Federal Court  Cour fédérale

Date: 20190917

Docket: T-1329-18

Citation: 2019 FC 1184

Ottawa, Ontario, September 17, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

DIANE MARIE VEILLEUX

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Diane Marie Veilleux, is a Canadian Armed Forces [CAF] veteran who suffers from multiple sclerosis [MS]. The Entitlement Appeal Panel of the Veterans Review and Appeal Board [Appeal Panel or Panel] has denied her disability benefits finding that she had not demonstrated a link between her military service and her medical condition. She seeks judicial review of the Appeal Panel's decision.

[2] Ms. Veilleux states that the Panel erred by basing its decision on an incorrect statement of the facts; by inappropriately substituting its own scientific conclusion for that of a trained expert; and by failing to adhere to section 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [VRAB Act] in interpreting the evidence. Having been granted leave to amend her Notice of Application she also asserts the Panel acted unfairly by relying on information that she was not provided an opportunity to respond to.

[3] The respondent submits the Appeal Panel reasonably concluded Ms. Veilleux had failed to provide sufficient credible evidence to establish that her condition arose out of or was directly connected to her military service. The respondent further submits Ms. Veilleux was notified that in examining and interpreting evidence the Panel may rely upon the very information with which she now takes issue.

[4] For the reasons that follow, the application is dismissed.

II. Background

[5] Ms. Veilleux served in the Regular Force of the Canadian Armed Forces [CAF] from 1977 to 1993, as an Air Defence Technician [AD Tech]. She then served in the Reserve Force, from 1996 to 2001.

[6] Ms. Veilleux reports that her military service was at times very stressful: she worked long overnight shifts; she was exposed to intense periods of work and activity in the context of military exercises; she was frequently deployed for weeks at a time to forward operating

locations in the north and on the west coast of Canada; she was also exposed to sexual harassment in the workplace in the early 1980s.

[7] On March 4, 1987, after completing a high altitude indoctrination course, she was diagnosed with decompression sickness and was placed in a decompression chamber for several hours. She reports this experience was traumatic for her and she now believes this event triggered the onset and/or progression of the MS from which she now suffers.

[8] In July 1988, Ms. Veilleux first experienced symptoms and over the next several years, she saw a number of doctors. She was occasionally hospitalized before being formally diagnosed with MS in 1992.

[9] In February 2006, she applied to Veterans Affairs Canada [VAC] for disability benefits pursuant to subsection 21(2) of the *Pension Act*, RSC 1985, c P-6, based on her MS diagnosis. In April of the same year VAC denied her application, finding that her condition did not arise out of and was not directly connected with or aggravated by her service. Ms. Veilleux appealed that decision to the Entitlement Review Panel [Review Panel] of the VRAB.

[10] In a decision dated May 25, 2007, the Review Panel again denied her a pension. The Review Panel found that Ms. Veilleux had placed no evidence before it that addressed the "points made in the Minister's decision dated 25 April 2006, that is to say the cause of Multiple Sclerosis is unknown and stress is not an aggravating factor".

III. The Decision under Review

[11] In January 2018, Ms. Veilleux appealed the May 2007 Review Panel decision to the Appeal Panel, taking the position that the decision was not consistent with current medical literature. She provided additional evidence on appeal, including a letter from her neurologist; additional medical literature relating to MS in the military context; previous decisions made by the VAC and VRAB involving MS; and policy statements from the Veterans Affairs Department in Australia indicating that where identified factors related to military service are present MS will be found to be related to military service.

[12] In affirming the Review Panel's decision the Appeal Panel found there was "no objective and credible medical evidence of any unusual emotional stress associated with [Ms. Veilleux's] work environment" or that her military service aggravated her MS.

[13] The Appeal Panel noted Ms. Veilleux's argument that the Review Panel's decision was over ten years old and was inconsistent with the current medical literature, recent VRAB decisions, and the approach by American and Australian authorities whereby MS is treated as a presumptive condition. The Appeal Panel reviewed her evidence relating to stress, including the stress resulting from her decompression chamber experience, the negative effect on her health of her military career and specialist reports that did not exclude the possibility that her MS was linked to her military service. The Appeal Panel also noted the absence of a family history of MS.

[14] In considering the evidence and submissions the Appeal Panel first addressed section 39 of the VRAB Act and recognized it was required to look at the evidence "in the best light possible and resolve doubt so that it benefits the Appellant". However, it noted that section 39 did not relieve Ms. Veilleux of the burden of proving the facts needed to link her claimed condition to military service and that it was not required to accept uncontradicted evidence where that evidence was found not to be credible.

[15] The Appeal Panel accepted that Ms. Veilleux had been diagnosed with MS and that as a result she suffered from permanent disability. However, it found that she had failed to show that her service caused, aggravated, or contributed to her MS. Specifically, there was "no objective and credible medical evidence of any unusual emotional stress associated with her work environment". The Appeal Panel concluded that the medical opinions submitted by the applicant were "not sufficiently credible" to conclude her condition was permanently aggravated. The applicant had failed to discharge her onus to present objective and credible medical evidence showing her condition was aggravated by her service.

IV. Issues

[16] The application raises the following issues:

A. Did the Appeal Panel act unfairly?

B. Is the decision unreasonable?

V. Standard of Review

[17] The parties do not dispute the standard of review to be applied.

[18] In considering alleged breaches of procedural fairness, the Federal Court of Appeal recently considered what a court is being asked to assess (*Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 [*Canadian Pacific Railway Company*]. The Court of Appeal held that where fairness is in issue, a reviewing court is being asked to consider whether the process was "fair having regard to all the circumstances" and that "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond". The Court of Appeal acknowledged that there is an awkwardness in using standard of review terminology when addressing fairness questions and held that "strictly speaking, no standard of review is being applied" but found that the correctness standard best reflects the court's role (*Canadian Pacific Railway Company* at paras 52–56).

[19] Ms. Veilleux submits, and I agree, that in this case the level of procedural fairness is quite high due to the importance of the matter to her (*Ladouceur v Canada (Attorney General),* 2011 FCA 247 at para 21).

[20] The Appeal Board's decision, including its interpretation of the evidence and whether it has given proper effect to section 39 of the VRAB Act, is to be reviewed on a standard of reasonableness (*McAllister v Canada (Attorney General)*, 2014 FC 991 at paras 38 and 39).

[21] A court conducting a reasonableness review is required to consider whether the impugned decision is justified, transparent and intelligible, and whether the outcome falls within the range of possible acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[22] A reasonableness review recognizes that it is not the reviewing court's role to reweigh or reassess the evidence. The delegated decision-maker is best situated to assess the evidence. In addition there may legitimately be a number of different possible reasonable outcomes. A reviewing court will not interfere where, having considered the decision within the context of the whole record, the outcome is reasonable even if the outcome is not one the court prefers (*Hiscock v Canada (Attorney General)*, 2018 FC 727 at paras 26 and 27 [*Hiscock*] citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55 and *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65).

VI. Analysis

A. *Did the Panel Act Unfairly?*

[23] Ms. Veilleux argues that the Panel acted unfairly by consulting excerpts from secondary sources, the Mayo Clinic website and the Merk Manual, without having explicitly put this information to her. She submits that the information ultimately influenced the Panel's decision and she therefore had a right to be made aware of and respond to the information.

[24] On the facts before me, I am not convinced that the Appeal Panel acted unfairly.

[25] Ms. Veilleux relies on the prior decisions of this Court in *Deschênes v Canada (Attorney General)*, 2011 FC 449 [*Deschênes*] and *Hiscock*. In *Deschênes*, Justice Michel Beaudry held that the Appeal Panel was entitled to consult sources other than those in the record but could not use this evidence to contradict medical evidence before it without providing the applicant an opportunity to respond.

[26] In *Hiscock*, Justice Henry Brown similarly found that the failure to disclose extrinsic evidence that was relied upon to reach a conclusion that differed from the medical opinion contained in the applicant's evidence was procedurally unfair. Justice Brown acknowledged that prior notice had been given that external sources would be consulted but held that this notice was insufficient given the passage of time, and the evolution of medical science to identify what information the panel was relying on.

[27] In *Deschênes* and *Hiscock*, the decision-makers relied on the extrinsic evidence to support a conclusion that differed from the opinions expressed by the applicant's medical experts. This is not what occurred here.

[28] In this case, the Appeal Panel reviewed Ms. Veilleux's evidence, and noted "that neither physician's opinion actually states that stress has aggravated the Appellant's condition, only that there is a possibility, and nor do they consider other risk factors". Only after having reached this conclusion does the Panel address the extrinsic evidence. In doing so, it does not rely on the extrinsic evidence to contradict the expert medical evidence before it. Rather it cites this evidence to confirm its prior conclusions.

[29] Ms. Veilleux was notified that the external sources might be relied upon in assessing the evidence. The notice specifically identified a number of sources including the Merk Manual and the Mayo Clinic website. The Appeal Panel's consultation was not a surprise to Ms. Veilleux and the Appeal Panel relied on the extrinsic evidence to reinforce a prior conclusion reached based on the medical evidence submitted in support of the claim. Having regard to all of the circumstances, I am satisfied that there was no breach of procedural fairness.

B. *Is the Decision Unreasonable?*

[30] Ms. Veilleux takes issue with the Appeal Panel's conclusions that there was "insufficient objective and credible medical evidence to support her claim" and that the medical opinions provided were not "sufficiently credible". She submits that these conclusions result from the Appeal Panel having misconstrued evidence and having substituted its own interpretation of the medical evidence for that of the experts. I respectfully disagree.

[31] The Appeal Panel assessed the medical evidence and set out its reasons for discounting that evidence. It noted that the 1993 report prepared by Dr. Messier went no further than not excluding the possibility of psychological trauma being a trigger for the claimed condition, expressed no opinion on whether stress was an aggravating factor, and failed to address other factors that may have contributed to the condition.

[32] In addressing the 2017 report prepared by Dr. Maclean, the Panel highlighted that the report confirmed that the cause and contributors to MS are unknown and that although the report indicated there was some evidence to suggest significant stressors worsened MS no supporting

research was cited. The Panel noted the report's conclusion that "we cannot rule out the possibility that the course of this patient's multiple sclerosis might have been negatively affected by her military service", noting that this amounted to an expression of possibility, not probability.

[33] The factors the Panel considered in assessing the medical evidence were identified and reasons were given. The Appeal Panel did not err in this regard.

[34] Ms. Veilleux further submits that the Panel failed to address medical literature and prior decisions of the VRAB that had been brought to its attention and instead substituted its opinion of the causes of MS for those expressed by the medical experts.

[35] The Appeal Panel was unquestionably aware of the evidence Ms. Veilleux had placed before it and did address the prior decisions noting the complicated nature of MS and that each case was to be decided on its own merits. While it may have been preferable for the Appeal Panel to have engaged in a more detailed consideration of this evidence, the failure to do so, at least in this case, does not warrant intervention. It is trite to note that a decision-maker is not required to engage with each piece of evidence and Ms. Veilleux has not identified anything in that evidence as being inconsistent with or contrary to the medical evidence before the Panel.

[36] I am also not convinced that the Appeal Panel substituted its decision for that of the medical experts. Ms. Veilleux points to the following statement by the Panel in support of this argument:

> The Panel also consulted The Merck Manual, Nineteenth Edition, page 1780 and finds that risk factors do not include stress as an aggravating condition.

[37] This is not, as Ms. Veilleux contends, a statement of conclusion by the Panel. Instead it is a statement of fact that flows from the Panel's review of the Merck Manual; the risk factors listed in the Manual do not include stress as an aggravating factor.

[38] Finally, I am satisfied that the Appeal Panel reasonably interpreted and applied section 39 of the VRAB Act. As the Panel noted, the duty to assess evidence in its best possible light and to the benefit of an applicant does not eliminate the applicant's burden of demonstrating a significant causal connection between her medical condition and military service.

VII. Conclusion

[39] Having considered the Appeal Panel's analysis and conclusions in the context of the decision as a whole (*Hiscock* at para 27 citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34), I am satisfied that the decision is justified, transparent and intelligible and falls within the range of possible acceptable outcomes defensible in respect of the facts and law.

[40] The application is dismissed. The respondent has not sought costs and none are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No costs are awarded.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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