Federal Court  Cour fédérale

Date: 20100330

Docket: T-543-09

Citation: 2010 FC 348

Ottawa, Ontario, March 30, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MARSHALL JOHNSTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a reconsideration by the Veterans Review and Appeal Board (the Board), dated February 6, 2009 (the decision), which affirmed the applicant's pension assessment.

[2] The applicant requests an order setting aside the decision of the Board and remitting the matter with directions to a differently constituted panel of the Board for a hearing *de novo*.

Introduction: The Board

[3] The Board is an independent tribunal established under the *Veterans Review and Appeal Board Act*, 1995, c. 18, V-1.6 (the Act). The Board functions as a review and appeal body for decisions rendered by the Minister of Veterans Affairs (the Minister) in relation to pensions and benefits for veterans, members of the Canadian Forces (CF), the RCMP, and their dependants. The *Pension Act*, R.S.C. 1985, c. P-6, is the principle legislation by which disability pensions for CF veterans are granted.

[4] There is a two-tiered system of appeals. Persons who are dissatisfied with any decision of the Minister under the *Pension Act* may apply for a review of the decision before the Board. Persons who are dissatisfied with the outcome of this review have further recourse in the form of a right of appeal to an appeal panel of the Board. Applicants to the Board are assigned advocates to make submissions to the Board on their behalf. In preparation for any hearing, Board policy is to always review all past decisions and all new evidence submitted.

[5] Disability pensions are awarded according to two factors. First, the extent of the disability is assessed on a scale from 0 to 100%. Next, the extent to which the disability was attributable to, or aggravated by, the applicant's service is determined on a scale by fifths (1/5 to 5/5). Finally, the two figures are multiplied to give the pension entitlement.

Background

[6] The applicant served in the Regular Force from December 19, 1973 to July 31, 1995, primarily as a flight engineer on helicopter crews and attributes his ailments to that position.

The First Application

[7] The applicant first applied for pension entitlement under subsection 21(2) of the *Pension Act* in 2005 for the condition of degenerative disc lumbar spine. The Minister assessed the extent of the disability at 10%, but denied this application on the grounds that there was no record that the condition arose out of or was directly connected with the applicant's peacetime military service. Unhappy with this result, the applicant appealed to the Board. On June 30, 2006, the Board's decision was to vary the Minister's decision. Its finding, backed by the applicant's testimony and a doctor's opinion, was that a major aggravation of the applicant's lumbar spine condition was directly connected with his service. The Board held that the aggravation was three fifths attributable to his service, but held back the remaining two fifths based on evidence of trauma and a complaint of low back pain at the time of enrolment. During his assessment, the applicant told the doctor that he had injured his back in a minor motor vehicle accident at age 16.

[8] The ruling brought his total entitlement to 6% (3/5 x 10%), which was retroactive to the date of his first application.

The Second Appeal

[9] The applicant was not satisfied with the assessed extent of his disability and appealed, arguing that his assessment should fall in the 20 to 30% range. On July 13, 2007, the assessment review panel of the Board concluded that the 10% assessment was fair and adequate and affirmed the previous decision.

The Third Appeal

[10] The applicant then appealed the June 30, 2006 ruling, arguing that based on new expert medical evidence and the applicant's occupational history, the Board should award four fifths entitlement. On August 28, 2007, applicant was successful as the Board awarded the requested additional one fifth to "more fairly reflect the contributing factors to the claimed condition". This entitlement was also retroactive.

Fourth Appeal

[11] The applicant then appealed his disability assessment again, arguing that it should be raised to 20%. In a decision dated August 20, 2008, the Board reviewed the applicant's submissions and the most recent medical examination/assessment conducted on January 15, 2007 and concluded that a 20% assessment was not justified. In preparation for the hearing the Board had also reviewed:

- All previous decisions relevant to the case;
- Consultation report dated May 4, 2005;
- Ambulatory Care Clinic letter dated December 3, 2007;
- Extract from Veterans Affairs Canada documentation with attached entitlement appeal decision dated August 28, 2007; and
- A copy of Table 1 to Article 19.04, chapter 19 of the 1995 Veterans Affairs Canada Table of Disabilities.

Fifth Appeal

[12] On September 29, 2008, an area advocate applied on the applicant's behalf, to the Board for a reconsideration of the decision dated August 20, 2008 (the previous decision), on the basis that the Board had made errors of fact and law. It is this reconsideration decision that is the subject of this judicial review application.

[13] The applicant first alleged that the Board failed to provide reasons explaining its decision, and secondly, alleged that the Board failed to properly assess his condition in accordance with the evidence and did not draw from the evidence all reasonable inferences in favour of an increase in his assessment.

[14] In reasons dated February 6, 2009, a three member panel of the Board indicated that the previous decision as well as the written submissions had been reviewed. The Board determined that

the previous decision was not based on any error of fact or law and consequently would not reconsider the previous decision. The Board also reminded the applicant that if he felt his condition had worsened, he could always have a new assessment conducted.

Issues

[15] The issues are as follows:

1. What is the applicable standard of review?
2. Is the Board, on an application for reconsideration, obliged to conduct a hearing *de novo*?
3. Did the Board fail to provide adequate reasons for its decision?

Applicant's Submissions

[16] The applicant submits that the application for reconsideration should have been a hearing *de novo*. The Board failed to do this. The Board simply restated the ratio *decidendi* of the previous decision and affirmed it. This is an error of pure law pertaining to the Board's interpretation of its jurisdiction. No deference is to be afforded.

[17] The applicant submits that the Board failed to provide meaningful reasons for its decision. This error is ironic since paucity of reasons in a previous decision was a primary ground for the

reconsideration submitted by the applicant. The reasons offered by the Board offer no confidence to the applicant that the Board undertook a meaningful and thorough review.

Respondent's Submissions

Standard of Review

[18] Reasonableness is the appropriate standard to be applied in reviewing Board decisions says the respondent. The right of appeal to the Board granted under section 25 of the Act represents a factor of statutory purpose which attracts deference. The fact that Board determinations of whether an applicant meets pension criteria are primarily fact-oriented decisions militates further towards deference. There is also a privative clause in the Act.

The Decision was Reasonable

[19] The respondent submits that sections 3 and 39 of the Act are meant to ensure that reviewing courts remain alert to the unique contributions made by such individuals to Canadian society. Nevertheless, it is the applicant who bears the onus of proving his case on a balance of probabilities.

[20] Under subsection 32(1) of the Act, an appeal panel may reconsider a decision it made under subsection 29(1) and may confirm the decision or amend or rescind the decision on an application from a person alleging that an error was made with respect to any findings of fact or the interpretation of any law or if new evidence is presented. Here, the Board reviewed all of the

information available and by refusing to reconsider the previous decision, effectively was agreeing with the previous decision. There was a significant history of previous decisions for the Board to rely on.

[21] There was a sufficient existence of transparency, justification and intelligibility in the decision-making process that against the standard of reasonableness, the decision should not be interfered with.

Analysis and Decision

[22] **Issue 1**

What is the applicable standard of review?

The applicant first challenges that the Board was required to hold a hearing *de novo*, in regard to his reconsideration application. His second ground challenges the paucity of reasons provided by the Board for its decision. I would characterize both as issues of Board procedure. The first issue relates primarily to interpretation of the Board's constituting statute and as such, is to be accorded deference and falls to be reviewed against the standard of reasonableness (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (QL) at paragraph 25). Paucity of reasons, on the other hand, is an issue of procedural fairness and does not attract any deference. Administrative boards and tribunals cannot deviate from minimum standards imposed by the common law.

[23] I wish to first deal with Issue 3.

[24] **Issue 3**

Did the Board fail to provide adequate reasons for its decision?

The Veterans Review and Appeal Board Regulations, SOR/96-97, section 7, require the Board to state the reasons for every decision it makes. Thus, the true question for me to determine is whether the reasons provided by the Board were adequate.

[25] Where reasons are required by law, decision makers must give reasons that are adequate, in the sense that they are sufficiently clear and intelligible to enable the individual to know why the tribunal decided as it did and to enable the losing party to assess whether there are grounds to challenge the decision (see Brown, D. J. M., and J. M. Evans. *Judicial Review of Administrative Action in Canada*, 1998 (loose-leaf ed. updated September 2009), at pages 12 to 61-2 and *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684).

[26] There is no specific test for the adequacy of reasons. It will always depend on the context (see *Gardner v. Canada (Attorney General)*, 2005 FCA 284, [2005] F.C.J. No. 1442 (QL) at paragraphs 28 to 31). A reviewing court must look at more than just the stated reasons, but must look to other communications between the parties and consider whether in the all circumstances the individual was adequately informed of the basic deciding factors.

[27] In the case at bar, the Board was asked by the applicant to reconsider the decision it had made on August 20, 2008. One ground for reconsideration argued by the applicant was that the August 20, 2008 decision was not supported by adequate reasons.

[28] The August 20, 2008 decision was not a reconsideration but an appeal in which all relevant previous decisions and new evidence were to be assessed. In that decision, the Board summarized some of the medical evidence and the applicant's arguments for a 20% assessment for his disability and then stated:

> The Board has reviewed the evidence in its entirety, in particular, the medical evidence from Drs. McCann, Alexander and Hennenfent.
>
> After comparing the objective findings to Table 1 to Article 19.04, the Board concludes that the Advocate's request for a 20% assessment is not justified. The Board based its conclusion on the medical evidence on file. In addition, the Board has not been provided with any new medical evidence to support an increase in assessment.

[29] In my view, these reasons were inadequate. How does one challenge an administrative decision effectively when the reasons provided do not explain why the decision was made?

[30] Table 1 to Article 19.04 (Tribunal Record at page 43) has column headings: Symtoms, Posture, Range of Motion, Straight Leg Raising, Reflexes and/or, Wasting, Toe& Heal Walking, Medication, and Back Brace. The rows underneath correspond to assessment at levels 0 to 10%, 10 to 20%, 20 to 30%, 30 to 40% and Above 40%. The body of Table 1 evaluates each category in regards to each corresponding level of assessment with a few words of description. For example,

assessing Straight Leg Raising at 20 to 30% requires “Less than 75 degrees radiation beyond buttock”.

[31] The Board’s summary of the medical findings only mentioned some of the column headings found in Table 1. Even had the Board listed all the headings, what was really missing from the reasons provided was an explanation of why the overall 10% assessment was preferred over the 20% the applicant had suggested. Some explanation is inherently required in any assessment under Table 1, since the table itself allows for discretion by using ranges of assessment instead of precise figures.

[32] The applicant, frustrated with the paucity of the reasons provided to him on August 20, 2008, sought recourse to the same administrative body by applying for reconsideration. This gave the Board an opportunity to fix the problem. It did not. That decision dated February 6, 2009 read in part:

> The Board reviewed the Assessment Appeal decision dated 20 August 2008 and considered that although the reasons articulated by said Panel were brief, the decision stated that based on the medical evidence already on file, an in the absence of new medical evidence indicating that an increase was warranted, as already noted in the Assessment Review decision, no increase in the assessment of the Applicant’s degenerative disc lumbar spine was warranted at that time.

[33] Reference was made to the Assessment Review decision dated July 13, 2007, which had stated in part:

> The Panel has carefully analysed the evidence *viv-a-vis* the Veterans Affairs Canada Table of Disabilities and is of the view that even

> when the Advocate's recommendations are taken into account, the lack of significant outcomes for straight leg raising, reflexes, wasting and toe and heal walking are such that, when factored in the equation, a 10% assessment is fair and adequate. Therefore the Panel affirms the previous decision. The Panel does so with regret as the
>
> Panel was most impressed by the Applicant.
>
> (My Emphasis)

[34] It is the underlined portion of the July 2007 reasons that makes them adequate. The underlined portion told the applicant, with some specificity, why the Board felt a 10% assessment was fair. The reasons made reference to the table and also referred to the particular categories that were the most significant in the Board's decision making.

[35] When the applicant appealed this in 2008 with some new medical evidence, the August 2008 reasons noted above did not explain what in particular was deficient with the new evidence he had supplied. Merely referring to Table 1 would not have explained why the Board ruled as it did. Nor did the August 2008 reasons indicate whether the Board had come to its determination that a 20% assessment was not justified for the same reasons the July 2007 Board had. They did not explain it at all.

[36] It is not sufficient to merely recite the medical evidence and then state the conclusion. The following paragraphs from Madam Justice Mactavish in *Ladouceur v. Canada (Attorney General)*, 2006 FC 1438, [2006] F.C.J. No. 1817 are instructive:

> 22 The need for adjudicative bodies to provide "reasoned reasons" has been recognized by the Supreme Court of Canada in cases such

> as *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. While the decision under review in this case is not of the same significance to Mr. Ladouceur that a criminal or immigration decision would have been, it was nonetheless important to him, and he should not be left in any doubt as to how the Board arrived at its conclusion.
>
> 23 Moreover, section 7 of the *Veterans Review and Appeal Board Regulations*, SOR/87-601 specifically imposes a duty on the Board to give reasons for its decisions.
>
> 24 While counsel for the respondent concedes that the reasons given by the Board in this case are not as detailed as one would like, she relies on the decision of this Court in *McTague v. Canada (Attorney General)*, [2000] 1 F.C. 647, to say that they are sufficient.
>
> 25 A review of Justice Evans' comments in *McTague* discloses that what he actually said was that where the Board was making an assessment based upon the specific facts of a particular case, it was unrealistic to expect it to analyse factually similar cases. That is not what we are dealing with here.
>
> 26 What we have here in the decision under review is essentially a recitation of the medical evidence, followed by the statement of a conclusion. Giving the Board the benefit of the doubt, and assuming that it turned its mind to the issue, we can deduce that the Board did not accept that the severe joint pain and stiffness experienced by Mr. Ladouceur entitled him to more than a five percent pension. What we do not know from the Board's reasons is why that was.
>
> 27 In these circumstances, the Board's reasons were insufficient, and resulted in a denial of procedural fairness to Mr. Ladouceur.

[37] In the August 2008 reasons, the Board merely recited the medical evidence and then stated its conclusion. This was inadequate. As stated above, the reference to the table did not provide a meaningful explanation. The reasons for the February 2009 decision were similarly inadequate

because they still left the applicant to wonder why the Board had come to its decision in August 2008.

[38] This has resulted in a denial of procedural fairness to the applicant. I would therefore allow judicial review on this ground.

[39] Because of my finding on Issue 3, I will not deal with Issue 2.

[40] The application for judicial review is therefore allowed and the matter is referred to a different panel of the Board for reassessment in accordance with these reasons.

[41] The applicant shall have his costs of the application.

JUDGMENT

[42] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination in accordance with these reasons.

2. The applicant shall have his costs of the application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Veterans Review and Appeal Board Act, 1995, c. 18, V-1.6

18. The Board has full and exclusive jurisdiction to hear, determine and deal with all applications for review that may be made to the Board under the *Pension Act* or the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, and all matters related to those applications.	18. Le Tribunal a compétence exclusive pour réviser toute décision rendue en vertu de la *Loi sur les pensions* ou prise en vertu de la *Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes* et pour statuer sur toute question liée à la demande de révision.
21. A review panel may	21. Le comité de révision peut soit confirmer, modifier ou infirmer la décision qu'on lui demande de réviser, soit la renvoyer pour réexamen au ministre, soit déférer à ce dernier toute question non examinée par lui.
(a) affirm, vary or reverse the decision of the Minister being reviewed;	
(b) refer any matter back to the Minister for reconsideration; or	
(c) refer any matter not dealt with in the decision back to the Minister for a decision.	
25. An applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.	25. Le demandeur qui n'est pas satisfait de la décision rendue en vertu des articles 21 ou 23 peut en appeler au Tribunal.

26. The Board has full and exclusive jurisdiction to hear, determine and deal with all appeals that may be made to the Board under section 25 or under the War Veterans Allowance Act or any other Act of Parliament, and all matters related to those appeals.

26. Le Tribunal a compétence exclusive pour statuer sur tout appel interjeté en vertu de l'article 25, ou sous le régime de la Loi sur les allocations aux anciens combattants ou de toute autre loi fédérale, ainsi que sur toute question connexe.

29.(1) An appeal panel may

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.

(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.

(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

(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

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 may be.

constitue, conformément au paragraphe 19(1), un nouveau comité de révision pour étudier la question.

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 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.

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 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.

(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.

(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).

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

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

Pension Act, R.S. 1985, c. P-6

21. . . .	21. . . .
(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,	(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :
(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;	a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;
(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;	b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;
(c) where a member of the forces is in receipt of an additional pension under paragraph (a), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner	c) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa a), du paragraphe (5) ou de l'article 36 continue d'être versée pendant

dies, except where an award is payable under subsection 34(8), the additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in respect of another spouse or common-law partner is awarded to the member commencing during that period, until the date that it so commences; and

l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui il cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

(d) where, in respect of a survivor who was living with the member of the forces at the time of that member's death,

d) d'une part, une pension égale à la somme visée au sous-alinéa (ii) est payée au survivant qui vivait avec le membre des forces au moment du décès au lieu de la pension visée à l'alinéa b) pendant une période d'un an à compter de la date depuis laquelle une pension est payable aux termes de l'article 56 — sauf que pour l'application du présent alinéa, la mention « si elle est postérieure, la date du lendemain du décès » à l'alinéa 56(1)a) doit s'interpréter comme signifiant « s'il est postérieur, le premier jour du mois suivant celui au cours duquel est survenu le décès » — d'autre part, après cette année, la pension payée au survivant l'est conformément aux taux prévus à l'annexe II, lorsque, à l'égard de celui-ci, le premier des montants suivants est inférieur au second :

(i) the pension payable under paragraph (b) is less than

(ii) the aggregate of the basic pension and the additional pension for a spouse or common-law partner payable to the member under paragraph (a), subsection (5) or section 36 at the time of the member's death,

a pension equal to the amount described in subparagraph (ii) shall be paid to the survivor in lieu of the pension payable under paragraph (b) for a period of one year commencing on the effective date of award as provided in section 56 (except that the words "from the day following the date of death" in subparagraph 56(1)(a)(i) shall be read as "from the first day of the month following the month of the member's death"), and thereafter a pension shall be paid to the survivor in accordance with the rates set out in Schedule II.

(i) la pension payable en application de l'alinéa b),

(ii) la somme de la pension de base et de la pension supplémentaire pour un époux ou conjoint de fait qui, à son décès, est payable au membre en application de l'alinéa a), du paragraphe (5) ou de l'article 36.

FEDERAL COURT

SOLICITORS OF RECORD

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	- and -
	ATTORNEY GENERAL OF CANADA
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APPEARANCES:

Yehuda Levinson	FOR THE APPLICANT
Sogie Sabeta	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levinson & Associates Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT