

Federal Court



Cour fédérale

Date: 2011078

Docket: T-250-11

Citation: 2011 FC 848

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 8, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**MAURICE ARIAL
(VETERAN - DECEASED)
MADELEINE ARIAL
(SURVIVING SPOUSE)**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The role of the review board of the Department of Veterans Affairs Canada [VAC] is to ensure that pension entitlement is given an interpretation that is as generous and as consistent with the purpose of the relevant legislation as possible. Furthermore, we must never forget the

debt of respect we owe those who have served Canada with devotion and dignity, and we must be ever mindful of the inviolability of the human person and of the vulnerability of individuals who served Canada on missions where they were ready to lay down their lives for their country.

[2] This application did not come from an individual seeking to exploit the system for her own financial benefit; rather, it was brought by someone who is seeking recognition of the fact that her husband gave up part of his health in service of Canada. This recognition is sought posthumously and is intrinsically linked to her husband's memory. Moreover, the pension claimed represents a significant sum for Madeleine Arial, the widow of Maurice Arial. As Sonia Arial (who is not a lawyer but is representing her parents before the Court) stated in an email filed in evidence, her father lived in a mobile home (Respondents' Record at p. 105).

[3] One cannot ignore the fact that the Arial family made repeated requests to VAC for help obtaining the required documents for their pension application, or for at least a clear and precise explanation of what had to be submitted in this case.

[4] A soldier's morale and devotion to duty are always important ingredients in any mission, so it is important that the government offer soldiers the same support in return once they have completed their missions. As Justice Danièle Tremblay-Lamer stated in *Arial v Canada (Attorney General)*, 2010 FC 184, 367 FTR 1, in the context of section 38 of the *Pensions Act*, RSC, 1985, c P-6 [PA]:

[34] More recently, the Federal Court of Appeal unanimously reiterated that it is important for the *Pension Act* to be "liberally construed and interpreted", both because it is "social welfare legislation" and because of its express wording

(*Canada (Attorney General) v. Frye*, 2005 FCA 264, (2005) 338 N.R. 382 at paras.14-20).

[5] VAC's duties with regard to providing information are set out at subsection 81(3) of the

PA:

81. (1) Every application must be made to the Minister.

Consideration of applications

(2) The Minister shall consider an application without delay after its receipt and shall

(a) where the Minister is satisfied that the applicant is entitled to an award, determine the amount of the award payable and notify the applicant of the decision; or

(b) where the Minister is not satisfied that the applicant is entitled to an award, refuse to approve the award and notify the applicant of the decision.

Counselling service

(3) The Minister shall, on request,

(a) provide a counselling service to applicants and pensioners with respect to the application of this Act to them; and

81. (1) Toute demande de compensation doit être présentée au ministre.

Examen par le ministre

(2) Le ministre examine la demande dès sa réception; il peut décider que le demandeur a droit à la compensation et en déterminer le montant payable aux termes de la présente loi ou il peut refuser d'accorder le paiement d'une compensation; il doit, dans tous les cas, aviser le demandeur de sa décision.

Service de consultation

(3) Le ministre fournit, sur demande, un service de consultation pour aider les demandeurs ou les pensionnés en ce qui regarde l'application de la présente loi et la préparation d'une demande.

(b) assist applicants and pensioners in the preparation of applications.

[6] VAC's mandate, posted on the Internet site of the Treasury Board Secretariat of Canada, is to ensure that veterans and their families receive every assistance possible in accessing the care to which they are entitled:

VAC's mandate stems from laws and regulations. Among the more significant is the Department of Veterans Affairs Act, which charges the Minister of Veterans Affairs with the following responsibilities:

“The care, treatment, or re-establishing in civil life of any person who served in the Canadian Forces or merchant navy or in the naval, army or air forces or merchant navies of Her Majesty, of any person who has otherwise engaged in pursuits relating to war, and of any other person designated . . . and the care of the dependants or survivors of any person referred to . . . ”

Le mandat d'ACC découle de lois et de règlements, notamment la *Loi sur le ministère des Anciens Combattants*, qui attribue au ministre des Anciens Combattants les responsabilités suivantes :

« [...] aux soins, au traitement ou à la réinsertion dans la vie civile de personnes ayant servi soit dans les Forces canadiennes ou dans la marine marchande du Canada, soit dans la marine, la marine marchande, l'armée de terre ou l'aviation de Sa Majesté, de personnes qui ont pris part, d'une autre manière, à des activités reliées à la guerre, et de personnes désignées [...] aux soins de leurs survivants ou des personnes à leur charge [...] ».

(Internet site of the Treasury Board Secretariat of Canada, <http://www.tbs-sct.gc.ca/dpr-rmr/2007-2008/inst/dva/dva01-eng.asp>).

[7] The duty to inform its members thus lies at the core of VAC's mandate.

II. Introduction

[8] This is an application for judicial review of a review of a disability pension application made to VAC. In *Thériault v Canada (Attorney General)*, 2006 FC 1070, 299 FTR 246, this Court cited the conditions laid down by Justice Marc Nadon, that is, the conditions that an applicant must meet to receive a pension:

[52] In order to be entitled to a pension, Mr. Thériault must meet the following conditions, as summarized by Marc Nadon J. in *MacNeill v. Canada*, [1998] F.C.J. No. 1115 (QL), at paragraph 23:

. . . On the basis of the paragraphs noted above, two conditions must be met before the applicant can be said to be entitled to a pension. First, the applicant's condition must be pensionable. In that regard, it must be a condition which can be classified as a "disability" resulting from an injury or disease. In my opinion the word "disability" requires that the condition be one from which the applicant continues to suffer. Second, the original condition must arise directly from the applicant's military service. After carefully reading the provision I have concluded that the applicant's military service must be the primary cause for the disability. However, the Act also provides that a pension may be awarded if the disability is aggravated by the applicant's military service. In either case, causation must be established and, in the absence of evidence to the contrary, causation is presumed if the injury was incurred during the course [of] the applicant's service. . . .

[53] *In Hunt v. Canada (Minister of Veterans Affairs)* [sic], [1998] F.C.J. No. 377 (QL), at paragraph 9, affirmed by [1999] F.C.J. No. 1601 (QL), this Court held that an applicant must prove, on the balance of probabilities, that the condition from which he is suffering arose during his military service. The Court added that when an applicant is trying to offer such evidence, the Board must accept any uncontradicted and credible evidence:

Although section 39 of the *Veterans Review and Appeal Board Act* requires that the Board accept uncontradicted evidence, this evidence must be credible. The applicant must prove the civil standard that on a balance of probabilities, with the bonus of having this evidence put in the best light possible, his disease was contracted while in the service of his country . . . [emphasis added].

[9] In the introduction to *Robertson Estate v Canada (Minister of Veterans Affairs)*, 2010 FC 233, 360 FTR 306, Justice Richard Boivin summarized the various benefits currently offered to veterans through the pension system under the PA:

[3] Section 39 of the *Pension Act*, R.S., 1985, c. P-6, sets out how the retroactivity of a pension is to be determined. The benefits currently offered by Veterans Affairs Canada (VAC) are organized into four groups: disability pensions; war veterans allowance; benefits under the *Veterans Health Care Regulations* (VHCRs), SOR/90-594 and benefits pursuant to the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, 2005, c. 21.

[4] Disability pensions are provided pursuant to the *Pension Act* and may be provided to serving Members or former Members of the Canadian Forces who have suffered a service-related medical condition.

[10] Over the last few years, Maurice Arial (deceased veteran) and Madeleine Arial (surviving spouse) have taken steps to submit pension applications concerning four different disabilities: hearing loss, thoracic kyphosis (hunchback), disc disease and duodenal ulcers. The applicants had also applied for an attendance allowance, an allowance that can only be paid once a disability pension has been awarded (result in *Arial*, above). The dates of the applicants' first contact with VAC regarding Mr. Arial's various disabilities are as follows:

- March 7, 1996: disability application for recurring duodenal ulcers;
- October 13, 1999: disability application for stomach problems;
- August 11, 2004: disability application for hearing loss, along with an [TRANSLATION] "exploratory" application for an attendance allowance;
- November 9, 2005: disability application for stomach problems;
- November 17, 2006: disability application for lumbar disc disease and thoracic kyphosis.

[11] This application for judicial review concerns the applicants' efforts to obtain a disability pension for the late Maurice Arial's stomach-related problems. Mr. Arial, accompanied by his wife, Madeleine Arial, went to meet with VAC officers for the first time on March 7, 1996, to have his file assessed and to obtain information about his rights as a veteran. At the time, Mr. Arial, who had left school at the age of 12, was 80 years old and suffering from the after-effects of a stroke he had had in January 1987. He walked with a cane, and his face was partially paralyzed. He died on September 25, 2005. After his death, it was Sonia Arial, the applicants' daughter, who was authorized to represent her parents pursuant to an order of Prothonotary Richard Morneau dated March 4, 2011.

III. Legal proceedings

[12] This application for judicial review was filed pursuant to section 18.1 of the *Federal Courts Act*, RS 1985, c F-7, against the decision of the Veterans Review and Appeal Board of Canada dated December 2, 2010, denying the application for reconsideration under subsection 32(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [VRABA] of the decision dated May 14, 2009, regarding retroactive entitlement to a pension for recurring duodenal ulcers.

IV. Facts

[13] The deceased veteran, Maurice Arial, was born on January 8, 1916. He served during the Second World War as a member of the active forces from July 1940 to July 1945. He worked overseas from September 1940 to December 1944 as a stocker in the engine rooms of a number of different vessels.

[14] Mr. Arial was demobilized in 1945, after the War ended. There were medical reports dated May 7, 1944, and February 19, 1945, among others.

[15] On March 7, 1996, Mr. Arial, accompanied by his wife, went to meet VAC officers for the first time to have his file assessed and to obtain information about his rights as a veteran. At the time, Mr. Arial wanted to find out whether he could receive an attendance allowance. Madeleine Arial alleges that the resource person they met with that day informed her husband that he did not qualify for an attendance allowance because the family's income exceeded the eligibility limit. He was allegedly told that there was no point in meeting with a pension officer in this regard.

[16] The couple nevertheless met with a pension officer, and Mr. Arial filled out a form and submitted it to the pension officer (Respondent's Record at pp. 98-101). The pension officer then allegedly told Mr. Arial that he should submit a medical report from his attending physician identifying his exact illness (Applicants' Record at p. 14).

[17] Mr. Arial allegedly met with Dr. Guy Lamontagne on March 11 and May 6, 1996. VAC then apparently requested Mr. Arial's service medical records from the National Archives, and the records were sent to the Québec district office on May 22, 1996 (Respondent's Record at p. 102).

[18] On August 20, 1996, the pension officer sent Mr. Arial a letter reminding him that he had to send in the report required to prepare his disability pension application (Respondent's Record at p. 103).

[19] On September 23, 1996, Madeleine Arial informed the pension officer that the doctor, for reasons unknown to the applicants (who only later found out that the doctor had retired and was therefore no longer performing any of his duties), had refused to co-operate and send them the report requested by VAC. Mrs. Arial alleges that at the time, the officer did not offer them any assistance in this regard. The applicants allege that they were under the impression that they had no choice but to withdraw their application (Respondent's Record at p. 104). At that time, VAC was in possession of the pension form that Mr. Arial had previously filled out, as well as Mr. Arial's service medical records.

[20] On May 30, 1997, Mr. Arial had a second stroke, which left him with serious lingering complications. On October 13, 1999, Mr. Arial appointed his daughter, Sonia Arial, as his representative so that she could submit a duly completed pension application on his behalf. She then allegedly contacted a VAC pension officer for information about the attendance allowance.

[21] In October 1999, Ms. Arial contacted VAC to begin a second disability pension application process (Respondent's Record at pp. 105-106). On October 21, 1999, a pension officer sent Mr. Arial a letter confirming his intention to apply for a pension, as well as an "Application for Disability Benefits" form (Respondent's Record at pp. 107-108). In his letter, the pension officer informed Mr. Arial that he had to provide VAC with a recent medical report

from his doctor in order for his pension application to be processed. The officer sent Mr. Arial a form entitled “Physician’s Statement” and medical benchmark criteria for this purpose. The pension officer also enclosed another letter for Mr. Arial’s doctor, asking the doctor to fill out the “Physician’s Statement” medical questionnaire or submit a medical report with a diagnosis of the nature and extent of Mr. Arial’s disability.

[22] On October 22, 1999, VAC allegedly sent the National Archives another request for Mr. Arial’s service medical records, and the records were sent to the Québec district office the following month.

[23] On November 18, 1999, Sonia Arial sent the following documents to the pension officer responsible for the case: a cover letter, a pension application form labelled [TRANSLATION] “stomach” and a statement from the attending physician. The form and Sonia Arial’s note stated, among other things, that the applicant had repressed his war-related traumatic stress, had suffered trauma to his nervous system and had always been under his doctors’ care for stomach problems (Respondent’s Record at pp. 120-121).

[24] In December 1999, in addition to the 1996 form, VAC had on file the form filled out in 1999, the explanatory letter from Ms. Arial, the Physician’s Statement on gastroesophageal reflux disease [GERD] and the military service medical records.

[25] On November 17, 1999, Dr. Lamontagne requested and obtained Madeleine Arial's consent to have the Centre François Charron and the Hôpital St-François d'Assise disclose Mr. Arial's medical records to him (Respondent's Record at pp. 113-115).

[26] VAC alleges that it did not receive any further medical documentation. On December 29, 1999, the pension officer responsible for the case sent Sonia Arial a letter stating that [TRANSLATION] "an analysis of his service records does not reveal any impairment or condition arising from military service or any injury resulting from a service-related accident" (Applicants Record at p. 307).

[27] Years later, as Mr. Arial's health continued to deteriorate, Sonia Arial allegedly contacted a VAC pension officer again, on August 11, 2004. Even though every pension application she had made so far on behalf of her father had been refused, a pension officer contacted that day allegedly told her that she could submit a pension application for Mr. Arial's hearing loss. On September 27, 2004, Sonia Arial mailed in the pension application form for hearing loss. On June 1, 2005, a favourable decision was rendered regarding Mr. Arial's hearing loss (Applicants' Record at pp. 178-179).

[28] In mid-June 2005, Sonia Arial contacted a disability pension officer by telephone. At that time, Mr. Arial was receiving a total pension of \$886.86 a month. Sonia Arial alleges that the pension officer told her that this was as much as Mr. Arial could apply for and that no other compensation could be awarded.

[29] Sonia Arial alleges that she contacted the Bureau of Pensions Advocates [BPA] on July 22, 2005, being under the impression that her parents' interests had been poorly served thus far.

[30] On September 21, 2005, VAC rendered a decision awarding an allocation allowance, retroactive to September 16, 2005. That decision was submitted for review.

[31] Mr. Arial died on September 25, 2005.

[32] On December 19, 2005, Sonia Arial wrote to VAC, asking that an official decision be made concerning the disability pension application for stomach problems submitted in 1999. She included some additional information with the application, namely a statement by her mother, Madeleine Arial, alleging that Mr. Arial had been treated for stomach ulcers after the Second World War (Respondent's Record at p. 4).

[33] On August 8, 2006, by a decision of the Minister, Mr. Arial's entitlement to a pension for GERD was refused pursuant to subsections 21(1) and 48(3) of the PA (Applicants' Record at pp. 121 et seq). Sonia Arial alleges that this application for GERD in fact overlooked the issue of duodenal ulcers, GERD being a disease caused by duodenal ulcers.

[34] On January 24, 2007, a review panel affirmed the Minister's decision dated August 8, 2006 (Applicants' Record at pp. 125 et seq). The panel admitted that, according to Mr. Arial's loved ones, he had experienced digestive tract problems since serving in the forces. However, the

panel noted that the evidence established that the diagnosis made in 1995 was clearly subsequent to his period of service. The panel remarked that no gastrointestinal problems had been mentioned in his service records, apart from the seasickness which Mr. Arial suffered during his nearly four years at sea.

[35] On October 30, 2007, a pension review panel amended the diagnosis from [TRANSLATION] “gastroesophageal reflux disease” to [TRANSLATION] “recurring duodenal ulcers” and granted a pension of 5/5 for the deceased veteran’s service in the Second World War, pursuant to subsections 21(1) and 48(3) of the PA, effective November 9, 2005, the day the application was deemed to have been submitted. The decision considered, among other things, a medical report dated August 20, 1953; a medical report by Dr. Robert Lepage dated November 4, 1999; and a letter from that same doctor dated February 2, 2007. The doctor concluded that Mr. Arial’s recurring duodenal ulcers dated back to 1940 and that the GERD was a manifestation of these ulcers (Respondent’s Record at pp. 229-230).

[36] On March 20, 2008, VAC rendered a decision assessing the recurring duodenal ulcers at 5%. The decision was referred back for reassessment and finally changed to 20% a year later (Applicants’ Record at pp. 148 et seq).

[37] The decision regarding the effective date was reviewed by a review panel on June 24, 2008. The panel concluded that the pension appeal board’s decision did not require review, considering that the decision contained no error in fact or in law (Applicants’ Record at pp. 154 et seq).

[38] On October 21, 2008, the review panel rendered a decision regarding an application made during Mr. Arial's lifetime and an application by his surviving spouse for hearing loss, dorsal kyphosis and lumbar disc disease. In that review determination, the panel concluded that the pension officer had failed to carry out his statutory mandate under subsection 81(3) of the PA (Applicants' Record at pp. 181 et seq).

[39] On May 14, 2009, a second review of the decision of the pension appeal panel's decision was done. The panel varied the previous decision and agreed that an application had been made in 1996 and that delays beyond the appellant's control had been incurred. The review panel therefore held that under subsection 48(2) and paragraph 56(1)(a.1) of the PA, the effective date would be three years before the day on which the appeal panel awarded the pension in its decision dated October 30, 2007, that is, October 30, 2004. The review panel also agreed that there had been delays beyond the appellant's control and made an additional award of 24 months' pension pursuant to subsection 56(2) of the PA.

[40] On December 2, 2010, the review panel dismissed the applicants' application and refused to review the decision dated May 14, 2009.

[41] On December 16, 2010, Justice Tremblay-Lamer of this court made a consent order concerning the attendance allowance.

V. Decision under judicial review

[42] In the decision dated May 14, 2009, the appeal panel determined that the effective date for the pension for recurring duodenal ulcers would be October 30, 2004, pursuant to paragraph 56(1)(a.1) of the PA, that is, the date three years before the appeal panel decision dated October 30, 2007, plus an additional award of 24 months' pension in accordance with subsection 56(2) of the PA, bringing us to October 30, 2002.

[43] In its review decision dated December 2, 2010, which is the decision under judicial review here, the panel agreed with the findings of the review panel which had disagreed with the argument that the onus was on the pension officer to obtain the supporting information for a compensation application, such as the diagnosis for the condition in question. The review panel concluded that counsel's argument placed too heavy a burden on pension officers.

[44] More specifically, the review panel reached two conclusions: first, VAC officers discharged their duty to provide counselling services under subsection 81(3) of the PA when processing the applicant's disability pension application, to the extent that it was up to the applicant, not the pension officer, to obtain a diagnosis of the impairment in question; second, the determination of the disability pension payment date, October 30, 2004, was consistent with the legal rule set out under paragraph 56(1)(a.1) of the PA (the day three years prior to the day of the appeal panel's decision).

VI. Issues

[45] [1] Did the review panel err in finding that VAC's pension officers had not breached their duties under subsection 81(3) of the PA?

- [2] Did the review panel err in its interpretation of section 39 and/or paragraph 56(1)(a.1) of the PA, in exceptional circumstances, by limiting the effective date of the pension to October 30, 2004 (the day three years prior to the day of the appeal panel's decision dated October 30, 2007)?
- [3] Did the review panel breach its duty to obtain a fair and equitable outcome for the applicants in a timely manner?

VII. Relevant statutory provisions

- [46] Section 2 of the PA stipulates that this Act shall be given a liberal interpretation:

Construction

2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

Règle d'interprétation

2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

- [47] Subsection 5(3) of the Act states the following:

Powers of the Minister

5. (1) Subject to this Act and any other Act of Parliament and to the regulations made under this or any other Act of Parliament,

Ministre

5. (1) Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale ou de leurs règlements, le ministre a tout

the Minister has full power to decide on all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension or other payment under this Act and to the recovery of any overpayment that may have been made.

pouvoir de décision en ce qui touche l'attribution, l'augmentation, la diminution, la suspension ou l'annulation de toute pension ou autre paiement prévu par la présente loi ainsi que le recouvrement de tout versement excédentaire.

...

[...]

Benefit of doubt

Décisions

(3) In making a decision under this Act, the Minister shall

(3) Lorsqu'il prend une décision, le ministre :

(a) draw from all the circumstances of the case and all the evidence presented to the Minister every reasonable inference in favour of the applicant or pensioner;

a) tire des circonstances portées à sa connaissance et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible au demandeur ou au pensionné;

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

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

(c) resolve in favour of the applicant or pensioner any doubt, in the weighing of evidence, as to whether the applicant or pensioner has established a case.

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

[48] Subsection 39(1) and paragraph 56(1)(a.1) of the PA deal with the rule on the retroactivity of the effective date for disability pension applications or surviving spouse benefits:

Date from which disability pension payable

Date à partir de laquelle est payable une pension d'invalidité

39. (1) A pension awarded for disability shall be made payable from the later of

39. (1) Le paiement d'une pension accordée pour invalidité prend effet à partir de celle des dates suivantes qui est postérieure à l'autre :

(a) the day on which application therefor was first made, and

a) la date à laquelle une demande à cette fin a été présentée en premier lieu;

(b) a day three years prior to the day on which the pension was awarded to the pensioner.

b) une date précédant de trois ans la date à laquelle la pension a été accordée au pensionné.

Additional award

Compensation supplémentaire

(2) Notwithstanding subsection (1), where a pension is awarded for a disability and the Minister or, in the case of a review or an appeal under the *Veterans Review and Appeal Board Act*, the Veterans Review and Appeal Board is of the opinion that the pension should be awarded from a day earlier than the day prescribed by subsection (1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension.

(2) Malgré le paragraphe (1), lorsqu'il est d'avis que, en raison soit de retards dans l'obtention des dossiers militaires ou autres, soit d'autres difficultés administratives indépendantes de la volonté du demandeur, la pension devrait être accordée à partir d'une date antérieure, le ministre ou le Tribunal, dans le cadre d'une demande de révision ou d'un appel prévus par la *Loi sur le Tribunal des anciens combattants (révision et appel)*, peut accorder au pensionné une compensation supplémentaire dont le montant ne dépasse pas celui de deux années de pension.

...

[...]

Date from which death pension payable

Date à compter de laquelle la pension pour décès est payable

56. (1) Pensions awarded with respect to the death of a member of the forces shall be payable with effect as follows:

56. (1) La pension accordée par suite du décès d'un membre des forces est payable comme il suit :

...

[...]

(a.1) to or in respect of the member's survivor or child, or to the member's parent or any person in place of a parent who was wholly or to a substantial extent maintained by the member at the time of the member's death, if no additional pension referred to in paragraph 21(1)(a) or (2)(a) was at the time of death being paid in respect of that person or that person is awarded a pension under section 48, from the later of

a.1) dans le cas où le membre ne recevait pas, à son décès, une pension supplémentaire visée aux alinéas 21(1)a) ou (2)a) à l'égard de cette personne ou dans le cas où une pension est accordée en vertu de l'article 48, à cette personne, ou à l'égard de celle-ci, à compter de la date précédant de trois ans celle à laquelle la pension a été accordée ou, si elle est postérieure, la date de présentation initiale de la demande de pension;

(i) the day on which application for the pension was first made, and

(ii) a day three years prior to the day on which the pension was awarded with respect to the death of the member;

[49] Sections 3 and 39 of the VRABA concern the liberal construction rule and the rules of evidence:

Construction

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.

...

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

Principe général

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.

[...]

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) 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.

[50] Section 3 of the *Award Regulations*, SOR/96-66, stipulates the following regarding what an applicant must submit with his or her compensation claim:

INFORMATION

3. An applicant for an award shall provide the Minister with

(a) any documentation necessary to substantiate the applicant's claim;

(b) information on the applicant's domestic status;

(c) any other relevant information; and

(d) an affidavit or statutory declaration attesting to the truth of the information provided.

RENSEIGNEMENTS

3. Le demandeur de compensation doit fournir au ministre :

a) tout document nécessaire à l'appui de sa demande;

b) des renseignements sur sa situation de famille;

c) tout autre renseignement pertinent;

d) un affidavit ou une déclaration solennelle attestant la véracité des renseignements fournis.

VIII. Parties' positions

[51] Sonia Arial submits that VAC breached its duty under subsection 81(3) of the PA, starting with the first pension application, which she states that she submitted on March 7, 1996. She also submits that a second pension application was submitted on October 13, 1999, pursuant to subsection 81(3) of the PA, with the result that there was a cause-and-effect relationship

between it and the unfair treatment Mr. Arial and his wife received. Finally, Sonia Arial submits that the respondent is refusing to interpret section 39 or paragraph 56(1)(a.1) of the PA in a manner consistent with the purpose of that Act in such a situation.

[52] The respondent submits that the period of retroactivity cannot be any longer than what has been awarded. He submits that applications alleged by Sonia Arial are in fact merely steps taken toward submitting applications; moreover, some of the applications were withdrawn by the applicants themselves. The PA provides that it is up to the applicant, not VAC, to submit an application; the applicant remains responsible for providing the Minister with all the documentation required for the application. The respondent also notes that regardless of whether the pension application had been submitted for the first time in 1996 or in 1999, the day three years prior to the day on which the pension was awarded is still the later date (subsection 39(1) and paragraph 56(1)(a.1) of the PA).

IX. Standard of review

[53] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, sets out a choice between two standards of review: reasonableness and correctness. In the present case, the case law has established that the issue of retroactivity is governed by the correctness standard, while the other issues put to the Court are subject to the reasonableness standard:

[32] The parties agree the applicable standard of review to the discretionary decisions of the Appeal Board is reasonableness (*Atkins v. Canada (Attorney General)*, 2009 FC 939, [2009] F.C.J. No. 1159 (QL) at par. 19; *Bullock v. Canada (Attorney General)*, 2008 FC 1117, 336 F.T.R. 73 at par. 13).

[33] However, the issue of retroactivity is a question of statutory interpretation not within the VRAB's particular area of expertise and is subject to a correctness standard (*Atkins* at par. 20; *Canada (Attorney General) v. MacDonald*, 2003 FCA

31, 238 F.T.R. 172; *Dugré v. Canada (Attorney General)*, 2008 FC 682, 170 A.C.W.S. (3d) 643; *Lenzen v. Canada (Attorney General)*, 2008 FC 520, 327 F.T.R. 12).

(*Robertson Estate*, above; also, *Canada (Attorney General) v MacDonald*, 2003 FCA 31, 238 FTR 172 at para 11).

X. Analysis

Preliminary issue

[54] In accordance with Parliament's intention to not exclude from consideration the statements of veterans, submitted, with supporting evidence, and to ensure that the whole of each case is understood as Parliament intended, the Court must first respond to a preliminary issue raised by the respondent before addressing the other issues put to the Court.

[55] Although the respondent submits in the first paragraph of his defence that the Court should ignore paragraphs 2, 4, 6, 19, 37, 49, 55, 56, 57 and 59 of the applicants' memorandum because they deal with irrelevant facts or with arguments that could have been raised in Part III of the applicants' record, the Court finds them relevant and will give them such weight as it deems proper. Otherwise, if dissected or picked apart to the point that it becomes divorced from its purpose, the law loses the intrinsic value for which it was implemented, leading to an outcome where the costs are assessed while disregarding the importance of the value of veterans' service that the law seeks to promote and revere.

(1) Did the review panel err in finding that VAC's pension officers had not breached their duties under subsection 81(3) of the PA?

[56] VAC's duty to provide information under subsection 81(3) of the PA requires that VAC provide applicants with counselling services and assist them in preparing pension applications. On the basis of this definition taken from the statutory provisions, it can immediately be concluded that the duty to inform as framed by the PA certainly does not mean that VAC must assist every person and in every situation, in cases where the applicant concerned does not come forward:

[41] Although VAC has an obligation to make arrangements for the care of veterans depending on their needs and circumstances, the Court notes not all veterans in all circumstances are to be given every benefit. The Court observed in *Krasnick Estate v. Canada (Veterans Affairs)*, 2007 FC 1322, 321 F.T.R. at par. 25 that “[t]here is nothing in the [*Pension Act*] or the [*Award Regulations*] or other Acts or Regulations that requires [VAC] to make specific benefits known to everyone or to certain persons or to be prescient and determine from signs, signals or inferences that some persons may be in need of benefits and if so, what benefits and when” ...

(*Robertson Estate*, above).

[57] However, the facts appear to indicate that this is not the case for the applicants here. The late Mr. Arial, his wife and their daughter, acting as her parents' representative, have all on a number of occasions directly taken many steps to obtain information about possible applications for disability pensions, including two applications which were later withdrawn (in 1996 and 1999). VAC even appears to have mislead the applicants on occasion, telling them several times that they were not entitled to a pension.

[58] For example, in a letter dated December 29, 1999, the pension officer concluded [TRANSLATION] “that an analysis of his service records does not reveal any impairment or condition arising from military service or any injury resulting from a service-related accident”. In

this regard, the respondent, referring to the decision on Mr. Arial's hearing loss, argued that VAC, in 1996, had just undergone a major reform which may in fact have [TRANSLATION] "contributed to an involuntary error that may have caused a certain client, namely, Mr. Arial, our veteran, to not be informed and counselled as he should have been". (Respondent's Memorandum of Fact and Law at para. 99).

[59] Indeed, the decision dated December 2, 2010, is to the effect that [TRANSLATION] "the review panel noted this submission, but in reviewing the facts on record and the authorities you have provided, the review panel must still admit that section 3 of the *Awards Regulations* is sufficient to conclude that there was a communications breakdown with the pension officers in this case. The review panel, as regards the first submission, concludes that no error in law was made" (Decision dated December 2, 2010, Applicants' Record at p. 5). However, in a parallel dealing with Mr. Arial's hearing loss disability, VAC had decided as follows:

[translation] . . . In the circumstances, it is clear that if the interview with the veteran had been pushed further in 1996, when he was already frail, paralyzed on one side, having difficulty speaking and walking with a cane, he would have immediately had access to the services and rights to which he was entitled . . .

(Applicants Record at page 181).

[60] The Court mentions that decision as it appears in the evidence because it had been rendered two years before the decision of December 2, 2010, dealt with steps very similar to those taken by Sonia Arial in this case and, what is more, was raised by the parties. Thus, the decision of October 21, 2008, on the disability pension application relating to Mr. Arial's hearing loss, dorsal kyphosis and lumbar disc disease concluded as follows:

[TRANSLATION]

Finally, the Board finds that this is one of the rare cases where the veteran must be considered to be entitled to the maximum retroactivity in the circumstances. Since the veteran applied to the Department for the first time in 1996 at the age of 80 and had never asked the government for anything when he could have done so long before, the Board is reminded of the words of Justice Harrington in *Melvin MacKenzie (Veteran) and Annie MacKenzie (Surviving Spouse) v. Attorney General of Canada*, in which he stated, “Melvin and Annie always did the right thing by us. When shall we do the right thing by them?” The Board had to ask itself the same question today: Madeleine and Maurice always did the right thing by us. When shall we do the right thing by them?

In the circumstances, the Board not only thanks the veteran posthumously for his service in the Second World War but also awards him the maximum retroactivity permitted by law under the provisions cited above at the beginning of this decision, setting the effective date for the hearing loss at June 1, 2000, and the effective date for the dorsal kyphosis and lumbar disc disease at May 31, 2002.

(Decision dated March 21, 2008, Applicants’ Record at p. 191) .

[61] In this particular case, the Board concluded that VAC staff had in fact been dedicated to carrying out their duties. However, the Board acknowledged that an implementational change in progress may have caused an error to occur, [translation] “and the veteran and his spouse were inadvertently subjected to its appalling consequences” (Decision dated March 21, 2008). The Board’s error is therefore the result of its failure to consider all the facts that could have led it to conclude that the pension officers did not discharge their duty to inform.

(2) Did the review panel err in its interpretation of section 39 and/or paragraph 56(1)(a.1) of the PA, in exceptional circumstances, by limiting the effective date of the pension to October 30, 2004 (the day three years prior to the day of the appeal panel’s decision dated October 30, 2007)?

[62] On the issue of retroactivity, it is paragraph 56(1)(a.1) of the PA that applies; since Mr. Arial is now deceased, it is thus a question of death benefits rather than a disability pension (although, in practice, the amount of the death pension is calculated according to the degree of

Mr. Arial's disability). Paragraph 56(1)(a.1) of the PA provides that a death pension is payable "to or in respect of the member's survivor or child, or to the member's parent or any person in place of a parent who was wholly or to a substantial extent maintained by the member at the time of the member's death, if no additional pension referred to in paragraph 21(1)(a) or (2)(a) was at the time of death being paid in respect of that person or that person is awarded a pension under section 48, from the later of (i) the day on which application for the pension was first made, and (ii) a day three years prior to the day on which the pension was awarded with respect to the death of the member".

[63] It is true that, as argued by Sonia Arial, the decision dated May 14, 2009, seemed to concede that a pension application had in fact been submitted, [TRANSLATION] ". . . since the review panel accepts that a disability pension application was submitted by the veteran while he was still alive, in 1996, for duodenal ulcers, so it is clearly subsection 48(2) and not subsection 48(3) that applies in the specific circumstances of this case" (Decision dated May 14, 2009, Applicants' Record at p. 99). However, the submission date for the initial pension application has little bearing on this case, since that date can only serve as a starting point for a retroactive pension award when it is later than the day three years prior to the day the pension was awarded (*Atkins v Canada (Attorney General)*, 2009 FC 939, 352 FTR 316).

[64] Section 39 of the PA is intended as a legislative safeguard. As Justice Boivin remarked in *Robertson*, above, the rationale for this provision is that an application should normally have been heard within three years of being submitted to VAC. However, 11 years passed between the

first contact with VAC on March 7, 1996, regarding the duodenal ulcers and the resulting pension award dated October 30, 2007.

[65] Moreover, it is not this Court's role to determine if the pension should be retroactive to May 7, 1996, or not; rather, the Court must determine whether the case should be referred back to a new panel so that the facts and law can be reconsidered should an error in fact or in law have been committed. It will be up to this new panel to determine whether the retroactive effect of the award should be extended back to March 7, 1996. Clearly, Parliament does not speak in vain. Since Parliament has provided that VAC pension officers owe veterans certain obligations to provide them with the information they seek about pension applications, a breach of these obligations must carry consequences.

[66] The applicants argue the VAC's breach of its statutory mandate, starting on March 7, 1996, is the cause of their injury, given that all of the documentation had been on file since nearly the very beginning of the process, except for Dr. Lepage's report. The applicants cite *Nelson v Canada (Attorney General)*, 2006 FC 225, 389 FTR 183, to the effect that it "is accepted law that the provisions of an enactment cannot be changed by a regulation or policy" (at para. 31).

[67] As in *MacKenzie v Canada (Attorney General)*, 2007 FC 481, 311 FTR 157, the Court is asking this question: "Section 56 of the *Pension Act* is very limiting. Does the term 'administrative difficulties' really describe what happened here?" (at paragraph 45). In that

decision, Justice Sean Harrington then went on to draw a parallel with negligent misrepresentation:

[46] The words uttered over the years to Mrs. MacKenzie and to her daughter appear to have been negligent misstatements made by persons in authority. Whether or not they apply in context, tortious liability for negligent misrepresentation and the contractual doctrine of unequal bargaining power are certainly thought provoking.

[68] The statutory framework will perhaps not allow a larger number of retroactive years to be awarded to the applicants. However, the fact that the panel failed to recognize that Mr. Arial had suffered serious difficulties over the last 11 years demonstrates that there is an error in fact and in law. The present case involves an issue of human dignity. The inviolability of the human person is a principle that must be upheld and respected. In this regard, it is relevant to reproduce a passage from *MacKenzie*, above, in which the debated centered on subsection 39(2) of the PA:

[55] Pensions to veterans, and their dependants, under the *Pension Act* should be contrasted with pensions payable under the *Canada Pension Plan*, which applies to all who have financially contributed thereto. Subsection 66(4) requires the Minister, if satisfied that “as a result of erroneous advise or in administrative error . . . any person has been denied . . . a benefit or portion thereof . . . “ to take such remedial action as appropriate to place that person in the position he or she would have been in had the erroneous advice or administrative error not been given or made.

[56] Unfortunately, there is no such provision in the *Pension Act*. While it may be said that the contributors to the Canada Pension Plan have paid money for their benefits, members of the Canadian Forces and their families have paid with their lives, their blood, and their sacrifices.

[57] While the *Pension Act* is silent, section 34 of the *Veterans Review and Appeal Board Act* contemplates compassionate awards, although the amount of such an award may be limited in amount. Furthermore, on 4 April 2007, the Prime Minister, in speaking to scores of former soldiers, said his government was delivering on an election promise to ensure veterans get the respect they deserve from Ottawa. An ombudsman’s office was created, with a bill of rights, which will apparently allow Veterans Affairs to ensure each veteran is treated with the “fairness, dignity and respect to which he or she is entitled.”

[58] Melvin and Annie always did the right thing by us. When shall we do the right thing by them? [Emphasis added.]

(3) Did the review panel breach its duty to obtain a fair and equitable outcome for the applicants in a timely manner?

[69] The review panel's role is to ensure that pension entitlement is given an interpretation that is as generous and as consistent with the purpose of the relevant legislation as possible. Furthermore, we must never forget the debt of respect we owe those who have served Canada with devotion and dignity, and we must be ever mindful of the inviolability of the human person and of the vulnerability of individuals who served Canada on missions where they were ready to lay down their lives for their country.

[70] This difficult situation was caused entirely by the failings of VAC employees. Because of these failings, the applicants still find themselves waiting for answers. Furthermore, the Arial family did not receive a pension for Mr. Arial's stomach problems until after his death. This application therefore did not come from an individual seeking to exploit the system for her own financial benefit; rather, it was brought by someone who is seeking recognition of the fact that her husband gave up part of his health in service of Canada. This recognition is sought posthumously and is intrinsically linked to her husband's memory. Moreover, the pension claimed could represent a significant sum for the widow of Mr. Arial. As Sonia Arial stated in an email filed in evidence, her father lived in a mobile home (Respondents' Record at p. 105).

[71] One cannot ignore the fact that the Arial family made repeated requests to VAC for help obtaining the required documents for their pension application, or for at least a clear and precise

explanation of what had to be submitted in this case, which was not necessarily just the report by Mr. Arial's doctor at the time.

[72] The challenge invoked by the Court is not necessarily one of result, but of means, with respect to the way people are treated. If only VAC staff had given Sonia and Madeleine Arial clearer information and had taken the time to carefully study the case with the sensitivity owed to vulnerable individuals who are unaware of their rights because they lack the education, a sensitivity that is required for the work the staff performs in service of Canada. Just as veterans looked after the interests of Canada, Canada must look after their interests today.

[73] The panels may have followed the letter of the law, but not its spirit. People who serve in the armed forces should receive every assistance possible when they come home. The type of situation that occurred here should never be allowed to happen, even in cases of administrative changes and adjustments. This was not only a question of long delays, but of incorrect information given to the applicants and a clear lack of support, such that the Arial family was not always able to make the best decision regarding their own case, particularly in withdrawing their applications in 1996 and 1999.

[74] A soldier's morale and devotion to duty are always important ingredients in any mission, so it is important that the government offer soldiers the same support in return once they have completed their missions. As Justice Danièle Tremblay-Lamer stated in *Arial*, above, in the context of section 38 of the PA:

[34] More recently, the Federal Court of Appeal unanimously reiterated that it is important for the *Pension Act* to be "liberally construed and interpreted", both

because it is “social welfare legislation” and because of its express wording (*Canada (Attorney General) v. Frye*, 2005 FCA 264, (2005) 338 N.R. 382 at paras. 14-20).

[75] Even should the government not award the applicant everything claimed, these people should not have been treated this way, and there is a difference between following the letter of the law and following its spirit. Otherwise, we would be no better than machines churning out decisions based on the letter of the law and not on its spirit as well.

XI. Conclusion

[76] VAC’s breach of the duty owed to Mr. Arial degraded the quality of life of this veteran. The Court refers the case back to the Veterans Review and Appeal Board so that the Board can review its responsibilities toward the Arial family. It will be up to the Board to determine what a major breach of its duty to inform is worth, in accordance with the legislation and the case law and bearing in mind that fact that it is not merely suggested but is explicitly stated in the PA itself that VAC must provide a counselling service to applicants and pensioners “with respect to the application of this Act to them . . . and . . . assist applicants and pensioners in the preparation of applications” (subsection 81(3) of the PA). The Board has an obligation to stay true to its mandate to respect this statement and not treat it like a superficial public relations ploy.

[77] For these reasons, the application for judicial review is allowed, and the review application is referred back to a differently constituted review panel for reconsideration on the basis of these reasons.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed, and the review application be referred back to a differently constituted review panel for reconsideration on the basis of these reasons.

“Michel M.J. Shore”

Judge

Certified true translation
Michael Palles

FEDERAL COURT

COURT SOLICITORS OF RECORD

DOCKET: T-250-11

STYLE OF CAUSE: MAURICE ARIAL
(VETERAN – DECEASED)
MADELEINE ARIAL
(SURVIVING SPOUSE)
v THE ATTORNEY GENERAL OF CANADA

**JUDICIAL REVIEW DEALT WITH BY VIDEO CONFERENCE BETWEEN
OTTAWA, ONTARIO, AND QUÉBEC, QUEBEC, ON JULY 7, 2011**

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: July 8, 2011

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