Federal Court  Cour fédérale

Date: 20130219

Docket: T-850-12

Citation: 2013 FC 168

Ottawa, Ontario, February 19, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

JOSEPH L. R. MOREAU

Applicant

and

VETERANS REVIEW AND APPEAL BOARD CANADA AND VETERANS AFFAIRS CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Veterans Review and Appeal Board [VRAB], dated March 14, 2012, denying the applicant's request for reconsideration on the grounds of new evidence, pursuant to subsection 32(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [Act]. This provision permits the reconsideration of an appeal decision when "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."

Factual background

[2] The applicant served in the Canadian Armed Forces from 1973 to 1976 and from 1980 to 1999. He was diagnosed with Hepatitis C in 1996, which he asserts he contracted from inoculations by multi-use jet air injectors during his early vaccinations while in service. As a result of his condition, the applicant also suffered from a number of secondary reactive psychological problems and received treatment for severe depression.

[3] The applicant applied for disability pension benefits on October 30, 1996. On April 11, 1997, the Department of Veterans Affaires recognized that the diagnosis of Hepatitis C was made while the applicant was in service but withheld entitlement because there was no evidence before it to support the applicant's claim that the condition he suffered was caused, as he alleged at that time, by exposure to asbestos or other chemicals.

[4] The applicant appeared before the Entitlement Review Panel to challenge the departmental decision dated April 11, 1997. On April 8, 1999, the Entitlement Review Panel found that there was sufficient medical opinion to consider it possible that the jet injection method of inoculation could provide a potential source for transmission of Hepatitis C if the apparatus was not cleaned between inoculations. However, the panel declined a pension entitlement, concluding that there was not enough evidence establishing that the gun injection method was used in the series of inoculations received by the applicant or that cleaning precautions were not taken.

[5] The applicant appealed this decision before the VRAB, arguing that he developed the condition as a result of inoculations received in service by way of jet injector. He testified that when standing in line for inoculations using the air gun, he noted that the gun was not cleaned between inoculations of different individuals. In support of this statement, the applicant submitted additional evidence, including letters from his family physician, his treating gastroenterologist, Dr. Buchholz, and his treating haematologist, Dr. Peltekian.

[6] Dr. Buchholz, who treated the applicant in Halifax, Nova Scotia, indicated in his letter dated February 19, 1998, that in 50% of cases, affected patients acquire Hepatitis C with no known cause which may be endemic of or perhaps related to prior sexual encounters, specifying however that sexual transmission of Hepatitis C is not as frequent as sexual transmission of Hepatitis B or the HIV virus. Dr. Buchholz added:

> Hepatitis C is more classically contracted through contaminated blood or blood products, and I understand that [the applicant] did have inoculation with a high pressure jet using the same amount of serum. This was during his early vaccination during his first part of enrolment in the Forces. Certainly there is a potential that the multiple inoculation method has been implicated in transmission of Hepatitis C

[7] Considering the applicant's case more specifically, Dr. Buchholz stated:

> Hepatitis C could not be screened for prior to 1992, but clearly [the applicant] had been in areas that could have given his increased risk factors. In understand that his estranged wife [omitted] and he has not had any other sexual affairs and has not received any other inoculations outside of the Canadian Armed Forces. This would tend to preclude any other risk factors for obtaining Hepatitis C while as a Canadian resident. Therefore, it is in my opinion that he likely contracted Hepatitis C sometime throughout his service for the Canadian Armed Forces, especially while on board ship and serving overseas.

[8] This opinion was confirmed by Dr. Faida Hermiz, general practitioner, in a letter dated September 7, 2000 addressed to Mr. Pruden, District Director Advocate Services, Veterans Affairs Canada, where Dr. Hermiz stated:

> Based on all data available there is still no way to confirm or rule out the jet injectors as a cause of the infection in [the applicant's] case in my opinion the cumulative evidence may lean more towards believing his story rather than rejecting it.

[9] On November 23, 2000, the VRAB upheld the Entitlement Review Panel's decision, stating that "the Board had not been provided with evidence of any cases of Hepatitis C having been caused by the jet injection inoculation system. The Board, after reviewing the documentation, does not find there is reasonable evidence given this fact. The Board, although sympathetic to the appellant's situation, finds that the claimed condition did not arise out of or is not directly connected with military service in peacetime." However, the VRAB did not question the fact that inoculation by way of jet injection carried a potential risk of transmission of Hepatitis C. In fact, the VRAB cited the following response provided by Commander F. J. Maggio on the subject:

> The information given is that apparently the reliability of the apparatus was dependent on the experience of the operator. If the patient moved, the high pressure jet might deflect off and cause a break in the skin with resulting bleeding. There may have been a chance for blood backspray (however, we cannot confirm this). If that was the case, then I must admit that if a patient with Hepatitis C was inoculated and cut, his/her blood might have been transmitted to subsequent patients...

[10] On December 12, 2001, the applicant submitted an application for reconsideration to the VRAB, based on further medical evidence provided by Dr. Peltekian dated September 30, 2001, indicating that:

> Having clear indications from the patient, this patient had no other risk factors for liver disease or viral hepatitis. He recalled having injections for vaccination while in the Armed Forces, and that is the only thing we have identified as a possible cause. As for the timing of the exposure to the virus, I suppose that since the liver biopsy showed Stage 1 disease, I would suspect that the exposure would have been within ten years of that biopsy.

[11] Upon reconsideration, on March 19, 2002, the VRAB found that Dr. Peltekian's medical report merely repeated what was previously before the Entitlement Review Board and did not constitute new relevant evidence that could lead to a different conclusion.

[12] Neither the November 23, 2000 decision nor the March 19, 2002 reconsideration by the VRAB was challenged before this Court.

[13] In January of 2012, the applicant submitted a second request to the VRAB for reconsideration of the Entitlement Review Board's decision, on the basis of new evidence confirming that "it is possible that [the applicant] may have contracted hepatitis C as a consequence of procedures or tests received as a serving member (vaccination, allergy skin test, allergy desensitization, minor skin surgery, gastroscopy and oesophageal biopsy) between 1973 and 1995." This additional evidence was provided by Dr. H. W. Jung, Surgeon General, Commander of the Canadian Forces Health Services Group, in a letter to the Applicant dated November 3, 2011.

Decision under Review

[14] A panel of the VRAB was convened on February 22, 2012 to review the applicant's application for reconsideration. Applying the four-part test for new evidence set out by this Court in *MacKay v Canada* (1997), 129 FTR 286, [1997] FCJ No 495 [*MacKay*] and *Canada (Chief Pensions Advocate) v Canada (Attorney General)*, 2006 FC 1317, [2006] FCJ No 1646 [*Chief Pensions Advocate*], aff'd in 2007 FCA 298, the VRAB concluded that the new evidence did not meet the required criteria for reconsideration, namely that i) 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; ii) the evidence must be relevant in the sense that it bears upon a decision or potentially decisive issue in the trial; iii) the evidence must be credible in the sense that it is reasonably capable of belief, and iv) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result (*Chief Pensions Advocate*, above, at para 6).

[15] More specifically, the VRAB concluded that there were no new revelations in the letter of Dr. Jung and no explanation why this evidence could not have been raised earlier at one of the several prior levels of adjudication. The VRAB recognized, however, that according to the jurisprudence it should not overemphasize the first prong of the test (*Chief Pensions Advocate*, above, at para 35).

[16] The VRAB recognized Dr. Jung's qualifications and extensive expertise through his 20 years of service in various postings in the Canadian Forces, but stated that it has not been made clear whether Dr. Jung's above-mentioned comment was being offered for his medical opinion on the merits of the possible transmission of Hepatitis C or for his knowledge of Canadian Forces medical administration. Furthermore, the panel noted that Dr. Jung's comment confirmed that a review of the applicant's medical file at the Canadian Forces showed the possibility of a causal link and did so based on the inability to rule it out. Dr. Jung did not deal with the expert medical evidence provided in 1999 that "50% of Canadians do acquire Hepatitis C with no known cause."

[17] The VRAB found that since it gave little weight to the letter, it also questioned the relevance of Dr. Jung's comment to the decisive issue in this case, namely the degree of probability that the applicant was infected during a vaccination or other medical procedure while serving in the Canadian military.

[18] With respect to the prospect of the evidence changing the result, the VRAB reiterated that Dr. Jung's letter merely speaks to a possibility of the applicant's claim and is therefore incapable of changing the result of the appeal decision under reconsideration, which held that the fact that Hepatitis C could be transmitted by jet injection had never been demonstrated.

[19] The applicant's application for reconsideration was therefore denied on March 14, 2012; hence this application for judicial review.

Issues and Standard of Review

[20] The applicant submits that the decision under review should be quashed because the VRAB i) erred in law by failing to properly consider section 3 of the Act in reviewing the evidence and made its decision without regard to the evidence before it; ii) erred in law by failing to draw favourable inferences from the medical evidence provided by Dr. H. W. Jung, Dr. Frida Hermiz, Dr. M.C. Buchholz as well as the affidavit of Roger Moreau, contrary to section 39 of the Act; and iii) issued inadequate reasons, thereby violating the requirements of natural justice.

[21] The foregoing provisions read as follows:

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 interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	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 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.
[...]	[…]
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	*a*) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à

favour of the applicant or appellant;	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.

[22] The issues raised in this application for judicial review are therefore:

1) Whether the VRAB erred in law in its assessment of the applicant's evidence and its application of sections 3 and 39 of the Act.

2) Whether the reasons provided in support of the impugned decision are adequate.

[23] Section 31 of the VRAB Act provides that decisions of the Appeal Board are final and binding. However, subsection 32(1) and section 111 of that statute authorize the Board to reconsider its decision in certain circumstances. The jurisprudence has consistently held that the combined effect of these provisions suggests a high level of deference.

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 <u>if it determines that an error was made with respect to any</u>	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 <u>s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient</u>

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.	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.
[…]	[…]
111. The Veterans Review and Appeal Board may, on its own motion, reconsider any decision of the Veterans Appeal Board, the Pension Review Board, the War Veterans Allowance Board, or an Assessment Board or an Entitlement Board as defined in section 79 of the *Pension Act*, 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, in the case of any decision of the Veterans Appeal Board, the Pension Review Board or the War Veterans Allowance Board, do so on application if new evidence is presented to it.	111. Le Tribunal des anciens combattants (révision et appel) est habilité à réexaminer toute décision du Tribunal d'appel des anciens combattants, du Conseil de révision des pensions, de la Commission des allocations aux anciens combattants ou d'un comité d'évaluation ou d'examen, au sens de l'article 79 de la *Loi sur les pensions*, et soit à la confirmer, soit à l'annuler ou à la modifier comme s'il avait lui-même rendu la décision en cause s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; s'agissant d'une décision du Tribunal d'appel, du Conseil ou de la Commission, il peut aussi le faire sur demande si de nouveaux éléments de preuve lui sont présentés.

[Emphasis added]

[24] The parties agree that the standard of reasonableness should be applied to the VRAB's assessment of the applicant's medical evidence in the reconsideration decision and its application of the invoked provisions of the Act (*Sloane v Canada (Attorney General)*, 2012 FC 567 at para 29, [2012] FCJ No 784 [*Sloane*]; *Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21, [2010] FCJ No 1222; *Rioux v Canada (Attorney General)*, 2008 FC 991 at para 17, [2008] FCJ No 1231; *MacDonald v Canada (Attorney General)*, 2007 FC 809 at para 57, [2007] FCJ No 1064 [*MacDonald*]). Reasonableness requires consideration of the presence of justification, transparency, and intelligibility in the decision-making process. 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 (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[25] The standard of reasonableness is also applicable to the extent that the adequacy of the reconsideration reasons is called into question given that, following the recent jurisprudence of the Supreme Court of Canada, inadequacy of reasons is no longer a stand alone basis on which to ground a breach of procedural fairness (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708; *Sloane*, above, at paras 26-28; *Lapalme v Canada (Attorney General)*, 2012 FC 820 at paras 17-21, [2012] FCJ No 949).

Analysis

[26] The applicant essentially takes issue with the VRAB's reading of his medical evidence. He asserts that several medical experts have opined that there is a strong possibility that the applicant has been infected during his service in the Canadian Armed Forces and that Dr. Jung's confirmatory opinion should be given its due and proper weight because of his undisputed experience and credibility.

[27] However, when one reads carefully Dr. Jung's letter of November 3, 2011, it seems that he was not providing the applicant with a new opinion as to what the cause of his medical condition was, but that he was rather, at the applicant's request, summarizing the content of his medical file at the Canadian Armed Forces, along with the findings of Colonel Cameron on May 1999 on his grievance. In that context, Dr. Jung adds that "it is possible that you may have contracted hepatitis C as a consequence of procedures or tests received as a serving member (vaccination, allergy skin tests, allergy desensitization, minor skin surgery, gastroscopy and esophageal biopsy) between 1973 and 1995." In sum, as I read the various medical reports submitted by the applicant since he first applied for disability pension benefits, I find the new evidence to be both more general and less affirmative, and consequently of less probative value.

[28] During the hearing before the Court, the applicant strongly argued that the VRAB erred in its interpretation and application of sections 3 and 39 of the VRAB Act and that it erred in weighing the evidence he had adduced. He relies on the decision of this Court in *Martel v Canada (Attorney General)*, 2004 FC 1287 at para 41, [2004] FCJ No 1559 [*Martel*], citing *Wood v Canada (Attorney General)*, [2001] FCJ No 52 (TD), where it was said that:

> If the evidence is uncontradicted and is considered credible, the VRAB must accept it. This point was confirmed in Wood, by Mackay. J. at para. 28:
>
> > The Board may reject the applicant's evidence when it has before it contradictory medical evidence. However, while there may be an absence of evidence in the form of definitive medical documentation about the injury claimed, where there is no contradictory evidence and the Board does not accept the Applicant's evidence without explanation of that, it commits an error that goes to jurisdiction
> > ...A decision of the Board that errs in the exercise of its jurisdiction is unreasonable and warrants intervention by the Court. The standard of patent unreasonableness is not apt if the error concerns the exercise of the Board's jurisdiction.

[29] In light of the evidence in *Martel*, the Court had found that the way the VRAB handled the new evidence was the core of the matter. At paragraph 123 of its decision, the Court came to the conclusion that the VRAB failed to give due consideration to the requirement of section 39 of the Act because sufficient contradictory evidence could not be adduced from the record:

> [T]he VRAB had no medical evidence before it concerning the connection between the two injuries other than the opinion of Dr. Petit. The VRAB made no mention that it had any problem with the credibility of Dr. Petit's evidence. This being the case, the VRAB required contradictory evidence to be adduced before rejecting Dr. Petit's evidence. Hence, I am of the view that, by rejecting Dr. Petit's evidence in the way it did, the VRAB erred in its application of s. 39 of the Appeal Board Act and breached its duties as found in that section. This constitutes, in my view, a jurisdictional error that nullifies the Decision in its entirety. See Rivard v. Canada (Attorney General), [2001] F.C.J. No. 1072 (T.D.), 2001 FCT 704 at paras. 43 - 44.
>
> [Emphasis added]

[30] The jurisprudence is clear that "section 39 is a critical provision in this statute which, according to section 3, is to be given a liberal interpretation, for the benefit of qualified persons." (*Chief Pensions Advocate*, above, at para 34), and that this provision is supposed to assist the claimants in meeting the burden of proving their entitlement to a pension (*Metcalfe v Canada*, [1999] FCJ No 22, 160 FTR 281). Accordingly, in several cases since *Martel* the Court did not hesitate to find that the VRAB erred in applying the rule of evidence set out in section 39 of the Act by requiring a higher standard of proof than that of the balance of probabilities or by ignoring the language and intent of sections 3 and 39 of the Act (see *Thériault v Canada (Attorney General)*, 2006 FC 1070 at para 51, [2006] FCJ No 1354; *MacDonald v Canada (Attorney General)*, above, at para 70; *Zielke v Canada (Attorney General)*, 2009 FC 1183 at para 53, [2009] FCJ No 1481).

[31] The jurisprudence also recognizes that it is an error for the VRAB to seek a "definitive medical opinion" (*Smith v Canada (Attorney General)*, 2001 FCT 857 at para 29, [2001] FCJ No 1225). Although the principle established in *Hall v Canada (Attorney General)*, 2011 FC 1431, [2011] FCJ No 1806 does not directly apply in this case, I have in mind that the jurisprudence has rejected the requirement of direct causation between the claimed condition and the pensioned condition, specifying that the words "arising out of" in paragraph 21(2)(b) of the *Pension Act*, RSC, 1985, c P-6, is broader than "caused by", and must be interpreted in a more liberal way.

[32] In the matter at bar, I am convinced that the VRAB did not ignore the benefit of doubt provisions of the Act in its assessment of the applicant's new evidence but simply found that Dr. Jung's opinion was not more conclusive than the previous opinions on the applicant's record. It is clear that there was no definitive medical documentation on the issue raised before the VRAB.

Although the absence of definitive opinion should not be determinative, I find that the VRAB reasonably found that Dr. Jung's opinion was incapable of changing the result of the appeal decision. In fact, although the VRAB also took issue with the relevance and the credibility of Dr. Jung's letter, namely whether Dr. Jung's comment should be characterized as a medical opinion or as evidence of the Canadian Forces medical administration, the gist of the decision was that there was no reason that this comment could ultimately change the result. I find this conclusion to be reasonable. As stated earlier, the new evidence is in fact less probative both on the subject of causation and on that of procedures or tests that could have potentially been at the source of the applicant's contamination.

[33] In *Martel*, above at paras 29-30, Justice Russel reminded the parties that:

> By s. 31 of the Appeal Board Act, a decision of an appeal panel is final and binding. However, an appeal panel is permitted to re-open and reconsider its decision pursuant to s. 32(1) of the Appeal Board Act where the appellant has new evidence, or if the panel determines on its own motion, or it is alleged by any person, that an error was made with respect to any finding of fact or the interpretation of any law. On reconsideration, the appeal panel may confirm, amend or rescind its original decision.
>
> Section 32(1) of the Appeal Board Act sets up an extraordinary remedy. It is not simply another level of appeal. This reconsideration jurisdiction allows the appeal panel to re-visit its own appeal decision and ask itself whether, in light of new evidence or legal argument, its own previous decision would have been different had it had the benefit of that material when it made the original decision.

[34] The applicant has not asked the VRAB to reconsider its previous decision on the basis that an error was made with respect to any finding of fact or the interpretation of any law. In his application for reconsideration submitted on January 9, 2012, he clearly stated that there was no error of fact or of law. He did not argue that the VRAB should have determined, acting upon its own motion, that an error was made with respect to a finding of fact or the interpretation of a provision of the Act. The basis for the application was only that of new evidence, namely the correspondence from Surgeon General H.W. Jung (pages 111-113 of the Tribunal's Record). It is also on this ground that the applicant has brought this application for judicial review.

[35] It seems to me that even if the totality of the evidence before the VRAB (medical evidence and other) could have been sufficient to support the applicant's application for disability pension benefits in the first place (and not necessarily as a result of the new evidence), this was not a ground for reconsideration that was submitted to the VRAB. In the circumstances, the Court is satisfied that the conclusion reached was one of the potential outcomes that was justified in respect of the facts and the law. As Justice Near held in *Hunt v Canada (Attorney General)*, 2009 FC 1218 at para 25, [2009] FCJ No 1508:

> Decisions of the Veteran's Review and Appeal Board are final and binding. Under subsection 32(1), the Board is able to reconsider previous decisions if there is an error of fact, law, or new evidence. It is important to note that under the legislation, each review, except the reconsideration review, is conducted on a *de novo* basis, with the opportunity to submit new evidence and arguments. As set out by Justice von Finkenstein at paragraph 20 of *Nolan*, above, applicants should be prepared to use the appeal hearing as their last opportunity to raise all potential arguments and avenues of appeal. Conducting a reconsideration every time any form of evidence is offered subsequent to the release of a final and binding appeal decision does not respect the principle of finality or promote the efficient use of resources.

[36] Consequently, I find that in the absence of new evidence, it was open to the VRAB to uphold its previous decision.

[37] Insofar as the issue of inadequacy of reasons is concerned, the VRAB clearly stated the basis on which it reached its conclusion. It also gave detailed, intelligible and transparent reasons in support of its core conclusions and responded to all of the arguments raised by the applicant in its application of the *MacKay* test. The Court had no difficulty judicially reviewing this decision and the applicant had no difficulty presenting his concerns in respect of the reasonableness of the decision (*Ralph v Canada (Attorney General)*, 2010 FCA 256, [2010] FCJ No 1532). Accordingly, I do not find any of the applicant's arguments are sufficient to quash the decision on this ground.

[38] For all of these reasons, the present application for judicial review is hereby dismissed. Costs shall follow the event.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs.

« Jocelyne Gagné »

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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