uncontradicted evidence was rejected. In this case, the Applicant argues the Appeal Panel did neither. Specifically, the Applicant contends that the Appeal Panel was entirely silent with respect to a superintendent's letter, which stated that the Applicant was on sick leave "as a result of a duty-related injury," as well as a letter from her supervisor confirming that he was a passenger in the Applicant's vehicle while driving to the mandatory French course on the day of the accident.

[26] The Respondent dismisses the Applicant's argument that the Appeal Panel was bound to accept conclusory statements on her entitlement to a pension by her supervisor and medical doctor. In the Respondent's view, these statements amount to opinion evidence on the legal

entitlement to a pension, the determination of which is squarely within the Appeal Panel's jurisdiction and expertise.

[27] According to the Respondent, section 39 of the *VRABA* relates to the interpretations of fact and assessing inconsistencies in favour of an applicant, and it does not extend to accepting the Applicant's statements on legal entitlement to a pension on face value because the assessment of a claim is the entire purpose of the review process.

[28] In my view, the Appeal Panel's decision denying the Applicant a pension under section 32 of the *Superannuation Act*, in accordance with subsection 21(2) of the *Pension Act*, was reasonable. The Appeal Panel clearly identified the correct legal test by its reliance on *Fournier* and reasonably applied it to the facts of the case in a clear and transparent manner. In this case, it was not unreasonable for the Appeal Panel to find that "portal-to-portal" coverage is not covered by the *Pension Act* because such a finding is consistent with the Board's jurisprudence.

[29] For example, in *100001531773* (Re), 2011 CanLII 100427, a member of the Canadian Forces was involved in a motor vehicle accident when travelling from his residence to a train station where he was required to report for duty to travel to Camp Farnham. The appeal panel of the Board in this case found that:

> … the Appellant's means of transportation, a private vehicle, was not authorized by the military, and therefore, he was not in the performance of military duty at the time.
>
> In determining this issue, the Board is guided by the Federal Court's decision in *Fournier v. Canada (Attorney General)*, 2005 FC 453 (CanLII) and the jurisprudence referred to therein…

> [Para 35 of *Fournier* quoted above omitted]
>
> In the case before the Board, the Appellant was travelling in his father-in-law's vehicle from his residence to the train station, where he would then carry on to Camp Farnham. He was travelling on a public road in his father-in-law's vehicle, and there is no evidence that at the time the motor vehicle accident occurred, the military was exercising any degree of control over the Appellant, and further that the Appellant was not on duty at that time…. Here, as in *Fournier*, the Appellant has not satisfied the onus of establishing that his injury arose from or in connection with his military service. Consequently disability award entitlement cannot be granted.

[30] This case is akin to *Fournier* where the member was denied a pension for chronic post whiplash syndrome arising from a motor vehicle accident. Sargent Fournier had driven her private motor vehicle from her workplace to a restaurant to get dinner and then intended to return to work; but while en route her vehicle was rear ended by another car and she suffered chronic post whiplash syndrome. The Board determined that the motor vehicle accident and subsequent injury did not arise out of and was not directly connected with Sargent Fournier's military service. This determination was upheld on judicial review since the causal connection between Sargent Fournier's injury and her military service was too remote (*Fournier* at para 61).

[31] This case is also like *Fawcett v Canada (Attorney General)*, 2017 FC 1071, 286 ACWS (3d) 269, where a member of the Canadian Forces was involved in a motor vehicle accident while taking her son to daycare on the way to work. Captain Fawcett argued that because she and her husband were serving in high readiness units, and because she was taking her son to daycare pursuant to a Canadian Forces Family Care Plan, she was on duty and acting pursuant to a military order at the time of the accident. The Chief of Defence Staff concluded that, in view of the relevant Canadian Forces Administrative Order to determine whether an injury was

attributable to military service (i.e., whether it "arose out of or was directly connected with service"), she was not on duty at the time of the accident and the injuries sustained were not attributable to military service. This conclusion was upheld upon judicial review.

[32] Likewise, in this case, the Applicant was driving her private motor vehicle on a public road when her car was rear ended. She was not under the control or direction of the RCMP, she was not on duty, she was not performing any work associated with the RCMP at the time of the accident, and she had not been directed by the RCMP to travel a specified route to the French language training centre.

V. Conclusion

[33] In conclusion, the Appeal Panel of the Board reasonably ruled to deny pension entitlement to the Applicant for her chronic myofascial pain syndrome pursuant to section 32 of the *Superannuation Act*, in accordance with subsection 21(2) of the *Pension Act*. The Appeal Panel's reasons provide an intelligible and transparent explanation for its decision, and the outcome is defensible in respect of the facts and the law. The Applicant's application for judicial review is, therefore, dismissed.

[34] The Respondent advised at the hearing of this application that she does not seek costs and, therefore, there is no order as to costs.

JUDGMENT in T-1957-17

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no order as to costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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