Federal Court of Appeal | Cour d'appel fédérale

Date: 20220601

Docket: A-218-21

Citation: 2022 FCA 97

CORAM: **RIVOALEN J.A.**
LOCKE J.A.
MONAGHAN J.A.

BETWEEN:

ROBERT JAMES THOMSON

Appellant

and

CANADA (ATTORNEY GENERAL)

Respondent

Heard at Vancouver, British Columbia, on May 12, 2022.

Judgment delivered at Ottawa, Ontario, on June 1, 2022.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: LOCKE J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] For over 30 years, the appellant, Mr. Robert Thomson, has tirelessly been attempting to qualify for an award of exceptional incapacity allowances for serious injuries he sustained as a civilian passenger on duty in the 1991 crash of a Canadian Forces Hercules aircraft. In 1992, pursuant to paragraph 3(1)(*a*) of the *Flying Accidents Compensation Regulations* C.R.C., c. 10

(the *Regulations*), he applied for and was awarded a Schedule "A" pension (now a Schedule I pension) for his injuries but was denied any amounts set out in Schedule III for attendance, clothing and exceptional incapacity allowances available under section 72 of the *Pension Act*, R.S.C. 1985, c. P-6 (the *Pension Act*).

[2] On June 19, 2014, after a series of administrative appeals, the Entitlement Appeal Panel (the EAP) of the Veterans Review and Appeal Board Canada (the Board) rendered the final administrative level decision in which it denied Mr. Thomson's request for allowances (2014 EAP Decision). On August 18, 2015, the Federal Court reviewed the 2014 EAP Decision and found it reasonable (*Thomson v. Canada (Attorney General)*, 2015 FC 985, [2015] F.C.J. No 984 (QL) [*2015 FC Thomson*]). Later, on October 19, 2016, this Court upheld the Federal Court's Judgment and found the 2014 EAP Decision reasonable (*Thomson v. Canada (Attorney General)*, 2016 FCA 253, 272 A.C.W.S. (3d) 230 [*2016 FCA Thomson*]). Mr. Thomson's application for leave to appeal to the Supreme Court was dismissed on March 30, 2017.

[3] The effect of this denial was (and remains) that Mr. Thomson is fully compensated under Schedule I with a monthly pension for injuries he sustained such as multiple amputations and Post Traumatic Stress Disorder, but he receives none of the additional compensation for exceptional incapacity available under section 72, Schedule III of the *Pension Act* due to his paraplegia. Although his total pensionable assessment is evaluated at 181%, he only receives a pension at 100%. If he did qualify for exceptional incapacity allowances, his pensionable assessment of 181% would have provided him with the maximum yearly rate of allowances in addition to the pension.

[4] In August 2019, Mr. Thomson applied to the Board for reconsideration of the 2014 EAP Decision. He alleged that the EAP had erred in law in its interpretation of paragraph 3(1)(*a*) of the *Regulations*. He submitted that the EAP should have performed a purposive and contextual analysis of the paragraph, and, had it done so, would not have ruled out his entitlement to exceptional incapacity allowances.

[5] In addition to the asserted error of law, as part of his application to the Board, Mr. Thomson included three documents that he says are new evidence that support his position:

A. Sections 1 and 2 of the 1978 *Veterans Treatment Regulations* (Chapter 1585) (the *1978 Regulations*);

B. The Treasury Board Proposal No. 715891, dated November 2, 1972, enclosing a draft copy of the *Flying Accidents Compensation Regulations,* and a Treasury Board circular, dated January 12, 1973, distributing the *Flying Accidents Compensation Regulations* as approved by the Governor-in-Council on November 9, 1972 (collectively the 1972 Proposal 715891); and

C. The Treasury Board Proposal No. 732762, dated December 5, 1974, recommending that the Governor-in-Council amend the *Flying Accidents Compensation Regulations* approved on November 9, 1972, to extend the definition of "civil aviation inspector" to include certain employees of the Ministry of Transport who are not qualified as pilots (the 1974 Proposal 732762).

[6] The Board rendered its decision on March 10, 2020 (Decision No.100003965151) (the 2020 Board Decision). It explained its two-stage process on an application for reconsideration as prescribed under section 32 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, and determined that Mr. Thomson had not provided sufficient grounds for it to move from the Stage I screening to a full Stage II reconsideration based on the merits of the claim. It set out two main reasons for its determination.

[7] First, the Board ruled that the EAP had not erred in law in its statutory interpretation of subsection 3(1)(*a*) of the *Regulations*. The Board relied on *2016 FCA Thomson* because the same 2014 EAP Decision was under review and the same question of statutory interpretation was considered.

[8] In particular, the Board referred to paragraph 32 of *2016 FCA Thomson*, in which this Court found that the only possible interpretation of paragraph 3(1)(*a*) of the *Regulations* is the one adopted by the EAP: Mr. Thomson is only entitled to a "pension", and the additional allowances he sought are not "pensions" but rather "allowances", which are not "pensions" under the *Pension Act*. This Court added that there is no purposive interpretation that would allow these clear words to be ignored in favour of finding that a pension includes the allowances set out in Schedule III of the *Pension Act*.

[9] Second, the Board ruled that the three documents provided by Mr. Thomson did not meet the test for new evidence.

[10] The Board concluded that the grounds to reopen the 2014 EAP Decision were not indicated and that it would not proceed to the second stage, being the actual reconsideration.

[11] Mr. Thomson applied to the Federal Court for judicial review of the 2020 Board Decision. On June 15, 2021, the Federal Court dismissed the application (*Thomson v. Canada (Attorney General*), 2021 FC 606 [*2021 FC Thomson*] (*per* Heneghan J.). Mr. Thomson now appeals to this Court.

[12] I admire Mr. Thomson's tenacity and agree that it seems unfair and unprincipled to treat civilian personnel on duty differently from military personnel who sustain serious injuries in the same aviation crash. As my colleague Gleason J.A. expressed, at paragraph 44 of *2016 FCA Thomson*, it is probable that the failure to amend the *Regulations* to extend entitlement to Mr. Thomson for exceptional incapacity allowances is an oversight. However, the Court's role is to interpret and apply the law. It is not to enact legislation in order to correct a potential oversight. A careful review of the documents submitted by Mr. Thomson does not change my view of the interpretation to be given to paragraph 3(1)(*a*) of the *Regulations* and therefore I am unable to find that the 2020 Board Decision is unreasonable.

[13] For the following reasons, I would dismiss the appeal.

II. The Standard of Review

[14] As this appeal is from a judgment on a judicial review application, in accordance with the Supreme Court of Canada's decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-46 [*Agraira*], this Court is required to step into the shoes of the Federal Court. We must determine whether the Federal Court selected the appropriate standard of review and, if it did, whether it applied it properly. Recently, the Supreme Court of Canada in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585, declined the invitation to reconsider *Agraira* and confirmed that its principles continue to apply.

[15] The question for us is whether the 2020 Board Decision is reasonable, having regard to the reasonableness standard of review established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*].

III. Mr. Thomson's Position

[16] Mr. Thomson repeats many of the arguments he made before the Federal Court. The main thrust of his argument before us is that the Board, in the exercise of its delegated power, failed to properly acknowledge and respect the legislative intent of Parliament. Had it done so, it would have given a large and liberal interpretation to the meaning of the word "pension" to include "allowances" as, according to Mr. Thomson, this is what Parliament had intended at the time.

[17] Mr. Thomson says that the historical documents he was able to uncover from Library and Archives Canada, had they been made available at the time the decisions were being made, could very well have changed the interpretation of paragraph 3(1)(*a*) of the *Regulations* found in the 2014 EAP Decision.

[18] Regarding the *1978 Regulations*, Mr. Thomson relies on them because they define "pension" as including any payment under the *Pension Act*.

[19] The most important document Mr. Thomson submits, among those upon which he now relies, is the 1972 Proposal 715891. He says it is at odds with the 2014 EAP Decision's interpretation of Parliamentary intent. The 2014 EAP Decision stated: "[t]he word "pension" in the Regulations was specifically used, and used in the context of a pension in accordance with the rates set out in the Schedules for the sole purpose of limiting the compensation to such pension" (Emphasis by Mr. Thomson). In contrast, Mr. Thomson submits that wording of the 1972 Proposal 715891 setting out the recommendation is clear.

> Reference to [the *Pension Act*] is included in [the Flying Accident Compensation Order] because it was regarded as only equitable that civilians and military personnel flying on duty in a military plane should have the same benefit protection if the plane crashed (…). The present Order now requires extensive revision to reflect the recent amendments to the Pension Act on which the benefits payable under this Order were based.

[20] Regarding the 1974 Proposal 732762, while Mr. Thomson acknowledges that this document was already before the EAP, the Federal Court and the Federal Court of Appeal, he relies on the following statement contained in it: "…[t]he compensation is equal to that which

would be payable under the Pension Act if his death or injury were compensable under that Act." He submits that this statement completely supports the interpretation to be given to the recommendation set out in the 1972 Proposal 715891.

[21] Based on these submissions, Mr. Thomson asks this Court to conclude that it was not reasonable for the Board:

A. to reject his request to submit new evidence; and,

B. to find that no error of law had been committed by the EAP when it did not respect Parliament's intent.

[22] In addition, Mr. Thomson argues that the Board's process was unfair, as it determined first whether there was an error of law before considering whether new evidence should be allowed. This sequence of decision-making is illogical according to him.

[23] I will deal with each of these points in turn.

IV. Analysis of the 2020 Board Decision

A. *Error of Law*

[24] The Board's powers to reconsider are contained in subsection 32(1) of the *Veterans Review and Appeal Board Act*. It can confirm, amend or rescind a previous decision if it

determines an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented. Mr. Thomson did not allege any error of fact.

[25] Therefore, in order for the Board to determine whether it should reconsider the 2014 EAP Decision, it must first decide whether the decision contained an error of law or whether it should consider any of the documents submitted by Mr. Thomson as being new evidence. The threshold for proceeding to the second stage is fairly low (see *Blount v. Canada (Attorney General)*, 2017 FC 647 at para. 26 [*Blount*]). The first stage is essentially a screening of the request to determine whether there is a ground for reconsideration. Here, if Mr. Thomson could convince the Board of an error of law or that even one of the documents was new evidence, this would have been sufficient for the Board to proceed to the second stage of the reconsideration.

[26] While I understand Mr. Thomson's argument that it would have been more logical for the Board to proceed first with its analysis on the question of new evidence before determining whether there was an error of law, in this case, nothing turns on the sequence.

[27] It was reasonable for the Board to start with the allegation of the error of law. It properly relied on binding jurisprudence, namely *2016 FCA Thomson*, as the same parties and the same legislative provisions were at issue before the Court. This Court had already undertaken an extensive statutory analysis of paragraph 3(1)(*a*) of the *Regulations* to determine that there was only one correct answer. The word "pension" did not include the word "allowances".

[28] Indeed, it would have been unreasonable for the Board to ignore this binding jurisprudence (*Blount* at para. 31; *Vavilov* at paras. 99 and 105).

B. *Test for New Evidence*

[29] The Board then turned to Mr. Thomson's request to submit new evidence. It went through each document and applied the four criteria set out by the Supreme Court in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 30 N.R. 181, and adopted for the purpose of a reconsideration decision in *Mackay v. Canada*, [1997] F.C.J. No. 495 (F.C.T.D.).

[30] Regarding the criteria:

1. On the first criterion, due diligence, it followed the Federal Court's teachings in *Chief Pension Advocate v. Canada (Attorney General)*, 2006 FC 1317, 302 F.T.R. 201, and did not give undue weight to the requirement of due diligence;

2. On the second, relevance, it found that the 1972 Proposal 715891 and the 1974 Proposal 732762 are relevant, but the *1978 Regulations* are not;

3. On the third, credibility, it found that the three documents are credible.

[31] It is on the fourth criterion, that is, when taken with the other evidence adduced at the EAP, would the document have affected the result, that the documents failed. The Board

determined that none of the documents would not have affected the result and therefore, none of them passed the test for new evidence.

[32] First, regarding the *1978 Regulations*, the Board found that the legislation and regulations are not "evidence". Rather, they are statutory instruments which speak to the state of the law at a particular point in time. The four-part test for new evidence therefore does not apply to the *1978 Regulations*.

[33] Nonetheless, the Board went on to consider the four criteria and found that the submitted version of the *1978 Regulations* was not relevant and could not reasonably be expected to change the outcome of the 2014 EAP Decision. The statutory interpretation would not have changed.

[34] I disagree on the relevance of the *1978 Regulations.* It may well be that the *1978 Regulations* were relevant to the interpretation of section 3(1)(*a*) of the *Regulations*. However, I am of the view that it was nonetheless reasonable for the Board to conclude that the statutory interpretation of paragraph 3(1)(*a*) of the *Regulations* would not have changed.

[35] Mr. Thomson's reliance on the *1978 Regulations* is misplaced. Its definition of "pension" applies only to those regulations. Also, the definition was repealed in 1990, one year prior to the accident. I agree with the findings in *2015 FC Thomson* that there was no reason to go beyond the plain meaning of paragraph 3(1)(*a*) of the *Regulations* because of its clear wording. In *2015 FC Thomson*, the Federal Court found, at paragraphs 57 and 58, that the statutory provision was not ambiguous: "Parliament has simply decided not to extend compensation of civilian FACR

pensioners to allowances covered in Schedule III of the *Pension Act*." This finding was upheld in paragraph 32 of *2016 FCA Thomson.*

[36] Next, regarding the 1972 Proposal 715891, the Board acknowledged that this document had never been put to the administrative decision maker, but found that, as similar documents to those provided by Mr. Thomson had been considered by the Court and were found not to support his position, the documents would not have changed the outcome of the decision.

[37] I discern from the 2020 Board Decision and the record before this Court that the Board, when it referred to similar documents, was describing at least the 1974 Proposal 732762. It was reasonable for the Board to have reached this conclusion.

[38] Indeed, the 1974 Proposal 732762 was already before the EAP in 2014, and was therefore before the Federal Court in *2015 FC Thomson* and before this Court in *2016 FCA Thomson*. It has already been considered and therefore does not pass the test for "new" evidence.

[39] In summary, it was reasonable for the Board to find that none of the documents submitted by Mr. Thomson passed the new evidence test. In any event, even if the *1978 Regulations* and the 1972 Proposal 715891 had been admitted as "new evidence", they would not have changed the outcome of the statutory analysis in *2016 FCA Thomson.*

C. *Res Judicata*

[40] I would add a few words about the Federal Court's conclusion in *2021 FC Thomson* that the question of alleged error of law was *res judicata*. I agree with the Federal Court that the three elements of that doctrine were met: the same parties; the same issues of statutory interpretation of paragraph 3(1)(*a*) of the *Regulations* were before the Federal Court of Appeal; and the decision was final (*2021 FC Thomson*, at paras. 39 to 41). However, as the Federal Court acknowledged at paragraph 42 of its reasons, the application of *res judicata* does not dispose of this matter. It is inherent in the provision for reconsideration on the basis of an error of law that prior judicial interpretation of a particular legislative provision may be wrong. Therefore, *res judicata* is not an obstacle. Another way to view the situation is that section 32 of the *Veterans Review and Appeal Board Act*, which provides for reconsideration, applies "notwithstanding section 31". It is section 31 that provides that a decision of the EAP is final. With section 32 overriding the finality of the 2014 EAP Decision, one may question whether this element of *res judicata* remains present.

V. Conclusion

[41] I conclude that the 2020 Board Decision is reasonable. The reasons met the requirements of transparency, intelligibility and justification set out in *Vavilov*. The reasons explain how and why the decision was made, and demonstrated that Mr. Thomson's arguments were considered. The 2020 Board Decision was based on an internally coherent and rational chain of analysis that was justified in relation to the facts and the law that constrained its functions as a reconsideration panel.

[42] Neither the Board, nor the Federal Court, nor this Court can alter the wording of paragraph 3(1)(*a*) of the *Regulations*.

[43] For these reasons, I would dismiss the appeal. The respondent is not seeking costs and therefore I would propose that none be awarded.

"Marianne Rivoalen"
J.A.

“I agree.
George R. Locke J.A.”

“I agree.
K.A. Siobhan Monaghan J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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