

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140930

Docket: A-290-13

Citation: 2014 FCA 215

**CORAM: NOËL J.A.
SCOTT J.A.
BOIVIN J.A.**

BETWEEN:

**MAURICE ARIAL (veteran – deceased),
MADELEINE ARIAL (surviving spouse)**

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Québec, Quebec, on September 16, 2014.

Judgment delivered at Ottawa, Ontario, on September 30, 2014.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**SCOTT J.A.
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REASONS FOR JUDGMENT

NOËL J.A.

[1] The surviving spouse of Maurice Arial, who is representing herself, is appealing on her own behalf and on behalf of her deceased husband, Maurice Arial (the appellants), from a decision of the Federal Court whereby Justice Roy (the Federal Court judge) dismissed an application for judicial review of a decision of a review panel of the Veterans Review and Appeal Board (the Board) holding that the appellants had been sufficiently compensated, under

sections 39 and 56 of the *Pension Act*, R.S.C., 1985, c. P-6 (the Act), for breaches of the duty of the Department of Veterans Affairs of Canada (VAC) to provide Maurice Arial with a counselling service.

[2] The issue that emerges from the arguments raised by the parties is whether the Federal Court judge erred in concluding that the decision of the Board not to refer the matter back to the Minister of Veterans Affairs (the Minister) was reasonable.

[3] For the reasons that follow, I conclude that the Board's decision was reasonable and that the appeal should therefore be dismissed.

[4] The provisions of the Act that are relevant to the analysis that follows are reproduced in an appendix to these reasons for judgment.

RELEVANT FACTS

[5] The late Maurice Arial was a veteran who had served in the Second World War. He was the spouse of Madeleine Arial and the father of Sonia Arial, who is representing the appellants in these proceedings.

[6] On March 7, 1996, the appellants filed a disability pension application for the stomach problems that Mr. Arial had been experiencing since his military service. This led to a series of exchanges between VAC representatives and the appellants over the years from 1996 to 2005, during which the appellants were allegedly misinformed or even misled.

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

[8] On August 8, 2006, the Minister issued a decision denying his entitlement to a pension, and this decision was confirmed by a review panel of the Board on January 24, 2007, on the basis of a lack of a causal link between Mr. Arial's stomach problems and his military service.

[9] On October 30, 2007, a review panel of the Board awarded him a pension, effective November 9, 2005. However, the Board refused to make an additional award.

[10] The appellants applied for a review of that decision, submitting that the effective date of the pension should be changed and that an additional award should be made. The appellants' application was originally rejected on June 24, 2008, but they finally prevailed on May 14, 2009, when a second panel of the Board agreed to backdate the pension to October 30, 2004, and to grant them the maximum additional award of 24 months' pension pursuant to subsection 56(2) of the Act because of the administrative difficulties they experienced.

[11] On December 2, 2010, a third Board panel rejected a new application for review filed by the appellants, concluding that VAC officers did not break their duty to provide a counselling service under subsection 81(3) of the Act when processing Mr. Arial's disability pension application, and that the disability pension payment date, October 30, 2004, should be confirmed.

[12] Dissatisfied with this latest decision, the appellants filed an application for judicial review in the Federal Court.

[13] In a decision dated July 8, 2011, Justice Shore, writing for the Federal Court, concluded that VAC broke its duty to inform under subsection 81(3) of the Act, which obliges VAC to, “on request, . . . 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”, and that this breach had caused a delay in paying the pension (Reasons at para. 61). Justice Shore therefore allowed the application for judicial review and ordered that the matter be referred back to the Board for reconsideration of the retroactivity of the pension in light of the breach of the duty to inform. The relevant passages from the reasons of Justice Shore read as follows:

[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.

...

[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.

...

[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

[Emphasis added.]

[14] In accordance with the reasons of Justice Shore, the Board rendered a new decision on January 4, 2012, and that decision is the subject of the application for judicial review underlying this appeal. Noting that the appellants were receiving the maximum awards allowed by the Act, the Board confirmed the maximum retroactivity period—which set the pension’s effective date at October 30, 2004—as well as the maximum additional award equivalent to two years’ pension.

[15] The Board also rejected the appellants’ argument that the case should be referred to the Minister with regard to the payment of an additional award under section 85 of the Act to compensate for the breaches found by Justice Shore.

[16] On February 3, 2012, the appellants filed an application for judicial review against that decision of the Board, which application was dismissed by the Federal Court, hence this appeal.

DECISION OF THE FEDERAL COURT

[17] Dealing first with the context of the application, the Federal Court judge noted that the decision under review concerned, for all intents and purposes, the follow-up to the decision of Justice Shore. On this point, the Federal Court judge referred to paragraphs 65 and 76 of the reasons of Justice Shore and observed that “the Court did not pre-order a conclusion by the reconsideration panel”, instead merely referring the matter back for reconsideration (Reasons at paras. 23 and 24).

[18] The Federal Court also noted that the appellants conceded in the memorandum that they filed with the Court that the Board had awarded them the maximum provided under the Act, thus rendering its decision unassailable in this regard (Reasons at paras. 27, 28 and 36).

[19] The Federal Court judge therefore turned to the appellants' alternative argument, according to which the Board should have remedied VAC's failure to provide a counselling service by referring the matter back to the Minister in accordance with section 85 of the Act (Reasons at paras. 29 et seq.). The Federal Court judge noted that section 85 does not allow the Minister to circumvent the pension payment limits in the Act (Reasons at para. 34):

[34] A provision such as section 85 cannot be read as allowing a minister to do whatever he or she wants as if the Act did not exist. Parliament chose to limit the state's liability for pension payments in legislation that deals with pensions. The power under section 85 must be read on the basis of this express limitation. Section 85 cannot be interpreted as giving the minister the outrageous power of ignoring the Act such as providing an award for an alleged fault that the Board itself cannot consider. The very wording of subsection 56(2) seems to describe the situation in this case, and the Board has already awarded the maximum that the Act provides for these cases.

[20] Furthermore, the Board can refer to the Minister only those applications for awards over which it has jurisdiction, that is, "a pension, compensation, an allowance or a bonus payable under this Act" (Reasons at para. 33). Similarly, the Minister can only consider applications for awards payable under the Act (Reasons at para. 35). Therefore, in view of this reasoning, the appellants' argument comes up against a considerable obstacle: "It is one of two things: either the fault is in the range of what is described in subsection 56(2), and the Act establishes its own remedy or the fault is of a different kind, and we are then in the area of civil liability where the Board has no jurisdiction" (Reasons at para. 35).

[21] At the end, the Federal Court judge held that the Board correctly refused to refer the matter back to the Minister on the basis of section 85 of the Act, particularly since Justice Shore had in no way ordered that remedy in his decision (Reasons at para. 37). Referring a matter back to the Minister is a discretionary remedy that is within the expertise of the Board and therefore subject to review on the reasonableness standard (Reasons at para. 37). For these reasons, the Federal Court judge was of the opinion that the Board's decision had all the attributes of a reasonable decision and should therefore stand.

POSITIONS OF THE PARTIES

[22] The appellants submit that the Federal Court judge erred in concluding that the Board's decision complied with the reasons of Justice Shore, and in failing to consider precedents where the Minister had intervened (Appellants' Memorandum at pp. 14 to 20).

[23] On this point, the appellants refer to several passages from Justice Shore's reasons suggesting that VAC's breaches must have consequences and that the Board had to remedy the mistreatment that the appellants had suffered. According to the appellants, Justice Shore had an administrative law remedy in mind, not a civil remedy (Appellants' Memorandum at pp. 15 to 17).

[24] The appellants also refer to a series of decisions supporting the Minister's discretion to consider applications for awards (Appellants' Memorandum at pp. 17 to 19).

[25] The appellants also cast doubt on the Board's impartiality, although they do not specify any conduct that might give rise to a reasonable apprehension of bias. Instead, the appellants evoke the [TRANSLATION] "unfavourable position" in which they were placed, from a legal standpoint, as well as the shortcomings in the services made available to veterans (Appellants' Memorandum at pp. 17 to 19).

[26] The Attorney General of Canada (the Attorney General), on the other hand, submits that the appeal should be dismissed. He argues that the Federal Court judge made no reviewable errors in concluding that the Board's decision not to refer the case to the Minister was reasonable. On this point, the Attorney General essentially invokes the reasoning of the Federal Court judge.

ANALYSIS AND DECISION

[27] As was recently reiterated by this Court, "this Court's role in an appeal of a decision rendered on an application for judicial review is well established: it is to determine whether the judge used the appropriate standard of review and applied it correctly" (*Desgagnés Transarctik Inc. v. Canada (Attorney General)*, 2014 FCA 14, [2014] F.C.J. No. 65 at para. 34, citing *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraphs 43 and 44; *Canada (Revenue Agency) v. Telfer*, 2009 FCA 23, [2009] F.C.J. No. 71 at paragraph 18; *Canada (Revenue Agency) v. Slau Limited*, 2009 FCA 270, [2009] F.C.J. No. 1194 at paragraph 26 and *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56, [2011] 2 F.C.R. 221 at paragraph 84).

[28] The only issue in this appeal is whether the Board erred in choosing not to refer the decision to the Minister. This is a discretionary decision, which calls for a measure of deference on the part of a reviewing court (*Robertson v. Canada*, 2010 FC 233, [2010] F.C.J. No. 263). The Federal Court judge recognized this in reviewing the Board's decision on a standard of reasonableness (Reasons at para. 37).

[29] The Federal Court judge therefore correctly identified the applicable standard of review. The remaining question is whether he applied it properly.

[30] In my view, the Federal Court judge correctly concluded that the Board's refusal to apply section 85 of the Act was reasonable. Let us recall that, in ordering the reconsideration, Justice Shore did not dictate any remedy to the Board, but instead ordered it to consider the difficulties that the appellants had faced in their contacts with VAC. As the Federal Court judge pointed out, the Board, in its decision dated May 14, 2009, gave the appellants the maximum awards available under subsections 39(2) and 56(2) of the Act, which are specifically intended to compensate claimants for any "administrative difficulty beyond the control of the [appellants]" (Reasons at para. 37).

[31] The appellants submit that the Minister could have offered them additional awards if the Board had agreed to refer the matter to him. The Federal Court judge reached the opposite conclusion, and in my view, his analysis is free of error. Section 85 of the Act does not provide an independent remedy for a breach of the duty to provide a counselling service, as set out in subsection 81(3) of the Act. Sections 39 and 56, when read together with the definition of

“award” appearing in section 3 of the Act, set the parameters within which the Minister’s power of reconsideration may be exercised, and the Minister could not act outside them.

[32] The imperative nature of these provisions is confirmed by the case law, which is well settled. In this regard, I think it is helpful to reproduce the key passages from *Leclerc v. Canada (Attorney General)*, 1998 CanLII 7445 (FC) at paragraphs 18 to 21, as reproduced in *Cadotte v. Canada (Veterans Affairs)*, 2003 FC 1195, [2003] F.C.J. No. 1513:

[18] Just as the provisions of the Act must be interpreted in such a way as to maximize payments for the benefit of pensioners, so subsection 39(1) is clear as to its effects in the context of this case. The purpose of that section is to limit the retroactive effect of any pension awarded to a maximum of three years. The only exception to this limitation is the one set out in subsection 39(2), which allows the Board to make an additional award in an amount not exceeding the cumulative annual value of two years pension.

[19] The limitation thus imposed on the retroactive payment of pensions is made necessary by the legislative scheme established for the benefit of pensioners. The effect of the scheme is that once a pension is awarded it is always reviewable, and in the course of such reviews the Board may have regard to any new evidence and amend its earlier findings of fact or of law in the event that it considers them to be erroneous. The reason why Parliament instituted a scheme that allows pensioners to present any new fact or legal argument, at any time, that could affect the amount of the pension paid to them, is to maximize the benefit derived from pensions and also to recognize the fact that disabling physical conditions may change over time. From the standpoint of the payer, however, this means that the financial burden associated with the pension scheme is never ascertained with finality, and it is in this context that Parliament deemed it advisable, through subsection 39(1), to put a time limit on the retroactive effect of awarding a pension.

[20] The applicant points out that in this case, what led to his full pension being awarded was the correction of an error of law, and that he is in no way responsible for the fact that the years went by before his entitlement was recognized. The fact that the cause of the delay is not attributable to the applicant does not mean that subsection 39(1) may be disregarded, as it applies to any pension regardless of the circumstances in which it is awarded.

[Emphasis added.]

[33] The pension that may be paid under subsection 56(1) upon the death of a veteran is subject to the same limits as the pension paid to a veteran's survivor under subsection 39(1). The only exception is provided in subsections 39(2) and 56(2), which authorize an additional payment equal to two years' pension. This regime applies to any form of award payable under the Act—including a pension, compensation, an allowance or a bonus, according to the definition appearing in section 3—such that the maximum award paid under the Act cannot, in any event, ever exceed the three-year retroactivity period (subsections 39(1) and 56(1)) and the additional award equivalent to two years' pension (subsections 39(2) and 56(2)). The appellants were indeed granted the maximum amounts under both these headings. *MacKenzie v. Canada (Attorney General)*, 2007 FC 481, [2007] F.C.J. No. 645, a Federal Court case, quoted at length in Justice Shore's reasons, has no bearing on these parameters.

[34] Therefore, the Federal Court judge's refusal to order that the matter be referred to the Minister is necessarily reasonable because even if he had done so, the appellants could not have been awarded any additional amount.

[35] As can be seen from the preceding, although Justice Shore's judgment did not guarantee any results, it did create false hopes, which is unfortunate, given the state of the law, as the maximum amounts that may be paid to the appellants under the Act could not be any clearer. In these circumstances, the decision of the Attorney General not to require the appellants to pay costs in the appeal is both honourable and appropriate.

[36] Finally, I note that the allegation of bias made against the Board is clearly unfounded, as no conduct raising a reasonable apprehension of bias was shown.

[37] For the above reasons, I would dismiss the appeal, without costs.

“Marc Noël”

J.A.

“I agree
A.F. Scott J.A.”

“I agree
Richard Boivin J.A.”

Certified true translation
François Brunet, réviseur

RELEVANT STATUTORY PROVISIONS

Pension Act (R.S.C., 1985, c. P-6)

Definitions

3. (1) In this Act,

“award” « compensation » “award” means a pension, compensation, an allowance or a bonus payable under this Act;

Date from which disability pension payable

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

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

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

Additional award

(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

Loi sur les pensions (L.R.C. (1985), ch. P-6)

Définitions

3. (1) Les définitions qui suivent s'appliquent à la présente loi.

« compensation » Pension, indemnité, allocation ou boni payable en vertu de la présente loi.

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

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

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

Compensation supplémentaire

(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

Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension.

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;

Additional award

Compensation supplémentaire

(2) Notwithstanding subsections (1) and (1.1), where a pension is awarded with respect to the death of a member of the forces, or an increase to that pension is awarded, 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 or the

(2) Malgré les paragraphes (1) et (1.1), s'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 ou l'augmentation devrait être accordée à partir d'une date antérieure, le ministre ou, dans le cadre d'une

increase, as the case may be, should be awarded from a day earlier than the day prescribed by subsection (1) or (1.1) 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 or two years increase in pension, as the case may be.

Application made to Minister

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,

demande de révision ou d'un appel prévus par la Loi sur le Tribunal des anciens combattants (révision et appel), le Tribunal peut accorder au pensionné une compensation supplémentaire, à concurrence d'un montant équivalant à deux années de pension ou d'augmentation.

Première étape

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.

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

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

Permission of Board required

85. (1) The Minister may not consider an application for an award that has already been the subject of a determination by the Veterans Review and Appeal Board or one of its predecessors (the Veterans Appeal Board, the Pension Review Board, an Assessment Board or an Entitlement Board) unless

(a) the applicant has obtained the permission of the Veterans Review and Appeal Board; or

(b) the Veterans Review and Appeal Board has referred the application to the Minister for reconsideration.

Autorisation préalable du Tribunal

85. (1) Le ministre ne peut étudier une demande de compensation déjà jugée par le Tribunal ou un de ses prédécesseurs — le Tribunal d'appel des anciens combattants, un comité d'évaluation, un comité d'examen ou le Conseil de révision des pensions — que si le demandeur a obtenu l'autorisation du Tribunal ou si celui-ci lui a renvoyé la demande pour réexamen.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-290-13

STYLE OF CAUSE: MAURICE ARIAL (veteran - deceased), MADELEINE ARIAL (surviving spouse) v. ATTORNEY GENERAL OF CANADA

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BOIVIN J.A.

DATED: SEPTEMBER 30, 2014

APPEARANCES:

Sonia Arial FOR THE APPELLANTS

Benoît de Champlain FOR THE RESPONDENT

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