Federal Court  Cour fédérale

Date: 20190417

Docket: T-2030-16

Citation: 2019 FC 467

St. John's, Newfoundland and Labrador, April 17, 2019

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MILES JEFFREY

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Miles Jeffrey (the "Applicant") seeks judicial review of the decision of the Veterans Review and Appeal Board (the "Board") sitting as an Entitlement Appeal Panel, pursuant to the *Veterans Review and Appeal Board Act*, S.C. 1995, C. 18 (the "VRAB Act").

[2] In that decision, dated November 4, 2016, the Board upheld the decision of an Entitlement Review Panel to deny the Applicant's request for a disability award, made pursuant to the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21 (the "Act"). The Applicant sought such an award on the basis of the condition of Post-Traumatic Stress Disorder ("PTSD"). His claim was denied on the grounds that he had failed to show that the PTSD arose from or was connected to his Reserve Force service, Regular Force service, or that he continues to be disabled, or that he is in a permanently disabled condition.

[3] The Applicant commenced this application for judicial review on November 24, 2017. Prosecution of the application was stayed by an Order of the Court made on February 3, 2017, to allow the Applicant to seek reconsideration by the Board. The request for reconsideration was based, in part upon new evidence that showed that the Applicant's release from the Canadian Armed Forces was considered to have been upon medical grounds.

[4] The Board denied the request for reconsideration on January 11, 2018 and the Applicant resumed pursuit of this application for judicial review.

II. BACKGROUND

[5] The following facts are taken from the Certified Tribunal Record (the "CTR") and the affidavits dated December 15, 2016 and January 20, 2017, filed by the Applicant. The Applicant filed two affidavits, both sworn by Mme. Nicole Bélanger-Drapeau.

[6] The affidavit of Mme. Bélanger-Drapeau dated December 15, 2016 includes 6 Exhibits. The affidavit provides articles of the *Queens Regulations and Orders*, a Treasury Board Secretariat publication on the subject of compensation, and information relating to isolated posts. It also includes a document which outlines the history of CFB Sioux Lookout and a CTV news article.

[7] The second affidavit of Mme. Bélanger-Drapeau, dated January 20, 2017, includes 3 Exhibits. The first Exhibit is correspondence between the Director of Military Careers Administration and Michael Drapeau Law Office dated February 19, 2016. The other exhibits are a Review of Medical Employment Limitations on Release for the Applicant, dated December 13, 2016 and a decision of Colonel P. Fuller, Director of Military Careers and Administration dated December 22, 2016.

[8] In the course of the hearing, the Applicant presented a summary of various documents that are contained in the CTR, including medical reports and a version of the decision with the Applicant's notes. The documents did not contain any information that was not already in the CTR. Counsel for Canada (Attorney General) (the "Respondent"), consented to the filing of this material at the hearing.

[9] A binder of documents including academic articles about PTSD and mental illness was not accepted at the hearing.

[10] The Applicant served as a member of the Canadian Armed Forces Reserve Force from January 6, 1977 to October 5, 1979. He then served as a member of the Canadian Armed Forces Regular Force from September 30, 1980 until he was discharged on June 14, 1990. He served as a member of the military police.

[11] In 2011, the Applicant applied for a disability award for four conditions, that is a pain disorder, PTSD, major depressive disorder and tinnitus. In a decision dated June 5, 2012, the VAC granted a disability award for the pain disorder and denied the other claims.

[12] The Applicant's claim for a disability award for PTSD is the focus of the within application; the denial of an award in respect of other claimed conditions will not be addressed.

[13] The VAC dismissed the Applicant's application for a disability award because it did not find a connection between the Applicant's condition of PTSD and his service.

[14] The VAC concluded that the condition of PTSD did not arise from and was not directly connected with the Applicant's service with either the Reserve or Regular Forces.

[15] The Applicant appealed the decision of the VAC to the Entitlement Review Panel. The Board confirmed the VAC decision. In its decision, the Board found that the determinative issue was the lack of connection between the Applicant's service and the condition of PTSD. It denied entitlement on the ground that the Applicant had failed to submit sufficient credible evidence that his condition arose from or was directly connected to his service.

[16] The Applicant appealed the decision of the Entitlement Review Panel to the Entitlement Appeal Panel. That decision is the subject of this application for judicial review.

[17] The Board addressed two issues. First, it considered whether it should refer the matter back to the Entitlement Review Panel, pursuant to its jurisdiction under paragraphs 29(1)(b**)** and **(c)** of the VRAB Act. Those paragraphs provide as follows:

Disposition of appeals	**Pouvoirs**
29 (1) An appeal panel may **(a)** affirm, vary or reverse the decision being appealed; **(b)** refer any matter back to the person or review panel that made the decision being appealed for reconsideration, re-hearing or further investigation; or **(c)** refer any matter not dealt with in the decision back to that person or review panel for a decision.	**29 (1)** Le comité d'appel peut soit confirmer, modifier ou infirmer la décision portée en appel, soit la renvoyer pour réexamen, complément d'enquête ou nouvelle audition à la personne ou au comité de révision qui l'a rendue, soit encore déférer à cette personne ou à ce comité toute question non examinée par eux.
Where matter cannot be referred to review panel	**Nouveau comité de révision**
(2) Where the members of a review panel have ceased to hold office or for any other reason a matter cannot be referred to that review panel under paragraph (1)(b) or (c), the appeal panel may refer the matter to the Chairperson who shall establish a new review panel in accordance with subsection 19(1) to consider, hear, investigate or decide the matter, as the case maybe.	**(2)** Lorsqu'elle ne peut être renvoyée au comité de révision parce que ses membres ont cessé d'exercer leur charge par suite de démission ou pour tout autre motif, la décision peut être transmise au président afin qu'il constitue, conformément au paragraphe 19(1), un nouveau comité de révision pour étudier la question

[18] The Board concluded that returning the Applicant's claim to the Entitlement Review Panel was not appropriate in the circumstances because it found that the Review Panel's decision was based on a question of fact, that is whether the Applicant's condition of PTSD could be linked to a traumatic event that arose from his military service.

[19] The second issue before the Board was whether the Applicant's claimed condition of PTSD arose out of or is directly connected with the Applicant's service in the Reserve Force or Regular Force. This nexus is required by section 45 of the Act which provides as follows:

Disability Awards	**Indemnité d'invalidité**
Eligibility	**Admissibilité**
45. (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from	**45. (1)** Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :
(a) a service-related injury or disease; or	**a)** soit par une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service.	**b)** soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.
Compensable fraction	**Fraction**
(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.	**(2)** Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une indemnité d'invalidité.

[20] The Board found that in order to grant a disability award it must be satisfied of three facts:

1. there is a valid, existing diagnosis of the claimed condition;
2. the claimed condition constitutes a permanent disability; and
3. the claimed condition was caused, aggravated or contributed to by military service.

[21] The Board addressed each incident that, according to the Applicant, caused, aggravated or contributed to his condition of PTSD.

[22] The Board concluded that the evidence before it, when assessed upon the balance of probabilities, did not show that the incidents cited arose from or were caused by service related factors.

[23] In its decision, the Board set out the allegations raised by the Applicant in support of his request for a disability award.

[24] The Board referred to the Statement of Case (the "SOC") that was submitted. The Board mentions several incidents that the Applicant alleges caused trauma to him during his enrollment in the Canadian Armed Forces, beginning with the failure of the military to perform medical screening of his wife as required by the *Queen's Regulations and Orders* prior to his posting to the isolated community of Sioux Lookout, Ontario in 1985 and the resulting deterioration of his wife's mental health that lead to depression and a knife attack upon him.

[25] The Applicant also alleged that he suffered trauma as the result of his incarceration while posted in Kingston in 1988. That incident led to a suicide attempt.

[26] The Applicant alleged that he suffered trauma, leading to the condition of PTSD, in consequences of his duties as a military policeman, including attendance at a major multiple car motor vehicle accident in British Columbia.

[27] The Board referred to medical evidence submitted by the Applicant and observed that no records were made during the Applicant's service about psychological distress. It referred to Post-Service medical evidence as well, including reports prepared in 2000 by a Dr. Hull, a psychiatrist; in 2012 by a Dr. Carverhill, a psychologist; and reports prepared in 2013, 2014 and 2015 by a Dr. Thomas, also a psychologist.

[28] The Board reviewed the evidence submitted, including materials from the Applicant's service file and ultimately concluded that the evidence was insufficient to show a causal connection between his service, either in the Reserve or Regular Forces and the claimed condition of PTSD.

III. SUBMISSIONS

A. *The Applicant's Submissions*

[29] The Applicant submits that his PTSD condition was both caused and aggravated by his military service. He claims that this can be attributed to five incidents, and that the Board unreasonably assessed each one of those incidents.

[30] The Applicant argues that the Appeal Board unreasonably determined that his wife's attack is too remote to be connected to military service. He submits that in reaching this conclusion the Board overlooked a direct causal connection – that but for the posting to Sioux Lookout, he would not have been attacked because the isolated posting led to his wife's deteriorating mental health and attack.

[31] The Applicant submits that the Board unreasonably overlooked medical evidence collected after his incarceration that indicated that workplace conflict was a contributing factor to his adjustment disorder. He submits that the Applicant's circumstances were aggravated by his military service and that the Board unreasonably failed to consider whether his incarceration aggravated his PTSD. He argues that the Board only considered whether the incarceration caused his PTSD, which is a reviewable error.

[32] The Applicant submits that the Board unreasonably found that there was no objective evidence that he had attempted suicide. He asserts that his suicidality is in medical records from the time of his assessment and subsequent reports.

[33] The Applicant submits that the medical reports of Dr. Caverhill and Dr. Thomas were unreasonably rejected on the basis that they were not objective and independent evaluations. He

also argues that the Board disregarded evidence which indicated that he did not trust the military doctors.

[34] The Applicant also argues that the Board erred in finding that it has the final word on medical findings. He submits that findings on the cause of disability are not within the Appeal Panel's competence.

[35] The Applicant submits that his PTSD was aggravated by the Canadian Armed Forces not following proper procedure upon release. He argues that his deteriorating mental health was evidence to his supervisors, and therefore, he should have undergone treatment upon or after his release. The Applicant argues that it was unreasonable for the Board to reject Dr. Hull's finding that he was not of sound mind at the time of his release from military service. He submits that the Board's preferences that contemporaneous medical evidence is favoured, is unintelligible because he had not received psychiatric treatment at the time of release.

[36] Further, the Applicant's release item has been changed to medical, which he argues shows that he was not of sound mind at the time of his release.

[37] The Applicant submits that the Board unreasonably dismissed Dr. Thomas' medical opinion that trauma he experienced while performing his duties as a military police officer aggravated his PTSD. He argues that the Board concluded that Dr. Thomas' report was unreliable because it was based only on the Applicant's accounts. He asserts that this is an

erroneous because the physician also used the assessment tools, reviewed his military records and identified a witness who could verify his accounts.

B. *The Respondent's Submissions*

[38] The Respondent submits that the Appeal Board reasonably found that the Applicant failed to establish that his PTSD resulted in a permanent disability. He argues that this application can be dismissed on the basis of the Board's findings on this issue alone because without it the applicant cannot establish the requirements for entitlement to a disability award.

[39] The Respondent further submits that the Board reasonably found that the Applicant failed to establish that his military service was a significant factor in causing or aggravating his PTSD. The Respondent argues that the Board considered the evidence before it and that this determination falls squarely within the VRAB's expertise.

[40] The Respondent addressed each of the incidents that the Applicant alleges caused or aggravated his PTSD condition and argued that the Board's conclusions on these incidents are reasonable.

IV. DISCUSSION AND DISPOSITION

[41] The first matter to be addressed is the objection raised by the Respondent to the inclusion of two affidavits of Mme. Nicole Bélanger-Drapeau in his Application Record.

[42] The Respondent objects to the submission of the affidavits on the grounds that they contain post-decision evidence that was not before the Board. The Respondent raised his objection at the hearing of the within application for judicial review.

[43] I agree with the submissions of the Respondent.

[44] The general rule is that only the material that was before the decision-maker should be presented to and considered by the Court in an application for judicial review. In limited circumstances, for example when a breach of natural justice is alleged, as discussed in the decision in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135.

[45] The Applicant responded, at the hearing, to the Respondent's objection.

[46] It was determined that the objection is well-founded and that, pursuant to my discretion, the affidavits would not be struck from the record but would not be considered in the disposition of the Applicant's application for judicial review.

[47] The next substantive issue to be addressed is the applicable standard of review.

[48] According to the decision in *Canada (Attorney General) v. Wannamaker* (2007), 361 N.R. 266 (F.C.A.), decisions of the Board are reviewable on the standard of reasonableness.

[49] According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the standard of reasonableness requires that a decision be transparent, justifiable and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[50] The Applicant did not directly challenge the Board's finding that his claimed condition of PTSD did not constitute a permanent disability arising from his service, as required by section 45 of the Act.

[51] The Board is tasked with assessing the evidence submitted by a person seeking a disability award. The statutory scheme depends upon evidence; see the decision in *Fourmier v. Canada (Attorney General)* (2005), 272 F.T.R. 92 at paragraph 60.

[52] The ameliorative benefit of section 39 of the VRAB Act does not operate in an evidentiary vacuum. The operation of that provision requires evidence, as noted by the Federal Court of Appeal in *Cole v. Canada (Attorney General)* (2015), 475 N.R. 276 (F.C.A.) at paragraph 97.

[53] Section 39 of the VRAB Act has been interpreted to mean that an applicant must submit sufficient credible evidence to show a causal link between his or her injury or disease and his or her time of military service. In this regard, I refer to the decisions in *Hall v. Canada (Attorney General)* (1998), 152 F.T.R. 58, aff'd. (1999), 250 N.R. 93 (F.C.A.) and *Tonner v. Canada (Minister of Veterans Affairs)* (1995), 94 F.T.R. 146, aff'd. [1996] F.C.J. No. 825 (F.C.A.).

[54] While often the failure to meet an essential element required by section 45 of the Act means that an application for judicial review would fail, that conclusion is not inevitable. In the present case, I am not satisfied that the Board reasonably reached this conclusion.

[55] In my opinion, it is not “transparent” that the Board took into the account the evidence provided in the report, dated February 4, 2013, from Dr. Thomas.

[56] In that report, Dr. Thomas said that the Applicant is currently suffering from PTSD, chronic type.

[57] In my opinion, the Board failed to consider if the evidence of chronic PTSD submitted by the Applicant was sufficient to show that the PTSD is a permanent disability arising from his military service.

[58] I accept the arguments that the Board unreasonably concluded that the Applicant’s incarceration in Kingston was not sufficiently connected to his military service. The Board overlooked evidence that investigation by his colleagues was one of the factors that precipitated his incarceration.

[59] Evidence in the CTR includes an assessment by Dr. Thomas dated February 4, 2013 that refers to the Applicant’s marital difficulties that were exacerbated by work-place conditions**.** The Applicant was investigated and imprisoned by his co-workers and then he was required to work beside them. There is medical evidence in the CTR that indicates that his incarceration is the

incident with which the Applicant struggles greatly and that the incarceration amplified his condition of PTSD.

[60] I also agree with the Applicant's submissions that the Board unreasonably found that he had not attempted suicide.

[61] There was evidence before the Board, as appears in the CTR, that the Applicant understood and was aware of the professional consequences of disclosing suicidal ideation and that he was apprehensive about making such disclosure. The Applicant returned his service weapon to his supervisor on account of suicidal thoughts.

[62] To the extent that there was contradictory evidence about suicidal thoughts, the inconsistency should have been resolved in favour of the Applicant, pursuant to section 39 of the VRAB Act which provides as follows:

Rules of evidence	**Règles régissant la preuve**
39 In all proceedings under this Act, the Board shall	**39** Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	**a)** il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted evidence presented to it by the	**b)** il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui

applicant or appellant that it considers to be credible in the circumstances; and	semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.	**c)** il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[63] In my opinion, the Board also unreasonably rejected the evidence of Dr. Thomas that the Applicant's experience of traumatic events prevented him from fulfilling his duties as a military police officer. In his report dated December 21, 2014, Dr. Thomas refers to five events which the Applicant investigated as a military police officer which contributed to his PTSD. He noted that investigations of a break and enter where he was outnumbered, investigations of two suicide cases, and the investigations of a marital dispute and a motor vehicle accident were traumatic for him.

[64] The Board apparently failed to consider the evidence that the Applicant was reluctant to talk with military doctors. It seems that it gave limited value to the evidence of Dr. Carverhill and Dr. Thomas because it found that it was inconsistent with contemporaneous medical evidence prepared at the time of the Applicant's service.

[65] The Board found that there is no evidence of PTSD during service. In my opinion, the Applicant's unwillingness to talk to military doctors is a relevant factor in assessing the contemporaneous medical evidence, that is the medical evidence from his period of service, relative to the Applicant's subsequent mental health. The Board's preference for the earlier

medical evidence over the later evidence is not reasonable, in light of section 39 of the VRAB Act.

[66] The evidence of Dr. Thomas addressed the negative effect upon the Applicant from experiences of trauma that could show the necessary connection between the Applicant's military service and the claimed condition of PTSD.

[67] Not all of the Board's findings failed to meet the standards of reasonableness, for example its findings that there is no service connection between the knife attack upon him by his wife. It reasonably concluded that the assistance from the Canadian Armed Forces at the time of his discharge did not contribute to his condition of PTSD.

[68] However, in my opinion, the unreasonable findings outweigh the reasonable ones.

[69] That is sufficient to invite judicial intervention and this application for judicial review will be allowed. The decision of the Board will be set aside, the matter will be remitted to a differently constituted panel of the Board for redetermination.

V. COSTS

[70] The Applicant seeks costs.

[71] Costs lie in the full discretion of the Court, pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106.

[72] The Applicant was initially represented by a lawyer and then he assumed conduct of the application. In the usual course of events, a self-represented litigant can receive a modest aware of costs.

[73] In the exercise of my discretion, I award the Applicant $500.00 in costs in respect of filing fees, copies and HST.

JUDGMENT in T-2030-16

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision dated November 4, 2016, made by the Veterans Review and Appeal Board sitting as an Entitlement Appeal Panel is set aside, and this matter is remitted to a differently constituted panel for re-determination. In the exercise of my discretion pursuant to Rule 400(1) of *Federal Courts Rules*, SOR/98-106, the Applicant shall have costs in the amount of $500.00 inclusive of disbursements and HST.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2030-16
STYLE OF CAUSE:	MILES JEFFREY v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	EDMONTON, ALBERTA
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Kathleen Pinno	FOR THE RESPONDENT

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