Federal Court  Cour fédérale

Date: 20091130

Docket: T-1820-08

Citation: 2009 FC 1218

Ottawa, Ontario, November 30, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

CHERYLYNN HUNT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Veteran's Review and Appeal Board, dated September 18, 2008, denying the Applicant's request for reconsideration of their previous decision refusing to grant benefits for a knee condition claimed by the Applicant.

[2] For the reasons set out below the application is dismissed.

I. Background

[3] The Applicant joined the Canadian Regular Forces in June 1982 and worked as an engineer. According to the Applicant, she had no medical knee problems when she joined the Canadian Forces. She began to experience general to extreme knee pain and discomfort during her initial years at the Royal Military College as an Officer Cadet and during training at the Canadian Forces School of Military Engineering.

[4] In 2002, the Applicant applied to the Department of Veterans Affairs (DVA) for a disability pension for chondromalacia patella in both her right and left knees (the knee condition). It is her position that the exigencies of her service, particularly during Basic Training, Recruit Training and the period when she was a first year cadet, initiated the problem with her knees that then underwent further aggravation during Phase II and Phase III training.

[5] The DVA determined that the Applicant was not entitled to a pension for this condition as the available medical evidence did not support that the knee condition arose out of, or was directly connected with, her Regular Forces service. The Applicant appealed this decision to the Veterans Review and Appeal Board Entitlement Review Panel (Entitlement Review Panel or the Panel). The Entitlement Review Panel conducted a *de novo* hearing and determined that the knee condition was not pensionable as there was no indication of service related trauma to either knee noted in any of the Applicant's service documents and that no medical opinion was presented to the Panel to relate the claimed condition to the Applicant's Regular Forces service.

[6] The Applicant appealed the Entitlement Review Panel decision to the Veteran's Review and Appeal Board (the Board). On January 13, 2005, the Board affirmed the Entitlement Review Panel decision, stating that the there was no medical opinion which could have allowed the Panel to infer a causal or aggravation relationship to the Applicant's military service.

[7] On February 25, 2005, the Applicant filed a Notice of Application with this Court to have the Board's decision judicially reviewed. The Applicant also applied to the Board for reconsideration of their decision and provided additional evidence from Dr. J.A. Ross dated April 25, 2005. The Federal Court dismissed the Applicant's application for judicial review for her knee condition. Justice Johanne Gauthier found that the Board made no reviewable error when it concluded that it could not infer a causal or aggravation relationship between the Applicant's condition and her military service on the basis of the evidence presented (see *Hunt v. Canada (Attorney General)*, 2006 FC 1029, 299 F.T.R. 84).

[8] Following the decision of Justice Gauthier, the Applicant's request for reconsideration was revived and submissions were made by the Applicant's pension advocate. On September 18, 2008, the Board denied the reconsideration.

A. *The Legislative Scheme*

[9] Subsection 32(1) of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the *VRAB Act* or the *Act*) authorizes the Board to reconsider a previous decision if one or more of the statutory grounds for reconsideration is established. Subsection 32(1) reads as follows:

Reconsideration of decisions:	Nouvel examen:
32. (1) Notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.	32. (1) Par dérogation à l'article 31, le comité d'appel peut, de son propre chef, réexaminer une décision rendue en vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.

[10] Sections 3 and 39 provide for the *Act*'s liberal interpretation in favour of the pension applicant:

Construction:	Principe général:
3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other	3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la

Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

[…]

[…]

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.

B. *The Decision*

[11] In her submissions to the Board, the Applicant argued she had new evidence to present. The new evidence was a March 23, 2005, letter from the Applicant and a letter dated April 25, 2005, from Dr. Ross. The Board determined that the evidence did not meet the legal requirement to be new evidence as it could have been presented at the *de novo* hearing, was not credible, and would not ultimately affect the previous result. The Board denied the application for reconsideration.

[12] The Board held that the new evidence must meet the test for "fresh evidence" as set out in *Mackay v. Canada (Attorney General)* (1997), 129 F.T.R. 286, 1997 F.C.J. No. 495. The principles of this test are:

1. The evidence should generally not be admitted, if, by due diligence, it could have been adduced earlier;

2. The evidence must be relevant in the sense that it bears upon the decisive or potentially decisive issue in the adjudication;

3. The evidence must be credible in the sense that it is reasonably capable of belief; and

4. It must be such that if believed, it could reasonably, when taken with other evidence adduced earlier, be expected to affect the result.

[13] In their decision, the Board determined that the evidence could have been adduced earlier by due diligence. They added that the Applicant had been put on notice in previous decisions that a

medical opinion would be helpful in for Entitlement Review Panel decision, but the Applicant did not bring any such evidence to the *de novo* hearing.

[14] The Board also held that Dr. Ross' evidence was not credible as it was not reasonably capable of belief. They found it was not reasonably capable of belief as the evidence was not supported by the documentary evidence. The Board took the position that it was difficult to reconcile the findings of the on-going medical reports that did not reference the knee condition with Dr. Ross' statement that the Applicant would have, on several occasions from 1982 to the present day, been symptomatic with her knee condition. The Board also found that Dr. Ross' opinion did not accord with the prevailing medical wisdom on the matter.

II. Standard of Review

[15] The applicable standard of review for reconsideration decisions of the Board is reasonableness (*Rioux v. Canada (Attorney General)*, 2008 FC 991, [2008] F.C.J. No. 1231 at paragraph 17; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

III. Issues

[16] There is one issue to consider in this matter: was the decision of the Board that the Applicant did not meet the requirements for reconsideration under subsection 32(1) of the *VRAB Act* reasonable?

A. *The Evidence Was Not New and Could Have Been Introduced At One of the De Novo Hearings*

[17] The Applicant argues that the Board's use of the test in *Mackay*, above, resulted in process and due diligence being placed before the "benefit of the doubt" principle in the *VRAB Act*. The correctness of using this test has been challenged in this court previously, notably in *Canada (Chief Pensions Advocate) v. Canada (Attorney General)*, 2006 FC 1317, 302 F.T.R. 201 and *Nolan v. Canada (Attorney General)*, 2005 FC 1305, 279 F.T.R. 311.

[18] In *Canada* (*Chief Pensions Advocate)*, above, the applicant challenged the Board's interpretation of subsection 32(1) and section 111 of the *Act*. The issue before the Court was whether the Board may consider the principle of "due diligence" in deciding whether to exercise its discretion to reconsider an appeal decision pursuant to subsection 32(1) and section 111. Justice Elizabeth Heneghan answered the question affirmatively, subject to the provision that the Board's discretion must be exercised in a manner that conforms to the broad purpose of the *Act* and respects the intent and meaning of sections 3 and 39.

[19] In *Nolan*, above, at the reconsideration hearing, the applicant tried to introduce a second letter from his doctor. The Board held that the second letter did not meet the requirements of new evidence as set out in *Mackay*, above. The applicant in *Nolan*, above, argued that the word "new" in subsection 32(1) should be given its ordinary and literal meaning and that applying the threshold test set out in *Mackay*, above, was contrary to the liberal provisions of section 3 and 39 of the

VRAB Act. Justice Konrad von Finkenstein did not accept this argument. He held at paragraph 21 that the Board's adoption of the test set out in *Mackay*, above, to deal with fresh evidence followed existing jurisprudence, was consistent with good agency management, avoided unnecessary expense, and was a practical way of applying the principle of finality in an agency context.

[20] In this matter, the Board found that the Applicant had not acted with due diligence. She knew or ought to have known that medical evidence on causation was necessary and had an opportunity to produce this evidence at her *de novo* hearing before the Board. She states that she did not produce the evidence because she felt the application was strong enough without it and that the evidence met the Medical Guideline's causation requirements. On reconsideration, the Board found that she could have produced the letter from Dr. Ross but chose not to until the reconsideration hearing and therefore she had not acted with due diligence. This was reasonable.

a. The Evidence Was Not Credible and Could Not Ultimately Affect the Previous Result

[21] The Board held that while Dr. Ross was credible, his opinion was not as it appeared to be based on the Applicant's self-reporting and was not consistent with other evidence, including the objective medical evidence. The Board then determined that Dr. Ross' evidence, when considered with the other evidence, did not provide a credible opinion on causation. Causation was the decisive issue in the matter and therefore the new evidence could not reasonably have affected the results.

[22] The Applicant argues that Dr. Ross' evidence should have been found to be credible as he is a doctor employed by National Defence. However, I note that the Board did not find Dr. Ross not credible; they found his opinion not credible. The Applicant makes further arguments that the Board did not consider the full extent of her knee condition, that many incidences of pain and discomfort were not reported, and that there were other opinions about the cause and treatment of her knee condition.

[23] *Dunsmuir*, above, teaches us that reasonableness is a deferential standard concerned with the existence of justification, transparency and intelligibility within the decision-making process and that "reasonable" decisions will fall within a range of possible acceptable outcomes which are defensible in respect of the facts and law. The Board may reject evidence if it has before it contradictory evidence or if it states reasons which would bear on the credibility and reasonable of the evidence (see *Wood v. Canada (Attorney General)* (2001), 199 F.T.R. 133, [2001] F.C.J. No. 52 (T.D.) at paragraph 33).

[24] Based on their review of the letter from Dr. Ross, the objective medical evidence, and their conclusion with regard to the credibility of the evidence on causation, the Board's decision was reasonable.

[25] Decisions of the Veteran's Review and Appeal Board are final and binding. Under subsection 32(1), the Board is able to reconsider previous decisions if there is an error of fact, law, or new evidence. It is important to note that under the legislation, each review, except the

reconsideration review, is conducted on a *de novo* basis, with the opportunity to submit new evidence and arguments. As set out by Justice von Finkenstein at paragraph 20 of *Nolan*, above, applicants should be prepared to use the appeal hearing as their last opportunity to raise all potential arguments and avenues of appeal. Conducting a reconsideration every time any form of evidence is offered subsequent to the release of a final and binding appeal decision does not respect the principle of finality or promote the efficient use of resources.

[26] The decision of the Board to deny the Applicant's application for reconsideration was reasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is dismissed; and

2. there is no Order as to costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1820-08**
STYLE OF CAUSE:	**HUNT** **v.** **ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**NOVEMBER 3, 2009**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
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APPEARANCES:

Cherylynn Hunt (905) 235-6709	SELF-REPRESENTED
Sharon McGovern (416) 952-0308	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cherylynn Hunt New Market, Ontario	SELF-REPRESENTED
Sharon McGovern Department of Justice Toronto, Ontario	FOR THE RESPONDENT