Federal Court  Cour fédérale

Date: 20130603

Docket: T-1056-12

Citation: 2013 FC 594

Ottawa, Ontario, June 3, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HERBERT GURZINSKI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Mr. Gurzinski, seeks judicial review of a reconsideration decision rendered by an Appeal Panel of the Veterans Review and Appeal Board [the Board] on April 23, 2012. The impugned decision denied the Applicant's claim for reconsideration of his request thereby preventing him from claiming disability benefits.

[2] The Applicant, a self-represented litigant, seeks an order from this Court quashing the Board's decision and awarding him a disability pension.

I. Background

[3] The Applicant served in the Reserve Force from October 30, 1961 until his discharge on November 18, 1969.

[4] On May 23, 1967, the Applicant was involved in a military exercise in Simcoe, Ontario in which he was ordered by his commanding officer to jump from an armoured personnel carrier [APC] vehicle, which allegedly resulted in him hurting both his left and right feet.

[5] The Applicant did not report these injuries and his military records show that he did not attend his pre-release medical examination. Therefore, there is no military record of the Applicant having suffered a heel or foot injury before his release from the armed service. The Applicant was discharged from the Canadian Armed Forces on November 18, 1969.

[6] On October 19, 2009, pursuant to subsection 45(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [New Veteran's Charter], the Applicant applied to the Minister for a disability award for the claimed conditions of chronic calcaneal bursitis of his left and right feet.

[7] In order to establish entitlement, an applicant must demonstrate that he suffered from an injury that was caused by military service. As part of his application to the Minister, the Applicant submitted the medical notes of his family doctor, Dr. Shonk, written in 1998, which indicated that the Applicant had injured his heels three (3) years earlier (twelve (12) years prior to his application for disability and eighteen (18) years after his discharge from the Canadian Armed Forces).

[8] On October 19, 2009, the Department of Veteran Affairs [the Department] denied his application on the grounds that there was insufficient evidence to establish a diagnosis of the claimed condition, or to establish a relationship between the claimed condition and his military service, as required by subsection 45(1) of the New Veteran's Charter.

[9] On April 27, 2010, the Applicant applied to the Board for a review of the Department's decision. The Applicant submitted new evidence in the form a medical report dated February 8, 2010, from Dr. Rhodes, who became his doctor after Dr. Shonk's retirement. The letter stated "it is entirely probable that jumping from the APC in 1967 could have resulted in your symptoms of bilateral heel pain. There is also some radiological evidence of an injury to that area consistent with trauma."

[10] On April 27, 2010, the Board denied the Applicant's claim for Entitlement review. In its decision, the Board stated that it afforded only limited weight to the letter from Dr. Rhodes and that his opinion did not indicate a thorough review of the Applicant's service medical files, nor did it indicate which medical evidence he was basing his opinion on.

[11] On December 24, 2010, the Applicant appealed the Board's decision to the Entitlement Appeal panel of the Board. On appeal, the Applicant filed additional new evidence, including a medical report by Dr. Ranney.

[12] On February 1, 2011, the Entitlement Appeal panel of the Board denied his appeal stating that the medical evidence presented by Dr. Ranney was not reliable, as it was based upon evidence which could not be corroborated by the Applicant's military record.

[13] On November 30, 2011, an application for reconsideration of the Entitlement Appeal Panel's decision was filed by Mr. Gurzinski supported by a further affidavit of Dr. Shonk, which sought to correct and alleged mistake in the date provided as 1995, when it should have been in the late 1960's. However, Dr. Shonk did not have access to his medical records before 1995, so could not review his records to ascertain if there was any mention of the heel problems before that time.

[14] On April 23, 2012, the Appeal panel denied the Applicant's request for reconsideration on the basis that Dr. Shonk's letter failed to meet the requirement for the admission of new evidence prescribed by section 32(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [VRABA].

II. Issue

[15] Did the Board err in denying the Applicant's reconsideration request?

III. Standard of review

[16] The appropriate standard of review is the standard of reasonableness (*Armstrong v Canada (Attorney General)*, 2010 FC 91 at para 33 [*Armstrong*]), where Justice Sean Harrington confirmed Justice Richard Mosley's standard of review analysis in *Bullock v Canada (Attorney General)*, 2008

FC 1117 at paras 11 to 13, and confirmed the application of the standard of reasonableness to an appeal panel's refusal to reconsider a decision in circumstances such as are presented in this case.

IV. Analysis

[17] The Respondent brings a preliminary motion to strike portions of the Applicant's materials, including his unsworn affidavit of September 27, 2012, and these materials filed pursuant to this Court's Orders dated September 21, 2012 and October 9, 2012.

[18] With respect to Mr. Gurzinski's unsworn affidavit, the Respondent submits that the affidavit contains facts not within Mr. Gurzinski's personal knowledge, and contains speculative, irrelevant facts as well as legal arguments and conclusions. Essentially, it is argued that the affidavit does not comply with the *Federal Court Rules*, and that it contains hearsay, which is neither necessary nor reliable, and speculative, unfounded allegations and arguments.

[19] I agree. An applicant, even when a self-represented litigant, is bound to comply with the Rules of the Court. Mr. Gurzinski's unsworn testimony and reference to speculative facts and hearsay is improper and cannot be allowed.

[20] Even if I was to allow and consider his affidavit, or portions of it, I find that his attempt to introduce new evidence after the hearings below, which concluded on April 23, 2012, does not meet the test to be applied under Section 32 of the VRABA. As stated by Justice André Scott in *Cossette v Canada (Attorney General)*, 2011 FC 416 at para 25, citing *Palmer v R (1979)*, 106 DLR (3d) 212 (SCC) [*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 […];
> (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.
>
> [emphasis added]

[21] By the time the applicant reached the stage at which he sought reconsideration by the Board, he had already had a determination of his claim by an adjudicator from the Department, a review hearing and appeal hearing before the Board. For hearings before the Board there are no time limitations and no grounds for appeal are necessary. At the review hearing, the applicant was given an opportunity to provide his testimony and the testimony of any witnesses he may wish to produce – it was a full *de novo* hearing. The appeal hearing process provided the applicant with a full opportunity to adduce new evidence and to make oral arguments on the case. At each proceeding before the Board, the applicant was entitled to legal advice and representation free of charge from the Bureau of Pension Advocates. Given the nature of this administrative process, substantial deference is warranted with respect to the Board's decisions.

[22] While I am sympathetic to the Applicant's injuries and his concerns with his ability to seek redress for his injuries, there is simply no new evidence that supports a nexus between his military service and these injuries that were not reasonably considered by the Board. Nor does the evidence meet the test as set out in *Palmer*, above. The Applicant's application is dismissed. However, given the unique nature of this case, I do not find that costs should be granted to the Respondent.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed;

2. No costs are awarded.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1056-12
STYLE OF CAUSE:	Gurzinski v. AGC
PLACE OF HEARING:	London, Ontario
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APPEARANCES:

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