

Date: 20081006

Docket: T-1977-07

Citation: 2008 FC 1117

Ottawa, Ontario, October 6, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

BRUCE BULLOCK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Bullock is a World War II veteran. He seeks judicial review of a decision of the Veterans Review and Appeal Board (VRAB) dated September 19, 2007, which denied his application made under subsection 32(1) of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the VRAB Act) for reconsideration of the VRAB Appeal Panel's decision of January, 2005, denying his claim for a disability pension.

[2] Mr. Bullock was not represented by counsel in these proceedings. At the hearing on September 15th, 2008 he was accompanied by a friend, Mr. Carl Reynolds, who holds a Power of Attorney executed by Mr. Bullock to deal with his personal affairs. Mr. Reynolds is not a lawyer.

[3] At the outset of the hearing, I inquired into whether efforts had been made to engage counsel to ensure that Mr. Bullock was exercising an informed choice to represent himself. As he is hard of hearing, it was necessary to rely upon Mr. Reynolds to convey the Court's questions to Mr. Bullock and to receive his responses. I determined that efforts had been made to retain counsel without success and that Mr. Bullock wished to proceed with the hearing. Relying upon my inherent discretion to grant an exception to Rule 119 of the *Federal Courts Rules*, S.O.R./9-106, I allowed a statement to be read by Mr. Reynolds as to the merits of Mr. Bullock's application.

Background

[4] The applicant enlisted in the Canadian army in August of 1940 and served in Canada from the date of his enlistment until October of 1942 when he was sent abroad. He served in the United Kingdom, Italy, Holland and Germany until his return to Canada in September, 1945. He was discharged from the army on October 24, 1945, and worked as a firefighter until his retirement in 1977.

[5] Mr. Bullock alleges that he sustained an injury during his service abroad during the war causing him to suffer from osteoarthritis of the left knee. In 1979 he submitted a claim for a disability pension to the Canadian Pension Commission (CPC) under subsection 12(1) of the

Pension Act, R.S.C. 1970, c. P-7. His claim was denied. Some 25 years later, Mr. Bullock appealed the CPC's decision to the VRAB Entitlement Review Panel pursuant to section 18 of the VRAB Act. In a decision dated July 14, 2004, the VRAB Review Panel upheld the CPC's initial decision.

[6] The applicant sought a further review the following year with the VRAB's Entitlement Appeal Panel, which affirmed the Review Panel's decision in accordance with paragraph 29(1)(a) of the VRAB Act. Both the VRAB Review Panel and the VRAB Appeal Panel found there to be a lack of supporting evidence and concluded that Mr. Bullock's condition (osteoarthritis of the left knee) is not attributable to his service in World War II.

[7] By letter dated May 28, 2007, Mr. Bullock requested the VRAB to reconsider its previous decision rendered in 2005, arguing that it had been made on an error of law. More specifically, the applicant submitted that the VRAB had contravened section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (CLPA) when it rendered its decisions in 2004 and subsequently in 2005. He petitioned the VRAB to rescind its earlier decisions on that basis and to consider his application for a disability pension *de novo*. The VRAB denied Mr. Bullock's request by letter dated September 19, 2007. It is that decision which is the subject of this application for review.

Decision under Review

[8] In the September 19, 2007 letter the VRAB acknowledged the applicant's letter of May 28, 2007, as "new documentation" within the meaning of section 32 of the VRAB Act. The VRAB

concluded that it had not erred in law because section 32 of the CLPA does not supersede section 18 of the VRAB Act. As the applicant had not provided any new and relevant evidence that would affect the outcome of the VRAB Appeal Panel's 2005 decision, a review of that decision was not carried out and Mr. Bullock's request for reconsideration was denied.

Issues

[9] The central issue of this application is whether the VRAB made a reviewable error when it refused to reconsider its Entitlement Appeal decision dated January 18, 2005. This can be separated into two sub-issues: 1) whether the VRAB erred in law in finding that section 32 of the CLPA does not supersede section 18 of the VRAB Act; and 2) whether the VRAB erred by refusing to reconsider Mr. Bullock's application based on the evidence before it.

Relevant Legislation

[10] Subsection 32(1) of the VRAB Act authorizes the VRAB to reconsider a previous decision if the statutory grounds for reconsideration prescribed thereunder are established. The provision reads as follows:

Reconsideration of decisions

32. (1) Notwithstanding section 31, 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

Nouvel examen

32. (1) Par dérogation à l'article 31, 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

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 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 or if new evidence is presented to the appeal panel.

les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.

Board may exercise powers

(2) The Board may exercise the powers of an appeal panel under subsection (1) if the members of the appeal panel have ceased to hold office as members.

Cessation de fonctions

(2) Le Tribunal, dans les cas où les membres du comité ont cessé d'exercer leur charge, peut exercer les fonctions du comité visées au paragraphe (1).

Other sections applicable

(3) Sections 28 and 31 apply, with such modifications as the circumstances require, with respect to an application made under subsection (1).

Application d'articles

(3) Les articles 28 et 31 régissent, avec les adaptations de circonstance, les demandes adressées au Tribunal dans le cadre du paragraphe (1).

Standard of Review

[11] In accordance with the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), where jurisprudence has already determined in a satisfactory

manner the degree of deference to be accorded to a particular category of question, there is no need to engage in what is now referred to as a “standard of review analysis”: *Macdonald v. Canada (Attorney General)*, 2008 FC 796.

[12] Generally, decisions of the VRAB Appeal Panel have been reviewed on a standard of patent unreasonableness or reasonableness, depending on the nature of the question at issue. In light of *Dunsmuir*, the standard of patent unreasonableness has been collapsed and now falls under the broader reasonableness standard: *Rioux v. Canada (Attorney General)*, 2008 FC 991.

[13] My colleagues Madam Justice Heneghan in *Lenzen v. Canada (Attorney General)*, 2008 FC 520, Mr. Justice Blanchard in *Pierre Dugré v. Canada (Attorney General)*, 2008 FC 682, and Madam Justice Layden-Stevenson in *Rioux v. Canada (Attorney General)*, 2008 FC 991, have determined that the applicable standard of review with respect to the VRAB’s reconsideration decision is that of reasonableness. Based on that jurisprudence, I am satisfied that there is no need to conduct a further standard of review analysis.

[14] As established in *Dunsmuir*, reasonableness is a deferential standard concerned with the existence of justification, transparency and intelligibility within the decision-making process. The Court’s concern is whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[15] The first issue, however, is a question of law that requires an analysis of section 32 of the CLPA and its application on the VRAB. This is an exercise of statutory interpretation that is not

within the VRAB's particular area of expertise and therefore should attract a standard of correctness: *Trotter and Reid v. Canada*, 2005 FC 434; *Canada (Chief Pensions Advocate) v. Canada (Attorney General)*, 2006 FC 1317.

Parties' Positions and Analysis

Did the VRAB err in law in finding that section 32 of the CLPA does not supersede section 18 of the VRAB Act?

[16] The applicant submits that the VRAB contravened section 32 of the CLPA, which provides for a provincial limitation period or a default federal limitation period of six years, when it entertained his review application in 2004 and subsequently in 2005. The applicant asserts that the only decision that was available for the VRAB to make was that he "was out of time" seeing that his request for review and subsequent appeal were both filed and heard more than six years after the initial decision of the CPC in 1979.

[17] The applicant relies on the Supreme Court of Canada's decision in *Markevich v. Canada*, 2003 SCC 9 (*Markevich*) in support of his contention that the VRAB Act is silent with regard to a prescription or a limitation period, and thus, by default, s. 32 of the CLPA should apply on a residual basis. Mr. Bullock asserts that the VRAB did not follow the principles established in *Markevich* when it rendered its decisions in 2004 and 2005, and thereby committed a reviewable error.

[18] The respondent submits that if the Court were to accept the applicant's argument, all that would remain on the record is the CPC's initial decision of 1979 which denied Mr. Bullock's claim for a disability pension. Based on his own argument, the applicant would be barred from seeking any relief because of the time limitation imposed by section 32 of the CLPA. Essentially, if this application were successful, the relief granted by the Court would provide no practical remedy as the applicant would still be without a disability pension and would be unable to seek further relief because he, too, would be "out of time".

[19] The respondent argues that Mr. Bullock's matter does not fall within the scope or purpose of section 32 of the CLPA and his reasons are twofold. First, the respondent submits that it was the applicant who availed himself of his right to seek an entitlement to a disability pension and subsequently took advantage of the absence of any time limitation period to ask for a review and appeal some 25 years after the initial decision was made. In seeking and obtaining an entitlement review and appeal, the applicant benefited from the advantages the scheme provided in the *Pension Act* and the VRAB Act because there were no limitation periods for which he had to be mindful.

[20] The respondent's second argument is that the procedural steps taken by the applicant before the VRAB in seeking a review and subsequent appeal have little or no connection to a "cause of action", therefore they do not fall within the scope or purpose of section 32 of the CLPA which necessarily applies to "proceedings in respect of a cause of action".

[21] Section 18 of the VRAB Act confers on the VRAB full and exclusive jurisdiction to hear, assess and determine applications for review that may be made to it under the *Pension Act*. There is

no statutory limitation period for submitting such applications either under the VRAB Act or under the *Pension Act*. It is my view that the absence of a prescribed limitation period is indicative of the VRAB's authority to entertain applications at its discretion. To impose a statutory limitation period on its reviewing power would unduly restrict and undermine the VRAB's role and general purpose as an administrative reviewing body.

[22] Furthermore, section 32 of the CLPA has no application to the case at bar since the procedural steps taken by the applicant with respect to the review and appeal before the VRAB are administrative in nature and do not amount to a "cause of action" within the meaning of section 32 of the CLPA. The facts of this case are clearly distinguishable from those in *Markevich*. That case dealt with the issue of whether the federal and/or provincial limitation periods under section 32 of the CLPA apply to the Crown's ability to exercise its statutory powers to collect tax debts.

[23] I share the respondent's view that the applicant's argument is untenable because it precludes him from obtaining the relief he ultimately seeks: a disability pension. If the Court were to accept that section 32 of the CLPA supersedes the VRAB, then Mr. Bullock would have no other means of seeking a further review of the CPC's initial decision of 1979 and/or of seeking any other remedy with respect to his pension disability claim. Although I have respectfully considered Mr. Bullock's submissions, I cannot conclude that this argument has any merit.

Did the VRAB err by refusing to reconsider the application based on the evidence before it?

[24] The applicant has asked the Court to set aside, rescind or quash the VRAB's decision of 2005 and to allow him to re-apply for a disability pension using the same evidence that was tendered to the VRAB in support of his prior applications.

[25] The respondent argues that the applicant's request to set aside the VRAB's decision rendered in 2005 and to consider his application *de novo* equates to a collateral attack on a decision that is not under review.

[26] By virtue of section 32 of the VRAB Act, the VRAB has the discretionary authority to reconsider a previous decision if it is satisfied that an error was made with respect to any finding of fact or to the interpretation of any law, or if new evidence is presented.

[27] In its decision not to re-consider, the VRAB made reference to the applicant's letter dated May 28, 2007, as the only piece of new documentation provided in support of his application. In this letter, the applicant sought the VRAB's re-consideration of its prior decisions on the basis of an alleged error of law, namely the violation of section 32 of the CLPA. As discussed above, section 32 of the CLPA has no application here. No other evidence was tendered.

[28] The applicant has not alleged that an error was made with respect to any finding of fact and there was no other "new evidence" provided in support of his application for reconsideration. Accordingly, the applicant failed to meet the requirements of the first step in the reconsideration application process provided for under section 32 of the VRAB Act. Having considered the

documentation in the records and the submissions of the applicant and counsel for the respondent, I find the VRAB's decision to be reasonable.

[29] The applicant has requested the Court to consider his claim for a disability pension *de novo*. However, that is not the Court's role. In a judicial review application, the Court must determine whether the decision-maker, the VRAB in this instance, committed a reviewable error. This is not an appeal and the Court is not entitled to render the decision that ought to have been rendered in the first place: *Figurado v. Canada (Solicitor General)*, 2005 FC 346, 138 A.C.W.S. (3d) 146.

[30] The respondent did not request costs and none are awarded.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. There is no award as to costs.

"Richard G. Mosley"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1977-07

STYLE OF CAUSE: BRUCE BULLOCK
and
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 15, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: October 6, 2008

APPEARANCES:

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| Bruce Bullock | FOR THE APPLICANT (self-represented Applicant) |
| Brian Harvey | FOR THE RESPONDENT |

SOLICITORS OF RECORD:

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