

Federal Court



Cour fédérale

**Date: 20090805**

**Docket: T-604-08**

**Citation: 2009 FC 801**

**Ottawa, Ontario, August 5, 2009**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**DENNIS PATTERSON**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Mr. Patterson served in the Canadian Armed Forces from 1981 to 2003. During his period of service he developed both Post Traumatic Stress Disorder (PTSD) and Multiple Sclerosis (MS). He was granted a one-fifth pension entitlement for the PTSD and later applied for a pension for his MS on the basis that it was an additional disability that in whole or part was a consequence of the PTSD. His claim was denied by the Veterans Review and Appeal Board (VRAB) on January 31,

2008. This is an application for judicial review of that decision. For the reasons that follow, the application is allowed.

## **Background**

[2] Mr. Patterson was born February 13, 1959, and served in the Canadian Armed Forces from June 11, 1981 to January 7, 2003. He was a traffic technician in the Regular Force of the Canadian Armed Forces, based in Regina, Saskatchewan, although he was also stationed elsewhere.

[3] Commencing in August 1998, Mr. Patterson began to experience a number of serious medical symptoms including chills, fevers, severe joint aches and the loss of more than 60 pounds. He saw several specialists and received several different possible diagnoses ranging from flu to cancer.

[4] In September 2000, Mr. Patterson was diagnosed as suffering from MS. He made a MS pension claim because of his understanding that a virus caused his MS. This application was unsuccessful as was an appeal to the VRAB on or about July 25, 2002.

[5] In January 2002, Mr. Patterson was diagnosed as suffering from PTSD. He then initiated a disability pension application for the PTSD. On June 19, 2003, the Department rendered an unfavourable first level decision on the PTSD claim. The Department advised that PTSD was not pensionable under subsection. 21(2) of the *Pension Act*, R.S.C. 1985, c. P-6 for Regular Force service.

[6] On April 20, 2004, the VRAB reversed the Minister's decision and granted a pension entitlement to Mr. Patterson for PTSD in the amount of 1/5th "for that part of the disability or aggravation thereof that arose out of or was directly connected with service in peace time in the Regular Force."

[7] In so doing the VRAB noted that nowhere does anyone explain medically what role, if any, the MS played in relation to the applicant's PTSD. The Board awarded one-fifth entitlement for the claimed condition based on a medical comment of the psychologist (Dr. Somers) treating Mr. Patterson that the inconsistency in physicians contributed to the delays in treatment for the PTSD. Also, the Board noted that it took four months from the time the neurologist in Germany recommended an MRI for the applicant until the time that he actually was scheduled for same. The VRAB withheld four-fifths entitlement on the basis that there was "no evidence of a lack of treatment as no stone was left unturned in trying to find the cause of the applicant's symptomology."

[8] In December 2004, Mr. Patterson initiated a disability pension application for the MS under subsection 21(5) of the *Pension Act*, as being a consequence of pensioned condition of PTSD. The basis for this claim was that the MS symptoms were precipitated or aggravated by Mr. Patterson's PTSD. That provision provides as follows:

21.(5) In addition to any pension awarded under subsection (1) or (2), a member of the forces who

21.(5) En plus de toute pension accordée au titre des paragraphes (1) ou (2), une pension est accordée conformément aux taux indiqués à

(a) is eligible for a pension under paragraph (1)(a) or (2)(a) or this subsection in respect of an injury or disease or an aggravation thereof, or has suffered an injury or disease or an aggravation thereof that would be pensionable under that provision if it had resulted in a disability, and

(b) is suffering an additional disability that is in whole or in part a consequence of the injury or disease or the aggravation referred to in paragraph (a)

shall, on application, be awarded a pension in accordance with the rates for basic and additional pension set out in Schedule I in respect of that part of the additional disability that is a consequence of that injury or disease or aggravation thereof.

l'annexe I pour les pensions de base ou supplémentaires, sur demande, à un membre des forces, relativement au degré d'invalidité supplémentaire qui résulte de son état, dans le cas où :

*a)* d'une part, il est admissible à une pension au titre des alinéas (1)*a*) ou (2)*a*) ou du présent paragraphe, ou a subi une blessure ou une maladie — ou une aggravation de celle-ci — qui aurait donné droit à une pension à ce titre si elle avait entraîné une invalidité;

*b)* d'autre part, il est frappé d'une invalidité supplémentaire résultant, en tout ou en partie, de la blessure, maladie ou aggravation qui donne ou aurait donné droit à la pension.

[9] In support of his application for a pension for the MS as a consequential disability to the PTSD, Mr. Patterson submitted evidence from his family physician, Dr. Govender and from his psychologist, Dr. Somers.

[10] Dr. Govender in a report dated September 27, 2004 wrote:

The above named [Dennis Patterson] is a regular patient of mine. He suffers with Relapsing Remitting Multiple Sclerosis. He served in the army and experienced Post Traumatic Stress Syndrome, which precipitated his initial attack of Multiple Sclerosis.

[emphasis added]

[11] In a further report dated October 30, 2007, he explained why he was of the view that there was a relationship between the PTSD and MS, as follows:

Many studies have shown that stress, whether it is mental or physical, is a precipitating factor for the onset and exacerbation of Multiple Sclerosis.

[12] Dr. Somers in her report dated January 25, 2007 opined that Mr. Patterson had been suffering from PTSD prior to its official diagnosis in 2003. She wrote :

There can be little doubt that the PTSD was established during the period of medical uncertainty prior to 2000.

...

His accounts make it abundantly clear that the events that traumatized him began in 1998.

[13] In addition, Mr. Patterson submitted an article entitled ‘Association between stressful life events and exacerbation in multiple sclerosis: a meta-analysis’ published March 19, 2004 in the British Medical Journal.

[14] On July 12, 2005, the Department of Veterans Affairs rendered an unfavourable decision regarding Mr. Patterson’s MS Application. The Department concluded that Mr. Patterson failed to establish a consequential relationship between his PTSD and MS.

[15] The VRPA denied an appeal on January 31, 2008, on the basis that “there is insufficient evidence to link the claimed condition of multiple sclerosis to the pensioned condition of post traumatic stress disorder” and there is “no medical opinion from a neurologist relating specifically

to this case which would conclude that the post traumatic stress disorder caused or aggravated the claimed condition of multiple sclerosis.”

### **Issues**

[16] The only issue raised in this application is whether the decision of the VRAB was reasonable.

### **Analysis**

[17] Mr. Patterson submits that the standard of review is reasonableness *simpliciter*. The respondent agrees that the standard of review is reasonableness; however, it urges that the Court afford the VRAB a high deference given its “expertise” in weighing evidence concerning pension claims and the existence of a privative clause: See *McTague v. Canada (Attorney General)*, [2000] 1 F.C. 647, at paras. 46 and 47; *Cramb v. Canada (Attorney General)*, 2006 FC 638, at para. 15; *Dumas v. Canada (Attorney General)*, 2006 FC 1533, at para. 23.

[18] In keeping with the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of review is reasonableness, which is to say:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[19] Mr. Patterson challenges both the reasonableness of the decision making process and the conclusion reached.

[20] He submits that the process was flawed in that the VRAB erroneously relied on the Medical Guidelines from the 1995 Table of Disabilities, despite there being a more current version dated April 2006. He further complains that the VRAB in its decision relied on and recited a passage in the Medical Guidelines that is included with reference to Arterial Sclerosis whereas the applicant suffers from Multiple Sclerosis.

[21] The applicant has correctly noted that the 1995 Table of Disabilities was replaced with the 2006 edition by the time the VRAP was rendering its decision. However, the new Guidelines state that the former Guidelines will continue to apply to certain proceedings. Specifically, it provides as follows:

The 2006 edition of the Table of Disabilities will replace the 1995 edition of the Table of Disabilities on the date that it is implemented. The 1995 edition of the Table of Disabilities will still apply to certain proceedings initiated prior to, on or after the date of implementation, as directed by Departmental Transition Protocols.

[22] It cannot be determined from the record whether Mr. Patterson's application, which was initiated prior to the implementation date of the 2006 Guidelines, is one of the "certain" proceedings referenced in the above passage. If it is, then the 1995 Guidelines would continue to apply, as was submitted by the respondent. The burden of proof is on the applicant to establish that the VRAB erred in relying on the former Guidelines; he has failed to meet that onus as there is no evidence

before the Court showing that the decision under review was not one of those certain proceedings. Aside from the applicant having the burden of proof, the VRAB is familiar with its processes and should not be assumed to have applied the wrong Guidelines in reaching its decision.

[23] The applicant also submits that the VRAB erred in including the following passage in its decision. This passage is from the 1995 Guidelines under the heading “Arterial Sclerosis”:

Veterans Affairs Canada recognizes that many skilful and highly respected clinicians accept reasonable current theories which have not yet been accepted in authoritative up-to-date textbooks. Veterans Affairs Canada considers that before a theory can be considered acceptable to the majority of the profession, such a theory must be outlined and accepted in authoritative and up-to-date textbooks. When such acceptance has been so demonstrated, it can then be considered to be a consensus of medical opinion.

[24] The VRAB appears to rely on this statement, in part, to discount the evidence submitted by the applicant which supported his position that his MS was triggered by or aggravated by his PTSD. The impugned passage is found in the decision immediately after the following sentence from the Medical Guidelines dealing with MS:

A number of triggering factors, such as infection, trauma, and pregnancy, have been suggested but none has been convincingly related to either first attacks or exacerbations of the disease.

[25] Without question, the VRAB ought not to consider passages from the Guidelines that relate to other specific diseases. The respondent submitted that the passage was not a critical component of the decision. It was submitted that the VRAB would have reached the same conclusion without referencing the impugned passage – it was used merely to support its conclusion. The respondent

submitted that, while the VRAB ought not to have referenced that passage, it cannot be said that in so doing, the ultimate result was impacted. I do not share that certainty, especially when one turns to examine the evidence that was before the Board concerning the relationship between the applicant's PTSD and his MS. This I will consider in tandem with the applicant's submission that the Board's ultimate conclusion was unreasonable.

[26] The applicant asserts that the result reached by the VRAB was unreasonable based on the evidence before it given the legislative requirement that the applicant was to be given the benefit of any doubt. Section 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c.18, provides as follows:

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| <p>39. In all proceedings under this Act, the Board shall</p> <p>(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;</p> <p>(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and</p> <p>(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.</p> | <p>39. Le Tribunal applique, à l'égard du demandeur ou de l'appellant, les règles suivantes en matière de preuve :</p> <p>a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;</p> <p>b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;</p> <p>c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.</p> |
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[27] In assessing the reasonableness of the result the Court must keep in mind these rules of evidence applicable to the VRAB.

[28] The VRAB made no findings that any of the evidence offered by the applicant was not credible. The uncontradicted evidence of the applicant (from Drs. Govinder and Somers) was that Mr. Patterson's MS was "precipitated" by the PTSD.

[29] The VRAB seems to have been heavily influenced by the fact that the MS was diagnosed in September 2000 while the PTSD was diagnosed in January 2002 – such that the PTSD was consequent to the MS and not the reverse. In my view, the Board failed to properly consider that it does not necessarily follow from the date of diagnosis that the patient did not suffer from the disease or condition prior to that date. The fact that one has felt ill for a few days before going to a doctor who diagnoses that one is suffering from the flu does not mean that one was not suffering from the flu in the preceding days.

[30] In this case, the uncontradicted evidence of Dr. Somers is that Mr. Patterson was suffering from PTSD well prior to the 2002 diagnosis and she expresses the view that it was prior to 2000 during his period of "medical uncertainty".

[31] Just as Mr. Patterson was suffering from PTSD prior to its date of diagnosis the same may be true of his MS. There is some evidence in the record that MS was suggested as a cause of his symptoms in 1998; however, there is nothing in the record that confirms that that period of illness was MS related. It may have been a discrete illness, such as a virus or flu, as some doctors suggested at the time.

[32] It appears that the basis for the VRAB refusing to accept that the MS was caused or aggravated by his PTSD was that there was no medically accepted textbook evidence for this causal relationship. However, the uncontradicted evidence of the medical witnesses was that in Mr. Patterson's case, the PTSD did cause the MS. It was unreasonable to reject that evidence on the basis of the passage in the Guidelines that related to Arterial Sclerosis, a different disease.

[33] For these reasons the decision of the VRAB is quashed and the matter is remitted back to the Board for a determination by a different panel.

[34] The applicant asked for costs to be awarded and proposed that \$2,500 was an appropriate amount. The respondent did not dispute that assessment. Costs of \$2,500 will be ordered payable to the applicant.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The decision of the Veterans Review and Appeal Board dated January 31, 2008, is quashed and referred back for a determination by a differently constituted board; and
2. The applicant is awarded costs fixed at \$2,500.00

“Russel W. Zinn”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-604-08

**STYLE OF CAUSE:** DENNIS PATTERSON v.  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 24, 2009

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

**DATED:** August 5, 2009

**APPEARANCES:**

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