Federal Court		Cour fédérale

Date: 20100128

Docket: T-944-09

Citation: 2010 FC 98

Ottawa, Ontario, January 28, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ALAIN LEBRASSEUR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and Rule 300(a) of the *Federal Courts Rules*, SOR/98-106, for judicial review of a decision by the Veteran's Review and Appeal Board (the "Board") maintaining a decision of the Entitlement Review Panel (the "Panel") to reduce by 2/5 the disability pension to which Alain Lebrasseur (the "Applicant") was entitled.

BACKGROUND FACTS

[2] The Applicant has been a member of the Royal Canadian Mounted Police (the "RCMP") since July 2, 1980. He encouraged his wife to join the RCMP, and she did so.

[3] However, starting in May 2001, she became the victim of sustained sexual and psychological harassment by her superiors, which ultimately made her unable to work. She initiated legal proceedings against the RCMP in 2003, and these were reported by the media.

[4] The Applicant had always been a successful and well-respected officer. Even after his wife became the victim of the RCMP's harassment, his performance for 2002 was reviewed positively. However, the RCMP apparently wanted him to persuade his wife to abandon her legal proceedings against it. As he refused, he was, in turn, harassed and abused by some of his superiors.

[5] After the RCMP started harassing him, the Applicant also became ill. He ceased working on October 28, 2003. He was eventually recognised as permanently disabled due to anxiety and depression.

[6] He applied for a disability pension, but his application was denied by the Minister of Veterans Affairs on the basis that there was no evidence to show that his disability arose directly out of his service with the RCMP; rather, it was caused by his wife's situation.

[7] The Applicant appealed to the Panel. The Panel took into account reports of health professionals and the Applicant's testimony, which it found to be credible, and awarded a partial pension, reduced by two fifths because it was of the view that two medical reports "permitted to believe" that the Applicant's wife's problems with the RCMP, which appear to be at the root of the Applicant's conditions, are related to his own person life.

[8] The Applicant appealed to the Board, which upheld the award. He is now asking for a judicial review of that decision.

DECISION UNDER REVIEW

[9] The Board considered that the issue before it was whether, on a balance of probabilities, the evidence supported a finding that the Applicant's disability "arose out of or was directly connected with" his service in the RCMP, as required by paragraph 21(2)(a) of the *Pension Act*, R.S.C. 1985, c. P-6.

[10] The Board rejected the various medical reports' conclusions to the effect that the RCMP was entirely responsible for the Applicant's disability. First, it noted that the reports were based on what the Applicant told their authors. The evidence in support of the health professionals' conclusions was, therefore, subjective. Second, given the entanglement between the Applicant's problems with the RCMP and his wife's, the Board found that "it is difficult to know whether or not [the health professionals] are referring to the actions by the RCMP vis-à-vis his wife or the actions of the RCMP vis-à-vis the [Applicant]."

[11] The Board concluded that the Panel's finding that the Applicant's wife's problems contributed to the development of his illness was justified.

ISSUE

[12] The issue on this application for judicial review is whether the Board erred in deciding to withhold two fifths of the Applicant's disability pension. The Applicant suggests that the Board's interpretation and application of certain statutory provisions, notably section 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, which provides directions as to the way in which

the Board ought to treat the evidence before it, is a distinct issue. However, in my view it is inextricably linked with the review of the Board's substantive decision.

STANDARD OF REVIEW

[13] The Federal Court of Appeal held, in *Canada (Attorney General) v. Wannamaker*, 2007 FCA 126 at par. 12, "that the Board's determination as to whether a particular injury arose out of military service, a question of mixed fact and law, is to be reviewed on the standard of reasonableness." The Court further held, at par. 13, that "[t]he proper application of section 39 [of the *Veterans Review and Appeal Board Act*] results in a decision on a question of mixed fact and law" and is also subject to review on a standard of reasonableness.

DISCUSSION

Applicant's Position

[14] The Applicant submits that a disability that "arose out of" his service with the RCMP within the meaning of paragraph 21(2)(a) of the *Pension Act* need not have been directly caused by such service. He relies on the Federal Court of Appeal's holding in *Canada (Attorney General) v. Frye*, 2005 FCA 264, at par. 29, that the causal nexus that a claimant must show between the death or injury and military service need be neither direct nor immediate. He also relies on *Frye* as well as on *John Doe v. Canada (Attorney General),* 2004 FC 451, [2004] 249 F.T.R. 301, for the proposition that the *Pension Act* ought to be interpreted generously. The Board's approach was, in his view, too narrow. The Board erred in applying s. 39 of the *Veterans Review and Appeal Board Act*, which provides for favourable treatment of evidence tendered to it by an applicant or an appellant.

[15] The Panel speculated in finding that medical reports permitted to believe that the Applicant's wife's problems with the RCMP, which appear to be at the root of the Applicant's

conditions, are related to his own personal life. The Board then committed a reviewable error in upholding this speculative decision. Marriage to a co-worker should not cause the Applicant to lose his entitlement, and that the Board's decision amounts to discrimination on the basis of marital status.

[16] The Board is obliged to maximize the benefits it awards, and that it failed to discharge this obligation. Thus to reduce the pension to which it agreed that he was entitled on the basis of speculative and irrelevant grounds is arbitrary and thus unreasonable.

Respondent's Position

[17] The Respondent submits that while the causal connection between service and disability need not be direct or immediate, the Applicant must still show that one exists. The Applicant failed to show that the connection between his service and his disability was such as to justify an entitlement to a full pension.

[18] The Board's conclusion was not speculative, because medical reports establish that the Applicant's disability has partly been caused by wife's problems. Thus the Respondent quotes one report's conclusions that the Applicant's "difficulty is related to the harassment his wife … was exposed to at work" and that his stress arose "from his wife's work-related problems that inevitably, affect him as well." Another report, by Dr Buteau, found the Applicant's "wife's situation and health" as well as his own "personal situation at work" as the factors contributing to his illness. On the basis of these reports, the Board was entitled to conclude that the Applicant's disability did not arise entirely out of his service.

[19] The Respondent rejects the argument that the Board's finding prejudices married co-workers or amount to discrimination against them. He argues that the Board's conclusion would have been the same if the Applicant's wife had been working elsewhere or if another co-worker's situation was at the root of his problems.

[20] Finally, the provisions of the *Veterans Review and Appeals Board Act* relied on by the Applicant do not mean that he does not bear the burden of establishing a causal connection between his service and his disability. Thus the Board did not have to believe the Applicant or the medical reports he relied on and which were based on what he had told their authors. The Board was free to determine whether his disability arose out of his service and, in the process, to make findings as to credibility and probative value of the evidence before it. Its findings were not unreasonable.

Analysis

[21] Pursuant to paragraph 21(2)(a) of the *Pension Act*, when a member of the RCMP "suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with [his] service, a pension shall, on application, be awarded to or in respect of the member." (My emphasis.)

[22] The terms "arose out of" are understood as not requiring a direct causal link. In a case turning on the interpretation of a regulation providing insurance coverage for injuries arising "out of" the use of a motor vehicle, the Supreme Court has cautioned against "a technical construction that defeats the object and insuring intent of the legislation providing coverage." (*Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at par. 17, 127 D.L.R. (4th) 618.) The words "arose

out of" therefore only require "some nexus or causal relationship (not necessarily a direct or proximate causal relationship)" (*ibid*; emphasis in the original).

[23] In my view, this interpretation of the terms "arose out of" is well-suited to the *Pension Act*. I note that Parliament, in its wisdom, has seen it fit to make clear the *Pension Act* "shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled … as a result of … service … may be fulfilled."

[24] Section 3 of the *Veterans Review and Appeal Board Act* provides that that enactment has the same objective. Furthermore, its section 39 provides that in considering a case:

> the Board shall
>
> (*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;
>
> (*b*) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
>
> (*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.

[25] It is with this legislative framework in mind that the Board's decision must be reviewed.

[26] This decision is mainly based on two findings: first, that the medical reports relied on by the Applicant, are less than fully probative since they are based on what the Applicant himself told his doctors; and second, that "it is difficult to know" whether the reports' attribution of the Applicant's disability to actions of the RCMP referred to the RCMP's treatment of him or of his wife. In my view, these conclusions are unreasonable for the following reasons.

[27] While the Respondent is right that the Board is entitled to make credibility findings and need not accept all of the evidence tendered to it, its calling in question of the medical reports submitted by the Applicant on the basis that he was the source of the health professionals' conclusions is unjustified. It is not enough to say that the reports in question are based on a story told by the Applicant because that does not make them any less credible if that story is true. The Board did not make any findings as to the Applicant's credibility; yet it disregarded the favourable credibility finding made by the Panel. Thus, it failed to justify its decision to discount the medical reports.

[28] I would add that the Board's reasoning is particularly flawed given the nature of the Applicant's disability. Unlike a wound or injury which a physician can simply inspect, diagnosing the causes of a disability such as the Applicant's – anxiety and depression – is simply not possible unless the health professional speaks to the patient; he has little to rely on but the patient's words. If the Board suspects that the patient's perception of past events is inexact, it must say so, and explain why. In the case at bar, however, the Applicant's truthfulness is unquestioned. Indeed, uncontradicted evidence establishes that the Applicant was harassed by his superiors for a period of two years. The last straw was his being told that they would "use and abuse [him] in other ways," with no end in sight. Thus, the evidence clearly supported a finding that the Applicant's disability "arose out of" his service with the RCMP.

[29] As for the Board's finding that "it is difficult to know" whether the health professionals' reports attributed the Applicant's illness to the RCMP's actions towards him or towards his wife, while it is entitled to deference, it cannot, in light of the applicable law, reasonably support the

conclusion that his pension ought to be reduced. The Board concluded that the evidence is ambiguous. This is, in my view, precisely the kind of case to which paragraph 39(c) of the *Veterans Review and Appeal Board Act*, which provides that "the Board shall … 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" applies. The evidence, in the Board's view, left room for doubt; that doubt must have been resolved in favour of the Applicant; it was not. The Board's decision is thus not "defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 CSC 9, [2008] 1 S.C.R. 190, par. 47).

[30] In addition, one must recall that the mistreatment of the Applicant, who had previously enjoyed a successful career and was held in high esteem by colleagues and superiors alike, started when his wife made a complaint, and subsequently initiated a lawsuit, against the RCMP. For the RCMP members who tried bullying the Applicant into making his wife abandon those proceedings, there was no separation between their personal lives and his service. However appropriate it may be in other cases to distinguish personal life and career, and the stress caused by each, it was too late to do so here. The Applicant has suffered because this was not done, and it strikes me as unreasonable to deny him compensation on this basis.

CONCLUSION

[31] For these reasons, the application for judicial review of the decision will be allowed, with costs.

JUDGMENT

[32] **THIS COURT ORDERS that** the application for judicial review of the decision be allowed, with costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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