Federal Court Cour fédérale

Date: 20170615

Docket: T-2214-16

Citation: 2017 FC 586

Ottawa, Ontario, June 15, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

COMMANDER HENRICK OUELLET

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is the second time that Commander Henrick Ouellet has sought judicial review of a decision of the Entitlement Appeal Panel [Appeal Panel] of the Veterans Review and Appeal Board [Board] made under the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [VRABA]. The Appeal Panel has twice found that Cdr. Ouellet is not entitled to a disability

award under s 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [*Compensation Act*].

[2] Cdr. Ouellet's application for judicial review of the Appeal Panel's first decision was granted by Justice Cecily Strickland on May 31, 2016 (*Ouellet v Canada (Attorney General)*, 2016 FC 608 [*Ouellet*]). Justice Strickland quashed the Appeal Panel's decision, and remitted the matter to a differently-constituted panel for redetermination "taking into consideration the reasons contained in [her] decision".

[3] The Appeal Panel rendered a second decision on September 14, 2016, again concluding that Cdr. Ouellet is not entitled to a disability award under s 45 of the *Compensation Act*. Cdr. Ouellet now seeks judicial review of that decision, on the ground that the Appeal Panel unreasonably departed from Justice Strickland's findings of fact and conclusions in *Ouellet*.

[4] In *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 25 [*Yansane*], the Federal Court of Appeal held that a judge who returns a case to an administrative decision-maker for reconsideration "in accordance with these reasons" is not giving instructions within the meaning of paragraph 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7. This kind of general instruction does not bind the administrative decision-maker unless it is explicitly included in the text of the judgment.

[5] In light of the guidance provided by the Federal Court of Appeal in *Yansane*, the application for judicial review must be dismissed.

II. Background

[6] The factual background of this case was comprehensively summarized by Justice Strickland in *Ouellet* at paragraphs 2 to 10.

[7] Briefly, Cdr. Ouellet was in good health when he joined the Canadian Armed Forces in 1988. He began to complain of shortness of breath in 2003. X-rays revealed an extensive interstitial lung reaction, most likely sarcoid. The results of a CT scan were said to be consistent with advanced sarcoidosis. Subsequent medical reports reached the same conclusion. A report dated October 15, 2009 contained a diagnosis of Stage 4 sarcoidosis.

[8] There is no clear evidence of what triggered Cdr. Ouellet's sarcoidosis. Cdr. Ouellet says that he was exposed to airborne particles (*e.g.*, crystalline silica) when he served on HMCS Halifax while the ship was undergoing repairs. He believes that his condition was aggravated by a subsequent posting to HMCS Ville de Quebec from 2002 to 2005, when that ship underwent similar repairs.

[9] In allowing Cdr. Ouellet's first application for judicial review, Justice Strickland said the following (*Ouellet* at paras 52-56):

> [52] […] Given the Applicant's factual evidence, which was uncontradicted and which the Appeal Panel accepted and found to be credible, the circumstances of the case and all of the submitted evidence – specifically the findings of the above studies which confirmed an increased risk of sarcoidosis in certain circumstances, including those to which the Applicant was exposed – the Appeal Panel should have considered whether this permitted it to draw a reasonable inference that the Applicant's

condition was the result of his military service. Further, the Appeal Panel should have weighed all of this evidence in making its finding. Instead, it simply dismissed the appeal on the basis that because the cause of sarcoidosis was unknown, the information contained in the articles was speculative. In my view, the Appeal Panel was required to take a wholistic view of the evidence in the context of s 39 [of the VRABA] and failed to do so, thereby rendering its decision unreasonable.

[53] The treatment of the letter from Dr. Smith is similarly flawed. The Appeal Panel found Dr. Smith's conclusions were subjective and insufficient to influence the balance of probabilities necessary to link the claimed condition to the Applicant's military service. It then quoted Dr. Smith's statement that "[u]nfortunately, because the cause of sarcoidosis is unknown it is difficult to say to what extent it is related to his service".

[54] The Respondent submits it was open to the Appeal Panel not to interpret this as confirming that the Applicant's condition *was*, to some extent, related to his service. Rather it could interpret it, as it did, as insufficient to influence the balance of probabilities necessary to link the claimed condition to the Applicant's military service. However, in my view such reasoning does not seem to be in keeping with the approach required by s 39. Particularly as the Respondent also submits that the evidence was insufficient to establish *any* connection between the Applicant's service and his condition.

[55] Dr. Smith's letter is candid and fairly describes the studies he provided. He concludes that the research does suggest environmental or occupational factors which may increase the risk of developing sarcoidosis, including certain naval environments. Neither his evidence or the studies are contradicted, nor does the Appeal Panel find either to lack credibility. There is also no evidence of any other cause for the Applicant's condition.

[56] A liberal and generous interpretation of the evidence required the Appeal Panel to consider the entirety of the circumstances *(Canada (Attorney General) v Frye*, 2005 FCA 264 at para 33), with a view to determining if the Applicant's condition was sufficiently causally connected to his military service to establish his eligibility for a disability benefit. As noted by the Federal Court of Appeal in *Cole* [*Cole v Canada (Attorney General)*, 2015 FCA 119], some kind of connection other than a direct or immediate one

> may be sufficient (*Cole* at paras 72 and 74). Instead, the Appeal Panel rejected the evidence in whole as speculative on the basis that the cause of sarcoidosis is unknown, and without any further analysis.
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> [Emphasis original]

[10] Justice Strickland's judgment in *Ouellet* reads as follows:

> 1. This application for judicial review is granted;
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> 2. The decision of the Appeal Panel is quashed and the matter is remitted back to a differently constituted panel for redetermination taking into consideration the reasons contained in this decision; and
>
> 3. The Applicant shall have his costs.

III. Decision under Review

[11] Following this Court's decision in *Ouellet*, the Appeal Panel reconsidered Cdr. Ouellet's appeal in the following manner:

> In determining whether the Appellant has met [his] burden, this Panel commences its analysis at square one. This is a new hearing. The Panel is not bound and has not relied upon any conclusions or findings from either the Department or previous Panels of this Board. The Panel does consider evidence which has been previously submitted at all levels of adjudication and the testimony that the Appellant gave, as recorded in the Review Decision, at the Review hearing.

[12] The Appeal Panel noted that three conditions must be met before an award can be made under s 45 of the *Compensation Act*: (a) there must be "a valid, existing diagnosis of the claimed

condition"; (b) the claimed condition must "constitute a permanent disability"; and (c) the claimed condition must have been "caused, aggravated or contributed to by military service".

[13] The Appeal Panel was satisfied that the first two conditions were met. The appeal therefore turned on whether Cdr. Ouellet's condition was caused, aggravated or contributed to by military service.

[14] The Appeal Panel considered whether Cdr. Ouellet could benefit from s 50(g) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50 [Regulations], which states that there is a presumption, in the absence of evidence to the contrary, that a condition is service-related, or non-service-related but aggravated by service, if the condition was incurred during "the performance by the member or veteran of any duties that exposed the member or veteran to an environmental hazard that might reasonably have caused the injury or disease or its aggravation".

[15] The Appeal Panel accepted that Cdr. Ouellet was exposed to silica on ships, but found that he had not established that he was exposed to "significant or potentially injurious concentrations of silica". The Appeal Panel also found that Cdr. Ouellet had not provided sufficient evidence of a causal link between his exposure to silica and the onset of his sarcoidosis: "While there are a number of studies that have been provided that discuss a correlation between the claimed exposure to silica and the onset of silicosis, no studies have been placed before the Panel which establish that exposure to silica causes sarcoidosis". The Appeal

Panel therefore concluded that Cdr. Ouellet could not benefit from the presumption in s 50(g) of the Regulations.

[16] The Appeal Panel also considered whether the medical evidence supported a conclusion that there "is a significant causal connection between Regular Force service and the onset of sarcoidosis", holding as follows:

> The preponderance of evidence does not plausibly support the conclusion that service in the military was a significant causal factor in the development of sarcoidosis. Therefore, the Appeal Panel finds that the Appellant has not met his burden of showing that his military service has caused, contributed to or otherwise aggravated his condition of sarcoidosis.

IV. Issue

[17] Cdr. Ouellet does not argue that the Appeal Panel's second decision was unreasonable on its merits. He says only that the Appeal Panel failed to comply with this Court's decision in *Ouellet*.

V. Analysis

[18] Decisions of the Appeal Board under the *Compensation Act* involve questions of mixed fact and law, and are subject to review by this Court against the standard of reasonableness (*Ouellet* at para 24). Following a successful application for judicial review, the Appeal Board is bound by *stare decisis* to apply the law as found by the Court. However, when the matter under reconsideration involves questions of mixed fact and law, the Appeal Board's decision is once again subject to review against the standard of reasonableness (*ABB Inc v Hyundai Heavy*

Industries Co, Ltd, 2015 FCA 157 at para 27). The Court will intervene only if the decision falls outside the "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).

[19] Cdr. Ouellet says that it was not open to the Appeal Panel to reject his application on the ground that the cause of sarcoidosis is unknown, given Justice Strickland's conclusion at paragraphs 51 and 52 of *Ouellet* that the medical literature demonstrates "an increased risk of sarcoidosis when persons are exposed to certain environmental factors, including particulate from non-skid surfaces", and "an increased risk of sarcoidosis in certain circumstances, including those to which the Applicant was exposed".

[20] Cdr. Ouellet argues that many findings of the Appeal Panel cannot be reconciled with Justice Strickland's reasons in *Ouellet*, including: (a) no studies were placed before the Appeal Panel to establish that exposure to silica causes sarcoidosis; (b) there was no evidence before the Appeal Panel of increased instances of sarcoidosis in naval personnel or members; (c) the medical evidence led to contradictory conclusions; (d) one study demonstrated that there was a lower risk of sarcoidosis in naval personnel compared to the general population, and so there was no connection between Cdr. Ouellet's condition and his service; (e) there was no evidence demonstrating that Cdr. Ouellet was exposed to "hazardous levels" of silica; (f) there was no evidence showing that protective equipment was required when sandblasting silica-laced ship decks; and (g) in order to succeed in his claim, Cdr. Ouellet would need to show that inhaling airborne silica without protective equipment could be hazardous, and sarcoidosis could result from breathing in airborne silica.

[21] Cdr. Ouellet also says that the Appeal Panel was precluded from finding that his condition was neither caused nor aggravated by his military service, given Justice Strickland's finding in *Ouellet* at paragraph 55 that "Dr. Smith's letter was candid and fairly described the studies he provided", and "[n]either his evidence nor the studies are contradicted, nor does the Appeal Panel find either to lack credibility. There is also no evidence of any other cause of the Applicant's condition".

[22] Counsel for Cdr. Ouellet referred the Court to the recent decision of the Federal Court of Appeal in *Yansane*. However, the decision does not support his client's position.

[23] In *Yansane*, Justice Yves de Montigny explained at paragraph 15 that, in general, the purpose of judicial review is not to replace the administrative decision-maker's decision with the court's own decision; rather, the court's role is limited to confirming the legality or reasonableness of the decision rendered, and returning the matter for reconsideration if the court finds that the decision was incorrect or fell outside the range of possible, acceptable outcomes.

[24] Exceptionally, this Court may set aside a decision and return it for reconsideration in compliance with instructions it deems appropriate (*Federal Courts Act*, s 18.1(3)(b)). The instructions will vary with the circumstances and may include, for example, (a) setting a deadline for re-examination; (b) limiting reconsideration to a specific question and requiring the decision-maker to take certain evidence into account; (c) excluding a piece of evidence; or (d) forbidding a specific result (*Yansane* at para 16).

[25] While the Court may direct a specific verdict, this authority is exercised only in the clearest of cases, for example, when the correct interpretation of the law permits only one possible outcome (*Yansane* at para 17, citing *Wihksne v Canada (Attorney General)*, 2002 FCA 356). Often, as in this case, the Court simply directs that reconsideration take place in accordance with its reasons.

[26] Caution is warranted for any directions or instructions that a court may issue when granting an application for judicial review (*Yansane* at paras 18 and 19):

> [18] […] We must never lose sight of the fact that such directions or instructions depart from the logic of a judicial review, and that their perverse or unjustified use would go against Parliament's desire to give specialized administrative organizations the responsibility for ruling on questions that often require expertise that common law panels are lacking. This is especially the case for eligibility and weighing of evidence, which are central to the mandate of administrative decision-makers.
>
> [19] According to that logic, I believe it is essential to interpret the possibility of issuing directions or instructions restrictively, such that only those explicitly stated in the judgment may bind the administrative decision-maker responsible for re-examining a case. This must be the case not only so that Parliament's decision not to allow appeals is respected, but also so that the law is predictable and appropriately guides those who must re-examine a question when the first decision was set aside. Consequently, I am of the opinion that only instructions explicitly stated in the judgment bind the subsequent decision-maker; otherwise, the comments and recommendations made by the Court in its reasons would have to be considered mere *obiters*, and the decision-maker would be advised to consider them but not required to follow them.

[27] As Justice Mary Gleason held in *Burton v Canada (Citizenship and Immigration)*, 2014 FC 910 at paragraph 30, the effect of a successful application for judicial review is generally to extinguish the decision of the administrative tribunal and set it aside for all purposes:

> [30] This Court has often commented on the impact of judgments setting aside administrative decisions and has confirmed that the effect of such judgments is to extinguish the decision being set aside for all purposes. For example, in *Hernandez Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1331, my colleague, Justice Luc Martineau, indicated at para 4 that a quashed decision cannot give rise to *stare decisis* or *res judicata* as it is quashed for all purposes. Similarly, in *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, [2012] FCJ No 1252, I noted at para 3 that, in the context of a redetermination of a refugee claim, it was open to the RPD to reach a different conclusion from the first member on the issue of credibility as the first decision was quashed for all purposes when it was set aside by order of this Court. (See also to similar effect *Miah v Canada (Minister of Citizenship and Immigration)*, 2007 FC 2005, [2007] FCJ No 1439 at para 8 and *Lee v Canada (Minister of Citizenship and Immigration*, 2003 FCT 743, [2003] FCJ No 977 at para 11).

[28] In this case, Justice Strickland's judgment in *Ouellet* stated only that the matter was to be reconsidered by the Appeal Panel in accordance with her reasons. Her judgment did not include any explicit instructions or directions. The impact of her judgment was therefore to extinguish the previous decision of the Appeal Panel and set it aside for all purposes. The subsequent Appeal Panel was free to reach its own conclusions based on a fresh consideration of the evidence and arguments presented.

[29] Cdr. Ouellet does not challenge the second decision of the Appeal Panel on any ground other than its alleged non-compliance with Justice Strickland's judgment in *Ouellet*. For the foregoing reasons, the application for judicial review must therefore be dismissed.

VI. Conclusion

[30] The application for judicial review is dismissed. The Attorney General has not requested costs, and none are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs to any party.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michel Drapeau Joshua M. Juneau	FOR THE APPLICANT
Zoe Oxaal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michel Drapeau Law Office Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT