Federal Court of Appeal  Cour d'appel fédérale

Date: 20140930

Docket: A-371-13

Citation: 2014 FCA 218

CORAM: **DAWSON A/C.J.**
SHARLOW J.A.
NEAR J.A.

BETWEEN:

KIMBERLY NEWMAN

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on September 15, 2014.

Judgment delivered at Ottawa, Ontario, on September 30, 2014.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON A/C.J.
NEAR J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The issue in this appeal is whether an Appeal Panel constituted under the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the "*VRABA*"), made an error warranting the intervention of this Court when it dismissed the application of the appellant Kimberly Newman for a disability award under section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21 (the "*Compensation Act*"). In my view, there was such an error, and Ms. Newman is entitled to have her application for a disability award reconsidered and granted pursuant to paragraph 45(1)*(a)* of the *Compensation Act*.

Facts and procedural history

[2] Ms. Newman joined the Canadian Armed Forces in 1985, at the age of 21. She began as an Ordinary Seaman and achieved the rank of Captain by the date of her retirement in 2009. She was consistently recognized for her hard work and productivity, and received glowing personnel evaluations. For a short time after her retirement she served as a member of the Reserve Force.

[3] It is undisputed that upon her retirement, Ms. Newman suffered from chronic dysthymia. It is also undisputed that this is a "disability" as defined in subsection 2(1) of the *Compensation Act*. In 2009, Ms. Newman applied under section 45 of the *Compensation Act* for a disability award for that condition.

[4] A disability award may be paid under paragraph 45(1)*(a)* of the *Compensation Act* for a disability resulting from an injury or disease that arose out of service in the Canadian Forces or that was directly connected with service in the Canadian Forces (see the definition of "service-related injury or disease" in subsection 2(1) of the *Compensation Act*).

[5] Alternatively, a disability award may be paid under paragraph 45(1)*(b)* of the *Compensation Act* for a disability that did not result from a service-related injury or disease if the disability was aggravated and the aggravation arose out of service with the Canadian Forces or was directly connected with service in the Canadian Forces (see the definition of "aggravated by service" in subsection 2(1) of the *Compensation Act*). In such a case, the disability award is paid to the extent of the service-related aggravation, measured in fifths.

[6] Ms. Newman's application for a disability award was initially dismissed by a disability adjudicator (a delegate of the Minister of Veterans Affairs) who was not satisfied that Ms. Newman's condition was the result of her military service or that it was aggravated by her military service. Pursuant to the *VRABA*, Ms. Newman was entitled to appeal that decision to the Veterans Review and Appeal Board, and she did so. An Entitlement Review Panel concluded that her condition was aggravated by her military service to the extent of one-fifth.

[7] Ms. Newman appealed further to an Appeal Panel, but without success. She then applied to the Appeal Panel for reconsideration, alleging mistake of law and mistake of fact. She also sought to adduce new evidence.

[8] Section 32 of the *VRABA* deals with the reconsideration of an Appeal Panel decision. It permits an Appeal Panel to accept new evidence and requires the Appeal Panel, whether or not new evidence is accepted, to reconsider its initial decision *de novo* in respect of any errors of law and fact alleged in the reconsideration application. Section 32 reads in relevant part as follows (my emphasis):

32. (1) … an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application <u>if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law</u> or if new	**32**. (1) […] le comité d'appel peut, de son propre chef, réexaminer une décision rendue en vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande <u>si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées</u> ou si de nouveaux éléments

evidence is presented to the appeal panel.	de preuve lui sont présentés.

[9] The Appeal Panel did not accept the new evidence Ms. Newman sought to adduce. It considered its initial decision *de novo* but found no error of law or fact. Ms. Newman's application for reconsideration was dismissed accordingly.

[10] Ms. Newman applied to the Federal Court for judicial review of the reconsideration decision on the basis of errors of law and fact (she did not challenge the decision of the Appeal Panel not to accept new evidence). The Federal Court reviewed the reconsideration decision on the standard of reasonableness and found it reasonable. Ms. Newman's application was dismissed with costs (2013 FC 354). Ms. Newman now appeals to this Court.

[11] On an appeal from the disposition of an application for judicial review, this Court must determine whether the Federal Court identified the appropriate standard of review and applied it correctly: *Canada Revenue Agency v. Telfer*, 2009 FCA 23, at paragraph 18; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45 to 47. The parties agree, as do I, that the Federal Court correctly identified reasonableness as the appropriate standard of review.

[12] In determining whether the reasonableness standard of review was applied correctly, this Court must stand in the shoes of the Federal Court to focus on the administrative decision under review (*Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23). The decision under review is the reconsideration decision of the Appeal Panel.

[13] A decision is reasonable if it falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47). Given section 32 of the *VRABA* (quoted above), a reconsideration decision by an Appeal Panel is not reasonable if its initial decision was based on an error of law or fact that should have been corrected on reconsideration and was not.

Discussion

[14] Section 45 of the *Compensation Act* requires the Minister to determine the cause of the disability for which a disability award is sought. If the Minister's determination is appealed under the *VRABA*, the responsibility for determining the cause of the disability falls to the Entitlement Review Panel or the Appeal Panel, as the case may be.

[15] The determination of the cause of a disability must be made in a manner that respects the statutory presumptions in section 43 of the *Compensation Act*, which reads as follows:

43. In making a decision under this Part or under section 84, the Minister and any person designated under section 67 shall	**43**. Lors de la prise d'une décision au titre de la présente partie ou de l'article 84, le ministre ou quiconque est désigné au titre de l'article 67 :
(a) draw from the circumstances of the case, and any evidence presented to the Minister or person, every reasonable inference in favour of an applicant under this Part or under section 84;	*a)* tire des circonstances portées à sa connaissance et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible au demandeur;

(b) accept any uncontradicted evidence presented to the Minister or the person, by the applicant, that the Minister or person considers to be credible in the circumstances; and	*b)* accepte tout élément de preuve non contredit que le demandeur lui présente et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case.	*c)* tranche en faveur du demandeur toute incertitude quant au bien-fondé de la demande.

[16] Substantially the same presumptions are found in section 39 of the *VRABA*.

[17] Additional presumptions favourable to the claimant for a disability award are found in sections 50, 51 and 52 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50 (the "*Regulations*"). Those provisions read as follows:

50. For the purposes of subsection 45(1) of the Act, a member or veteran is presumed, in the absence of evidence to the contrary, to have established that an injury or disease is a service-related injury or disease, or a non-service-related injury or disease that was aggravated by service, if it is demonstrated that the injury or disease or its aggravation was incurred in the course of	**50**. Pour l'application du paragraphe 45(1) de la Loi, le militaire ou le vétéran est présumé démontrer, en l'absence de preuve contraire, qu'il souffre d'une invalidité causée soit par une blessure ou une maladie liée au service, soit par une blessure ou maladie non liée au service dont l'aggravation est due au service, s'il est établi que la blessure ou la maladie, ou leur aggravation, est survenue au cours :
…	[…]
(f) any military operation, training or administration, as a result of either a specific order or an established military custom or practice, whether or not a failure to	*f)* d'une opération, d'un entraînement ou d'une activité administrative militaire, soit par suite d'un ordre précis, soit par suite d'usages ou de pratiques

perform the act that resulted in the injury or disease or its aggravation would have resulted in disciplinary action against the member or veteran ….

militaires établis, que l'omission d'accomplir l'acte qui a entraîné la blessure ou la maladie, ou leur aggravation, eût entraîné ou non des mesures disciplinaires contre le militaire ou le vétéran […].

51. Subject to section 52, if an application for a disability award is in respect of a disability or disabling condition of a member or veteran that was not obvious at the time they became a member of the forces and was not recorded on their medical examination prior to enrolment, the member or veteran is presumed to have been in the medical condition found on their enrolment medical examination unless there is

51. Sous réserve de l'article 52, lorsque l'invalidité ou l'affection entraînant l'incapacité du militaire ou du vétéran pour laquelle une demande d'indemnité a été présentée n'était pas évidente au moment où il est devenu militaire et n'a pas été consignée lors d'un examen médical avant l'enrôlement, l'état de santé du militaire ou du vétéran est présumé avoir été celui qui a été constaté lors de l'examen médical, sauf dans les cas suivants :

(a) recorded evidence that the disability or disabling condition was diagnosed within three months after enrolment; or

a) il a été consigné une preuve que l'invalidité ou l'affection entraînant l'incapacité a été diagnostiquée dans les trois mois qui ont suivi l'enrôlement;

(b) medical evidence that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to enrolment.

b) il est établi par une preuve médicale, hors de tout doute raisonnable, que l'invalidité ou l'affection entraînant l'incapacité existait avant l'enrôlement.

52. Information given by a member or veteran at the time of enrolment with respect to a disability or disabling condition is not evidence that the disability or disabling condition existed prior to their enrolment unless there is corroborating evidence that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to the time they became a member of the forces.

52. Les renseignements fournis par le militaire ou le vétéran, lors de son enrôlement, concernant l'invalidité ou l'affection entraînant son incapacité, ne constituent pas une preuve que cette invalidité ou affection existait avant son enrôlement, sauf si ces renseignements sont corroborés par une preuve qui l'établit hors de tout doute raisonnable.

[18] It is convenient in this case to consider these provisions in reverse order.

[19] Section 52 of the *Regulations* has no application because Ms. Newman's application for enrolment does not mention chronic dysthymia or any similar problem.

[20] It is undisputed that Ms. Newman is entitled to the benefit of the presumption in section 51 of the *Regulations*, which means that it must be presumed, for the purposes of her disability award application, that at the time of her enrolment she was in the medical condition found in her enrolment medical examination.

[21] The section 51 presumption is subject to two exceptions. In Ms. Newman's case, the first exception would render the presumption inapplicable if there is recorded evidence of a diagnosis of chronic dysthymia within three months after enrolment. There is no such evidence. The second exception would apply if there is medical evidence that establishes beyond a reasonable doubt that the disability existed prior to enrolment. The record discloses no medical evidence (and *a fortiori*, no medical evidence that establishes beyond a reasonable doubt) that Ms. Newman suffered from chronic dysthymia prior to her enrolment.

[22] Therefore, based on the presumption in section 51 of the *Regulations*, the Appeal Panel was obliged to proceed on the basis that Ms. Newman did not suffer from chronic dysthymia before her enrolment. As it is undisputed that she suffered from that condition upon her retirement, it must have been during her military career that she began to suffer from that condition. The only remaining question is the cause of that condition.

[23] Ms. Newman bears the onus of proving that her chronic dysthymia falls within the statutory definition of "service-related injury or disease". In determining whether her evidence is sufficient to discharge that onus, it is necessary to apply in her favour the general presumptions in section 43 of the *Compensation Act* – (1) every reasonable inference must be drawn in her favour; (2) all uncontradicted and credible evidence she presents must be accepted; and (3) any doubt in the weighing of the evidence must be resolved in her favour – as well as the more specific presumption in paragraph 50*(f)* of the *Regulations*.

[24] The Appeal Panel concluded, initially and on reconsideration, that there was "an absence of evidence indicating that service factors actually contributed to the development" of her chronic dysthymia beyond the one-fifth disability award that had previously been granted. In my view, this conclusion fails to give due weight to the medical evidence presented by Ms. Newman, given the statutory presumptions to which Ms. Newman is entitled.

[25] According to paragraph 50*(f)* of the *Regulations*, Ms. Newman is presumed, in the absence of evidence to the contrary, to have established that her chronic dysthymia has a service related cause if her evidence demonstrates that her chronic dysthymia was incurred in the course of "any military operation, training or administration, as a result of either a specific order or an established military custom or practice" or, in other words, in the course of the work she was assigned to do as a member of the Canadian Forces.

[26] If every reasonable inference is drawn in Ms. Newman favour, and every doubt in the weighing of evidence is resolved in her favour, Ms. Newman's medical evidence is capable of

proving the required causal connection between her military work and her chronic dysthymia. Her evidence indicates that early in her military career, she was diagnosed with reactive depression, which led to a change in her career path. Subsequently, at various times during her military career, she was treated for anxiety and depression that, according to the notes of the medical practitioners made at the point of diagnosis and during treatment, were attributable directly to the stress she experienced as a result of workplace demands. That evidence is not challenged or contradicted, and the Appeal Panel expressed no reservation as to its credibility.

[27] Therefore, Ms. Newman is entitled to the benefit of the presumption in paragraph 50*(f)* of the *Regulations*. It follows that the Appeal Panel should have determined that her chronic dysthymia has a service related cause unless there is "evidence to the contrary", that is, any evidence proving that the cause of Ms. Newman's chronic dysthymia is something other than the stresses of her military workplace.

[28] The position of the Crown is that there is evidence to the contrary, which is Ms. Newman's admission that when she was approximately 16 years old she suffered what she believed was a "depressive illness" apparently related to what was then a difficult family situation. Ms. Newman's evidence is that this illness was resolved by medication and did not recur. Medical reports in 1985, 1989, 2000 and 2007 recount that episode as part of Ms. Newman's medical history, apparently based on Ms. Newman's own statements.

[29] The Crown argues that the Appeal Panel was relying on that evidence when it found that "pre-enrolment factors played a major role in her current chronic depression and anxiety". This

vague statement may be intended to express a conclusion that Ms. Newman's chronic dysthymia was caused by something that happened prior to her military enrolment. Or, it may be intended to express the conclusion that Ms. Newman was predisposed to develop chronic dysthymia. The only possible basis for either conclusion is Ms. Newman's own report of her experience at the age of 16.

[30] I am prepared to assume that Ms. Newman's experience as a teenager is indeed the basis of the Appeal Panel's conclusion that there is "evidence to the contrary" for the purpose of paragraph 50*(f)* of the *Regulations*. The question is whether it was reasonably open to the Appeal Panel to reach that conclusion.

[31] The record discloses no medical opinion to the effect that Ms. Newman's chronic dysthymia could be the result of her experience at the age of 16. Given the entitlement of Ms. Newman to the benefit of all reasonable presumptions in her favour and the benefit of every doubt in weighing the evidence, Ms. Newman's own report of that experience is not capable by itself of rebutting the medical evidence that expressly relates Ms. Newman's chronic dysthymia to the stresses of her military work. The fact that her report was repeated by medical practitioners does not enhance its probative value.

[32] I conclude that the only conclusion reasonably open to the Appeal Panel on the evidence is that her chronic dysthymia resulted from her military service and that there is no evidence of any other cause for her condition. Therefore, she is entitled to have her application for a disability award considered under paragraph 45(1)*(a)* of the *Compensation Act*.

Conclusion

[33] For these reasons, I would allow the appeal and set aside the judgment of the Federal Court. Making the judgment that the Federal Court should have made, I would allow the application for judicial review, quash the reconsideration decision of the Appeal Panel, and return this matter to the Appeal Panel for fresh reconsideration with a direction to amend the initial decision of the Appeal Panel pursuant to section 32 of the *VRABA* on the basis that Ms. Newman's disability is the result of a "service-related injury or disease" as defined in section 2 of the *Compensation Act*. I would award Ms. Newman her costs in this Court and in the Federal Court.

"K. Sharlow"

J.A.

"I agree,
Eleanor R. Dawson A/C.J."

"I agree,
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-371-13
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE JAMES W. O'REILLY OF THE FEDERAL COURT OF CANADA DATED APRIL 9, 2013, DOCKET NUMBER T-926-12)	
STYLE OF CAUSE:	KIMBERLY NEWMAN v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	SEPTEMBER 15, 2014
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	DAWSON A/C.J., NEAR J.A.
DATED:	SEPTEMBER 30, 2014

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