

Federal Court



Cour fédérale

Date: 20170919

Docket: T-233-17

Citation: 2017 FC 840

Ottawa, Ontario, September 19, 2017

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**HUGH VINCENT LUNN, CORPORAL
RETIRED, CANADIAN ARMED FORCES**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
THE HONOURABLE JODY WILSON-
RAYBOULD**

Respondent

JUDGMENT AND REASONS

[1] Hugh Vincent Lunn is a former member of the Canadian Armed Forces. He served his country for nearly 20 years before being discharged from the Forces for medical reasons, after having been diagnosed as suffering from a paranoid personality disorder.

[2] Mr. Lunn's 1994 application for a military pension was turned down on the basis that he had failed to demonstrate that there was a causal connection between his psychiatric condition

and his military service. This decision was subsequently upheld through two levels of appeal, the latter of the two decisions having been rendered in March of 1997.

[3] Mr. Lunn renewed his efforts to obtain a military pension beginning in 2012. This application for judicial review relates to the decision of an Entitlement Appeal Panel of the Veterans Review and Appeal Board (VRAB) refusing to reconsider the 1997 Entitlement Appeal decision. The Panel's decision was based on its finding that new medical evidence provided by Mr. Lunn did not establish that his military service was a "significant cause" of his paranoid schizophrenia. The Panel also refused to return the matter to the Minister for reconsideration on the basis that it was beyond the powers of the Panel to do so.

[4] While I understand that Mr. Lunn firmly believes that the mistreatment that he says that he suffered in the course of his military service was the cause of his psychiatric problems, he has not persuaded me that the Panel's decision was unreasonable. Consequently, his application for judicial review will be dismissed.

I. Background

[5] Mr. Lunn was discharged from the military in 1994 on the ground that his psychiatric disorder rendered him unable to fully function as a member of the CAF. He then applied for a military pension. In accordance with subsection 21(2) of the *Pension Act*, RSC, 1985, c. P-6, members of the CAF who serve during peacetime are entitled to a pension if they suffer from an injury or disease that "arose out of, or was directly connected with" their military service.

[6] Mr. Lunn's application was refused on the basis that he had failed to demonstrate that there was a causal connection between his psychiatric condition and his military service. This

decision was subsequently upheld through two levels of appeal. In 1996, an Entitlement Review Panel concluded that even though Mr. Lunn's condition had deteriorated during his military service, there was no evidence indicating that the CAF was in any way responsible for any aggravation of Mr. Lunn's psychiatric condition, and that his condition did not appear to have had its origins in his military service. An Appeal Panel upheld the finding of the Entitlement Review Panel in March of 1997, agreeing that Mr. Lunn's military service played no role in the development or aggravation of his paranoid personality disorder.

[7] In 2012, Mr. Lunn once again applied for a disability award, this time claiming to suffer from Post-Traumatic Stress Disorder (PTSD). A year later, he applied for a disability award on the basis that he now suffered from paranoid schizophrenia. Mr. Lunn provided medical evidence in the form of a letter from his psychiatrist, Dr. Duncan A. Scott, in support of his applications.

[8] Dr. Scott stated that while Mr. Lunn did not satisfy the diagnostic criteria for PTSD, he did suffer from paranoid schizophrenia. Dr. Scott further noted that Mr. Lunn had a genetic vulnerability to a major mental illness and that "[i]t appears that the stress of being in the Armed Forces precipitated the schizophrenia and this developed from sensitivity issues to vigilant issues to hyper-vigilant issues and eventually into a full blown psychotic state. He is now in the chronic debilitating phase of this illness and requires daily monitoring [...]"

[9] In January of 2014, the Minister rejected Mr. Lunn's pension application, concluding that his claimed disability of paranoid schizophrenia was inseparable from his 1996 application for a pension for his paranoid personality disorder. Subsection 85(1) of the *Pension Act* provides that the Minister may not consider an application for an award that has already been the subject of a

determination by the Board. This decision was subsequently affirmed by the Deputy Chair of the VRAB.

[10] Mr. Lunn sought judicial review of this decision. On June 16, 2016, Mr. Lunn's application was dismissed on the basis that it was premature, as he had failed to exhaust his available administrative remedies: *Lunn v. Canada*, 2016 FC 675, [2016] F.C.J. No. 659. Justice Fothergill concluded that Mr. Lunn could still apply for reconsideration of the March 1997 decision based on new evidence, or, alternatively, he could seek a compassionate award.

[11] Mr. Lunn then applied for reconsideration of the March 1997 decision on the basis of new evidence. He provided a further letter from Dr. Scott – this one dated February 24, 2014 – as well as a brief statement from Pierre Leichner. Dr. Leichner is a retired psychiatrist who is evidently a childhood friend of Mr. Lunn's.

[12] Dr. Leichner's statement simply notes that paranoid personality disorder and paranoid schizophrenia are two distinct conditions. He also provided two articles that discussed the two conditions.

[13] Dr. Scott's February 24, 2014 letter stated that Mr. Lunn clearly suffered from paranoid schizophrenia, and that the diagnosis of paranoid personality disorder had been made many years earlier and was no longer "acceptable". Dr. Scott's letter went on to note that someone in the pre-morbid phase of paranoid schizophrenia would likely be diagnosed as suffering from a paranoid personality disorder. From this, Dr. Scott deduced that at the time that Mr. Lunn was originally diagnosed with a paranoid personality disorder, he was developing paranoid schizophrenia and that it was in its pre-morbid phase.

[14] Dr. Scott further noted that paranoid schizophrenia takes quite a while to develop, that onset usually occurs between the ages of 18 and 30, and that it “is usually related to vulnerability to the illness”. The material portion of Dr. Scott’s letter stated that “Mr. Lunn was vulnerable and the increasing demands placed upon him precipitated his paranoid thinking and eventually delusional [*sic*]”. Dr. Scott stated that his opinion was that Mr. Lunn “ha[d]been suffering from paranoid schizophrenia and was most likely in the premorbid phase when he was given the diagnosis of paranoid personality disorder. Hence, this illness was manifested while in the Armed Forces”.

II. The Entitlement Appeal Panel’s Decision

[15] In considering the new evidence adduced by Mr. Lunn, the Entitlement Appeal Panel applied the four-part test established in cases such as *Mackay v. Canada* (1997), 129 F.T.R. 296, [1997] F.C.J. No. 495 and *Canada (Chief Pensions Advocate) v. Canada (Attorney General)*, 2006 FC 1317, aff’d 2007 FCA 298. This test requires that:

1. The evidence should not be admitted if, by due diligence, it could have been adduced at a previous hearing;
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the adjudication;
3. The evidence must be credible in the sense that it is reasonably capable of belief;
and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced earlier, be expected to have affected the result.

[16] After reviewing the new evidence provided by Mr. Lunn, the Panel concluded that the evidence failed to satisfy the latter two parts of the *Mackay* test.

[17] Insofar as the last part of the test was concerned, the Panel considered Mr. Lunn's new evidence in light of the information regarding his medical history that was already in the record, concluding that Mr. Lunn's new evidence could not be expected to have affected the result of his pension appeal. The Panel noted that Dr. Scott had found that Mr. Lunn's paranoid schizophrenia had manifested itself during his military service, but that this only demonstrated that there was a *temporal* link between his military service and his illness. It did not, however, demonstrate that there was a *causal* link between the two events.

[18] As a result, the Panel was unable to conclude that Mr. Lunn's new evidence established that his military service was a significant cause of his schizophrenia. It found that it was more likely that Mr. Lunn was in the course of developing the illness during the period of his service, that his perceptions of his experiences there were coloured by his illness and that non-injurious events were perceived by Mr. Lunn as causative events. The Panel further found that the stressors in Mr. Lunn's life during the period of his military service were the result of his own actions and the odd behavior that resulted from his illness.

[19] As a consequence, the Panel concluded that Mr. Lunn's illness could not be said to have arisen out of his military service. Rather, his military service was "merely the setting in which the events occurred, and during which a non-compensable disease process developed, which, unfortunately, became fully symptomatic after [Mr. Lunn] was released from the Canadian Forces".

[20] While this finding was sufficient to dispose of Mr. Lunn's appeal, the Panel went on to state that even if it was mistaken in its interpretation of Dr. Scott's February 24, 2014 letter, it chose to assign little weight to the document as there was nothing in the letter to indicate that Dr. Scott had reviewed Mr. Lunn's service health records. Nor was there any suggestion that he had considered Mr. Lunn's medical history. There was no way of telling what information Dr. Scott had relied on in arriving at his findings. Moreover, his letter did not contain a reasonably valid and complete "anamnesis" (medical or psychiatric patient history) which, it said, was "an essential component of a credible medical opinion for pension purposes", citing this Court's decision in *Woo Estate v. Canada (Attorney General)*, 2002 FCT 1233 at para. 62, 229 F.T.R. 217.

[21] Consequently, the Panel dismissed Mr. Lunn's application for reconsideration.

[22] The Panel also dismissed Mr. Lunn's request that the matter be returned to the Minister for reconsideration under section 85 of the *Pension Act*. This provision provides the Board with the discretion to allow an application that has already been decided by the Board to be reconsidered by the Minister. The Panel determined that this power was confined to the VRAB, and did not apply to a Review Panel or an Appeal Panel, whose powers were limited by section 29 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18.

III. The Issues

[23] As I understand Mr. Lunn's Notice of Application, the decision under review in this case is the January 2017 decision of the Entitlement Appeal Panel refusing to reconsider the March 18, 1997 Entitlement Appeal decision dismissing his application for a military pension.

[24] The standard of review for decisions of the VRAB regarding the weight given to evidence, as well as its interpretation of its statutory scheme is that of reasonableness: *Werring v. Canada (Attorney General)*, 2013 FC 240 at para 11, [2013] F.C.J. No. 300; *Ouellet v. Canada (Attorney General)*, 2016 FC 608 at paras. 23-24, [2016] F.C.J. No. 575.

[25] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339.

[26] The majority of Mr. Lunn's oral and written submissions focused on a number of events pre-dating his release from the CAF in 1994. While I have carefully considered what Mr. Lunn had to say, I am satisfied that the principle issue for determination in this case is whether the Entitlement Appeal Panel's decision with respect to Mr. Lunn's reconsideration application was reasonable in light of the new medical evidence that was before it.

IV. Analysis

[27] Before addressing the merits of Mr. Lunn's application, I would note that he seeks forms of relief through this application that are not available to him in a proceeding of this nature. As I explained to Mr. Lunn in the course of his hearing, I do not have the power to confer military honours on him such as the Victoria Cross. I also advised him that I do not have the power to award the damages that he seeks in an application for judicial review, and that the proper way to seek an award of damages is through an action.

[28] The issue that the Entitlement Appeal Panel had to decide was whether the March 18, 1997 Entitlement Appeal decision dismissing Mr. Lunn's application for a military pension should be reconsidered in light of the new evidence that he had provided.

[29] In accordance with the provisions of paragraph 21(2)(a) of the *Pension Act*, the onus is on an applicant for a military pension to establish on a balance of probabilities, that he or she suffers from a disability, and that this disability arose out of, or was directly connected with his or her military service: *Boisvert v. Canada (Attorney General)*, 2009 FC 735 at para. 28, [2009] F.C.J. No. 1377.

[30] An Appeal Panel of the VRAB concluded in 1997 that Mr. Lunn had failed to establish the necessary causal connection between his military service and his paranoid personality disorder. However, subsection 32(1) of the *Veteran's Review and Appeal Board Act*, S.C. 1995, c. 18, provides that an Appeal Panel may reconsider a decision, either on its own motion or on application, based on new evidence.

[31] Mr. Lunn believes that his experiences in the CAF caused his paranoid schizophrenia, and that Dr. Scott's February 24, 2014 letter establishes that he is entitled to a military pension. However, while Mr. Lunn clearly does not agree with the Entitlement Appeal Panel's conclusions, he has not identified a reviewable error in its treatment of his new evidence.

[32] When faced with contradictory medical evidence, the VRAB is entitled to reject medical evidence where it finds that evidence not to be credible, or where it provides reasons for its rejection of the evidence: *Woo Estate*, above at para. 62, citing *Kripps v. Canada (Attorney General)*, 219 F.T.R. 146, [2002] F.C.J. No. 742.

[33] In this case the Entitlement Appeal Panel provided lucid reasons for concluding that Dr. Scott's February 24, 2014 letter did not establish a causal relationship between his military service and the emergence of his paranoid schizophrenia. This finding was one that was reasonably open to the Panel on the record before it.

[34] The Panel was, moreover, mindful of the obligation imposed on it by section 39 of the *Veterans Review and Appeal Board Act* to resolve any doubt in the weighing of the evidence in Mr. Lunn's favour. It recognized that Dr. Scott's letter was potentially open to more than one interpretation, and that it could potentially be construed as suggesting that there was a causal link between Mr. Lunn's military service and his mental illness. Giving Mr. Lunn the benefit of the doubt on this point, the Panel went on, in the alternative, to consider whether, if that was what Dr. Scott intended to say, his opinion should be given weight.

[35] Once again, the Panel provided lucid reasons for concluding that little weight should be attributed to Dr. Scott's letter, and no basis has been shown for interfering with that assessment.

[36] The second piece of new evidence adduced by Mr. Lunn was Dr. Leichner's undated statement. This document notes that paranoid personality disorder and paranoid schizophrenia are two distinct conditions. It did not, however, address the causation issue, and it thus did not assist Mr. Lunn in establishing his entitlement to a military pension.

[37] At the hearing of his application, Mr. Lunn produced a letter dated August 28, 2017 from Dr. Rob Brison. Dr. Brison is a Professor in the Department of Emergency Medicine at Queen's University. He is also a friend of Mr. Lunn's dating back to their days at summer camp in the early 1970's. There are two reasons why this letter does not assist Mr. Lunn.

[38] The first is that the letter was not before the Entitlement Appeal Panel when it made the decision under review. Judicial review ordinarily proceeds on the basis of the record that was before the original decision-maker. Additional evidence may be admitted in limited circumstances where, for example, there is an issue of procedural fairness or jurisdiction: see *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218 at para. 30, [2003] 1 F.C.R. 331. Mr. Lunn has not suggested that there was any procedural unfairness in the process before the Entitlement Appeal Panel, nor has he identified a jurisdictional question in this case that would allow for consideration of Dr. Brison's letter.

[39] The second reason that Dr. Brison's letter does not assist Mr. Lunn is that it does not address the issue of causation. Dr. Brison simply states that Mr. Lunn did not show any signs of a thought disorder or psychosis when he knew Mr. Lunn in the early 1970's, and that he has had little contact with Mr. Lunn since that time.

[40] As a consequence, I am satisfied that the Entitlement Appeal Panel reasonably concluded that the new evidence submitted by Mr. Lunn failed to establish a causal link between his medical condition and his military service.

[41] Mr. Lunn has also not identified any error in the Panel's determination that it was not open to it to refer his application to the Minister for reconsideration.

[42] Consequently, I am satisfied that the Panel's decision to dismiss Mr. Lunn's application for reconsideration was reasonable, and his application for judicial review is dismissed. The Attorney General of Canada does not seek an order of costs, and none are awarded.

[43] Before concluding, I would note that my finding with respect to the merits of this application for judicial review does not leave Mr. Lunn without any further avenues of recourse. As counsel for the Minister noted at the hearing, it remains open to Mr. Lunn to bring a further application for reconsideration if he obtains medical evidence establishing that there was a causal relationship between his military service and his mental illness. It may also be open to Mr. Lunn to apply to the Board for a compassionate award under subsection 34(1) of the *Veterans Review and Appeal Board Act*.

JUDGMENT IN T-233-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-233-17

STYLE OF CAUSE: HUGH VINCENT LUNN, CORPORAL RETIRED,
CANADIAN ARMED FORCES v THE ATTORNEY
GENERAL OF CANADA THE HONOURABLE JODY
WILSON-RAYBOULD

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 12, 2017

JUDGMENT AND REASONS: MACTAVISH J.

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APPEARANCES:

Hugh Vincent Lunn

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Kevin Palframan

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT