Date: 20081121

Docket: T-1178-07

Citation: 2008 FC 1302

Ottawa, Ontario, November 21, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

JAMES GRANT

Applicant

and

VETERANS REVIEW AND APPEAL BOARD OF CANADA, ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is a motion by Mr. James Grant (the Applicant), for an order, pursuant to rule 51 of the Federal Court Rules, to set aside the order of Prothonotary Richard Morneau, dated October 14, 2008, denying his request to have the underlying judicial review converted into an action, pursuant to subsection 18.4(2) of the *Federal Courts Act.*

[2] The Applicant also asks for costs of this motion and of the motion before Prothonotary Morneau as well as any other relief this Court deems just.

II. Facts

[3] The facts in this matter are accurately summarized by Madam Justice Heneghan in a decision rendered on December 1, 2006, wherein she allowed the Applicant's application for judicial review of the July 14, 2005 decision of the Veterans Review and Appeal Board (the VRAB) denying pension benefits to the Applicant. I reproduce below the learned judge's review of the facts upon which she rendered her decision with my additions in square brackets:

> The Applicant joined the Canadian Armed Forces on September 27, 1954. He served as a member of the Regular Force from that date until October 26, 1976. He served as a member of the Reserves from January 31, 1990 until August 10, 1991 and again, from February 24, 1993 until September 26, 1993.
>
> During his service as a member of the military, the Applicant served as a radar plotter with the Royal Canadian Navy and later, as a member of the air crew on the aircraft carrier "Bonaventure". In the course of his service, he was exposed to work environments that were very loud and noisy as a result of the operation of unpressurized aircraft engines on aircraft carriers, rocket launchers, and other heavy artillery aboard naval vessels. He was also exposed to a large amount of small arms fire.
>
> The Applicant was first diagnosed with hearing loss in an Aircrew Medical Re-Examination dated February 27, 1967.
>
> ...
>
> On July 24, 1991, the Applicant was examined by Dr. L. Terepasky. The report includes the following information: "hearing loss 2nd to aircraft exposure".
>
> In 1994 and 1995, the Applicant sought further medical advice concerning his hearing problems.

In 1997, the Applicant applied for pension benefits for his hearing loss. In a decision dated June 6, 1997, the [VRAB] dismissed his application because the evidence did not establish the existence of an assessable disability, as defined in the Pension Act, at the time the Applicant was released from the Regular Forces.

On June 17, 2003, the Applicant underwent audiometric testing by Dr. Michael Fong who prepared a report, dated October 31, 2003 [and diagnosed the Applicant with Tinnitus]. Dr. Fong reviewed and summarized his history of prior audiograms and tendered the opinion that the greatest contribution to his hearing loss was his service with the Navy.

On January 15, 2004, the Applicant underwent a further hearing assessment at Audiology Associates. Dr. Dennis A. Herx prepared a Tinnitus Assessment and concluded that the Applicant's hearing loss was consistent with high noise exposure during his military service.

The Applicant made a further application for a disability pension based upon hearing loss and tinnitus on March 9, 2004. On July 30, 2004, the Minister determined that his tinnitus was not pensionable pursuant to subsection 21(2) of the Pension Act, Regular Force Service.

The Applicant appealed the decision of July 30, 2004 pursuant to the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the VRAB Act). On January 18, 2005, an Entitlement Review Panel of the Appeal Board dismissed his appeal on the ground that his tinnitus "did not arise out of nor was it directly connected with service in peace time in the Regular Forces".

Subsequently, the Applicant obtained another medical opinion from Dr. Ian. C. MacMillan. [In his report dated May 9, 2005, Dr. MacMillan concluded that the repeated noise exposure was the likely cause of his hearing loss and tinnitus.]

...

On June 28, 2005, Dr. Herx wrote a letter to Area Advocate Aiden Sheridan [expressing his opinion that his service years most probably were the cause of his hearing loss and tinnitus.]

...

> The Applicant appealed the decision of the Entitlement Review Panel to the Appeal Board of the VRAB, in accordance with section 25 of the VRAB Act, bringing the medical evidence of Dr. Fong, Dr. Macmillan and Dr. Herx to the attention of the VRAB.
>
> In its decision dated July 14, 2005, the VRAB dismissed the Applicant's appeal. Its ruling provided that his condition of tinnitus "did not arise out of nor was it directly connected with service in peace time in the Regular Force", [making reference to subsection 21(2) of the Pension Act.]
>
> ...

[4] As stated above, the Applicant's application for judicial review of the July 14, 2005 decision of the VRAB was allowed by Madame Justice Heneghan. In ordering the matter remitted for reconsideration to another panel, she found that the Board "committed a reviewable error by rejecting the evidence submitted by the Applicant without giving any explanation for doing so."

[5] On February 28, 2007, the newly constituted panel of the VRAB once again refused the Applicant's claim based upon the fact that there was no disability at the time of the Applicant's discharge. The board concluded that "the Board cannot grant pension entitlement for the claimed condition of tinnitus, based on the medical opinions provided by Dr. Macmillan, Dr. Fong, and Dr. Herx as these opinions are not consistent with the factual findings during the Appellant's Regular Force service in reference to his hearing loss".

[6] On June 26, 2007, the Applicant brought an application for judicial review of the VRAB's February 28, 2007 decision.

[7] On June 27, 2008, pursuant to subsection 85(1) of the *Pension Act*, the Applicant wrote to the VRAB seeking permission to have the Minister reconsider the Applicant's application for hearing loss under the new hearing loss policy adopted by Veterans Affairs Canada in November of 2007 (the new Policy). Permission was granted on August 18, 2008.

[8] On August 21, 2008, a Notice of Motion was filed on behalf of the Applicant seeking an Order to convert his application for judicial review into an Action pursuant to subsection 18.4(2) of the *Federal Courts Act*.

[9] On September 26, 2008, further to the Applicant's request for reconsideration, the Minister, pursuant to paragraph 85(1)(*b*) of the *Pension Act*, granted the Applicant a disability pension for hearing loss under subsection 21(2) of the *Pension Act*, retroactive 3 years as per subsection 39(1) of the *Pension Act*. This decision was not known to the Prothonotary prior to the rendering of his decision.

[10] On October 14, 2008, Prothonotary Richard Morneau issued an order denying the Applicant's motion for an order converting his application for judicial review into an Action.

[11] On October 24, 2008, the Applicant filed the within appeal of Prothonotary Morneau's order.

III. Decision Under Review

[12] The Prothonotary's order dismissing the motion reads as follows:

> Upon reviewing the motion material filed by the parties in relation to the motion at bar, this motion is denied, the whole with costs in the cause. Said conclusion is based on the reasons provided by the respondents in their written representations filed on September 2, 2008, and more specifically by reason of paragraphs 13 and 14 of said representations.

[13] I reproduce below paragraphs 13 and 14 of the Respondents' memorandum of fact and law which is also found at page 13 of its motion record:

> 13. The Respondents submit that the most expeditious and cost-effective means of having this matter resolved would be for the Applicant to await the decision of the Veterans Review and Appeal Board under the new policy. Should the matter proceed and be heard by the Board, it will be heard within a matter of months, at no additional cost to the Applicant. On the other hand, if this matter is converted into an action, the reconsideration of the Veterans Review and Appeal Board will not proceed and the action will result in significant and unnecessary expense to the Applicant. The matter would be unnecessarily delayed by converting the application for judicial review into an action.
>
> 14. The factors which have been considered in the past in favour of converting an application into an action – namely, the need for *viva voce* evidence, avoidance of a multiplicity of proceedings, facilitating access to justice and avoiding unnecessary cost and delay – cannot be found in the case at bar. As such, the Respondents respectfully submit that the Applicant's motion for conversion must be denied.

IV. Issues

[14] Should the Court intervene and set aside the Order of the Pronthonotary?

V. Standard of Review

[15] Justice Décary, in *Merck & Co. v. Apotex Inc*., 2003 FCA 488 at para 19, clarified the standard, as originally expressed in *Canada v. Aqua-gem Investments Ltd.,* [1993] 2 F.C. 425, as follows:

> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

VI. Analysis

[16] In my view, the questions raised in the motion before the Prothonotary are not vital to the final issue of the case. The matter continues by way of judicial review before the Federal Court. The order is in no way dispositive of the issues raised in the underlying application and does not prevent the applicant from bringing an action in damages if and when it is established that the decision he appeals is invalid. At the hearing of this appeal, counsel for the Applicant essentially conceded that the impugned order is not vital to the final issue of the case.

[17] I now turn to consider the second part of the test: Is the Prothonotary's order clearly wrong?

[18] The jurisprudence of this Court teaches that the following factors may be considered in deciding whether to convert a judicial review into an action under subsection 18.4(2) of the *Federal Courts Act*:

(1) the undesirability of multiple proceedings;

(2) the desirability of avoiding unnecessary costs and delays;

(3) whether the particular issues involved require an assessment of demeanour and credibility of witnesses; and

(4) the need for the Court to have a full grasp of all the evidence.

See: *Canada (Attorney General) v. Macinnis,* [1994] 2 F.C. 464 at pg. 470; and *Drapeau v. Canada (Minister of National Defence)* (1995), 179 N.R. 398; *Del Zotto v. Minister of Natural Resources*, [1995] F.C.J. No. 1359 (Lexis).

[19] The Applicant argues that the Prothonotary failed to provide adequate reasons for his decision. It is argued that by simply adopting the arguments of the Respondents, the Prothonotary, failed to examine or weigh any of the evidence before the Court to determine whether a conversion of the Motion to an Action was appropriate. Alternatively, the Applicant contends that the Prothonotary was clearly wrong in finding that it would be more expeditious and less costly to wait for the outcome of the Applicant's appeal to the Minister under the new Policy. Given the history of the numerous administrative proceedings and time required to have these reviewed by the Court, it is the Applicant's position that it would be far more expeditious to have the Court deal with the matter in the ambit of a trial. Finally, the Applicant argues that new issues and evidence have arisen given the Minister's decision on reconsideration. These issues and evidence were not before the VRAB and are not before this Court in the underlying application. As a consequence the Applicant argues the VRAB is no longer in a position to address all of the concerns and issues being raised by the Applicant, nor is there any evidence that the Ministerial review would cover all matters at issue in the proposed action.

[20] On this last point I note that council for the Respondents has, at the hearing of the appeal, informed the Court that the Respondents were prepared, in the interest of expediting matters, to consent to the Reconsideration decision being filed and considered as evidence in the underlying proceeding. The Applicant indicated his agreement with this approach, in the event the Court dismissed his appeal.

[21] For the reasons that follow, I am of the view that the Prothonotary's order is not clearly wrong, in the sense that the exercise of his discretion was based upon a wrong principle or upon a misapprehension of the facts.

[22] The Applicant has failed to establish that any of he above-noted factors, are sufficiently compelling, either on their own or collectively, to justify an order converting the underlying application for judicial review into an action.

[23] The Applicant has not demonstrated that the evidence in the application could not adequately be dealt with by way of affidavit. The credibility of the medical affiants is not at issue and the Applicant concedes that this evidence can adequately be tested on cross-examination.

[24] I am not persuaded by the Applicant's argument that converting the application to an action would essentially avoid multiple proceedings and would avoid unnecessary costs and delays. All of the evidence required to decide the issue is before the Court, and has been since March of 2008. All the necessary steps in the application have been completed and the application is ready for a hearing

date to be set. Further, in the particular circumstances of this case, the Respondents do not object to the record and decision on the reconsideration being filed with the Court for consideration in the underlying application. This can only serve to expedite a decision on the merits of all of the issues that are outstanding between the parties. I am convinced that conversion to an action in the circumstances would only serve to delay matters further. Conversion at this stage of the proceeding, in the circumstances, would not facilitate access to justice or avoid excessive costs and delay.

[25] This is a case where the Applicant is essentially seeking a full hearing on the merits by way of an action before this Court, outside the administrative scheme provided for by Parliament. Such relief can only be granted in exceptional circumstances where on consideration of the above cited factors, such an order is warranted. This is not such a case.

[26] I am satisfied that the Prothonotary turned his mind to the applicable factors which required consideration. The exercise of his discretion was not based upon a wrong principle or upon a misapprehension of the facts. In the circumstances, I am satisfied the Pronthonotary was not clearly wrong in disposing of the matter as he did.

VII. Conclusion

[27] For the above reasons I will dismiss the appeal. I will also grant leave to the Respondents to file and serve, within 20 days from the date of this Order, an affidavit attaching the September 26, 2008 reconsideration decision of the Minister, as well as supplementary submissions with respect to the reconsideration, if any. The Applicant will be given 10 days thereafter to file and serve a reply.

ORDER

THIS COURT ORDERS that:.

1. The appeal of the decision of Prothonotary Richard Morneau, dated October 14, 2008, is dismissed.

2. Leave is granted to the Respondents to file and serve within 20 days from the date of this Order, an affidavit attaching the September 26, 2008 reconsideration decision of the Minister, as well as supplementary submissions with respect to the reconsideration, if any.

3. The Applicant shall have 10 days thereafter, to file and serve his reply, if any.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1178-07
STYLE OF CAUSE:	JAMES GRANT v. VETERANS REVIEW AND APPEAL BOARD and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Halifax, N.S.
DATE OF HEARING:	November 13, 2008
REASONS FOR ORDER AND ORDER:	Blanchard J.
DATED:	November 21, 2008

APPEARANCES:

James D. MacNeil Dartmouth, N.S.	FOR THE APPLICANT
Korinda McLaine Halifax, N.S.	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Boyne Clarke Dartmouth, N.S.	FOR THE APLICANT
John H. Simms, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS