Federal Court of Appeal | Cour d'appel fédérale

Date: 20120615

Docket: A-343-11

Citation: 2012 FCA 181

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

BETWEEN:

ROBERT ANDREW MCBRIDE

Applicant

and

HER MAJESTY, THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL DEFENCE and THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Vancouver, Colombie-Britannique, on May 15, 2012.

Judgment delivered at Ottawa, Ontario, on June 15, 2012.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: SHARLOW J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] Robert McBride was released from the Canadian Forces on June 12th, 2007, because he was considered medically unfit for duty. This appeal arises from the unsuccessful grievance of his release to the Chief of Defence Staff (CDS), and his subsequent unsuccessful application for judicial review of the CDS' decision. The issues raised in this appeal are whether his right to procedural

fairness, specifically his right to timely disclosure of relevant information, was respected during the grievance process. If it was not, the issue becomes whether this breach of procedural fairness was remedied by subsequent disclosure. Finally, the appeal raises the issue of whether the decision to release Mr. McBride was reasonable in light of the changes in his medical condition. Mr. McBride argues that the CDS ought to have remitted the matter to the appropriate medical authorities for reconsideration as a result of these medical changes. For the reasons that follow, I would dismiss Mr. McBride's appeal.

FACTS

[2] I will set out only those facts material to the disposition of the appeal. A fuller exposition of the facts can be found in the decision of the Federal Court, reported as *McBride v. Canada (Minister of National Defence)*, 2011 FC 1019, [2011] F.C.J. No. 1250.

[3] Mr. McBride's current difficulties began when he was accused of misconduct in the course of his duties, leading to his release from the Canadian Forces in 2003. Mr. McBride grieved and obtained a stay of this release order, pending the hearing of his grievance. In 2006, the CDS allowed Mr. McBride's grievance on the ground that his right to procedural fairness had not been respected in the process leading up to his release.

[4] Prior to the CDS' decision, however, Mr. McBride began to experience mental health problems, which his treating psychiatrist attributed in part to his conflict with the military. In

October 2005, medical employment limitations (MELs) were imposed on him as a result of his medical condition.

[5] Medical employment limitations, as the name suggests, are limitations placed on the tasks that a member of the Canadian Forces can perform, or on the locations that he or she may be assigned to.

[6] In this case, Mr. McBride's MELs were described as follows:

- requires regular specialist medical follow-up more frequently than every 6 months;
- unfit for work in a military operational environment.

[7] The process for the assignment and review of MELs can be summarized as follows. A Canadian Forces physician (the Director, Medical Policy) considers a member's medical record, condition, and prognosis, and assigns MELs based on this. A policy document designated as CFP 154 is used to guide this assignment.

[8] Following the assignment of MELs, an Administrative Review follows (AR/MEL), in which an analyst conducts a review of the member's employability in light of the MELs assigned. On the basis of these MELs, and without considering the member's underlying medical condition or medical record, the analyst makes a recommendation to the Directorate of Military Careers Administration and Resource Management (Director, Military Careers) with respect to whether the member ought to remain in the services of the Canadian Forces. The Director, Military Careers, eventually makes the final decision in this respect.

[9] In the course of the AR/MEL process, a disclosure package is sent to the member, which includes a synopsis of the AR/MEL, the documents used by the analyst in coming to the recommendation, as well as the documents that will be used by the Director, Military Careers, in coming to the final decision. A Disclosure Letter is also sent to the member, which states as follows:

> …the member has the right to provide any written representation or any other material which the member feels would assist the Approving Authority [Director, Military Careers] in reaching a decision. … A member may obtain his/her medical information by requesting his/her medical file. The procedures are as follows [sic]:
>
> - The member must first show up to the local medical records section;
> - The member must request to review his/her medical file;
> - A written consent will be signed at this time;
> - Member will receive his/her medical file and have to review it on site;
> - On member's request, the medical records staff will provide a copy of the medical record in part or in whole;
> - Member may also obtain his/her medical file by contacting DAIP [Director Access to Information and Privacy].
>
> …
>
> The member's written representations, as well as any additional material that the member wishes to submit and the disclosed documents will be reviewed by the Approving Authority [Director, Military Careers] in arriving at a final decision. Any medical documents submitted by the member as part of his written representation will be forwarded by DMCARM 5-3 to the [Director, Medical Policy] in order to obtain a medical assessment as to their bearing on the member's present medical condition and associated employment limitations

[10] During the AR/MEL process, and as noted in the Disclosure Letter, members are also invited to make submissions, including medical records and information. Once this is done, the Director, Military Careers reviews the MELs, the analyst's recommendation, and the member's

submissions, and comes to a final decision with respect to whether the member ought to be released from the Canadian Forces. The Director, Military Careers, does not, however, consider the member's underlying medical condition in coming to this decision. A member's medical record is not before the Director, Military Careers, unless it is included by the member in his or her submissions.

[11] In the course of the AR/MEL process, Mr. McBride did not request his medical records using the method set out in the Disclosure Letter provided to him. His lawyer did, however, ask the Canadian Forces to disclose the specific medical reports on which the assignment of the MELs were based, together with any relevant policies. The specific medical reports were not provided until December of 2008, after Mr. McBride was released from the Canadian Forces. The relevant policy document, CFP 154, was never provided to Mr. McBride by the Canadian Forces.

[12] Mr. McBride was invited to make submissions during the AR/MEL process, and did so. At that time, he was aware of the MELs that had been imposed on him, as well as the fact that the analyst conducting the administrative review had recommended that he be released from the Canadian Forces as medically unfit. Mr. McBride also knew that the analyst concluded that he was unable to be accommodated in another capacity in the Canadian Forces. In April of 2006, the Director, Military Careers, approved the recommendation that Mr. McBride be released from the Canadian Forces. His attempt to obtain another stay was unsuccessful. Mr. McBride was released in June of 2007.

[13] Mr. McBride grieved the imposition of the MELs in January of 2006 and the decision to release him from the Canadian Forces in June of 2007. The two grievances were consolidated.

[14] In December 2008, an officer from the Judge Advocate General's office wrote to Mr. McBride's lawyer and provided him with a summary of the medical evidence considered by the Director, Medical Policy, in assigning the MELs, as well as copies of the specific medical reports containing this evidence.

[15] In April of 2008, Mr. McBride took advantage of the process described in the AR/MEL Disclosure Letter and obtained a copy of his entire 400 page medical file. In that file, he found two documents that he says ought to have led the Canadian Forces to reconsider both decisions being grieved.

[16] The first document was a file notation by his treating psychiatrist, Dr. Ewing, dated February 24th, 2006, following the CDS' decision overturning his original release from the Canadian Forces. In that note, the psychiatrist observed an improvement in Mr. McBride's condition and concluded: "with the turn of events it is possible that he may become employable and deployable once again".

[17] The second document, dated June 28th, 2006, was a communication by Dr. Ewing to another Canadian Forces medical officer, in which the latter wrote: "A second opinion re his medical/psychiatric release status is advisable in view of his improvement…"

THE CANADIAN FORCES GRIEVANCE BOARD DECISION

[18] Mr. McBride's grievances were the subject of a first level assessment and recommendation by the Grievance Board, dated April 21st, 2010. Mr. McBride was given and exercised the right to make submissions to the Grievance Board. In the course of those submissions, he referred to his treating psychiatrist's comments dated February 24th, 2006, and June 28th, 2006. He did not submit any new medical information and, in particular, he did not submit a medical or psychiatric assessment of his condition at that time.

[19] The Grievance Board recommended that Mr. McBride's grievances be dismissed. Mr. McBride's submissions included an allegation that he had been denied procedural fairness as a result of the Canadian Forces' inadequate document disclosure. On this issue the Grievance Board held as follows:

> Based on my review, it is clear from the 26 January 2007 grievance that the griever was in possession of the psychiatric report dated 9 February 2005 […] which contained a fairly detailed diagnosis and prognosis. The file confirms that the griever was informed that this was the medical report which precipitated his release and he made representations about the 9 February 2005 report. Although it would have been preferable if the griever had in his possession all of the medical reports under consideration by the [Director, Medical Policy], there is no evidence in the file as to whether the griever asked his physician for copies or whether this information was provided verbally (presumably they would have been provided as was the 9 February report). That being said, the griever now has in his possession all of the relevant medical documentation and was free throughout the grievance process to make submissions about their content. He did not. I am satisfied that the release proceedings were procedurally correct; even if they could be said to be deficient, any injustice has been cured through the grievance process

[20] The Grievance Board also acknowledged the notes from the treating psychiatrist that Mr. McBride relied upon in arguing the imposition of the MELs were unreasonable. The Grievance Board nevertheless found that the MELs were reasonable in light of Mr. McBride's lengthy medical history. In the end, the Grievance Board found that deference was owed to the Director, Medical Policy, whose function it was to review medical information and make assessments as to the appropriate MELs.

[21] Finally, with respect to his release, the Grievance Board found that "it was reasonable for the [Canadian Forces] to have concluded in October 2005 that there had not been any significant improvement in the grievor's medical condition and that the condition rendered him unfit for an operational environment".

THE CDS' DECISION

[22] The grievances proceeded to the CDS. Mr. McBride made additional submissions, but again, he did not present any evidence with respect to his medical or psychiatric condition aside from the two documents on his file from his treating psychiatrist. The CDS accepted the Grievance Board's recommendation and dismissed Mr. McBride's grievances.

[23] On the issue of procedural fairness, the CDS found that Mr. McBride had been treated fairly throughout the AR/MEL process because he had been advised how he could access his medical file, but failed to do so in the course of that process. In addition, he was given the opportunity to make

representations before the decision to release him was made. In those representations, he did not mention that he was unable to gain access to his records or that he was missing key documents.

[24] As for the reasonableness of the assigned MELs, the CDS noted that when Mr. McBride was provided with the disclosure package in February of 2006, he was responsible for providing medical evidence demonstrating that he did not have medical limitations that breached the Universal Service Principle embodied in s. 33 of the *National Defence Act*, R.S.C., 1985, c. N-5. According to this principle, all members of the Canadian Forces must be able to carry out a range of core military duties and must be prepared for deployment at any time. The CDS also noted that even with the December 2008 disclosure of the specific medical reports relied upon by the Director, Medical Policy, Mr. McBride had still not substantiated, through medical evidence or otherwise, the claim that his MELs should be modified or overturned. The CDS concluded that the assignment of the MELs was reasonable and that these MELs justified Mr. McBride's release from the Canadian Forces.

THE FEDERAL COURT DECISION

[25] Mr. McBride sought judicial review of the CDS' decision in the Federal Court. He was unsuccessful.

[26] On the issue of procedural fairness, the Applications Judge (the Judge) found that although Mr. McBride repeatedly requested the medical reports relied upon by the Director, Medical Policy, his efforts were to no avail, at least during the AR/MELs process itself. However, the judge noted

that after the AR/MEL process was complete, Mr. McBride did in fact obtain the relevant medical documents in two ways: he followed the process laid out in the Disclosure Letter; and the medical records relied upon by the Director, Medical Policy, were provided to him by an officer in the Judge Advocate General's office. The Judge therefore concluded that if there was a breach of procedural fairness at the AR/MEL level, it was cured by both the subsequent disclosure of the medical records, and by the fact that the CDS conducted a *de* novo review that was not subject to such procedural deficiencies.

[27] On the issue of the reasonableness of the MELs, the Judge quoted the CDS' reasons at length. He found that the CDS' decision was well reasoned and that the CDS had properly considered the evidence before him. The Judge noted that Mr. McBride took the risk of not submitting additional medical evidence. He found that, on the basis of the medical evidence before him, the CDS' decision to affirm both the MELs and the release decision was reasonable because it fell within a range of acceptable outcomes, given the facts of the case.

[28] As a result, the Judge found that there was no error justifying intervention.

THE ISSUES

[29] In his Memorandum of Fact and Law, Mr. McBride raised four issues:

1- The standard of review.

2- Whether there was a breach of procedural fairness during the AR/MEL process?

3- If there was any unfairness, whether it was cured by subsequent disclosure prior to the decisions of the Grievance Board and the CDS?

4- Whether the CDS' decision as to the imposition of the MELs and Mr. McBride's release from the Canadian Forces was reasonable?

[30] I will refer to the respondents, Her Majesty the Queen as represented by the Minister of National Defence and the Attorney General of Canada, as the Canadian Forces because the dispute in this case is essentially between Mr. McBride and the administration of the Canadian Forces. The named respondents have not taken a position inconsistent with that of the Canadian Forces in the course of this dispute.

[31] The Canadian Forces accepts the issues as Mr. McBride has formulated them. I will therefore address them in the order in which they have been raised.

The standard of review

[32] Mr. McBride states that on appeal from a judicial review, the role of this Court is first to determine if the Judge properly identified the applicable standard of review, and then to determine if he applied that standard correctly. I believe that Mr. McBride has accurately identified the task before this Court: see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 18, [2003] 1 S.C.R. 226 at para. 43. The Judge properly identified correctness as the standard of review applicable to matters of procedural fairness. The Judge also properly identified reasonableness as the standard of review with respect to questions of mixed fact and law, except to the extent that these raise extricable questions of law.

[33] When it comes to reviewing the Judge's application of the reasonableness standard, an enquiry as to whether that standard was applied correctly amounts to asking whether the original decision was reasonable. Therefore, the issue for us, as it was for the Judge, is simply to determine the reasonableness of the original decision: *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] F.C.J. No. 129 at para. 14.

Was there a breach of procedural fairness during the AR/MEL process?

[34] The Canadian Forces has consistently taken the position that there was no breach of procedural fairness as a result of the failure to disclose the medical records relied upon by the Director, Medical Policy, in imposing the MELs. It takes this position because those records were not before the analyst who recommended Mr. McBride's release during the AR/MEL process, nor were they before the Director, Military Careers, who ultimately adopted that recommendation. In the same vein, the Canadian Forces denies that the failure to disclose the policy document CFP 154 was a breach of procedural fairness because that document was not relevant to the AR/MEL process. It is a document for the use of Canadian Forces physicians in assessing and assigning MELs. Finally, the Canadian Forces is of the view that it was always open to Mr. McBride to obtain his own medical records using the procedure proposed in the Disclosure Letter.

[35] As I understand the reasoning behind the Canadian Forces' position, there is a distinction between the imposition of the MELs, which is a medical matter, and the consequences of those MELs, which are the service limitations that flow from the medical limitations. Counsel for the Canadian Forces indicated that the only way the imposition of the MELs can be challenged is by

introducing fresh medical evidence in the course of the AR/MEL process. This evidence will then be forwarded to the Director, Medical Policy, who will review the MELs imposed on the member in light of the new medical evidence. Counsel pointed to *Smith v. Canada (Chief of Defence Staff)*, 2010 FC 321, [2010] F.C.J. No. 371, as an example of how the system is intended to work.

[36] Given this process, I find it extremely difficult to understand how the Canadian Forces can take the position that the medical reports, which are the basis for the imposition of the MELs, are irrelevant and do not need to be disclosed simply because they were not before the AR/MEL analyst or the Director, Military Careers. This position is particularly surprising given the Canadian Forces' concession that the only way to challenge the reasonableness of the MELs is via the AR/MEL process.

[37] The Canadian Forces' position is apparently based on privacy concerns with respect to the member's health records. Such concerns are misplaced insofar as they deny a member the right to know which specific portions of his or her health record the Director, Medical Policy, relied upon when imposing the MELs. The effect is to force a member, who has access to his or her entire record by following the request procedure, to guess which portions of that record were material to the imposition of the MELs. While a member who has received treatment for a serious condition may well have some idea of what lies behind the imposition of those MELs, there is no advantage to the Canadian Forces in forcing that member to guess which elements of a voluminous health record are material to the decision they are challenging. There is, however, a significant disadvantage to the member in having to do so. In the circumstances, I find that the failure to disclose the material

medical records as part of the AR/MEL process is a breach of procedural fairness, and that it is not justified by concerns about the privacy of health records.

[38] Mr. McBride argues that the failure to disclose the policy document CFP 154 is also a breach of procedural fairness. As noted earlier, CFP 154 is a document intended to assist military physicians in assessing MELs. Mr. McBride argues that, without access to CFP 154, a non-military physician cannot challenge the specific limitations imposed by the Director, Medical Policy. I am not persuaded that it is the role of a civilian physician to second-guess the judgment of a military physician as to the effect of a medical condition on a member's ability to perform core military tasks. The civilian physician can provide a second opinion as to the diagnosis and prognosis for recovery, and he or she may offer comments with respect to the effect of that condition on the member's ability to function in civilian life. However, I accept the Canadian Forces' submission that it is not the role of a civilian physician to apply the criteria set out in CFP 154 and its affiliated policies to a member of the Canadian Forces. Consequently, I am of the view that the failure to disclose CFP 154 did not amount to a breach of procedural fairness.

[39] This is all the more so when one considers that CFP 154 appears to have been available on-line to members of the public at all material times. Counsel for Mr. McBride admitted that he downloaded from the internet the copy of CFP 154 which appears as an exhibit to Mr. McBride's affidavit.

[40] That said, the Canadian Forces' refusal to provide Mr. McBride or his legal representative with a copy of a publicly available document on the ground of lack of relevance appears to be

simply wrong-headed. If a document is publicly available, there is no excuse for not supplying a copy of the document or, at the very least providing an indication as to where it can be accessed, even if it may be the case that the document is not relevant.

3- If there was any unfairness, whether it was cured by subsequent disclosure prior to the decisions of the Grievance Board and the CDS?

[41] Mr. McBride argues that the breach of procedural fairness that occurred in this case was not remedied by the subsequent disclosure of the specific records relied upon by the Director, Medical Policy, in imposing the MELs. He relies on the decision of the British Columbia Court of Appeal in *Taiga Works Wilderness Equipment Ltd. v. British Columbia* (*Director of Employment Standards*), 2010 BCCA 97, [2010] B.C.J. No. 316 [*Taiga*] in support of this position. In particular, he says that when the factors enumerated below are considered, the proper conclusion is that the procedural defect in the earlier proceedings was not remedied by the Canadian Forces' subsequent disclosure. These factors are taken from Stanley A. De Smith, Sir Harry Woolf & Jeffery A. Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) and are quoted in *Taiga*:

i) the gravity of the error committed at first instance;

ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing;

iii) the seriousness of the consequences for the individual;

iv) the width of the powers of the appellate body; and

v) whether the appellate decision is reached only on the basis of the material before the original decision maker or by way of re-hearing *de novo*.

[42] The difficulty is that these factors are to be considered only in cases where the question at issue is whether the original breach of procedural fairness has been cured by an appeal proceeding. The relevant passage reads as follows:

> Whilst it is difficult to reconcile all the relevant cases, recent case law indicates that the courts are increasingly favouring an approach based in large part upon an assessment of whether, in all the circumstances of the hearing and appeal, the procedure as a whole satisfied the requirements of fairness. At one end of the spectrum, when provision is made by statute or by the rules of a voluntary association for a full rehearing of the case by the original body (constituted differently where possible) or some other body vested with and exercising original jurisdiction, a court may readily conclude that a full and fair rehearing will cure any defect in the original decision. However, where the rehearing is appellate in nature, it becomes difficult to do more than to indicate the factors that are likely to be taken into consideration by a court in deciding whether the curative capacity of the appeal has ensured that the proceedings as a whole have reached an acceptable minimum level of fairness. Of particular importance are (i) the gravity of the error committed at first instance, (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (iii) the seriousness of the consequences for the individual, (iv) the width of the powers of the appellate body and (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing de novo.
>
> *Taiga*, cited above, at para. 28, (emphasis added).

[43] In this case, both the Grievance Board and the CDS considered the matter *de novo* and in each instance, made a fresh decision on the basis of Mr. McBride's entire file and the submissions made at each level. In my view, the proceedings were not, therefore, appellate in nature and so the factors identified by Mr. McBride, while useful, are not a template for assessing whether the original breach of procedural fairness was remedied.

[44] I think it is more useful to frame the question in terms of whether, given the circumstances as a whole, the procedure was fair. I have no hesitation in concluding that it was.

[45] Before the Grievance Board considered Mr. McBride's case, he received the disclosure he had requested during the AR/MEL process. He was invited to make submissions to the Grievance Board and he did so, with full knowledge of both the contents of his health record and the specific records that the Director, Medical Policy, relied on in imposing the MELs. The same is true of the proceedings before the CDS. Each of these proceedings was a *de novo* consideration of Mr. McBride's file, culminating first in a non-binding recommendation that his grievances be dismissed, and then in a final decision by the CDS that his grievances be dismissed. In the circumstances, I find that the breach of Mr. McBride's right to procedural fairness was cured by these subsequent *de novo* hearings.

4- Whether the CDS' decision as to the imposition of the MELs and Mr. McBride's release from the Canadian Forces was reasonable?

[46] Mr. McBride argues that, in light of the two notations by his treating psychiatrist Dr. Ewing, dated February 24th, 2006 and June 28th, 2006, the Grievance Board and the CDS ought to have sent the matter back to the Director, Medical Policy, for a reassessment of his MELs. According to Mr. McBride, the CDS' failure to return the file to the military medical authorities renders his decision unreasonable.

[47] When one considers the content of the notations that Mr. McBride relies upon, they are not as conclusive as he makes them out to be.

[48] As noted earlier, the first notation, written after the CDS' first decision reinstating him, says: "with the turn of events, it is possible that he may become employable and deployable once more." This is far from an unqualified opinion that Mr. McBride's medical condition had changed to the point that the original assessment had to be reconsidered. It is merely a statement of future possibilities, which cannot reasonably be expected to have triggered a review of Mr. McBride's MELs as of the date it was made.

[49] The second notation, a communication to another physician, says: "[a] second opinion re his medical/psychiatric release status is advisable in view of his improvement." This is taken from an e-mail written by Dr. Ewing, who was then located in Borden, Ontario, in response to a communication from Dr. Pepin, located at the Canadian Forces Health Services Center in Kingston, Ontario, to the effect that Mr. McBride's transportation costs from Kingston to Borden to see Dr. Ewing would no longer be covered by the military. The full text of Dr. Ewing's e-mail is as follows:

> Thanks for letting me know. This appears to be a military decision, rather than a clinical one. I need to go on record stating that I disagree with this decision. <u>It will be important that someone monitors how he is managing, including the risk issue, on an ongoing basis, should he decide to discontinue his psychiatric involvement in Kingston</u>. I agree that he is feeling better and I am pleased that he is no longer on meds. The release issue remains a legal quagmire, and from a clinical standpoint, I hope that he can remain in long enough to obtain his medal. This is very important to him and will impact his emotional adjustment to release, should the 3b release come about. A second opinion re his medical/psychiatric release status is advisable in view of his improvement, and in view of the co-morbid diagnosis of Adjustment Disorder. Have you been receiving my progress notes for his 2034? I will go over all of this when I see him next.
>
> (Emphasis added).

[50] A review of the medical reports in the appeal book leads to the conclusion that the "risk issue" to which Dr. Ewing refers was the risk that Mr. McBride would become a danger to himself or others. When the entire e-mail is read in this light, Dr. Ewing's comments on the advisability of a second opinion appear differently than when the passage is taken out of context. This is the answer to Mr. McBride's assertion at paragraph 85 of his Memorandum of Fact and Law that Dr. Ewing's communication to Dr. Pepin should have triggered a new medical assessment. The change in condition signaled in Dr. Ewing's e-mail is far from unequivocal and was, to all appearances, taken as such by Dr. Pepin.

[51] Furthermore, at paragraph 86 of his Memorandum of Fact and Law, Mr. McBride indicates that Dr. Pepin was the physician who initiated the medical assessment that lead to the imposition of MELs in the first instance. In those circumstances, one can only conclude that Dr. Pepin was not persuaded by Dr. Ewing's email that a review of Mr. McBride's MELs was indicated. The CDS was entitled to rely on that assessment.

[52] In any event, any remaining doubt on the issue of Mr. McBride's health could have been resolved had Mr. McBride, in the course of the grievance process, presented a medical opinion as to his condition, diagnosis, and prognosis. The plain fact of the matter is that, out of a 400 page medical record, Mr. McBride is only able to muster the slightest evidence in support of his contention that the MELs imposed on him were unjustified. The need for additional medical evidence cannot have escaped the attention of Mr. McBride and his advisers.

[53] The CDS' treatment of this point can be found in the following paragraph:

> Although you mention that your medical condition has improved since the CDS's decision in January 2006, the [Canadian Forces] medical assessments that occurred after that decision continued to indicate ongoing issues. On December 5, 2008, as you had requested, the office of the Judge Advocate General produced a summary of the best available information regarding the basis for the decisions to impose medical limitations and to release you. Even with all of the documents in hand, you have not provided, since 2006, medical substantiation demonstrating that your MELs were not justified and should therefore be modified, overturned, or that you should have been retained in a temporary capacity.

[54] The CDS' reasoning is sound and it supports his conclusion that there was no basis for revisiting the MELs imposed on Mr. McBride. If the MELs were appropriate, there is nothing to suggest that the decision to release him from the Canadian Forces was unreasonable.

CONCLUSION

[55] For all of these reasons, I would dismiss the appeal from the judgment of the Federal Court, with costs.

"J.D. Denis Pelletier"
J.A.

"I Agree
K. Sharlow J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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