Federal Court  Cour fédérale

Date: 20190903

Docket: T-654-18

Citation: 2019 FC 1125

St. John's, Newfoundland and Labrador, September 3, 2019

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KEVIN JOSEPH WHITTY

Applicant

and

VETERANS REVIEW AND APPEAL BOARD AND ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Kevin Joseph Whitty (the "Applicant") seeks judicial review of the decision of the Veterans Review and Appeal Board (the "Board"), constituted pursuant to the *Veterans Review and Appeal Board Act*, S.C. 1995, c.18 (the "VRAB Act"). In that decision, dated March 12, 2018, the Board denied the Applicant's request for reconsideration of a decision, dated December 4, 2008, made by an Entitlement Appeal Panel of the Board.

[2] In its decision, the Entitlement Appeal Panel denied pension entitlement, pursuant to subsection 21 (2) of the *Pension Act*, R.S.C., 1985, c. P-6 (the "Act") for the claimed condition of schizophrenia in respect of the Applicant's Regular Force service.

II. BACKGROUND

[3] The following details are taken from the Certified Tribunal Record (the "CTR").

[4] The Applicant served in the Canadian Armed Forces, Regular Service from December 16, 1982 until March 10, 1983. He was admitted to the hospital for a psychosis on January 10, 1983 and released on March 10, 1983.

[5] On May 24, 1990, the Applicant applied to Veterans Affairs Canada (the "VAC") for a disability pension under the Act. He claimed that the condition of schizophrenia was caused or aggravated by his Regular Force Service.

[6] The VAC denied the application on January 14, 1991, on the basis that the Applicant had failed to provide sufficient evidence that the condition of schizophrenia was caused by his service time. The VAC concluded that that this medical condition did not arise from and was not directly related to the Applicant's military service.

[7] The Applicant appealed the decision of the VAC to the Board, sitting as an Entitlement Review Panel (the "Review Panel"). On March 24, 1999, the Review Panel upheld the decision of the VAC and denied disability entitlement for the claimed condition.

[8] In its decision, the Review Panel referred to a medical report dated March 26, 1990, from Dr. M.C. Nurse, the Applicant's treating psychiatrist. The report includes the opinion that "To the best of my knowledge these symptoms first appeared following his entry into the Armed Services…."

[9] The Applicant appealed to the Entitlement Appeal Panel (the "Appeal Panel") of the Board and in a decision dated December 4, 2008, the decision of the Review Panel was upheld.

[10] The Appeal Panel found that the Applicant was suffering from a psychiatric disorder at the time he enlisted and that there was nothing in his medical records to show that his condition "was triggered by any specific duty or factor encountered during service."

[11] On January 27, 2011, the Applicant applied to the Board for reconsideration of the 2008 decision of the Appeal Panel by which a pension, pursuant to section 32 of the VRAB Act, was denied. In making this reconsideration, the Applicant filed some written submissions. He also provided another report from his physician, Dr. Nurse.

[12] In this report, dated December 17, 2010, Dr. Nurse provided his opinion that the Applicant was initially diagnosed with schizophrenia "following a psychotic episode that occurred while he was a member of the Armed Services." Dr. Nurse also provided the opinion that stress can "bring about psychotic symptoms, not within several weeks, within several days."

[13] By a decision made on February 24, 2011, the Reconsideration Panel dismissed the application for reconsideration, on the grounds that the Appeal Panel had not erred in law or in fact and that there was no new evidence, within the scope of the VRAB Act.

[14] The Reconsideration Panel found that although the December 17, 2010 report from Dr. Nurse was credible, the information was not new evidence and would not change the result of the Applicant's pension application.

[15] The Reconsideration Panel further commented that the opinion from Dr. Nurse was a subjective opinion that was not based upon the complete medical history of the Applicant.

[16] On January 15, 2017, the Applicant again applied to the Board for reconsideration of the negative 2008 decision of the Appeal Panel.

[17] On April 19, 2017, the Board denied the reconsideration application. It found that there was no error of law or fact, and that no new evidence has been provided, as addressed in section 32 of the VRAB Act. The Board also found that the report of Dr. Nurse was "not sufficiently relevant to the decisive points to change the result in the present case."

[18] The Board, in this decision, noted that Dr. Nurse, in his report dated December 17, 2010, did not discuss the Applicant's medical history.

[19] The Board also observed that granting a reconsideration request is a “rare” remedy and was not an opportunity to reapply for a pension, relying on the same facts as originally submitted.

[20] The Applicant responded to the decision of April 19, 2017 by filing an application for judicial review, in cause number T- 655-17, seeking an Order setting aside the negative reconsideration decision.

[21] By letter dated August 2, 2017, the Board advised the Applicant that the panel who heard his reconsideration request on April 19, 2017 may not have been properly constituted. The Board advised that if the Applicant asked for reconsideration of the matter, based on an error of law, a newly constituted panel would reconsider the decision in question.

[22] The Applicant submitted another application for reconsideration, dated October 18, 2017. In that application, he said there had been an error of fact “throughout entire file based on previous decisions” and he noted, in particular, the report from Dr. Nurse and the 1982 review which “corrects all misinformation errs (sic) in.”

[23] By a decision dated November 29, 2017, the Board denied this reconsideration request. This decision of the Board is the subject of the within application for judicial review.

[24] In this decision, the Board found that there was no error of fact or of law. It found that there was no new evidence as required by section 32 of the VRAB Act. Further, it found that the

letter from Dr. Nurse, dated December 17, 2010, was not "new evidence." Although the Board agreed with Dr. Nurse that stress could cause psychotic symptoms, it found that the Applicant's enrolment in the military did not cause his condition of schizophrenia.

[25] The Board acknowledged the Applicant's argument that the decision made in March 1999 was invalid because it had been made by one member of the Board. However, the Board found that upon reviewing the record, that decision had been made by two members, pursuant to subsection 19 (1) of the VRAB Act and there was no reviewable error in this regard.

III. SUBMISSIONS

A. *The Applicant's submissions*

[26] The Applicant argues that the Canadian Armed Forces were negligent in the medical treatment it provided. He claims that the condition was diagnosed on January 10, 1983, after his enrolment began on December 16, 1982. He claims that although prescriptions were written, they were not given to him until his last two weeks of service.

[27] The Applicant submits that the records will show that no psychosis was present when he enlisted, yet the condition was diagnosed on January 10, 1983 and can be attributed to consistent stress while in the military.

[28] The Applicant argues that he should have been hospitalized rather than being isolated and subject to "extraction of information" to find out if he were a homosexual.

[29] The Applicant also submits that the Board erred in law in failing to give him notice, prior to the 2018 reconsideration decision, about the composition of the Board for the 1999 hearing. He argues that some of the evidence used in the 1999 hearing was "extracted under duress."

B. *The Respondent's Submissions*

[30] The Respondent first raises a preliminary objection, that is the inclusion of the "Veterans Review and Appeal Board" as a respondent in this application.

[31] Next, the Respondent submits the Board committed no breach of procedural fairness and that its decision of November 29, 2017 meets the applicable standard of review, that is the standard of reasonableness.

IV. DISCUSSSION AND DISPOSITION

[32] The first matter to be addressed is the objection raised about the naming of the Veterans Review and Appeal Board as a respondent to this application for judicial review since the decision maker is usually not named as a party.

[33] The objection was discussed in the hearing with the Applicant and he did not object to the request that the style of cause be amended, by the removal of that party as a respondent.

[34] The Respondent is correct in his submissions and the style of cause will be amended, to remove the "Veterans Review and Appeal Board of Canada" as a party respondent.

[35] The next matter to be addressed is the applicable standard of review.

[36] A question of procedural fairness is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[37] Any issue arising about findings of fact or of mixed fact and law is reviewable on the standard of reasonableness; see the decision in *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190.

[38] The Board, in the most recent reconsideration request, was essentially dealing with the evidence on the record about the Applicant's health condition while a member for the Canadian Armed Forces.

[39] I am not persuaded that the Board committed any breach of procedural fairness in the manner in which the reconsideration hearing was held. There is no basis for judicial intervention on this ground.

[40] According to the decision in *Dunsmuir, supra*, the standard of reasonableness requires that the decision be justifiable, transparent, and intelligible, falling within a range of possible outcomes that are defensible on the facts and the law.

[41] The essential task of the Board is to weigh the evidence submitted, against the statutory criteria.

[42] The Applicant applied for a disability pension pursuant to subsection 21 (2) of the Act which provides as follows:

Service in militia or reserve army and in peace time	**Milice active non permanente ou armée de réserve en temps de paix**
(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	**c)** sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces

spouse or common-law partner who is living with the member and the spouse or common-law partner 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

en application de l’alinéa a), du paragraphe (5) ou de l’article 36 continue d’être versée pendant 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)

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

(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.

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.

[43] Section 18 of the Act allows a person who is dissatisfied with a decision made by VAC to seek a review of the decision, section 18 provides as follows:

Exclusive jurisdiction	**Compétence exclusive**
18 The Board has full and exclusive juris-diction to hear, determine and deal with all applications for review that may be made to the Board under the Pension Act or the Veterans Well-being 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 le bien-être des vétérans et pour statuer sur toute question liée à la demande de révision.

[44] Section 25 of the Act gives the right of appeal to an appeal panel of the Board; section 25 provides as follows:

Appeal	**Appel**
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.

[45] The burden of proving the existence of a disability lies upon an applicant. However, sections 3 and 39 of the VRAB Act set out a framework within which evidence is to be considered by the Board, that is to allow the drawing of inferences in favour of an applicant. Those sections provide as follows:

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	**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

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.

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.

Rules of evidence

39 In all proceedings under this Act, the Board shall

(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;

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and

(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.

Règles régissant la preuve

39 Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve:

a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;

b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;

c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[46] The VRAB Act allows the Board to reconsider an earlier decision, that is pursuant to subsection 32 (1) which provides as follows:

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.

[47] Pursuant to section 32, an applicant can submit new evidence to the Board.

[48] Although the words "new evidence" are not defined in the VRAB Act, a test for such evidence was set out by the Supreme Court of Canada in *R. v. Palmer*, [1980] 1 S.C.R. 759 at page 775 as follows:

> (1) The evidence should generally not be admit-ted 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*[5].
>
> (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 the other evi-dence adduced at trial, be expected to have affected the result.

[49] In *MacKay v. Canada* (1997), 129 F.T.R. 286 at page 4, Justice Teitlebaum described the nature of a reconsideration decision as follows:

> It is important to clarify the nature of a reconsideration, a distinct type of review function that is not to be confused with appeal proceedings or judicial review applications considered by a Court. Essentially, under Section 111 of the *Veterans Review and Appeal Board Act*, the VRAB may reconsider the earlier decision on two broad grounds: (i) on application for new evidence; or (ii) on its own motion for errors in fact or law.

[50] In the present case, the Applicant submits that the letter, dated December 17, 2010, from Dr. Nurse is "new" evidence.

[51] The Board found otherwise. It found that Dr. Nurse did not say anything "new," within the meaning of the test for "new evidence" referred to above.

[52] The question for the Court in this application for judicial review is whether this finding of the Board meets the legal standard of reasonableness.

[53] In other words, is this finding "justifiable, transparent and intelligible"?

[54] On the basis of the material in the CTR, I am satisfied that the Board reasonably concluded that the Applicant has failed to present “new evidence” that would change the decision about his entitlement to a disability pension.

[55] The beneficial effects of sections 3 and 39 of the VRAB Act do not operate in a vacuum. The burden always lies upon an applicant to present evidence in support of a claim for a disability pension.

[56] In this case, the Board found that the Applicant had not done so. I see no reviewable error in the Board’s finding in this regard.

[57] The Board also found that the presumption of fitness, set out in subsection 21 (3) of the Act, had been rebutted since the Applicant’s health condition had been diagnosed within three months of his enlistment.

[58] Although the Applicant now argues that the Canadian Armed Forces had been negligent in the provision of medical treatment, he has not submitted evidence to support that claim or evidence to contradict the medial records that are part of the CTR. There is no reviewable error in this finding of the Board.

V. CONCLUSION

[59] In the result, there is no basis for judicial intervention in the decision of the Board and this application for judicial review will be dismissed.

[60] The Respondent does not seek costs and in the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR / 98-106, no costs will be awarded.

JUDGMENT in T-654-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, there is no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-654-18
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