

Federal Court



Cour fédérale

Date: 20140930

Docket: T-943-14

Citation: 2014 FC 942

Vancouver, British Columbia, September 30, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

GREGORY R. BALDERSTONE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Gregory Balderstone seeks judicial review of a decision of the Veterans Review and Appeal Board dismissing his appeal from a decision refusing to grant him a disability award for the loss of his teeth.

[2] Mr. Balderstone says that he lost his teeth in 2001 because he received inadequate dental treatment during his two years of service with the Canadian Military Regular Forces in the early 1960s.

[3] While I have carefully considered Mr. Balderstone's submissions and have sympathy for his situation, he has not persuaded me that the Veterans Review and Appeal Board's decision was unreasonable. As a result, I have no alternative but to dismiss his application for judicial review.

I. Background

[4] Mr. Balderstone joined the Canadian Army in the summer of 1962 when he was 16 years old. Upon enlisting, he underwent a dental examination. The examination notes indicate that he had dental caries and several missing teeth. I understand Mr. Balderstone's position to be that he was not in fact missing any teeth, but had unerupted wisdom teeth. There is no evidentiary support for this assertion in the record, but nothing ultimately turns on this question.

[5] In early October 1962, Mr. Balderstone was hospitalized because he was suffering from dental abscesses. He was treated with antibiotics, and the hospital records indicate that the infection cleared up, and that Mr. Balderstone was discharged from the hospital on October 19, 1962. Mr. Balderstone confirmed before me that he did not experience any recurrence of the abscesses while he was in the Army.

[6] The medical records also show that on October 17, Mr. Balderstone was "referred to the dental clinic". Mr. Balderstone did not visit a dental clinic or see a dentist for the remainder of his time in the Army. He has provided various reasons for his non-attendance. He explained that the Cuban Missile Crisis intervened, and he spent 24 hours in a truck preparing for an attack. He also says that in November of 1962, he was discouraged from seeing a dentist by his superiors, who told him not to malingering.

[7] Later in his period of military service, Mr. Balderstone was admitted to the hospital for an unrelated injury. There is no evidence that he complained of any dental issues at that time or that he asked to see a dentist.

[8] Mr. Balderstone was discharged from the Army in 1964. He did not mention any dental problems during his pre-discharge examination. Mr. Balderstone provided a detailed description of the circumstances of his discharge at the hearing of this application to explain his failure to mention his dental problems. Unfortunately, much of the information provided by Mr. Balderstone was not in the record that was before the Veterans Review and Appeal Board and thus cannot be used to call into question the reasonableness of the Board's decision.

[9] In 1992, Mr. Balderstone underwent surgery for a benign tumour in his mouth. He did not, however, see a dentist until 2001, by which time he needed to have all of his teeth removed and replaced with dentures.

[10] Mr. Balderstone submitted an application for disability benefits in July of 2010, in which he claimed that the inadequacy of his dental treatment while serving caused the development of the lymphangioma, and the subsequent need to extract his teeth.

[11] Veterans Affairs Canada declined Mr. Balderstone's application for a disability award. It found that although he was diagnosed with dental conditions during his service, the evidence did not support a finding that Mr. Balderstone's dental conditions were caused or aggravated by any military factors. An Entitlement Review Panel subsequently affirmed Veterans Affairs Canada's decision. Mr. Balderstone then took his case to the Veterans Review and Appeal Board.

II. The Veterans Review and Appeal Board's Decision

[12] The Veterans Review and Appeal Board dismissed Mr. Balderstone's appeal. It found that there was no evidence to support an inference that medical negligence on the part of the military caused or permanently aggravated Mr. Balderstone's claimed condition.

[13] After reviewing Mr. Balderstone's medical records during and after his service, the Board found that Mr. Balderstone had dental problems, including dental caries, at the time of his enrolment. The Board further found that he had been appropriately treated for his dental abscesses, and that he had been referred to a dental clinic but did not follow up for treatment. The Board also found that Mr. Balderstone did not make any dental complaints at the time of his release from service, and did not seek any dental care until 1992, some 28 years after he completed his military service.

[14] The Board considered the two medical opinions before it: a "Pension Medical Advisory" opinion from a Dr. Barrett, which confirmed that the standard of care of the day had been met in Mr. Balderstone's case, and an opinion from a Dr. Burlin that had been provided on behalf of Mr. Balderstone.

[15] The Board preferred Dr. Barrett's opinion over that of Dr. Burlin, noting that Dr. Barrett is a duly qualified dentist with specific training and practice in dentistry, whereas Dr. Burlin is a medical doctor engaged in General Practice. While recognizing that Dr. Burlin works as a Dental Anaesthetist, the Board found that he lacked dental expertise. The Board further noted that Dr. Burlin went beyond the scope of his expertise, acting as Mr. Balderstone's advocate in attempting to apply legislative provisions to the facts of Mr. Balderstone's case. In the Board's view, this made Dr. Burlin's opinion less credible.

[16] After reviewing all of the evidence, the Board was not satisfied that Mr. Balderstone's dental problems, including the loss of his teeth in 2001, arose out of or was directly connected to his military service. Consequently, his appeal was dismissed.

III. Analysis

[17] The reasonableness standard of review applies to the Board's interpretation of medical evidence and its assessment of an applicant's disability: see *Beauchene v. Canada (Attorney General)*, 2010 FC 980, at para. 21, 375 F.T.R. 13. As a result, I cannot interfere with the Board's decision unless I am satisfied that the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[18] It is evident from the Board's reasons that it was aware of the provisions of section 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18. This section requires the Board to draw every reasonable inference in favour of an appellant, to accept any uncontradicted evidence presented by an appellant that it considers to be credible, and to resolve any doubt in the weighing of evidence in favour of an appellant.

[19] While section 39 is intended to ensure that evidence adduced to support an application for benefits "is considered in the best light possible", it remains the applicant's task to establish facts giving rise to entitlement to benefits on a balance of probabilities: *Wannamaker v. Canada (Attorney General)*, 2007 FCA 126, at para. 5, [2007] F.C.J. No. 466.

[20] In this case, the Board was faced with contradictory medical opinions relating to the issue of causation. It provided lucid and detailed reasons as to why it preferred the evidence of

Dr. Barrett to that of Dr. Burlin, noting, amongst other things, that Dr. Barrett possessed superior expertise.

[21] The Board further noted that Dr. Burlin had stepped beyond the role of an objective medical expert and had assumed the role of advocate for Mr. Balderstone. This was a reasonable finding, given that Dr. Burlin purported to apply legislative provisions to the facts of the case. Indeed, Dr. Burlin went so far as to argue that Veteran Affairs Canada “should be responsible for assisting [Mr. Balderstone] to receive the timely and appropriate ongoing dental care” that he needs because the Armed Forces could not prove “beyond a reasonable doubt that [Mr. Balderstone] received timely and appropriate care”.

[22] Whether Mr. Balderstone meets the legal test for disability benefits is not a medical question, and is one wholly outside Dr. Burlin’s area of expertise.

[23] A review of the record reveals several other reasons for questioning the reliability of Dr. Burlin’s opinion. Dr. Burlin suggests that Mr. Balderstone should have been offered treatment under anaesthetic due to his fear of dentists. Nothing in the record suggests, however, that the Army was ever made aware that Mr. Balderstone had a fear of dentists. Dr. Burlin also does not suggest that the treatment of dental conditions under general anaesthetic was the standard of care at the relevant time, namely the early 1960s.

[24] Dr. Burlin also appears to believe that Mr. Balderstone’s teeth were removed in 1992 – nine years before the removal actually took place. Thus the loss of Mr. Balderstone’s teeth was significantly more remote in time to Mr. Balderstone’s period of his military service than Dr. Burlin understood. Finally, because of his inability to read French, Dr. Burlin did not have a

complete picture of Mr. Balderstone's dental situation, or the treatment that had been provided to him while he was in the Army.

IV. Conclusion

[25] While I understand that Mr. Balderstone disagrees with the decision rendered in his appeal, he has not identified any error on the part of the Board that could justify the intervention of this Court. Consequently, the application is dismissed. The respondent does not seek costs, and none are awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

“Anne L. Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-943-14

STYLE OF CAUSE: GREGORY R. BALDERSTONE v THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: SEPTEMBER 25, 2014

JUDGMENT AND REASONS: MACTAVISH J.

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