Federal Court  Cour fédérale

Date: 20120313

Docket: T-1271-11

Citation: 2012 FC 303

Ottawa, Ontario, March 13, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROSARIA DI DOMENICI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Veterans Review and Appeal Board denying the applicant's survivor claim for a pension. The Board determined that there was no medical evidence that the applicant's late husband, Louis Peter Di Domenici, worsened his flat feet during his active service from June 1, 1943 to November 29, 1944.

[2] For the following reasons the application is dismissed.

Background

[3] Mr. Di Domenici was born in 1918 and died in 1989. He volunteered and served in the army during the Second World War from June 1943 to November 1944. At the time of his enrolment the medical records indicate that he had right pes planus and left pes planus (bilateral flat feet).

[4] Mrs. Di Domenici, his surviving spouse, applied for a survivor's disability pension. By decision dated April 26, 2010, the Minister of Veteran Affairs determined that Mr. Di Domenici's gastric ulcer was pensionable under subsections 48(3) and 21(1) of the *Pension Act*, RSC 1985, c P-6, but that his bilateral flat feet were not. The basis of that negative decision was as follows:

> A review of the service medical records reveals on his enrolment medical examination in June 1943, bilateral flat feet was recorded. A further review did not reveal any other reference to his flat feet bothering him, including his release in October 1944.
>
> Although your husband did have flat feet noted on his enrolment our records do not show that he experienced any further foot trouble related to flat feet throughout his military service. As a result, we regrettably conclude the claimed right pes planus and left pes planus are not attributable to, were not incurred during, or aggravated by, his National Resources Mobilization Act service.
>
> The Department, therefore, cannot grant disability pension entitlement under subsections 48(3) and 21(1) of the *Pension Act.*

[5] The applicant sought review of this decision at the Entitlement Review Panel in January 2011; the Panel affirmed the Minister's decision. The applicant appealed this decision to the Board which, on June 20, 2011, denied the claimed pension entitlement, finding that there was

no medical evidence that her husband's flat footedness was in any way worsened during his service.

[6] The Board acknowledged the remarks made on a medical examination prior to enrolment regarding "feet pain on walking far" and noted the enrolment diagnosis of flat feet. The Board also noted that upon release, the Veteran's Medical Board Proceedings made no mention of the claimed condition although he was said to suffer from an ingrown great toe nail bilaterally.

[7] The Board stated that it weighed the evidence, drew every reasonable inference in favour of the applicant, and provided her with the benefit of the doubt.

[8] An applicant for a disability pension bears the burden of producing evidence to establish the causal link between the disability and the aggravation and the Board determined this burden was not met.

Issue

[9] In her memorandum, the applicant states that the issues in "this application are whether the Board erred in overlooking evidence that Louis' flat feet worsened and, if not, whether it failed to properly explain why it did not accept the evidence."

Analysis

Standard of Review

[10] The applicant accepts that a tribunal's decision and assessment of evidence is reviewable on the reasonableness standard; however, she submits that the Board's "failure to articulate reasons for not accepting evidence is an error of law and warrants judicial intervention on a

correctness standard: *MacDonald v Canada (Attorney General)*, [1999] FCJ 346. I agree with the respondent that *MacDonald* is distinguishable. There the Board had failed to give any reason for not accepting new evidence that was submitted on a reconsideration motion. The Court was careful at para. 22 to indicate that the standard of review differed in that particular circumstance. Furthermore, the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, recently instructed that the adequacy of reasons is not a stand-alone basis for quashing a decision; rather "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." This directs a reasonableness review.

[11] For these reasons, the appropriate standard to be applied to decisions of the Board, as recently confirmed by this Court, is reasonableness: *Carnegie v Canada (Attorney General)*, 2012 FC 93.

The Impugned Evidence

[12] At the hearing counsel for the applicant candidly acknowledged that the disagreement of the parties centred on one specific document – an entry in Mr. Di Domenici's Personnel Selection Record, dated December 2, 1943 which reads as follows: "In view of lowering of Profile to P3, L2 re-allocated from C.A.C. (Recoe) to R.C.A.M.C. (N.T.) General Duties, L. of C." The applicant submits that this is evidence of the worsening of Mr. Di Domenici's flat feet and that the Board overlooked it, or if it did not, it failed to properly explain why it did not accept it as showing that the condition had worsened.

[13] This entry refers to Mr. Di Domenici's PULHEMS score, a measure of physical and mental health used by the armed forces. Soldiers were graded numerically on the following: P = physique, U = upper limbs, L = lower limbs, H = hearing, E = eyesight, M = mental function and S = stability.

[14] The applicant reads the December 2, 1943 entry as stating that two of Mr. Di Domenici's ratings were lowered: P (physique) and L (lower limbs). It is accepted that the L2 rating was "because of flat feet."

[15] The applicant in her memorandum states:

> There was no record of Louis' initial PULHEMS score on his enlistment papers. … Louis' discharge papers record that his PULHEMS score on enlistment had been L-2. However, this is contrary to [the] note from December 2, 1943, which indicates a lowering of Louis' PULHEMS profile, presumably from L-1 to L-2."

[16] The applicant reads the December 2, 1943 note as if the "comma" were an "and" such that would read: "In view of lowering of Profile to P3 [and] L2 [Louis] re-allocated …" I accept that if there was no evidence of Mr. Di Domenici's L rating prior to this note, the proposed interpretation would be available. Moreover, because it favours the veteran, it would be accepted as the correct interpretation in keeping with section 39 of the *Veterans Review and Appeal Board Act***,** SC 1995, c 18, which provides that the Board is to "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."

[17] However, there is evidence of the L rating of Mr. Di Domenici prior to the 1943 note. As the applicant acknowledges, the discharge papers state that on enlistment Mr. Di Domenici's L rating was L2 and that was because of his flat feet. The applicant submits that this entry must be in error. I cannot agree. First, the document is an official armed forces report and accordingly is a record that is admissible for the truth of its contents in accordance subsection 26(1) with the *Canada Evidence Act*, RSC 1985, c C-5 as an entry in a book kept in any office or department of the Government of Canada. Second, there is no evidence to suggest that Mr. Di Domenici was not rated L2 at the time of enlistment. In fact, given his flat feet, the suggested prior rating of L1 would not have been likely or accurate as a "1" rating is excellent. Common sense alone suggests that the best rating Mr. Di Domenici could have obtained on enlistment given his flat feet was L2.

[18] Accordingly, I am unable to find that the Board ignored any relevant evidence or that it failed to explain why it rejected the evidence on which the applicant relies. In my view, the note merely states that Mr. Di Domenici's P rating was lowered (due, it appears, to his gastric distress) and this combined with his L2 rating due to his flat feet, led to him to being reallocated to General Duties at the Royal Canadian Army Medical Corps

[19] Mr. Davis represented the applicant on a pro bono basis. I commend him for having done so and for the professional and thorough manner in which he carried out those duties. I also commend the Crown for agreeing that each party would be responsible for its own costs, regardless of the result.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no costs are ordered.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1271-11
STYLE OF CAUSE:	ROSARIA DI DOMENICI v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
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