Federal Court		Cour fédérale

Date: 20101116

Docket: T-1853-09

Citation: 2010 FC 1148

Toronto, Ontario, November 16, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ROGER LADOUCEUR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Roger Ladouceur is a veteran of the Canadian Armed Forces. While serving with the Forces in Cyprus in the early 1980's the Applicant suffered severe injuries to his ankle which left him with a permanent disability. Since 1998 the Applicant has been seeking appropriate pension compensation for this disability. The present proceeding has been preceded by a long chain

of events in that regard. In the present application the Applicant is requesting judicial review of a decision of the Veterans Review and Appeal Board dated July 9, 2009. That decision denied the Applicant's request for an increase of the assessment and a variance of the starting date applicable to his compensation. For the reasons that follow I have allowed this application for judicial review and direct that the matter be retuned for re-determination having regard to these reasons. The Applicant is entitled to costs fixed at the sum of $3500.00.

[2] I will briefly set out some of the history respecting the Applicant's pursuit of what he claims to be an appropriate pension in compensation for his injuries:

a. On January 30, 2004 the Minister of Veterans Affairs determined that the Applicant was entitled to a pension to be assessed at 3% effective 6 October 2003.
b. An Entitlement Review decision dated 14 January 2005 changed the date of entitlement to 30 January 2001.
c. A decision of the Veterans Review and Appeal Board dated 14 January 2005 increased the pension rate to 5% and confirmed that the effective date of entitlement was 30 January 2001.
d. The Applicant appealed this assessment requesting a 15% pension, that appeal was dismissed. This decision was the subject of judicial review in this Court. On 28 November 2006 Justice Mactavish set aside this decision (her decision is cited as 2006 FC 1438) and remitted the matter for re-determination by a different panel of the Board.

e. On 7 February, 2007 a different panel of the Veterans Review and Appeal Board maintained the assessment at 5%.

f. On 23 August 2007 the Applicant requested a medical reassessment of his condition as a result of which his pension was increased to 10% effective 23 August 2007.

g. On 13 February 2008 the Applicant requested a review by the Veterans Review and Appeal Board both as to the quantum of the pension awarded and the effective date assigned.

h. On 9 January 2009 the Veterans Review and Appeal Board ruled that the pension should be increased to 11% but that the effective date of the increase was to remain as 23 August 2007, the date a new medical examination was requested.

i. On 9 July 2009 in dealing again with the matter the Board maintained its decision of 9 January 2009. It is this decision of 9 July 2009 that is the subject of this judicial review.

ISSUES

[3] The Applicant has raised two issues for determination:

i. Did the Veterans Review and Appeal Board err in law in the application of the appropriate category of Table of Disabilities in this case?

ii. Did the Veterans Review and Appeal Board err in law, exceed its jurisdiction or breach the rules of natural justice by consulting a Medical Advisor of Veterans Affairs Canada? I have described this issue as whether the Board improperly delegated its decision making duties?

Bound up with these issues is the necessity to determine the standard of review.

STANDARD OF REVIEW

[4] There is no doubt that in considering the questions of law, of procedural fairness and natural justice the standard of review to be applied by the Court is that of correctness.

[5] In considering jurisdiction, the Courts, in general, should adhere to a standard of correctness however if it comes to the interpretation of a statute in respect of which the Board has considerable expertise, the Court should take cognizance of the Board's determination in that regard.

[6] When it comes to consideration of the application by the Board if its mandated duties under the appropriate statutes and regulations the Court must, as directed by the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, [2008] 1 SCR 190 afford deference to the Board so long as its decisions are within an appropriate range of reasonableness. The decision of Simpson J. of this Court in *Goldsworthy* v. *Canada (Attorney General)* 2008 FC 380 at paragraphs 10 to 14 is instructive in this regard.

[7] There is an aspect of the *Dunsmuir* criterion that must be viewed differently when considering the *Veterans Review and Appeal Board Act, SC 1995, c.18* in that s. 3 requires that the *Act* and any other Act or Regulation dealing with the jurisdiction, powers, duties or functions of the Board must be liberally construed and interpreted in a manner favourable to veterans such as the Applicant:

Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent	*The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers,*

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.	*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.*

[8] I will turn to the issues.

ISSUE #1: Did the Veterans Review and Appeal Board err in law in the application of the appropriate category of Table of Disabilities in this case?

[9] The *Pension Act*, R.S.C. 1985, c.P.6, s. 35(2), provides for "instructions and a table of disabilities" for the guidance of persons making an assessment of disabilities for purposes of assigning a percentage of pension applicable to an individual veteran:

Les estimations du degré d'invalidité sont basées sur les instructions du ministre et sur une table des invalidités qu'il établit pour aider quiconque les effectue.	*The assessment of the extent of a disability shall be based on the instructions and a table of disabilities to be made by the Minister for the guidance of persons making those assessments.*

In accordance with this provision a Table of Disabilities with instructions has been provided. That Table opens with the following statement:

> *The Table of Disabilities is the instrument used by the Veterans Affairs Canada to assess the degree of medical impairment cause by an entitled disability. The Table of Disabilities has been revised using the concept of medical impairment based on a per condition methodology. The relative importance of that body part/body system has been a consideration in the development of criteria to assess the*

> *medical impairment resulting from the entitled disability. The Disability Assessment will be established based on the medical impairment rating, in conjunction with quality of life indicators which assess the impact of the medical impairment on the individual's lifestyle.*

The principles of assessment are thereafter set out including a requirement that both medical impairment and quality of life are to be determined in arriving at a final assessment:

> *This Table of Disabilities is to be used to assess service related disability for disability pension/award purposes.*
>
> *In accordance with the Pension Act and Canadian Forces Members and Veterans Re-establishment and Compensation Act, disability is defined as "…the loss or lessening of the power to will and to do any normal physical or mental act." As impairment refers to a loss of function that can be measured and documented objectively, disability, as defined in the Pension Act and the Canadian Forces Members and Veterans Re-establishment and Compensation Act, exceeds the physical limitations or impairment and thus requires both medical (impairment) and non-medical (quality of life) information to determine the final assessment of a disability.* (Emphasis added)

Individual tables are provided and the following instruction given:

> *(III)- Choice of Table*
>
> *Always use a table specific to the condition(s) being rated unless the instructions in a chapter specify otherwise. To choose the appropriate table, identify the loss of function, refer to the appropriate body system table and identify the rating criteria.*

At issue here is whether Table 17.9 or 17.12 is appropriate. They are described as follows:

> *Section 2*
>
> *Determining Impairment Assessments of Musculoskeletal Lower Limb Conditions*
>
> *The tables that may be used to rate impairment from musculoskeletal lower limb conditions are:*

…

Table 17.9	*Loss of Function- Lower Limbs*	*This table is used to rate impairment from musculoskeletal conditions which impact on the function of the lower limbs as a whole.*
	…	
Table 17.12	*Loss of Function- Lower Limb- Ankle*	*This table is used to rate impairment from musculoskeletal conditions affecting the active range of motion of the ankle.*

With respect to table 17.9 instructions, including the following, are provided:

> *Table 17.9- Loss of Function- Lower Limb*
>
> *Only one rating may be given for the lower limbs as a functional unit from Table 17.9. When more than one rating is applicable, the ratings are compared and the highest selected.*

Table 17.9 provides for ratings ranging from nil to eighty-one percent. The following rating is provided at eighteen percent.

Rating	*Criteria*
Eighteen	*-Walks at reduced pace on flat ground, and requires routine use of a cane or crutch and is unable to manage either stairs or ramps without rails; or* *-Pain restricts walking to 250 m or less.*

[10] The decision of the Veterans Review and Appeal Board dated 9 January 2009 made a number of findings as to the Applicant's condition which findings were not contested by the Board in the decision of 9 July 2009 now the subject of judicial review. These findings include:

a. The Applicant requires the use of a custom made brace and a ski pole to walk. Pain restricts walking to 250m or less.
b. The Applicant falls frequently causing injuries
c. The Applicant is unable to work at his regular occupation, his personal and social relationships are difficult to maintain
d. The Applicant takes strong medication for pain including morphine causing mood and sleep disorders

[11] It would appear that the Applicant readily meets the criteria for eighteen percent provided by Table 17.9 when both medical impairment and quality of life are considered.

[12] The Respondent, however, argues that Table 17.12 is the correct table. It deals with "Loss of Function- Ankle" and provides, for instance at nine percent:

> *Table 17.12- Loss of Function- Lower Limb- Ankle*
>
> *Only one rating may be given for each ankle from Table 17.12. If more than one rating is applicable, the ratings are compared and the highest selected.*
>
> …

Rating	*Criteria*
Nine	*-Dorsiflexion no more than 10°; or* *-Plantar flexion no more than 15°; or* *-Ankle unstable* on clinical exam*

[13] This is the rating assigned by the 9 January 2009 decision as affirmed by the 9 July 2009 decision. The 9 January 2009 decision states, *inter alia*:

> *The Panel is very sympathetic of the Applicant's difficulty, but it is unable to change the use of the specific Table of Disabilities from Table 17.12 to 17.9, as Table 17.9 does not apply specifically to the Applicant's condition. Therefore, the Panel will use Table 17.12- Loss of Function- Lower Limb- Ankle and determines that the criteria in this case does not show a clinical instability of the Applicant's ankle and plantar flexion of not more than 15 degrees, which is not denied by the Advocate.*

[14] It appears that there is considerable question that arises as to whether Table 17.12 is the correct table to apply. It is essentially directed only to the degree of flexibility exhibited by the injured ankle whereas Table 17.9 on the other hand is directed to broader issues including the ability to walk, degree of assistance required, level of pain and the like. Table 17.9 is the more appropriate table when considering both medical impairment and quality of life as is required by the instructions given.

[15] Regrettably the 9 July 2009 decision did not direct itself to any reasoned discussion as to whether 17.9 or 17.12 was appropriate. Instead the Board simply deferred to the opinion of an unnamed "Medical Advisor". This leads to the second issue.

ISSUE #2: Did the Veterans Review and Appeal Board err in law, exceed its jurisdiction or breach the rules of natural justice by consulting a Medical Advisor of Veterans Affairs Canada? I have described this issue as whether the Board improperly delegated its decision making duties?

[16] The decision of the Board of 9 July 2009 states, *inter alia*, as follows (I have underlined certain passages):

> *The Board was advised by the Medical Advisor that Table 17.12- Loss of Function- Lower Limb- Ankle is the appropriate Table to use for the entitled condition Post Traumatic Arthritis Left Ankle. This Table utilizes the objective finding of a physical examination, specifically Range of Motion (ROM) to arrive at the appropriate assessment. The loss of ROM is not a disability in and of itself but represents the degree to which the loss of ROM would affect the ankle joint and the functioning of the limb as a whole. The rating/assessment provided by Table 17.12 Loss of Function- Lower Limb- Ankle does not capture the functioning of the limb as a whole and does not require a separate or additional rating from Table 17.9- Loss of Function- Lower Limb. Table 17.9 Loss of Function- Lower Limb is designed to address the assessment of conditions which do not lend themselves well to objective physical examination findings such as loss of ROM.*
>
> *Nowhere in this Table is it mentioned that using Table 17.12 or Table 17.9 is an "option" and/or if the Table is more favourable that it has to be the one to be used. It corresponds to a specific goal and in this case, the goal of assessing the ankle condition is by the way of using Table 17.12. In total fairness with the other Appellants with the same type of disability, the Board considered in order to have fair assessments across Canada, the same Table must be used. In this case, arthritis of the left ankle must be assessed under Table 17.12. When this assessment is made under this Table, the current assessment of 11% represents the disability caused by the pensioned condition.*

[17] There are two errors made by the Board as set out in this passage of the Reasons. The first is that the Board has stated that it relied on the opinion of an unnamed "Medical Advisor" given at some undisclosed time, that Table 17.12 was the appropriate table. Second, the Board stated that it wanted to be consistent with some undisclosed assessments made in respect of other undisclosed Appellants with presumably the same disabilities.

[18] As to the first error, the *Veterans Review and Appeal Board Act supra*, section 18 makes it quite clear that the Board has exclusive jurisdiction to hear, determine and deal with applications for pension review:

18. Le Tribunal a compétence exclusive pour réviser toute décision rendue en vertu de la Loi sur les pensions ou prise en vertu de la Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes et pour statuer sur toute question liée à la demande de révision.	*18. The Board has full and exclusive jurisdiction to hear, determine and deal with all applications for review that may be made to the Board under the Pension Act or the Canadian Forces Members and Veterans Re-establishment and Compensation Act, and all matters related to those applications.*
1995, ch. 18, art. 18; 2005, ch. 21, art. 110.	*1995, c. 18, s. 18; 2005, c. 21, s. 110.*

[19] I disagree with Counsel for the Respondent who says that sections 14 and 15 enable the Board to seek out and rely on opinions of persons such as the "Medical Advisor".

14. Le Tribunal et chacun de ses membres ont, pour l'exercice des fonctions que leur confie la présente loi, les pouvoirs d'un commissaire nommé au titre de la partie I de la Loi	*14. The Board and each member have, with respect to the carrying out of the Board's duties and functions under this Act, all the powers of a commissioner appointed under Part I of the Inquiries Act.*

sur les enquêtes.

15. Sous réserve de toute autre loi fédérale et de ses règlements, le Tribunal peut consulter les dossiers du ministère des Anciens Combattants ainsi que tous autres documents relatifs aux affaires dont il est saisi. *1995, ch. 18, art. 15; 2000, ch. 34, art. 94(F).*	*15. Subject to any other Act of Parliament and any regulations made under any other Act of Parliament, the Board may inspect the records of the Department of Veterans Affairs and all material relating to any proceeding before the Board.* *1995, c. 18, s. 15; 2000, c. 34, s. 94(F).*

[20] Section 14 simply enables the Board to act like a commission of inquiry, section 15 enables the Board to review certain records. There is no suggestion or implication that the Board can abdicate its exclusive powers under section 18 to a "Medical Advisor".

[21] Respondent's Counsel referred to the decision of the Supreme Court of Canada in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***,** [2001] 2 S.C.R. 781 for the proposition that a Board can seek out the advice and assistance of others. I do not read this decision as stating that proposition. What it says is that by express statutory language or necessary implication Parliament may override the common law rules of natural justice. The Chief Justice, for the Court, wrote at paragraph 22:

> *22 However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra, [1981] 2 S.C.R. 145; Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301; Ringrose v. College of Physicians and Surgeons (Alberta), [1977] 1 S.C.R. 814; Kane v. Board of Governors of the University of British*

> *Columbia, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.*

[22] I find no express provisions or necessary implication in the present case in any relevant statutory provision.

[23] I find the decision of Nadon J (as he then was) in *King v. Canada (Veterans Review and Appeal Board)* 2001 FCT 535 to be instructive in respect of the issue here. He wrote at paragraphs 59 to 63:

> *59 In my view, the VRAB did not apply the proper test and, as a result, its decision cannot stand. Furthermore, I agree entirely with the applicant that the VRAB erred in seeking and in considering the opinion of the OJAG. In my view, contrary to the VRAB's belief, section 14 of the Veterans Review and Appeal Board Act does not allow the Board to search for evidence and to seek opinions with regard to the evidence and the issues before it in a given case. That position would nullify a number of provisions in that Act and, more particularly, section 39 thereof, which provides that the Board shall draw from the evidence before it every reasonable inference in favour of an applicant and that the Board is to accept any uncontradicted evidence before it that it considers credible in the circumstances.*
>
> *60 The position taken by the VRAB would also render meaningless section 38 of the Veterans Review and Appeal Board Act, which authorizes the Board to obtain independent medical advice in respect of the issues before it. The section also allows the Board to require an applicant to submit himself or herself to a medical examination directed by the Board. When the Board intends to exercise the power conferred upon it by section 38, it must notify an applicant of its intention to do so and allow the applicant an opportunity to argue the issue. If the position taken herein by the Board were correct, section 38 of the Veterans Review and Appeal Board Act would have to be considered as an*

example only of the broad powers given to the Board by section 14 of that Act. In my view, that cannot be the correct position. Consequently, the Board was wrong in seeking opinions from the OJAG and in considering these opinions in reaching its conclusion.

61 At page 5, paragraph 10 of these Reasons, I have reproduced, in part, the letter written by the VRAB to the OJAG, seeking out answers with respect to a number of questions. Specifically, the VRAB sought answers with respect to the meaning and origin of the term "official temporary duty", with respect to whether a member of the Armed Forces on "official temporary duty" was considered by the Armed Forces as being on duty 24 hours a day from the time he left his base until his return thereto, with respect to whether a member on "official temporary duty" was entitled to benefits pursuant to subsection 21(2) of the Pension Act for any disability or disabling condition resulting from an off-duty incident and, finally, with respect to the "protection" given to a member of the Armed Forces while on "official temporary duty" and whether that protection included benefits under subsection 21(2) of the Pension Act.

62 It is clear that the VRAB was seeking the assistance of the OJAG in respect of the issues that were before it and which it had to decide. It is also clear from the Board's decision, particularly from page 10 thereof, that the views of the OJAG were determinative of the first issue. At page 10 of its decision, the VRAB states the following:

> *While it may have been Brigadier General Christie's understanding that official temporary duty away from home base provided Mr. King full authorization to proceed into the local economy (of Sardinia) for meals and recreation and that such authorization provided him with 24 hour protection by the "rules and regulations of the RCAF", it is clear from the office of the Judge Advocate that his understanding was deficient or misguided or erroneous. While the Federal Court decision found that Brigadier General Christie's evidence was "... clear, unequivocal and on the face of the record unassailable,' this Board in the light of the Judge Advocate's opinion must conclude, based on the evidence before it, that while Mr. King's Hepatitis condition was contracted during his period of service in Sardinia in 1968, it can not be said to*

> *have "arisen out of or directly connected with his service in peacetime" as that term is defined in the Pension Act.*
>
> *63 The VRAB had to decide the relevant issues on the basis of the record before it. That record, in my view, did not include the views of the OJAG. As the VRAB is not authorized by its enabling legislation to seek out opinions at will, its decision to seek out the OJAG's views and its consideration thereof, constitutes a reviewable error.*

[24] As a second error, the Board based its decision on a desire to be consistent with other, undisclosed decisions respecting undisclosed Appellants which the Board said had similar disabilities. Those decisions are nowhere to be found in the Record. It cannot be determined by the Applicant or this Court whether the circumstances are truly similar. In any event, simply for a Board to be consistent does not make its decisions right.

CONCLUSION

[25] The decision of the Board was made with improper delegation to a “Medical Advisor” and improperly based on undisclosed, purportedly similar, circumstances. It must be set aside.

[26] A differently constituted Board should re-determine the matter giving consideration to both medical impairment and quality of life impairment in respect of which Table 17.9 is more appropriate in the circumstances of this case.

COSTS

[27] The Applicant is successful and is entitled to costs. After considering the submissions of both Counsel I fix these costs at $3,500.00.

JUDGMENT

For the Reasons provided:

THIS COURT ORDERS AND ADJUDGES that:

1. The Application is allowed;

2. The decision of the Veterans Review and Appeal Board dated 9 July 2009 is set aside and is returned for re-determination by a different Board mindful of these Reasons;

3. The Applicant is entitled to costs fixed at $3,500.00

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1853-09
STYLE OF CAUSE:	ROGER LADOUCEUR v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2010
REASONS FOR JUDGMENT AND JUDGMENT BY:	HUGHES J.
DATED:	November 16, 2010

APPEARANCES:

Yehuda Levinson	FOR THE APPLICANT
Melanie Toolsie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levinson & Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT