Federal Court  Cour fédérale

Date: 20110414

Docket: T-1147-10

Citation: 2011 FC 416

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 14, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

RICHARD COSSETTE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated May 18, 2010, by the Veterans Review and Appeal Board's appeal panel sitting in reconsideration (appeal panel sitting in reconsideration), established pursuant to section 4 of the *Veterans Review and Appeal Board Act*,

S.C. 1995, c. 18 (VRABA), refusing to reconsider its decision dated February 16, 2010, to not grant the benefit sought by the applicant.

I. The facts

[2] Richard Cossette, the applicant, was born on October 7, 1949, and served in the Regular Force of the Canadian Forces from January 23, 1967, to August 16, 1978, and from November 26, 1981, to July 12, 1993. On April 7, 1992, the applicant's lumbar disc lesion was recognized as being the result of his service in the Armed Forces. On November 1, 2007, the applicant underwent a surgical procedure at the Centre hospitalier de Trois-Rivières. During his recovery, around November 30, 2007, the applicant aggravated his condition while trying to change positions in bed. On May 14, 2008, the applicant underwent an MRI examination.

[3] On May 16, 2008, he filed an application for disability benefits in accordance with the *Canadian Forces Members and Veterans Re-establishment and Compensation Act,* S.C. 2005, c. 21 (Re-establishment and Compensation Act), which states that " . . . an injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of a service-related injury or disease . . . ". On July 21, 2008, an adjudicator from the Department of Veterans Affairs refused this benefits application. On April 23, 2009, the applicant appeared before the review panel, which affirmed the decision dated July 21, 2008, on the following grounds:

> [TRANSLATION]
>
> However, given the findings of the medical imaging protocol dated May 14, 2008, which show acromioclavicular degenerative changes, which changes could have caused an impingement syndrome, and given the other findings noted in this protocol, the Board cannot rule on the contribution of these findings to a predisposition or even to a causation in the development of the disabling conditions

> under review. To this end, an opinion by an orthopaedic physician could clarify the situation.

The Board confirmed the departmental decision dated July 21, 2008.

[4] In reply, on November 11, 2009, the applicant obtained a medical report from Dr. Tremblay, orthopaedic surgeon at the Centre hospitalier de l'Université de Montréal (Hôtel-Dieu de Montréal) and associate professor at the Université de Montréal. Dr. Tremblay established a link between the applicant's military service and the state of his left shoulder. He opined the following:

> [TRANSLATION]
>
> If this patient had not undergone lumbar surgery, he probably never would have developed acute tendinitis in his left shoulder. Consequently, we can therefore state that the military service is responsible for the state of Mr. Cossette's left shoulder in the proportion of 4/5, given that a rotator cuff is subject to natural degeneration.

[5] The applicant appealed the review panel's decision before the Veterans Review and Appeal Board of Canada's appeal panel (appeal panel) and submitted this report in support of his application. The appeal panel rejected the appeal application on February 16, 2010. It determined that [TRANSLATION] "entitlement to benefits is not granted for these disabilities because they are not caused by the pensionable lumbar condition" (appeal panel decision dated February 16, 2010).

[6] In its decision, the appeal panel also specified that the applicant had the obligation to produce evidence establishing a causal link between the disability or aggravation he was claiming and the military service. It considered the evidence in the record insufficient in terms of demonstrating that the service was the primary cause of the aggravation of the applicant's disability.

[7] With respect to the evidentiary weight given to Dr. Tremblay's report, the Board made the following findings at page 5:

> [TRANSLATION]
>
> The Board notes that Dr. Tremblay did not provide sufficient reasons to justify his finding. The wording used in Dr. Tremblay's medical report is extremely vague and mentions only the possibility of a link but is not conclusive and is open to the Board's interpretation, which is different from that of the appellant. The Board also notes that Dr. Tremblay does not have any other evidence concerning the appellant's incidents that would make it possible to determine which incident allegedly caused the injury. The Board finds that much of Dr. Tremblay's medical report is based on information of a subjective nature provided by the appellant. According to the Board, this is therefore only a subjective opinion or conjecture.
>
> Thus, the Board finds that Dr. Tremblay's medical opinion does not constitute credible evidence for the purposes of granting a disability award because of its lack of reasoning and analysis on the issue of causation together with the proferred cautious opinion of possibility. The medical opinion constitutes the mere possibility of an opinion favourable to the appellant.

[8] On April 19, 2010, the applicant filed an application for reconsideration, in accordance with section 32 of the VRABA, before the appeal panel sitting in reconsideration. This application was accompanied by a written submission and a letter by Dr. Tremblay, the content of which is as follows:

> [TRANSLATION]
>
> . . . In fact, even if this patient's imaging showed acromioclavicular degenerative changes that could cause some shoulder impingement, this patient never had any functional limitation with his shoulder or symptoms in his shoulder.
>
> His effort to grasp the bedrail, using an anterior elevation of the arm greater than 90 degrees, is an effort that is likely to cause an acute tear in a rotator cuff that is slightly degenerated and, especially, in one that can be pinched more severely due to this patient's acromioclavicular arthrosis.
>
> The accidental mechanism and magnetic resonance appearance argue in favour of accepting the relationship between the tear-capsulitis in the left shoulder and the incident described.

[9] In its decision dated May 18, 2010, the appeal panel sitting in reconsideration did not admit Dr. Tremblay's letter into evidence. It determined that the tests in *Mackay v. Attorney General of Canada* [1997] F.C.J. No. 495 were not met. It considered [TRANSLATION] "that this opinion should have been presented in appeal and, in the end, does not offer any relevant evidence that could have affected the preceding decision" (decision dated May 18, 2010). It also reiterated the reasons for the appeal panel's decision dated February 16, 2010.

II. Issues

[10] This application for judicial review gives rise to one primary issue and two sub-issues:

(1) Did the appeal panel sitting in reconsideration err by refusing to reconsider the decision dated February 16, 2010?

(a) Did the appeal panel sitting in reconsideration err by refusing to admit into evidence Dr. Tremblay's letter dated March 18, 2010?

(b) Did the appeal panel sitting in reconsideration err by reiterating the reasons for the decision dated February 16, 2010?

III. Applicable standard of review

[11] The applicable standard of review for decisions by an appeal panel of the Veterans Review and Appeal Board is reasonableness, as specified by Justice Mosley in *Bullock v. Canada (Attorney General)*, 2008 FC 1117, at paragraphs 11 to 13:

> 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.

> 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.
>
> 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.

[12] *Armstrong v. Canada (Attorney General)*, 2010 FC 91, at paragraph 33, restated Justice Mosley's standard of review analysis and confirmed the application of reasonableness to an appeal panel's refusal to reconsider a decision. More specifically, this decision involved a refusal to admit new evidence, namely, letters by a medical expert, as is the case here.

IV. Analysis

[13] Did the appeal panel sitting in reconsideration err by refusing to reconsider the decision dated February 16, 2010?

[14] An award may be paid for an injury or disease that is deemed to be a service-related injury or disease under paragraph 46(1)(*b*) of the Re-establishment and Compensation Act:

Consequential injury or disease	**Blessure ou maladie réputée liée au service**
46. (1) An injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of:	46. (1) Est réputée être une blessure ou maladie liée au service la blessure ou maladie qui, en tout ou en partie, est la conséquence :

(a) a service-related injury or disease;	a) d’une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service;	b) d’une blessure ou maladie non liée au service dont l’aggravation est due au service;
(c) an injury or a disease that is itself a consequence of an injury or a disease described in paragraph (a) or (b); or	c) d’une blessure ou maladie qui est elle-même la conséquence d’une blessure ou maladie visée par les alinéas a) ou b);
(d) an injury or a disease that is a consequence of an injury or a disease described in paragraph (c).	d) d’une blessure ou maladie qui est la conséquence d’une blessure ou maladie visée par l’alinéa c) Blessure ou maladie réputée liée au service.
Compensable fraction	**Fraction indemnisable**
(2) If a disability results from an injury or a disease that is deemed to be a service-related injury or disease, a disability award may be paid under subsection 45(1) only in respect of that fraction of the disability, measured in fifths, that represents the extent to which that injury or disease is a consequence of another injury or disease that is, or is deemed to be, a service-related injury or disease.	(2) Pour l’application du paragraphe 45(1), si l’invalidité est causée par une blessure ou maladie réputée liée au service au titre du paragraphe (1), seule la fraction — calculée en cinquièmes — du degré d’invalidité qui représente la proportion de cette blessure ou maladie qui est la conséquence d’une autre blessure ou maladie liée au service ou réputée l’être, donne droit à une indemnité d’invalidité.

[15] Pursuant to section 21 of the VRABA, first the review panel makes a decision. This decision can then be reconsidered under section 23 of this same Act. An applicant can appeal this decision or reconsideration before the appeal panel as specified by section 25 of the VRABA. Section 29 of this same Act gives the appeal panel the power to affirm, vary or

reverse the decision being appealed or refer it back for reconsideration, re-hearing or further investigation.

[16] Section 32 of this Act establishes that the appeal panel may reconsider, on application, a decision made by it, if new evidence is presented to it, or if the person making the application alleges that the decision contained errors of fact or law:

Reconsideration of decisions	**Nouvel examen**
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.

(a) Did the appeal panel sitting in reconsideration err by refusing to admit into evidence Dr. Tremblay's letter dated March 18, 2010?

[17] The applicant claims that the applicable tests for new evidence to be admitted by the appeal panel during the reconsideration stage as set out in *MacKay v. Attorney General of Canada* [1997] F.C.J. No. 495 (*Mackay*) were met. The decision specifies that due diligence, relevance, expectation

to affect the result and evidence credibility must be considered. According to the applicant, the appeal panel therefore erred by refusing to admit new evidence.

[18] The applicant also argues that the due diligence test was met because Dr. Tremblay's report was submitted on November 11, 2009, and the appeal panel did not object to it at that time. In this context, the letter dated March 18, 2010, must not be considered as new evidence, but rather as a clarification requested of the expert further to the decision dated February 16, 2010. The applicant therefore claims that the appeal panel sitting in reconsideration applied the due diligence test in an overly rigid fashion when it determined that [TRANSLATION] " . . . this opinion should have been presented in appeal . . . ".

[19] The applicant also alleges that the appeal panel improperly applied two of the other tests, that of relevance of the evidence and its effect on the result. It was unreasonable for it to find that [TRANSLATION] "this opinion . . . does not offer any relevant evidence that could have affected the preceding decision".

[20] Also according to the applicant, Dr. Tremblay's letter was relevant and likely to affect the result because it explains why he eliminates the hypothesis of degenerative tearing, which renders the direct causal link between the applicant's unfortunate movement in bed and the tearing of his rotator cuff extremely plausible. Furthermore, the appeal panel itself indicated, in its decision dated February 16, 2010, that it would have liked to have had more detailed reasons on Dr. Tremblay's reasoning that there was a link between the incident in November 2007 and the state of the applicant's left shoulder.

[21] The applicant also contends that the evidence is plausible because, contrary to what the appeal panel sitting in reconsideration states in its decision, his letter is based on the anamnesis of the incident, which was considered credible by the review panel in its decision dated April 23, 2009. In his report, Dr. Tremblay also considered the applicant's history (lack of functional limitations before the incident) and the imaging findings.

[22] The respondent claims that the decision by the appeal panel sitting in reconsideration was reasonable. The appeal panel refused Dr. Tremblay's second letter not only because it did not meet the tests in *MacKay*, above, but also because it believed that this report should have been submitted at the time of the appeal and that it contained no relevant evidence allowing it to amend the previous decision. Thus, irrespective of whether this evidence met the tests in *Mackay*, the panel's decision would not have been any different. The appeal panel did not deem it to have objective evidence on the events that led to the tearing of the rotator cuff in the applicant's left shoulder. It had no obligation whatsoever to rely on other medical expertise.

[23] Section 3 states that the provisions in the VRABA must be interpreted liberally and broadly:

Construction	**Principe général**
3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and	3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des

interpreted to the end that the recognized obligations of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge**.**

[24] Section 39 of this same Act specifies the rules of interpretation applicable to evidence presented to the Board and, consequently, to the appeal panel:

Rules of evidence	**Règles régissant la preuve**
39. In all proceedings under this Act, the Board shall:	39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(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;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possibles à celui-ci;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(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.	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[25] According to *Mackay*, on which the panel relies, new evidence will be admitted if it meets the following tests:

> However, I am satisfied that Dr. Murdoch's report qualifies as "new evidence" for the purposes of Section 111. The applicant has cited a test for "new" evidence from *Palmer and Palmer* v. *The Queen* (1979), 106 D.L.R. (3d) 212 (S.C.C.) at 224 (hereinafter *Palmer*):
>
> ...The following principles have emerged:
> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin* v. *The Queen*, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;
> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
> (3) the evidence must be credible in the sense that it is reasonably capable of belief; and
> (4) it must be such that if believed it could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.

[26] In this case, Dr. Tremblay's letter was filed as additional information in reply to the appeal panel's findings on February 16, 2010, on the insufficiency of the reasons and the vagueness of the report. This additional information could not have been filed before the applicant learned of the appeal panel's criticism of his expert. It was therefore unreasonable to find that the letter filed in support of the application for reconsideration did not meet the due diligence test in *Mackay*, above.

[27] It was also unreasonable for the appeal panel sitting in reconsideration to find that this evidence did not meet the relevance test in *Mackay*, above. This letter provided the precision sought that was essential to a determinative issue, as the refusal to award the benefit sought was based on insufficient evidence establishing the link between the military service and the aggravation of the applicant's disability.

[28] The applicant was entitled to believe that this evidence, if accepted as credible, could affect the result of his appeal because it addressed the doubt raised by the appeal panel. By specifying that the applicant had never had any functional limitations in his left shoulder despite the

acromioclavicular degenerative changes that could have caused some impingement in this shoulder, Dr. Tremblay's letter dispelled any doubt. The causal link between the injury to this shoulder and the incident in November giving rise to the applicant's application should have therefore been accepted.

[29] The respondent submits that, in addition to the fact that the tests in *Mackay* were not met, the appeal panel sitting in reconsideration also noted that the letter should have been submitted at the time of the appeal and that it did not contain important evidence allowing it to amend the decision. With respect, I consider this argument unfounded because these findings also address two of the tests in *Mackay*, that of due diligence and relevance.

[30] The Veterans Review and Appeal Board and its appeal panel must, under the applicable VRABA, "liberally" address issues concerning evidence that is presented by the applicant. For this and the above-mentioned reasons, I consider the decision by the appeal panel sitting in reconsideration to not admit Dr. Tremblay's letter as new evidence unreasonable. The application for judicial review must therefore be allowed. Having answered in the affirmative to the first sub-issue, it is unnecessary to continue analyzing the application.

[31] The applicant argued that, under certain circumstances, the Court could give specific instructions to the Veterans Review and Appeal Board and order it to pay the award requested. He cites the case law of this Court to this end and, more specifically, the decision by the Federal Court of Appeal in *Turanskaya v. Canada (Minister of Citizenship and Immigration)* 1997 [1995] F.C.J.

No. 1776. The Court does not believe that the case before it gives rise to the issuance of such instructions.

[32] For these reasons, the application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.

2. The decision by the appeal panel of the Veterans Review and Appeal Board sitting in reconsideration dated May 18, 2010, to refuse to reconsider the decision dated February 16, 2010, is set aside.

3. The matter is referred back for reconsideration by a differently constituted appeal panel of the Veterans Review and Appeal Board sitting in reconsideration in accordance with the present reasons.

WITH COSTS.

"André F. Scott"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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