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Date: 20070525

Docket: A-158-06

Citation: 2007 FCA 200

CORAM: CHIEF JUSTICE RICHARD

LINDEN J.A.

RYER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

LARRY W. NELSON

Respondent

Heard at Winnipeg, Manitoba, on May 7, 2007.

Judgment delivered at Ottawa, Ontario, on May 25, 2007.

REASONS FOR JUDGMENT BY:

RICHARD C.J.

CONCURRED IN BY:

LINDEN J.A.

RYER J.A.

Date: 20070515

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REASONS FOR JUDGMENT

-

[1] This is an appeal of the decision of Justice O’Keefe of the Federal Court dated March 15, 2006 (2006 FC 225), granting an application for judicial review of a decision by the Veterans Review and Appeal Board (“VRAB”) dated November 15, 2004. The VRAB refused the respondent’s request for reconsideration of a decision of the former Veterans Appeal Board (“VAB”) of April 20, 1995, that denied the respondent pension disability benefits under subsection 21(2) of the *Pension Act*, R.S.C. 1985, c. P-6 (the “Pension Act” or the “Act”).

Summary of the Facts

[2] There is no dispute over the facts giving rise to this proceeding. Briefly, the respondent served in the Canadian Regular Forces from August 13, 1970, until his honourable discharge on July 17, 1978. During the course of his service, the respondent worked in the infantry for several years and drove an armoured personnel carrier.

[3] Prior to joining the armed forces, the respondent was medically examined and it was found that he did not have any hearing problems. However, an undated audiogram, taken at about the time of his discharge, indicated that the respondent had some high frequency hearing loss in his left ear. The respondent believes that the hearing loss was due to excessive noise exposure during the course of his military service, from performing tasks such as firing small arms and missiles, driving personnel carriers, and working on aircraft.

[4] The respondent's hearing continued to worsen after his discharge and, in 1991, he was diagnosed with bilateral moderately severe high frequency sensorineural hearing loss. The respondent subsequently applied for a hearing loss disability pension on the basis of his 1991 diagnosis. His application was denied on June 7, 1993, by the Canadian Pension Commission on the ground that the respondent's hearing loss at the time of his discharge was not sufficiently severe to be considered a disability as described in a report of the Pensions Medical Advisory Division dated May 20, 1993.

[5] The respondent appealed this decision to the Entitlement Board of the Canadian Pension Commission, which denied the appeal on February 28, 1994. The respondent then appealed that decision to the VAB, which also denied the appeal, on April 20, 1995.

[6] The respondent continued to consult with doctors and, as a result of audiometry tests and medical opinions regarding the cause of the respondent's hearing loss, the respondent filed a request for reconsideration of his pension application on August 31, 2004.

[7] By letter dated November 15, 2004, the VRAB denied the respondent's request for reconsideration on the basis that the result of the respondent's audiogram did not satisfy the requirement of what constitutes a hearing disability according to the Veterans Affairs Table of Disabilities, Chapter 09, ("Table of Disabilities"). The VRAB stated the following at pages 2 to 3 of its decision:

The proffered evidence is credible enough, but none of it addresses the relevant issue in the case, which was that the Appellant did not have a disability level hearing loss at the time of his discharge from the Canadian Armed Forces.

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the case, which was that the Appellant did not have a disability level hearing loss at the time of his discharge from the Canadian Armed Forces.

The policy followed by the Department of Veterans Affairs dictates that if the recorded decibel losses at discharge do not meet the minimum level accepted by the Minister as a disability, the claimed condition is not pensionable.

While Ministerial or Departmental policies regarding entitlement do not normally restrict the jurisdiction of the Veterans Review and Appeal Board, that is not the case with the Minister's Policy on Hearing Loss. The hearing loss policy is written and included as part of the Veterans Affairs Canada Table of Disabilities, which document has legislative authority.

... While the Board recognizes that some decibel losses were recorded within the Appellant's military service, and while it recognizes that excessive noise exposure within that service was at least a partial cause of those decibel losses and, therefore, of the Appellant's present-day hearing loss disability, it is bound by the legislative authority of the hearing loss policy which states, in part:

If the audiogram on release from service does not meet the requirements for hearing loss disability, any hearing loss demonstrated on subsequent audiograms is not considered due to service-related noise exposure and, therefore, pension entitlement is not normally awarded.

The VRAB therefore denied the respondent's request for reconsideration.

[8] The respondent brought an application for judicial review of the VRAB's refusal to reconsider its earlier decision. The applications judge allowed the application by order dated March 15, 2006. The appellant now appeals the applications judge's decision to this Court.

Relevant Statutory Provisions

[9] For our purposes, the relevant provisions of the Pension Act are set out below.

CONSTRUCTION

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

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.

INTERPRETATION

Definitions

3. (1) In this Act,

...

"disability" means the loss or lessening of the power to will and to do any normal mental or physical act;

...

"pension" means a pension payable under this Act on account of the death or disability of a member of the forces, including a final payment referred to in Schedule I;

DÉFINITIONS ET INTERPRÉTATION

Définitions

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

...

«invalidité» La perte ou l'amointrissement de la faculté de vouloir et de faire normalement des actes d'ordre physique ou mental.

...

«pension» Pension payable en vertu de la présente loi en raison du décès ou de l'invalidité d'un membre des forces, y compris un paiement définitif visé à l'annexe I.

POWERS OF THE MINISTER

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, 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.

Additional duties

(2) The Governor in Council may, by order, confer on the Minister duties like those under subsection (1) in respect of pensions or other payments authorized by any other Act of Parliament or by the Governor in Council.

Benefit of doubt

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

(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;

(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

POUVOIRS DU MINISTRE

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 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.

Pouvoir équivalent

(2) Le gouverneur en conseil peut, par décret, conférer au ministre un pouvoir équivalent au sujet des pensions ou autres paiements autorisés au titre de toute autre loi ou par lui-même.

Décisions

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

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

c) tranche en sa faveur toute incertitude quant au bien-

(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.

Decisions shall be made expeditiously

(4) Decisions of the Minister shall be made as informally and expeditiously as the circumstances and considerations of fairness permit.

...

PART III

PENSIONS

...

Service in militia or reserve army and in peace time

21(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;

...

PENSIONS FOR DISABILITIES

Pension in accordance with extent of disability

35. (1) Subject to section 21, the amount of pensions for disabilities shall, except as provided in subsection (3), be determined in accordance with the assessment of the extent of the disability resulting from injury or disease or the aggravation thereof, as the case may be, of the applicant or pensioner.

...

How extent of disability assessed

(2) The assessment of the extent of a disability shall be

fondé de la demande.

Procédure

(4) Dans la mesure où les circonstances et l'équité le permettent, le ministre prend ses décisions sans formalisme et en procédure expéditive.

...

PARTIE III

PENSIONS

...

Milice active non permanente ou armée de réserve en temps de paix

(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :

a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

...

PENSIONS POUR INVALIDITÉ

Montant conforme au degré d'invalidité

35. (1) Sous réserve de l'article 21, le montant des pensions pour invalidité est, sous réserve du paragraphe (3), calculé en fonction de l'estimation du degré d'invalidité résultant de la blessure ou de la maladie ou de leur aggravation, selon le cas, du demandeur ou du pensionné.

...

based on the instructions and a table of disabilities to be made by the Minister for the guidance of persons making those assessments.

Estimation du degré d'invalidité

(2) Les estimations du degré d'invalidité sont basées sur les instructions du ministre et sur une table des invalidités qu'il établit pour aider quiconque les effectue.

Relevant Policy Guidelines

[10] The relevant portions of the Veterans Affairs Table of Disabilities, Chapter 09, Ears and Hearing, are reproduced below.

Old Table of Disabilities (1995 Edition) – Chapter 09

A disability is established:

- i. when the Pure Tone Average (PTA)¹ over the 500, 1000, 2000 and 3000 hertz frequencies is 25 decibels or more for either ear;

or

- ii. when the above criteria is not met, and there is a loss of 50 decibels or more at the 4000 hertz frequency in both ears.

Il y a invalidité :

- i. lorsque le seuil d'audition moyen (SAM)¹ est de 25 décibels ou plus, aux fréquences de 500, 1 000, 2 000 et 3 000 hertz, dans l'oreille droite ou l'oreille gauche;

out

- ii. lorsque le requérant ne répond pas aux critères précités, et que la perte d'audition est de 50 décibels ou plus à la fréquence de 4 000 hertz dans les deux oreilles.

Noise- induced hearing loss claims under subsection 21(2) of the Pension Act:

Where there is no audiogram during service or on release, it should be demonstrated medically that the current loss is, in fact, a noise- induced one. This determination should be made by a departmental adjudicator who has examined the result of a current audiometric test and has been given the factual history of the applicant. The adjudicator will also consider any other medical evidence on file.

The evidence should show that the loss arose out of, was directly connected with or was aggravated by service (e. g. significant service- related noise exposure that seems reasonably to be the cause of the current disability).

In cases where there is an audiogram on release and it shows a noise- induced hearing loss, full entitlement may be considered:

- a. if there is evidence of significant service- related noise exposure; and
- b. there is no evidence of pre- enlistment hearing

Demande de pension pour surdit  attributable   l'exposition au bruit aux termes du paragraphe 21 (2) de la Loi sur les pensions

Lorsque aucun audiogramme n'a  t  pass  au cours du service militaire ou au moment de la lib ration, il doit  tre  tabli m dicale­ment que la surdit  est attribuable   l'exposition au bruit. Seul un arbitre du Minist re qui a examin  le r sultat d'un examen audiom trique r cent et qui a consid r  les ant c dents m dicaux du requ rant peut d terminer si tel est le cas. L'arbitre  tudiera aussi la preuve m dicale au dossier.

La preuve doit d montrer que la perte d'audition est attribuable ou li e directement au service ou qu'elle a  t  aggrav e par l'exposition au bruit pendant le service (p. ex. la preuve doit  tablir qu'il y a eu une exposition consid rable au bruit durant le service militaire et que l'on peut conclure que celle-ci est la cause de l'invalidit  actuelle).

Lorsqu'un audiogramme pass  au moment de la lib ration r v le une perte d'audition due au bruit, on peut envisager la pleine pension :

loss or of other contributing factors (e. g. an audiogram showing post- discharge deterioration, medical opinions to the effect that age or non- service noise exposure are factors, etc.).

Partial entitlement may be considered if there is evidence of pre- enlistment hearing loss or of other contributing factors (e. g. an audiogram showing post- discharge deterioration, medical opinions to the effect that age or non- service noise exposure are factors, etc.).

If the audiogram on release from service does not meet the requirements for hearing loss disability, any hearing loss demonstrated on subsequent audiograms is not considered due to service- related noise exposure and therefore, pension entitlement is not normally awarded.

In any event, each individual case should be considered on its own merits.

- a. si, selon la preuve, il y a eu exposition considérable au bruit au cours du service;
- b. si rien ne confirme l'existence de la perte d'audition avant l'enrôlement ou d'un facteur qui en serait la cause (p. ex. un audiogramme démontrant une détérioration après la libération, des avis médicaux selon lesquels l'âge ou l'exposition au bruit en dehors du service sont des facteurs, etc.).

On peut envisager d'accorder une pension partielle lorsque, d'après la preuve, le requérant souffrait déjà de surdit   avant de s'enr  ler et qu'il existe un ou plusieurs facteurs contributifs (p. ex. un audiogramme montrant une d  t  riation apr  s la lib  ration, des avis m  dicaux selon lesquels l'  ge ou l'exposition au bruit en dehors du

service sont des facteurs, etc.).

Si l'audiogramme effectu   au moment de la lib  ration est n  gatif, toute perte d'ou  e   tablie par un audiogramme ult  rieur ne peut   tre imput  e    l'exposition au bruit reli  e au service et ne donne habituellement pas droit    une pension.

Chaque cas doit   tre   tudi   en toute objectivit  .

Analysis

[11] The issue before us on this appeal involves a question of law and, more specifically, the interpretation of the word “disability” in subsection 3(1) of the Pension Act.

[12] The Pension Act is the source of law for the award of disability pensions to members of the forces. Section 2 provides that the Act shall be liberally construed and interpreted. It recognizes the 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 services and to their dependants. Subsection 5(3) stipulates the rules of evidence which apply to any decision taken by the Minister under the Act.

[13] The term “disability” or “disabilities” appears in many sections of the Act. Subsection 3(1) defines “disability” as follows:

"disability" means the loss or lessening of the power to will and to do any normal mental or physical act;

«invalidit   » La perte ou l'amointrissement de la facult   de vouloir et de faire normalement des

actes d'ordre physique ou mental.

[14] Pursuant to subsection 21(2) of the Act, a member of the forces is entitled to a pension if it can be shown that the disability arose out of or was directly connected with military service. Once the member of the forces has established that the disability arose out of military service, an assessment of the extent of the disability must then be made to determine the amount of the disability pension.

[15] Subsection 35(2) of the Act provides that the assessment of the extent of a disability must be based on the instructions and a table of disabilities to be made by the Minister for the guidance of persons making those assessments. The Table of Disabilities, Chapter 09 – Ears and Hearing, are guidelines established by Minister of Veterans Affairs pursuant to subsection 35(2) of the Act. They are provided for the guidance of physicians and surgeons to promote a uniform standard of assessment: *King v. Canada (Attorney General)* (2000), 182 F.T.R. 226 at para. 17 (T.D.), aff'd (2000) 261 N.R. 93 (F.C.A.).

[16] As noted by the applications judge, the VRAB relied on the guidelines to determine whether the respondent met the definition of disability in subsection 3(1) of the Act. It considered that its interpretation of the term “disability” in that subsection was governed by the Minister’s guidelines on hearing loss as reflected in the Table of Disabilities.

[17] The applications judge found that there was an inconsistency between the definition of “disability” in subsection 3(1) of the Act and Chapter 09 of the Table of Disabilities:

FCA/CAF In my view, section 3 of the Pension Act means that an applicant would have a disability if his or her ability to hear was lessened or lost. Section 9.01 on the other hand, only permits a disability to be established if certain levels of hearing loss are established. This is inconsistent with the definition of disability in the Pension Act which provides that an applicant has a disability if his or her ability to hear is lessened.

As noted earlier, when there is a conflict between a statutory provision (section 3 of the Pension Act) and a provision of subordinate legislation or policy, the Act prevails. In the present case, the Minister established the Veterans Affairs Table of Disabilities, Ears and Hearing, pursuant to section 35 of the Pension Act. Accordingly, the definition of “disability” contained in section 3 of the Pension Act is the prevailing definition [paragraphs 34-35].

[18] As such, the applications judge concluded that the VRAB made an error of law in failing to apply the definition of “disability” contained in subsection 3(1) of the Act. He stated the following:

there was clearly an error of law made by the previous tribunal in regard to the definition of “disability”, the VRAB had the statutory mandate under section 111 of the Veterans Review and Appeal Board Act to determine whether or not it should reconsider the earlier decision. The VRAB committed a reviewable error by ignoring this error of law in determining whether or not to reconsider the earlier decision. The VRAB did not dispute that the applicant did suffer some hearing loss during his military service which was a least partially caused by noise exposure within that military service. There is no question that the Minister can establish and use a table to assess the extent of a disability,

but to determine whether or not there is a disability, section 3 of the Pension Act applies [paragraph 38].

[19] The applications judge correctly found that the VRAB committed an error of law by relying on the provisions of the Table of Disabilities to determine if the respondent had a disability rather than applying the definition of “disability” contained in subsection 3(1) of the Act.

[20] On appeal, the appellant submits that, had the applications judge considered the French version of the Act together with the English version, he would have come to a different conclusion. The appellant argues that “[t]he only consistent meaning in each of the two versions of s. 3 of the *Pension Act*, requires that ‘disability’ be read to mean that a ‘normal mental or physical act’ is the ability to hear normally.”

[21] I note that the definition of “disability” contained in subsection 3(1) of the Act dates back to 1920 and that counsel have not drawn to my attention any case where it has been suggested that there is an inconsistency between the two versions.

[22] The difference between the English and French versions is grammatical; the word “normal” in the English version is used as an adjective whereas the word “normalement” in the French version is used as an adverb. By focusing on this grammatical variation, the appellant is attempting to create a conflict between the two versions in order to narrow the scope of the definition of “disability”. However, in my view, the variation between the texts makes no practical difference to the proper interpretation of the term. As the applications judge concluded, “an applicant would have a disability if his or her ability to hear was lessened or lost” (paragraph 34).

[23] Even if there is a variation between the English and French versions, a purposive interpretation of the Act would support the applications judge’s conclusion. The proper approach to statutory construction is to adopt the interpretation that accords with the true meaning, spirit and intent of the enactment and best ensures the attainment of its object. In *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 618, the Supreme Court of Canada held that “[i]t is an established principle of interpretation in Canada that French and English texts of legislation are deemed to be equally authoritative [...] and where there is a discrepancy between the two, it is the meaning which furthers the purpose of the legislation which must prevail [...]” See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[24] In this case, section 2, which was added to the Act in the early 1970s, requires that the provisions of that Act be liberally construed and interpreted to recognize Canada’s obligation to provide compensation to those members of the forces who have been disabled or have died as a result of military

service. Section 5 of the Act is also aimed at making the application process as informal and expeditious as possible, requiring the Minister to draw every reasonable inference in favour of the applicant and to resolve any doubt in favour of the applicant when weighing the evidence.

[25] The applications judge did not err in law in his interpretation of the term “disability” in section 3 of the Pension Act.

[26] Accordingly, the appeal will be dismissed with costs.

"J. Richard"

Chief Justice

“I agree

A.M. Linden J.A.”

“I agree

C. Michael Ryer J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-158-06

APPEAL FROM A JUDGMENT OF THE HONOURABLE JOHN A. O'KEEFE DATED MARCH 15, 2006, CITATION: 2006 FC 225.

STYLE OF CAUSE: THE ATTORNEY GENERAL OF CANADA v. LARRY W. NELSON

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: May 7, 2007

REASONS FOR JUDGMENT BY: RICHARD C.J.

CONCURRED IN BY: LINDEN J.A. & RYER J.A.

DATED: May 25, 2007

APPEARANCES:

Mr. Kevin Staska

FOR THE APPELLANT

Mr. Dean G. Giles

FOR THE RESPONDENT

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SOLICITORS OF RECORD:

John H. Sims, Q.C.

FOR THE APPELLANT

Deputy Attorney General of Canada

Ottawa, Ontario

Fillmore Riley

FOR THE RESPONDENT

Winnipeg, Manitoba