

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110908**

**Docket: A-480-10**

**Citation: 2011 FCA 247**

**CORAM: SHARLOW J.A.  
PELLETIER J.A.  
STRATAS J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**ROGER LADOUCEUR**

**Respondent**

Heard at Toronto, Ontario, on September 7, 2011.

Judgment delivered at Toronto, Ontario, on September 8, 2011.

**REASONS FOR JUDGMENT BY:**

**STRATAS J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
PELLETIER J.A.**

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**Respondent**

**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] The Attorney General of Canada appeals from a judgment of the Federal Court (*per* Justice Hughes): 2010 FC 1148. The Federal Court quashed a decision dated July 9, 2009 of the Veterans Review and Appeal Board.

**A. Background**

[2] The respondent, Mr. Ladouceur, suffered a severe injury to his ankle during his military service in Cyprus and is entitled to a disability pension under the *Pension Act*, R.S.C. 1985, c. P-6. The issue before the Board concerned the amount of his disability pension.

[3] Subsection 35(1) of the *Pension Act* provides that the amount is to be determined “in accordance with the assessment of the extent of [his] disability.” Subsection 35(2) provides that that assessment is to be “based on the instructions and a table of disabilities to be made by the Minister.”

[4] The Minister has made a table of disabilities with instructions. The main issue before the Board was how this should be applied to Mr. Ladouceur’s case. Specifically, the Board had to consider which of two tables, Table 17.9 and Table 17.12, should apply to Mr. Ladouceur’s disability. Table 17.9 gives Mr. Ladouceur a higher disability pension than Table 17.12 does.

[5] The Board decided that Table 17.12 applied. Mr. Ladouceur brought an application for judicial review of that decision in the Federal Court and succeeded.

[6] The Federal Court quashed the Board’s decision on three grounds: the Board did not select the most appropriate table, the Board improperly received and relied upon advice from a medical advisor, and the Board relied on certain undisclosed decisions. The Attorney General appeals on all three grounds.

**B. Analysis**

**(1) The reasonableness of the Board's choice of Table 17.12**

[7] The parties agree in this Court that the standard of review of the Board's choice of Table 17.12 is reasonableness.

[8] It is not clear from the Federal Court judge's reasons whether he adopted correctness or reasonableness as the appropriate standard of review. However, he did analyze the Board's choice of table in a way that approached correctness review. He embarked upon his own analysis of the Minister's table of disabilities and instructions and arrived at his own view that Table 17.9 was "the more appropriate table" (at paragraph 14). He did not engage in the methodology of reasonableness review required under *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 54, [2008] 1 S.C.R. 190, which is to focus upon whether the outcome reached by the Board, as explained in its reasons, fell within the range of what was defensible on the facts and the law. In the end, he required the Board to redetermine the matter "mindful of [his] reasons," which included his own view of which table was more appropriate.

[9] In choosing which table to apply, the Board had to make factual findings concerning Mr. Ladouceur's physical and medical condition. These are matters calling for the application of the deferential standard of review of reasonableness: *Beauchene v. Canada (AG)*, 2010 FC 980 at paragraph 21; *Gilbert v. Canada (AG)*, 2010 FC 1300. Then it had to interpret the tables and accompanying instructions – legislation closely related to this Board's home statute – and apply its

interpretation to its factual findings. For this, reasonableness is also the standard of review:

*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 54, [2008] 1 S.C.R. 190. Therefore, I agree with the parties' joint view that reasonableness is the standard of review to be adopted in this case.

[10] Under this deferential standard of review, Mr. Ladouceur must convince this Court that the Board's choice of Table 17.12 is unreasonable based on the evidence before the Board, the wording of the Tables and the instructions given by the Minister. In other words, he must show that the Board reached an outcome that was outside of the range of what was defensible on the facts and the law. See *Dunsmuir, supra*, at paragraph 47.

[11] In my view, Mr. Ladouceur has not met that burden. The Board's choice of Table 17.12 was reasonable. The Board found that Mr. Ladouceur suffered from post traumatic arthritis in his left ankle, a matter that, in its view, fell within the plain wording of Table 17.12. The Board, noting an example in the instructions supplied for Table 17.9, observed that Table 17.9 "is more applicable for a neurological disorder that affects the lower limbs as a whole." In its view, other tables, such as Table 17.12, are to be "used to assess the disability resulting from a specific part of the body," such as an ankle. The Board observed that there is no language in the instructions that allows the Board to choose a Table that would give a claimant a more favourable disability pension. All of these considerations supplied the Board with a defensible basis for its decision that Table 17.12 applied.

**(2) The Board's receipt of and reliance on advice from a medical advisor**

[12] In reaching its conclusion, the Board took into account advice from a medical advisor that:

Table 17.12 was to be used. This is seen from the following excerpt from the Board's decision:

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.

[13] The medical advisor's identity is unknown. Whether the advice was given in writing or orally is unknown. The circumstances that prompted the medical advisor's advice are unknown. Whether the advisor was given any information or documents is unknown. If the advisor had been given information or documents, exactly what the advisor was given is unknown.

[14] Only the Board received the medical advisor's advice. If the advice were written, it should have appeared in the record of the Board that was filed with the Federal Court and, in this appeal, to our Court. If oral, it should have been documented and that document should have appeared in the record.

[15] During the course of the proceedings leading up to the Board's decision, Mr. Ladouceur did not receive the medical advisor's advice. He never had an opportunity to test, challenge or rebut it.

[16] Leaving to one side the question of whether the choice of the appropriate table is a proper subject for medical advice or is an ultimate issue on which an expert should not opine, I agree with

the Federal Court judge that the Board's receipt and reliance on this advice was a reviewable error. On this ground alone, I agree with him that the Board's decision must be quashed.

[17] Like the Federal Court judge, I see no express or implied authority for the Board to receive and consider the medical advisor's advice in the way that it did. Further, the manner in which it received the medical advisor's opinion was procedurally unfair.

[18] The *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 ("VRAB") provides guidance on how the Board may receive and take into account evidence, such as the medical advisor's advice.

[19] Under section 38(1) of VRAB, the Board may obtain independent medical advice and may require that a claimant undergo a medical examination. Before accepting as evidence any advice or report concerning the examination, the claimant has the right under subsection 38(2) to make submissions about its admissibility. These provisions do not apply here since Mr. Ladouceur was not examined by an independent medical examiner. But they do suggest that obligations of procedural fairness arose in this case. In this case, the medical advisor advised the Board as to which table should apply. We can only assume that in arriving at this advice, the advisor must have examined and assessed the medical and other evidence. This is a task akin to that under section 38(1), a task that requires strict observance of procedural fairness to the claimant.

[20] Another indicator of the level of procedural fairness that should apply is section 14 of VRAB. Under section 14, the Board has been given the powers of a Commissioner under Part I of

the *Inquiries Act*, R.S.C. 1985, c. I-11. Using these powers, the Board can summon witnesses before it and require them to attend, give evidence and produce documents: see sections 4 and 5 of the *Inquiries Act*. Opportunities for a claimant to cross-examine or rebut that evidence would then follow.

[21] Finally, I note that the level of procedural fairness to be afforded in cases such as this should be quite high given the importance of the matter to the claimant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 25.

[22] By receiving the medical advisor's advice without disclosure to Mr. Ladouceur and without giving him an opportunity to test, challenge or rebut it, the Board worked a fundamental unfairness to Mr. Ladouceur. Had Mr. Ladouceur been afforded that opportunity, he might have been able to convince the Board that his disability falls under Table 17.9 rather than Table 17.12, or, alternatively, he might have been able to convince this Court that the Board's choice of Table 17.12 was unreasonable in light of all of the evidence. In light of this, I do not accept the Attorney General's submission that if there were a procedural error in this case, it was minor and should be disregarded.

[23] In light of the Board's improper receipt of the medical advisor's evidence and the significant impact that that error might have had on Mr. Ladouceur, its decision to choose Table 17.12 rather than Table 17.9 cannot stand.



**(3) The Board's reliance on certain undisclosed decisions**

[24] In support of its decision to choose Table 17.12 rather than Table 17.9, the Board offered an additional reason. It stated:

In total fairness with 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. [sic]

Mr. Ladouceur interprets this as meaning that the Board took into account certain other decisions it had made. He complains that this was procedurally unfair because the decisions are unknown and undisclosed.

[25] I do not interpret the Board's words as referring to specific decisions that it has already rendered. Rather, in my view, the Board was simply making the point that there is merit in treating persons with similar injuries in the same way. However, if I am incorrect and the Board was referring to some of its other decisions, at a minimum it should have identified those decisions and, subject to any legal obligation of confidentiality, it should have made them available upon request.

**C. Disposition**

[26] The Federal Court set aside the Board's decision and returned it to a differently constituted Board mindful of the reasons of the Federal Court.

[27] I agree that the Board's decision should be set aside and returned to a differently constituted Board for redetermination of all issues, but on a different basis. To the extent that the reconstituted Board does receive advice from a medical advisor, it should disclose it to Mr. Ladouceur, along with any information and instructions given to the medical advisor. It should afford Mr. Ladouceur the opportunity to respond to that advice by way of cross-examination or rebuttal evidence. After receiving submissions from the parties, the Board should reconsider all issues, including the table that should apply, in light of all applicable law and the entire evidentiary record before it.

[28] It follows from the foregoing that I would allow the appeal but only to the extent of varying the Federal Court's judgment by deleting the words "mindful of these Reasons" in paragraph 2.

[29] As this Court has agreed with the Federal Court that the Board's decision should be quashed, in substance Mr. Ladouceur has prevailed in this appeal. I would award him his costs, fixed at \$5,000 inclusive of disbursements and taxes.

"David Stratas"

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J.A.

"I agree  
K. Sharlow J.A."

"I agree  
J.D. Denis Pelletier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-480-10

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HUGHES  
OF THE FEDERAL COURT, DATED NOVEMBER 16, 2010, DOCKET NO. T-1853-09**

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. ROGER  
LADOUCEUR

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 7, 2011

**REASONS FOR JUDGMENT BY:** Stratas J.A.

**CONCURRED IN BY:** Sharlow J.A.  
Pelletier J.A.

**DATED:** September 8, 2011

**APPEARANCES:**

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