Federal Court  Cour fédérale

Date: 20130228

Docket: T-1961-11

Citation: 2013 FC 208

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 28, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ALAIN GRENIER
(VETERAN)

Applicant

and

ATTORNEY GENERAL
OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Grenier served in the Canadian Forces Regular Force from 2004 to 2010. These six years of service were very difficult for him. Because of problems of stress and anxiety he was unable to pursue his occupation of a military police officer or remain in the Forces. That result, however, is not the issue here. The question is rather whether Mr. Grenier is entitled to receive a disability benefit.

[2] The Veterans Review and Appeal Board confirmed the decision of the Veterans Review and Appeal Board Entitlement Review Panel to grant Mr. Grenier a two-fifths award for an adjustment disorder with mixed mood from an aggravated pre-existing medical condition. This is the judicial review of that decision.

[3] Since I will allow the judicial review on the ground that the rules of procedural fairness were not followed in two specific respects, it is sufficient to briefly summarize the facts.

I. THE FACTS

[4] Mr. Grenier submitted a first application for employment to the Canadian Forces in 2002, but for some reason he chose not to enrol until 2004. At that time he had to fill out a medical examination report to be admitted into the Canadian Forces and become a military police officer. He was older than most of the other candidates and had already served a few years as a municipal police officer in Quebec.

[5] According to the *Report of Physical Examination* (*for enrolment*) of 2002, Mr. Grenier obtained the highest air factor besides that reserved for military officers aspiring to exceptional duty such as astronaut or aircrew training.

[6] In 2003, he participated in a badminton tournament for police officers and firefighters in Barcelona, where he won the bronze medal. However, he returned from it stressed and anxious.

[7] In 2004, when he again applied to enrol in the Canadian Forces, he had to undergo a new examination and again received the same factor. He stated that he consulted Dr. Patrice Trottier on returning from Barcelona. He authorized Dr. Trottier to disclose medical information about him. According to the *Medical Information Disclosure Request Form* filled out by Dr. Trottier, Mr. Grenier was given a diagnosis of [TRANSLATION] "adjustment disorder with anxiety" for which he received psychological treatment. Further, the doctor wrote in it that on November 28, 2003, the problem was resolved.

[8] Dr. Trottier had to answer the following questions:

> [TRANSLATION]
>
> Would it be possible, in your answer, for you to provide us with details on the following aspects:
>
> …
>
> E. Any restrictions with respect to physical and mental activities, given that a member of the Canadian Forces sometimes works under conditions of intense physical/mental stress;
>
> F. Risk of reoccurrence

In response to question E, he stated "no restriction" and to question F "no".

[9] On receiving this report, the Canadian Forces doctors approved Mr. Grenier's enrolment.

[10] However, problems arose. Mr. Grenier had difficulties finding his place in a military environment. He felt that he had been harassed because of his age and experience, in particular his experience as a police officer. In fact, his instructor was of the opinion that Mr. Grenier was not fit

for the occupation of military police officer. Following a grievance, he succeeded in having this decision set aside by the Canadian Forces Provost Marshal and was therefore readmitted to the Military Police Academy. In a letter addressed to Mr. Grenier's lawyer, the Provost Marshal stated [TRANSLATION] "I am sorry about the anxiety that this process may have caused LS Grenier and I thank you for bringing this matter to my attention."

[11] Mr. Grenier also experienced stress and anxiety related to issues that had nothing to do with the Forces, such as his relationship with his spouse and a dispute relating to repairs following the purchase of a used car.

[12] Mr. Grenier's situation continued to worsen. He had to be hospitalized, he also had physical ailments and his physical fitness score plummeted to the point where he was clearly no longer fit for military service.

[13] One particular incident should be noted: a complaint was filed by one of Mr. Grenier's colleagues against his personal hygiene. He was very troubled by this and consulted Dr. Labonté of Canadian Forces Base Borden Mental Health Services, who had already treated him previously. Here is the summary that is included in Dr Labonté's consultation report of March 16, 2007:

> [TRANSLATION]
> … He said that he took part in a filmed discussion relating to a complaint filed against him by one of his classmates about his hygiene. He feels distressed about it; he feels that he finds himself in the same situation that he experienced when he first started his course, when he filed a grievance, which was allowed. He feels specifically targeted and does not understand why the situation is happening again. …

[14] Several medical reports included in the file suggest that Mr. Grenier's problems of stress and anxiety were longstanding.

II. THE DECISIONS

[15] The first decision was rendered in September 2008 in the name of the Minister of Veterans Affairs. Since the Minister was not persuaded that Mr. Grenier's condition was as a result of factors associated with his military service, he refused to grant him an award under section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, which states that:

45. (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from	45. (1) Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :
(a) a service-related injury or disease; or	a) soit par une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service.	b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.
(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.	(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une indemnité d'invalidité.

[16] However, during a departmental review in November 2009, a two-fifths award was granted to him under this section. The decision contains the following note: [TRANSLATION] "The evaluation reports indicate that your psychological condition is related to several factors, including stress associated with the grievance process, interpersonal conflicts and personal factors." It also noted a previous consultation with a psychologist who had diagnosed Mr. Grenier with an adjustment disorder with anxiety in 2003. However, the fact that this same report also noted full recovery was overlooked.

[17] A third decision was rendered in June 2010. The Veterans Review and Appeal Board, Entitlement Review Panel, confirmed the granting of the two-fifths award.

[18] The final decision, which is the subject of this judicial review, was rendered in October 2011 by the Veterans Review and Appeal Board, Entitlement Review Panel. This decision reconfirmed the granting of the two-fifths award.

[19] I am of the view that the outcome of this review relies on the following two passages:

> [TRANSLATION]
> …
>
> The copy of the video recording from February 21, 2007 (AD-Annex-G2) was not accepted because the Board does not accept video testimony but only written documents for appeal hearings.
>
> …
>
> As for the application for verification of medical information from January 2004, noted in the Department's decision, the appellant remembered that Dr. Trottier had prepared a letter on his enrolment stating that he was in good mental health and that he could pursue a career in the army. Despite his many attempts to obtain this letter, he

> was not able to because the doctor's records are no longer available (AD-G1).

[20] It is not clearly explained why the Appeal Board was not able to obtain Dr. Trottier's report; in any case, there is no question that it is included in the record submitted to this Court.

III. THE ACT

[21] Counsel for the applicant offered meticulous arguments with respect to the fact that the decision was generally unreasonable and that the statutory presumptions that could have benefitted Mr. Grenier were excluded.

[22] The first presumption on which the applicant relies is provided in section 51 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*.

[23] Section 51 reads as follows:

Subject to section 52, if an application for a disability award is in respect of a disability or disabling condition of a member or veteran that was not obvious at the time they became a member of the forces and was not recorded on their medical examination prior to enrolment, the member or veteran is presumed to have been in the medical condition found on their enrolment medical examination unless there is	Sous réserve de l'article 52, lorsque l'invalidité ou l'affection entraînant l'incapacité du militaire ou du vétéran pour laquelle une demande d'indemnité a été présentée n'était pas évidente au moment où il est devenu militaire et n'a pas été consignée lors d'un examen médical avant l'enrôlement, l'état de santé du militaire ou du vétéran est présumé avoir été celui qui a été constaté lors de l'examen médical, sauf dans les cas suivants :

(a) recorded evidence that the disability or disabling condition was diagnosed within three months after enrolment; or	a) il a été consigné une preuve que l'invalidité ou l'affection entraînant l'incapacité a été diagnostiquée dans les trois mois qui ont suivi l'enrôlement;
(b) medical evidence that establishes beyond a reasonable doubt that the disability or disabling condition existed prior to enrolment.	b) il est établi par une preuve médicale, hors de tout doute raisonnable, que l'invalidité ou l'affection entraînant l'incapacité existait avant l'enrôlement.

[24] No evidence has been entered in the record in the three months following his enrolment and Mr. Grenier argues that the medical evidence could have been sufficient to establish, beyond a reasonable doubt, that his disabling condition was pre-existing.

[25] Mr. Grenier also relies on other presumptions. In particular, those set out by sections 3 and 39 of the *Veterans Review and Appeal Board Act*, which provide that:

3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.
39. In all proceedings under this Act, the Board shall	39. Le Tribunal applique, à l'égard du demandeur ou de

	l'appelant, les règles suivantes en matière de preuve :
(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[26] The respondent argues that the applicant is in essence asking the Court to re-weigh the evidence. The applicable standard of review is reasonableness and the decision under review clearly meets the criteria identified in this respect by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL), specifically at paragraph 47. Moreover, while the decision contains no explicit reference to the noted presumptions, the evidence on the record conclusively indicates that Dr. Trottier's medical opinion in 2003 with respect to the applicant's mental fitness for military service was shown to be wrong. In short, it is clear from the record that the decision is reasonable, although the reasons do not include all the arguments or details that Mr. Grenier would have preferred (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador* (*Treasury Board*), 2011 SCC 62, [2011] 3 SCR 708, [2011] SCJ No 62 (QL), at para 16).

IV. DECISION

[27] Considering the provisions of section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, above, which cover both service-related diseases and non-service-related diseases and non-service-related diseases that were aggravated by service, I asked myself aloud, during the hearing, what impact this distinction could truly have had on the award granted Mr. Grenier. It is likely—and, if applicable, possibly unjustified—that the Board was of the view that were it not for Mr. Grenier's pre-existing condition, the stress related to the grievance process would not have resulted in disability.

[28] It is possible—and here I stress the hypothetical nature of my statement—that the Board's decision, considering the record before it, was reasonable. However, I need not decide on that issue, since the Board's decision was based on an incomplete record. The question in this case is not what elements were contained in the record submitted to the Board, but rather to determine which ones should have been included (*Tremblay v Canada* (*Attorney General*), 2005 FC 339, [2005] FCJ No 421 (QL)).

[29] Questions of procedural fairness arise from natural justice: this Court is under no obligation to defer to the Board whose decision was challenged for such reasons (*CUPE v Ontario* (*Minister of Labour*), 2003 SCC 29, [2003] 1 SCR 539).

[30] Natural justice requires that the parties are given the fair opportunity to make their case or present their defense and requires that decisions be rendered based on a complete record.

[31] The Board, by its refusal to allow Mr. Grenier the opportunity to present the DVD recording of the alleged harassment, misinterpreted its own rules. If it is true that in procedural matters, tribunals are masters of their own procedure, the fact remains that procedure must respect the principles of natural justice.

[32] As Lord Denning stated in *Selvarajan v Race Relations Board*, [1976] 1 All ER 12, at page 19:

> In recent years we have had to consider the procedure of many bodies who are required to make an investigation and form an opinion… In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. …The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure.

In short, the rules of procedure could not be given an interpretation that is inconsistent with the principles of natural justice.

[33] Section 28 of the *Veterans Review and Appeal Board Act* provides as follows:

28. (1) Subject to subsection (2), an appellant may make a written submission to the	28. (1) Sous réserve du paragraphe (2), l'appelant peut soit adresser une déclaration

appeal panel or may appear before it, in person or by representative and at their own expense, to present evidence and oral arguments.	écrite au comité d'appel, soit comparaître devant celui-ci, mais à ses frais, en personne ou par l'intermédiaire de son représentant, pour y présenter des éléments de preuve et ses arguments oraux.

[34] The question of whether a DVD recording is [TRANSLATION] "documentary evidence" was raised.

[35] In this respect, sections 19 et seq. of the *Canada Evidence Act* address "documentary evidence". Under subsection 31.8, the documents include any "electronic document". There is no doubt that a DVD is an electronic document.

[36] In *Yates v Canada* (*Attorney General*), 2004 FC 1159, 262 FTR 309, [2004] FCJ No 1384 (QL), at paragraph 13, Justice Simpson stated the following:

> The applicant thought that the section meant that neither he nor the Attorney General could use new evidence on the Appeal before the Board. He believed that the Board breached the section when it relied on the POW Report. However, what the section means, in my view, is simply that, although an appellant may make oral or written argument, no oral evidence will be permitted - it must be in documentary form such as affidavits or experts' reports.

[37] The quoted paragraph fully applies to the issue of the DVD. In this case, Mr. Grenier was denied a fair opportunity to make his arguments. The Board found that he was not a victim of harassment; the viewing of the video recording could have had an impact on this finding and, thus, on the awarding of a disability pension.

[38] Mr. Grenier attempted, through his affidavit, to submit the DVD to this Court. Prothonotary Morneau ordered that the DVD and the portion of Mr. Grenier's affidavit referring to it be struck from the record. I acknowledge that his order essentially relates to the issue of administration of justice, particularly to evidence submitted that was not on the tribunal record. In my view, the question is not whether the DVD should have been admitted before this Court, but rather, as in *Tremblay*, above, whether it should have been admitted into evidence before the Board.

[39] Further, the Board's rules of practice regarding exhibits and attachments specifically provides that additional evidence may include audio recordings, video recordings, CDs and DVDs:

> [TRANSLATION]
> Statements, documents, recordings, video tapes, CDs, DVDs, photos, Internet materials or any other materials used to argue or support a claim and that was not on the claimant's record prior to the current decision.

[40] Another problem with the impugned decision is that Dr. Trottier's report was not on the record on which the Board based its decision. This report is a key element with respect to the statutory presumptions concerning the applicant.

[41] Further, if Dr. Trottier's report was not available, the question becomes how the Board can state that [TRANSLATION] "Doctor Trottier had prepared a letter at his enrolment indicating that he was in good mental health and that he could pursue a career in the army". The only reference to this report in the certified tribunal record is in the *Departmental Review*, where it simply states the following: [TRANSLATION] "you saw a psychologist for an adjustment disorder with anxiety in 2003…". No reference was made to Dr. Trottier's conclusion regarding Mr. Grenier's fitness for

military service. Had the Board relied on information that had not been placed in the record or provided to Mr. Grenier? If so, it would be a further breach of procedural fairness in this case.

[42] There is a presumption that the Tribunal has read all the information on the record and that they considered it all. However, this presumption is called into question when a document on the record contains information that contradicts the Board's finding. Dr. Trottier's report is clearly different from the Board's finding. In this case, it had an obligation to explain why it chose to give no weight to the report. Tacit inference is not sufficient (*Cepeda-Gutierrez v Canada* (*Minister of Citizenship and Immigration*) (1988), 157 FTR 35, [1998] FCJ No 1425 (QL)). In this case, the report was not even in the tribunal record. It sometimes happens, in a written motion filed under section 369 of the *Federal Courts Rules*, that a judgment is based on an incomplete record. When such a discrepancy is revealed, justice requires that the matter be reconsidered.

ORDER

FOR REASONS GIVEN;

THE COURT ORDERS that:

1. The judicial review of the decision of the Veteran's Review and Appeal Board, appeal panel, rendered on October 20, 2011, is allowed, with costs.

2. The matter is referred back to a differently constituted panel for redetermination, in view of these reasons.

"Sean Harrington"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1961-11
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PLACE OF HEARING:	MONTRÉAL, QUEBEC
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APPEARANCES:

Mark Phillips Marc Unger	FOR THE APPLICANT
Sébastien Gagné	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais Lawyers Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT