

Date: 20031015

Docket: T-1637-02

Citation: 2003 FC 1195

Ottawa, Ontario, October 15, 2003

PRESENT: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

ALBERT CADOTTE

Applicant

and

**THE DEPARTMENT
OF VETERANS AFFAIRS**

Respondent

REASONS FOR ORDER AND ORDER

[1] In 1943, Albert Cadotte was the youngest Regimental Sergeant-Major in the British Empire to serve in battle. Upon leaving the Army in July 1945, he was suffering from a partial disability due to a ruptured right medial meniscus. He first obtained a pension for this condition on October 20, 1986.

[2] Since that time, he has been seeking a retroactive payment. On February 2, 2001, the

Review Panel of the Veterans Review and Appeal Board awarded him a pension with effect from October 20, 1983, three years prior to the date on which the pension was first awarded to him (subsection 39(1) of the *Pension Act*, R.S.C. 1985, c. P-6 (Act)). The Review Panel refused to award him an additional retroactive pension, having determined that there had been no administrative delay in the matter (subsection 39(2) of the Act). Mr. Cadotte appealed to the Veterans Review and Appeal Board (Board) from that decision, and, on July 18, 2002, the Board confirmed the Review Panel's decision. The instant application for judicial review, filed by Mr. Cadotte, is in respect of this July 18, 2002, decision.

[3] From August 25, 1985, the date on which he contacted the Department of Veterans Affairs to obtain a pension, until July 2002, Mr. Cadotte was represented by counsel made available to him by the Department. However, he is representing himself in the case at bar. In his memorandum and at the hearing, Mr. Cadotte went over the highlights of his military career and explained that he was the victim of an error – specifically, a misdiagnosis by Dr. Keenan on February 26, 1940. He claims that this misdiagnosis, which was entered in his military record, caused the Canadian Pension Commission to determine, on July 11, 1949, that he was not entitled to a pension because his partial disability was a condition that pre-dated his enlistment in the Army and was not aggravated in the course of his service.

[4] Mr. Cadotte says that he has had a vested right to this pension since July 26, 1945, when he left the Army, because it was an error on the Army's part that prevented him from obtaining the pension. In his view, the decision of July 18, 2002, is erroneous in law and in fact because, in

view of the *Canadian Charter of Rights and Freedoms* (being Part I, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)), section 39 of the Act cannot limit his entitlement to that pension.

[5] The Department of Veterans Affairs submits that the Board has committed no reviewable error. Indeed, it submits that the Department is bound by subsections 39(1) and 39(2) of the Act. In the Department's view, there is no evidence of administrative delay or of any other circumstances beyond Mr. Cadotte's control that would warrant awarding the additional two-year pension provided for in subsection 39(2) of the Act. In fact, the respondent submits that Mr. Cadotte is the only person responsible for the delay between his pension award and his release from service, since it was he who chose to wait until August 1985, almost 40 years later, to apply for the pension. In the Department's view, Mr. Cadotte could have appealed from, or sought a review of, the 1949 decision well before that date.

[6] As for whether there are vested rights, the respondent submits that the question cannot be entertained because Mr. Cadotte did not raise the temporal application of the Act as an issue. In the respondent's view, Mr. Cadotte has not proven that he was entitled to the pension in 1945 or 1949, nor has he proven that his entitlement was limited by section 39 of the Act. Moreover, this argument was never raised before the Board.

Analysis

[7] Subsections 39(1) and 39(2) of the Act read as follows:

39. (1) A pension awarded for disability shall be made payable from the later of

(a) the day on which application therefor was first made, and

(b) a day three years prior to the day on which the pension was awarded to the pensioner.

(2) Notwithstanding subsection (1), where a pension is awarded for a disability and the Minister or, in the case of a review or an appeal under the *Veterans Review and Appeal Board Act*, the Veterans Review and Appeal Board is of the opinion that the pension should be awarded from a day earlier than the day prescribed by subsection (1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension.

39(1) Le paiement d'une pension accordée pour invalidité prend effet à partir de celle des dates suivantes qui est postérieure à l'autre :

a) la date à laquelle une demande à cette fin a été présentée en premier lieu;

b) une date précédant de trois ans la date à laquelle la pension a été accordée au pensionné.

(2) Malgré le paragraphe (1), lorsqu'il est d'avis que, en raison soit de retards dans l'obtention des dossiers militaires ou autres, soit d'autres difficultés administratives indépendantes de la volonté du demandeur, la pension devrait être accordée à partir d'une date antérieure, le ministre ou le Tribunal, dans le cadre d'une demande de révision ou d'un appel prévus par la *Loi sur le Tribunal des anciens combattants (révision et appel)*, peut accorder au pensionné une compensation supplémentaire dont le montant ne dépasse pas celui de deux années de pension.

[8] Since it is important, for the purposes of subsection 39(2), to determine the cause of the delay in awarding the pension in the case at bar, it is worth noting the following facts.

[9] In its decision of October 20, 1986, the Canadian Pension Commission clearly stated that this was Mr. Cadotte's first application in connection with this condition. Thus, the Commission was not informed of the 1949 decision. The Commission found that Mr. Cadotte's condition was partially the result of a condition that pre-dated his enlistment in the Army, but that he must nonetheless receive a full pension in respect of that condition because it was aggravated during

his military service and because it was not obvious upon his enlistment and was not recorded in his file at the time (paragraph 21.1(c) and subsection 21(9) of the Act). In making this finding, the Commission took into consideration Dr. Keenan's diagnosis of February 26, 1940, which stated that Mr. Cadotte's condition existed well before his enlistment and well before the two medical examinations (July 1944 and July 1945) that showed that his condition had been aggravated (the PULHEMS score changed from L-3 to L-4).

[10] The Commission added that his entitlement to a pension with no deductions was based on the fact that Dr. Keenan's diagnosis was recorded in his file four days after the expiry of the three-month time limit set by subsection 21(9) of the Act, which reads as follows:

21. . . .

(9) Presumption as to medical condition of member on enlistment

Subject to subsection (10), where a disability or disabling condition of a member of the forces in respect of which the member has applied for an award was not obvious at the time he or she became a member and was not recorded on medical examination prior to enlistment, that member shall be presumed to have been in the medical condition found on his or her enlistment medical examination unless there is

(a) recorded evidence that the disability or disabling condition was diagnosed within three months after the enlistment of the member; or

(b) medical evidence that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to the enlistment of the member.

(my emphasis)

21 ...

(9) Présomption quant à l'état de santé du membre au moment de l'enrôlement

Sous réserve du paragraphe (10), lorsqu'une invalidité ou une affection entraînant incapacité d'un membre des forces pour laquelle il a demandé l'attribution d'une compensation n'était pas évidente au moment où il est devenu membre des forces et n'a pas été consignée lors d'un examen médical avant l'enrôlement, l'état de santé de ce membre est présumé avoir été celui qui a été constaté lors de l'examen médical, sauf dans les cas suivants :

a) il a été consigné une preuve que l'invalidité ou l'affection entraînant incapacité a été diagnostiquée dans les trois mois qui ont suivi son enrôlement;

b) il est établi par une preuve médicale, hors de tout doute raisonnable, que l'invalidité ou l'affection entraînant incapacité existait avant son enrôlement.

(mes soulignés)

[11] In his submissions to the Board, Mr. Cadotte argued that his application was based on subsection 39(2), and that he was entitled to the additional two-year award because he should not be penalized due to an error made by the Canadian Pension Commission, which had failed to apply paragraph 21(1)(c) of the Act. Mr. Cadotte had not raised the issue of vested rights, and had not stated that subsection 39(2) of the Act could not apply to limit his entitlement to the

pension.

[12] In any event, it is clear that the error raised is an error of law which could have been rectified by an appeal or an application for review. The Court is satisfied that the Act, as it stood in 1949, enabled Mr. Cadotte to have the error rectified. Thus, this was not a circumstance beyond his control within the meaning of subsection 39(2).

[13] Although there is no evidence in the record in this regard, Mr. Cadotte stated, at the hearing, that he was not aware of the Commission's 1949 decision until 2000 or 2001. The Court notes that the Commission had a duty to notify the applicant of its decision in writing and to inform him of the time available for instituting an appeal or a review (*Pension Act*, R.S.C. 1927, c. 157, as amended by S.C. 1930, c. 35, ss. 6 and 14, S.C. 1931, c. 44, s. 3, S.C. 1932-33, c. 45, s. 15, S.C. 1936, c. 44, s. 21, S.C. 1939, c. 32, ss. 16 and 17, and S.C. 1946, c. 62, ss. 27, 28 and 29).

[14] The Court also notes that the Canadian Pension Commission's decision of July 11, 1949, refers to a June 1949 medical examination in which the degree of Mr. Cadotte's disability was determined to be 5%. Lastly, the Court notes that Mr. Cadotte remained in contact with the Army, because the Board's record contains a medical statement or enlistment certificate dated May 7, 1951.

[15] In view of the evidence in the Board's record, the Court rules that, for the purposes of

subsection 39(2) of the Act, there is no reviewable error in the record.

[16] Since the argument concerning vested rights raises a question of law, the Court is willing to consider it if the evidence in the Board's file was sufficient to decide it (see *Drover v. Canada*, [1998] F.C.J. No. 647 (QL) (C.A.), at paragraph 10).

[17] Upon leaving the Army in July 1945, Mr. Cadotte was not automatically entitled to a pension payable from that date. He merely had the right to apply for a pension. At the time, the *Pension Act* stated that the Canadian Pension Commission had to "award" the pension in order for it to be payable. In addition, the *Pension Act* determined the date from which the pension was payable.

[18] Thus, in order to successfully claim a vested right to a pension payable effective 1945 or July 1949, Mr. Cadotte had to show that he met all the statutory prerequisites for the payment of such a pension on those dates. He had to show that he had been awarded a disability pension prior to any legislative change that reduced his entitlement. The evidence shows the contrary, because he was refused this right in 1949 and was only awarded it in 1986. Consequently, his pension entitlement only accrued on that date, and not earlier (*Apotex Inc. v. Canada (Attorney General)*, [2000] F.C.J. No. 634 (C.A.), at paragraphs 82-85; and *R. v. Puskas*, [1998] 1 S.C.R. 1207, at p. 1216, paragraph 14).

[19] At the Court's request, the respondent prepared a legislative history of section 39 of the Act. Until the 1951 revision, the relevant section of the *Pension Act*, R.S.C. 1927, c. 157, as amended by S.C. 1939, c. 32, s. 11, was section 27, which read as follows until August 1946:

27. (1) A pension awarded for disability shall be payable with effect as hereinafter set forth:

(a) When entitlement to pension is granted by the Commission, or by an Appeal Board thereof, upon a date less than twelve months subsequent to the date upon which application therefor was made to the Commission; from the date of grant or, in the discretion of the Commission, from a date not earlier than the date of application;

(b) When entitlement to pension is granted by the Commission, or by an Appeal Board thereof, upon a date more than twelve months subsequent to the date upon which application therefor was made to the Commission; from the date of grant, or, in the discretion of the Commission, from a date twelve months prior to the date upon which the decision of the Commission or of the Appeal Board was rendered.

(2) Notwithstanding any limitation contained in this section, the Commission may, in its discretion, make an additional award not exceeding an amount equivalent to an additional six months' pension in cases where it is apparent that hardship and distress might otherwise ensue.

27(1) Une pension accordée pour invalidité est payable avec l'effet ci après énoncé:

a) Lorsque le droit à pension est accordé par la Commission, ou par un Bureau d'appel de cette dernière, à une date ultérieure de moins de douze mois au jour où la requête à cet effet a été présentée à la Commission; à compter de la date de la concession, ou à la discrétion de la Commission, à compter d'une date non antérieure à celle de la requête;

b) Lorsque le droit à pension est accordé par la Commission, ou par un Bureau d'appel de cette dernière, à une date postérieure de plus de douze mois au jour où la requête à cet effet a été présentée à la Commission; à compter de la date de la concession, ou à la discrétion de la Commission, à compter d'une date de douze mois antérieure à celle où a été rendue la décision de la Commission ou du Bureau d'appel.

(2) Nonobstant toute restriction contenue dans le présent article, la Commission peut, à sa discrétion, accorder une somme additionnelle, qui n'excède pas un montant équivalant à une pension additionnelle de six mois dans les cas où il est apparent que la privation et la gêne pourraient autrement s'ensuivre.

In August 1946, an additional subsection was enacted, which provided as follows:

(3) Notwithstanding any limitations contained in this section, the Commission may, in its discretion, in respect of service during World War II, make an additional award not exceeding an amount equivalent to an additional eighteen months' pension where, through delays in securing service or other records, or through other administrative difficulties, beyond the applicant's control, it is apparent that an injustice might otherwise ensue.

1946, c. 62, s. 18

(3) Nonobstant toute restriction contenue dans le présent article, la Commission peut, à sa discrétion, relativement au service pendant la seconde guerre mondiale, accorder une somme additionnelle n'excédant pas un montant équivalant à dix-huit mois de pension additionnelle, lorsque par suite de retards dans l'obtention des dossiers militaires ou autres, ou par suite d'autres difficultés administratives, indépendantes de la volonté du requérant, il appert qu'une injustice pourrait autrement s'ensuire.

1946, ch. 62, art. 18

This provision remained essentially unchanged until 1970, when a provision similar to section 39 of the Act came into force. Thus, it appears that, prior to 1970, the maximum retroactive period – assuming, for the moment,¹ that Mr. Cadotte could benefit from subsections 27(1), 27(2) and 27(3), which is by no means obvious – was 36 months from the date on which a pension was awarded to him. Thus, the period is the same as the one contemplated in subsection 39(1) of the Act, to which Parliament has now added an additional two-year period in the cases contemplated by subsection 39(2).

[20] Moreover, and in any event, in *Leclerc v. Canada (Attorney General)*,

¹ With respect to vested rights, Mr. Cadotte cannot claim to have been entitled to a pension under subsection 27(2) or 27(3), because it is an additional discretionary benefit, and the Commission has never exercised this discretion (see *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, at p. 772 (C.A.), affirmed,

[1998] F.C.J. No. 153, Justice Marc Noël had to decide whether the Veterans Review and Appeal Board had erred in not granting retroactivity to the date of the Commission's first decision, which had erroneously denied Mr. Leclerc his pension. The Court stated the following:

[20] The applicant points out that in this case, what led to his full pension being awarded was the correction of an error of law, and that he is in no way responsible for the fact that the years went by before his entitlement was recognized. The fact that the cause of the delay is not attributable to the applicant does not mean that subsection 39(1) may be disregarded, as it applies to any pension regardless of the circumstances in which it is awarded.

[21] For the same reasons,² this Court is satisfied that the Board could not disregard the operation of section 39, regardless of the circumstances under which Mr. Cadotte's pension application was denied in July 1949. Thus, the Board did not commit a reviewable error.

[22] This Court has a great deal of sympathy for Mr. Cadotte, and commends him for his spirited defence of his rights. However, it is important to recall that the veterans' pension scheme under the Act is a very generous one, despite the limits posed by section 39. In this regard, this Court considers it important to emphasize another excerpt from the decision in *Leclerc*, above:

[18] Just as the provisions of the Act must be interpreted in such a way as to maximize payments for the benefit of pensioners, so subsection 39(1) is clear as to its effects in the context of this case. The purpose of that section is to limit the retroactive effect of any pension awarded to a maximum of three years. The only exception to this limitation is the one set out in subsection 39(2), which allows the Board to make an additional award in an amount not exceeding the cumulative annual value of two years pension.

² In addition, see E.A. Driedger, *The Composition of Legislation* (1976), at p. 107:

. . . if the statute is clear and unambiguous it will operate according to its terms whether or not vested rights are prejudicially affected.

. . . There is a presumption that a statute does not apply retrospectively so as to affect rights unless an intention to do so is clearly expressed or arises by necessary implication. . . .

[19] The limitation thus imposed on the retroactive payment of pensions is made necessary by the legislative scheme established for the benefit of pensioners. The effect of the scheme is that once a pension is awarded it is always reviewable, and in the course of such reviews the Board may have regard to any new evidence and amend its earlier findings of fact or of law in the event that it considers them to be erroneous. The reason why Parliament instituted a scheme that allows pensioners to present any new fact or legal argument, at any time, that could affect the amount of the pension paid to them, is to maximize the benefit derived from pensions and also to recognize the fact that disabling physical conditions may change over time. From the standpoint of the payer, however, this means that the financial burden associated with the pension scheme is never ascertained with finality, and it is in this context that Parliament deemed it advisable, through subsection 39(1), to put a time limit on the retroactive effect of awarding a pension.

[23] For these reasons, the application for judicial review is dismissed.

ORDER

THE COURT ORDERS THAT:

1. The application for judicial review is dismissed, without costs.

“Johanne Gauthier”

Judge

Certified true translation
François Brunet, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1637-02

STYLE OF CAUSE: ALBERT CADOTTE
v.
DEPARTMENT OF VETERANS AFFAIRS

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 30, 2003

REASONS FOR ORDER: GAUTHIER J.

DATED: October 15, 2003

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