Federal Court  Cour fédérale

Date: 20160113

Docket: T-807-16

Citation: 2017 FC 47

Ottawa, Ontario, January 13, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

PETER BRIAN STOYEK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 of a decision dated March 24, 2016 of the Entitlement Reconsideration Panel [the ERP] of the Veterans Review and Appeal Board [the VRAB] upholding its decision as an Entitlement Appeal Panel [the EAP] of April 22, 2015. The ERP confirmed that the Applicant was eligible to receive an Exceptional Incapacity Allowance [EIA],

pursuant to section 72 of the *Pension Act*, RSC 1985 c P-6 [the Act, or *Pension Act*] as of March 1, 2011, rather than February 17, 2009, as argued by the Applicant.

[2] To receive an EIA under section 72 of the Act, the Applicant must satisfy two criteria. First, he must be "in receipt" of a Class 1 pension as that term is used in section 72. Second, he must suffer an "exceptional incapacity" under the Act. It is common ground that the earliest date of suffering an exceptional incapacity as a factor entitling an EIA [which for ease of reference to timing issues that predominate this matter, I describe as the "EIA suffering date"] cannot precede the date of receipt of a Class 1 pension ["the pension date"]. In other words, the pension date becomes the delimiting date for determining the commencement date for paying an EIA, [which for ease of reference I call the "EIA date" to distinguish it from the "EIA suffering date"]. The issue at hand is to determine the appropriate EIA date, which in turn is based upon the determination and application of the EIA suffering and pension dates.

[3] The pension date depends on the interpretation of when the Applicant was "in receipt" of his Class 1 pension [the receipt date]. He was awarded a Class 1 pension on March 25, 2010 ["the decision date"], but this decision was deemed effective back to February 17, 2009 ["the effective date" from which payments were made]. The Applicant claims that the correct interpretation of "receipt" date is the effective date, while the Respondent argues that it is reasonably the decision date of the pension.

[4] The significant issue in this matter that transcends the Applicant's particular circumstances is whether EIA payments should be delimited by the earlier effective date from

which the pension is paid, or the later decision date when it is awarded. For example, if the Respondent's argument is accepted, and even if the Applicant would be found to have suffered an exceptional incapacity before the decision date of his Class 1 pension, the decision date would prevail to determine the EIA date. The result would deny the Applicant, and all pensioners in similar circumstances, an allowance for a period during which they suffered an exceptional incapacity.

[5] Secondly, the Applicant argues that if reasonably assessed, his EIA suffering date was at least as far back as February 17, 2009, being also claimed as the limiting date of the effective date of his Class 1 pension. The Respondent argues that the evidence reasonably establishes that the Applicant's EIA suffering date did not commence before suffering from kidney cancer. It is agreed that, in this case, his EIA suffering date would be on March 1, 2011, after the pension date in either case.

[6] Because both the pension date of being in receipt of a Class 1 pension and the EIA suffering date are in play, three possible outcomes are foreseeable, as follows:

- the EIA suffering date and pension date are February 17, 2009 [the EIA date is then February 17, 2009, as argued by the Applicant];

- the EIA suffering date is February 17, 2009 but the pension date is March 25, 2010 [the EIA date is the subsequent pension date of March 25, 2010 – the Panels' decision would be modified to this date]; and

- regardless of the earlier pension dates, the EIA suffering date is March 1, 2011 [the EIA date is the EIA suffering date of March 1, 2011, as found by the Panels].

[7] The Court dismisses the application. In doing so it upholds the ERP's reconsideration of the EAP's decision that the EIA date is March 1, 2011 as representing a reasonable assessment of the EIA suffering date [the third scenario]. Conversely, it concludes that the EAP and ERP [together the Panels] unreasonably interpreted the receipt date of a Class 1 pension under section 72 as that of the decision date. The only reasonable interpretation of a Class 1 pensioner being "in receipt of" his or her pension is the effective date. This is also the pension application date from which pension payments are calculated to commence.

II. Background

[8] The Applicant is a veteran of the Royal Canadian Mounted Police [RCMP] who retired in January 2010.

[9] Since 2007, the Applicant has been awarded assessments for tinnitus, cervical disc disease, lumbar disc disease, and, finally, post-traumatic stress disorder [PTSD] and Major Depressive Disorder [MDD]. It is his PTSD and MDD assessment that resulted in the Applicant receiving a total assessment over 98% and satisfying the first section 72 criterion upon being awarded a Class 1 pension. The Applicant submitted his application with respect to PTSD and MDD on February 17, 2009 [his pension application date]. An interim assessment dated July 29, 2009 brought his total assessment to 68%. A further assessment dated March 25, 2010 increased

his PTSD and MDD assessment, bringing his total assessment to 107% and satisfying the first section 72 criterion. The effective date of this assessment for the purpose of calculating pension payments, however, was February 17, 2009, his pension application date.

[10] On October 29, 2012, the Applicant completed and submitted his application for an EIA. On December 17, 2012, the Department awarded the Applicant his EIA at the Grade 3 level effective October 29, 2012, the date of his EIA application.

[11] On review of this decision, the Entitlement Review Panel decided, in a decision dated July 5, 2013, to award the Applicant an EIA at the Grade 2 level, but upheld the effective date of October 29, 2012. On July 2, 2014, the EAP upheld this decision [the 1st Appeal Decision].

[12] On August 28, 2014, the Applicant brought an application for judicial review of the 1st Appeal Decision before this Court. Pursuant to a Consent Order dated February 27, 2015 [the Consent Order], the matter was remitted back to the EAP for redetermination with directions that the 2006 Table of Disabilities be applied to the decision, that the EIA date be the earliest that the Applicant establishes that he satisfied the two section 72 criteria. The date the Applicant applied for an EIA was found to be irrelevant to the determination.

[13] On April 22, 2015, further to the Consent Order, the EAP found the Applicant's EIA date to be March 1, 2011 [the 2015 Decision]. It interpreted being "in receipt of" a Class 1 pension as the decision date of the pension, March 25, 2010. However, the EIA date was determined based

on the EAP's assessment of the Applicant's EIA suffering date as March 1, 2011, when he began to suffer significant symptoms in relation to his kidney cancer.

[14] On March 24, 2016, in what is the impugned decision [the 2016 decision], the ERP denied the Applicant's application for reconsideration of the 2nd Appeal Decision, thereby upholding the EAP's decision.

III. Relevant Legislation

[15] The relevant provisions of the *Pension Act* and *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRABA*] as well as relevant regulations and policies are provided in the annex.

IV. Issues

[16] The application raises the following issues:

1. Was the Panels' interpretation of the "receipt date" of a Class 1 pension reasonable?

2. Was the ERP's assessment of the Applicant's exceptional incapacity date reasonable?

V. Standard of Review

[17] The Applicant cites case law regarding the standard of review applicable to interpretive decisions of an EAP applying a standard of correctness to the alleged errors of law, including assessing the date the Applicant was in receipt of a Class 1 pension (*Cole v Canada (Attorney General)*, 2015 FCA 119 at paras 50-53; *Arial v Canada (Attorney General)*, 2010 FC 184 at para 17 and *Phelan v Canada (Attorney General)*, 2014 FC 56 at para 25). However, the standard of review for a reconsideration decision under section 32 of the *VRABA*, has been determined to be that of reasonableness, regardless of whether it relates to the interpretation of a provision of the *Pension Act* or to a question of fact (*Newman v Canada (Attorney General)*, 2014 FCA 218 at paras 11-13 [*Newman*]; *Thomson v Canada (Attorney General)*, 2015 FC 985 at paras 35-36; *McAllister v Canada (Attorney General)*, 2014 FC 991 at paras 38-40 [*McAllister*]; *Cossette v Canada (Attorney General)*, 2011 FC 416 at paras 11-12).

[18] Justice De Montigny reviewed the jurisprudence on this issue in the *McAllister* decision at paras 38-40, as follows:

> [38] Prior jurisprudence has held that the standard of review for a reconsideration decision by the VRAB is reasonableness: *McAllister*, at para 30; *Bullock v Canada (Attorney General)*, 2008 FC 1117 at paras 11-13, 336 FTR 73; *Rioux v Canada (Attorney General)*, 2008 FC 991 at paras 15 and 17, [2008] FCJ No 1231; *Dugré v Canada (Attorney General)*, 2008 FC 682 at para 19, [2008] FCJ No 849; *Lenzen v Canada (Attorney General)*, 2008 FC 520 at para 33, 361 FTR 16; *Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21, 375 FTR 13.
>
> [39] The question of whether the VRAB gave proper effect to section 39 of the *VRAB Act* also attracts a standard of reasonableness (*Wannamaker v Canada (Attorney General)*, 2007 FCA 126 at para 13, 361 NR 266).

> [40] As such, in reviewing the VRAB's decision on a standard of reasonableness, the Court should not interfere if the decision is transparent, justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. It is not up to a reviewing court to reweigh the evidence that was before the officer: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59, [2009] 1 SCR 339.

[19] Justice Dawson, at paragraph 13 of *Newman*, set out that in light of section 32 of the *VRABA*, "a reconsideration decision by an Appeal Panel is not reasonable if its initial decision was based on an error of law or fact that should have been corrected on reconsideration and was not."

[20] This being said, a reasonableness review may sometimes look similar to a correctness review in situations where there is a narrow range of reasonable options, for example when a question of statutory interpretation leaves only one single reasonable option (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38).

I. Analysis

A. *Was the Panels' interpretation of the "receipt date" of a Class 1 pension reasonable?*

(1) Construction Principles Applicable to the Interpretation of the *Pension Act*

[21] A succinct statement of the principles of statutory interpretation may be found in the British Columbia Court of Appeal decision of *R v Appulonappa*, 2014 BCCA 163, authored by Madam Justice Neilson, at paragraphs 57 and 58 as follows:

> [58] The pre-eminent rule of statutory interpretation, repeatedly endorsed by the Supreme Court, is Driedger's "modern principle": *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 26. This provides:
>
> > [T]he words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [59] The process of purposive analysis, discussed in Chapter 8 of Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), is another integral tool in ascertaining the legislative objective of a statutory provision. This exercise is directed to identifying the object of the legislation under review and, ultimately, to ensuring that proper attention is paid to an interpretation that best attains this object. Legislative purpose may be established by direct evidence, such as explicit descriptions of purpose in the legislation itself or in its legislative history, or in other authoritative sources. It may also be established indirectly, by reference to extrinsic materials that provide a factual basis from which an inference as to legislative purpose may be drawn. These materials may include parliamentary commissions or debates; statements by government departments that administer the legislation; domestic decisions with precedential value; authoritative academic articles; the legislative text and scheme; and examination of the mischief that the provision is designed to cure.
>
> [Emphasis added]

[22] The exercise of determining the purpose of the *Pension Act* is aided by an "explicit description of purpose in the legislation itself". Section 2 directs that the provisions of the Act are to 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 […] may be fulfilled" [emphasis added]. In the Court's view, this provision implies that any ambiguity in the Act regarding compensation of members of the forces determined to be disabled should be resolved in favour of the claimant, unless other overriding policy considerations apply.

[23] It is also noted that policy statements and how the statute has been administered may be useful inferential evidence of the purpose of legislation.

(2) The Decision Date is an Unreasonable Interpretation of Being "in Receipt of" a Class 1 Pension under section 72

(a) *Deficiencies in the interpretive methodology applied by the Panels*

[24] Section 72 appears to have been drafted with the view to establishing the conditions for the receipt of an EIA, without regard to prescribing the principles fixing the date when payment of the allowance should commence. That is the drafters of the provision omitted to establish a date when the Class 1 pension was considered to commence for the purpose of determining when an EIA should commence. Similarly, they did not address the date from which an EIA should be paid for someone suffering an exceptional incapacity, which was the subject matter of the first Federal Court Consent Order. Nevertheless, the issue of the commencement date for an EIA, i.e. the EIA date, must be determined. This issue necessarily involves fixing the commencement date of a Class 1 pension, given that it represents the delimiting date used to determine the EIA date. This in turn involves attributing a meaning to the words "in receipt of" as the term most aptly applicable for determining the pension date.

[25] The EAP decision stated that "the word 'receipt' was used on purpose, and should be taken to have the plain meaning of the word". It rejected the Applicant's submission based on the effective date of the pension decision and, instead, opted for the date of the decision awarding the pension stating, "[t]his conclusion is based upon the fact the phrase 'effective date of award' is used in other sections of the *Pension Act*". Given the Court's view that the EIA date did not

appear to have been addressed by the drafters, it does not agree that the term "receipt" has a plain or unambiguous meaning in the context of section 72. It also disagrees that a word has a plain meaning if it is required to consider the term contextually with reference to other terms in the Act for the purpose of its construction.

[26] The Court also concludes that the EAP's contextual interpretation should have considered that the term being interpreted was "receipt", not "effective date". The contextual interpretation of terms used elsewhere in the same statutory document is of most assistance when the term being construed (i.e. "receipt") has been used in different circumstances, usually in counterpoint to a competing interpretive term. Much less interpretive probative value can be achieved when the other term used in the statute is said to represent the only acceptable wording that could support the alternative interpretation, and the term being construed is not found elsewhere in the Act used for its suggested purpose.

[27] In fact, the Panel's reasoning can be applied in different manners to achieve different interpretations of the term "receipt" in establishing the pension date. Thus, the phrase "in receipt of (i) a pension" could be replaced with "on the decision date (i) a pension …". This substitution would provide an unambiguous statement supporting the Panel's interpretation of the pension date being the decision date used to determine the EIA date. Conversely the phrase could be replaced with the wording "on the effective date of (i) a pension …". The point is that it is just this absence of any clear wording, which could have readily been employed by experienced drafters, that supports the Court's conclusion that there was never an intention to import any meaning of timing of payment into the term "receipt". Indeed, it is the Court's speculation that

none was required as the drafters probably thought that the commencement of the eligibility date of an EIA was obvious, being the same as the effective date used to determine the commencement of the payment of Class 1 benefits. There does not appear to be any rationale for using any other date.

[28] In addition, the Court agrees with the Applicant's submission that the EAP's reference to provisions in the Act employing "effective date of award" was misstated [in reference to sections ss 21(1)(g) and 21(3.1)]. Moreover, where correctly referenced in sections 21(1)(i), 21(2)(d) and 45(3.1), the effective date of the award related to the particular circumstances of section 56 of the Act. This provision pertains to the date from which death pensions are payable and varies depending on the identity of the survivor. The drafters only used the effective date where it was necessary to do so. Different effective dates therefore, must be distinguished for the different scenarios referred to in the section. In conclusion, the Court rejects the EAP's methodology of analysis in support of its conclusion that the decision date of a Class 1 pension should apply to limit receipt of an EIA.

(b) *The Panels failed to consider the absurd outcomes of their interpretation of section 72*

[29] The Court concludes that the EAP's interpretation of section 72 is unreasonable in many other regards. First and foremost, the Court agrees with the Applicant's submission that:

> [I]nterpreting "in receipt of" to mean the date at which the administrative process is complete leads to an absurd result: Those members whose administrative process takes less time to complete would be in a better position than those members whose applications take longer to be processed.
>
> [Emphasis added]

[30] By interpreting the receipt date as the decision date of the pension, the Panels ensure that claimants suffering an exceptional incapacity on a date prior to the decision date will have their pension calculated on factors that necessarily will vary from applicant to applicant. This differential treatment of pensioner is totally unrelated to their condition of being exceptionally disabled, and over which they have little or no control. In other words, besides the outcome of the application of the Panel's interpretation lacking any rational foundation, it results in an irrational outcome that Parliament could not possibly have intended.

[31] Features that could affect the processing time and delay the decision date of a claimant's Class 1 pension, thereby differentially affecting the commencement date of payments of an EIA for different claimants, would include: processing backlogs, changes or shortages of personnel, vacations, illness, work stoppages, differing degrees of proficiency of personnel, and the complexity of the claim, such as the time required to obtain relevant medical and other documentation.

[32] In addition, claimants would not be aware when applying for a Class 1 pension that the processing time of this application will affect the amount of any EIA they could receive in the future. It is only when they are informed at a later date of being eligible to apply for an EIA that they will learn that the allowance will not necessarily be determined by the date they are actually

found to be exceptionally incapacitated, but by the past decision date of their Class 1 pension, even if the EIA suffering date was earlier than the pension date.

[33] An interpretation of section 72 that would affect the amount of EIA based upon a decision date that is dependent upon the exigencies of the administration of applications for Class 1 pensions is clearly unreasonable. As such, no other ground is needed to set aside the ERP's reconsideration of its decision sitting as the EAP.

(c) *The Panels acted unreasonably in failing to consider and apply the construction principles set out in section 2 of the Act*

[34] The Court notes that in interpreting section 72 of the Act, neither Panel referred to the statutory construction provisions of section 2 of the Act, or section 3 of the *VRABA*. The Court finds this omission methodologically unreasonable. These provisions acknowledge the Government of Canada's obligation to provide an allowance to disabled members of the forces in situations where it is found that they have suffered an exceptional incapacity as a result of their service to their country. In such circumstances, decision-making entities are directed to adopt a liberal interpretation of the Act to ensure that the Government fulfills its obligation to the exceptionally incapacitated service member.

[35] The Panel's interpretation of the term "receipt" as having a plain meaning that denied compensation to exceptionally incapacitated service members frustrates the purpose of the Act and the statutory direction to liberally construe its provisions to achieve its objectives. By this I mean that a construction of section 72 is *prima facie* unreasonable when it produces a result that

undermines the explicit purpose of fulfilling Canada's obligation to compensate service members who have suffered an exceptional incapacity in the line of duty. When this is the obvious outcome of a Panel's construction of the Act, a sober second reflection is required to take into consideration all factors that bear on the interpretation of the provision before issuing the decision. Had it done so, in the Court's view, it could not reasonably have interpreted section 72 so as to deny pensioners a portion of an allowance to compensate them for their exceptional incapacity.

(d) *The Panel failed to consider VAC's updated policies on the administration of section 72*

[36] The Applicant argues that the Panels erred in ignoring the 2006 Table of Disabilities [the 2006 Table]. While the EAP relied on the 1995 Table of Disabilities [the 1995 Table] in their 2014 decision, the 2015 Consent Order of this Court specifically directed the Panel to apply the 2006 Table in deciding the EIA date in its second appeal decision.

[37] Instead, the EAP dismissed the 2006 Table as irrelevant to the question at hand:

> The Panel finds the 2006 Table of Disabilities is <u>not relevant to the issue of determining entitlement to an EIA</u>. The Table is produced for the <u>sole purpose of assessing the extent of a disability</u>. It is not established for the purposes of determining entitlement. If the Panel were to rely upon the Table for the purposes of determining entitlement, then it would be improperly fettering its discretion.
>
> [Emphasis added]

[38] The Respondent first submits that this question is not appropriately before this Court as the Applicant did not raise the issue of the applicability of the 2006 Table before the ERP issued the impugned decision. Nonetheless, the Respondent submits that the ERP determined the EIA date in a manner consistent with the 2006 Table.

[39] I do not have to rule on this issue inasmuch as there are more than sufficient grounds to conclude that the interpretation of the Panel was unreasonable. Nevertheless, I will comment on the issue, which was fully argued by both parties.

[40] While section 35(2) stipulates that the purpose of the table of disabilities is to assess the extent of the disability, the 2006 Table, as well as other relevant administrative policies, nevertheless reflects invaluable extrinsic evidence to assist in the interpretation of section 72. The fact that the Department amended its policy over a decade ago and now administers the provision on the very point before the Panel suggests these policies represent a form of "statements by government departments that administer the legislation" that should be considered by a decision-maker interpreting the provision. Previously, the Department applied the decision date to delimit the payment of an EIA, whereas subsequent to the policy change in 2006, the effective date of the pension was used to constrain the retrospective commencement date of an EIA.

[41] Tribunal decision-makers and courts owe considerable deference to those responsible for interpreting and administering legislation on a daily basis. This is precisely why policy directions on the administration of a statute are considered extrinsic interpretive aids. Program

administrators are the repository of significant practical and effective knowledge that comes from being responsible for making the legislator's words achieve their intended objectives. Moreover, to the extent that the administration of a provision gives rise to comment and objections from the intended recipients of social remedial legislation, program administrators have a holistic understanding of the practical realities of the application of the legislation.

[42] These realities point to the significance of a modification overturning an administrative procedure formerly in use. There must have been sound policy considerations underlying the change in the administration of these allowances that reflected the Department's experience. In the Court's view, it was unreasonable for the Panel not to consider the amended policies for their substantive interpretive significance as valuable intrinsic evidence, instead of rejecting them on a formalistic ruling that they exceeded the Department's jurisdiction.

[43] On the basis of this change in policy, the Court also rejects the Respondent's submission that it should follow the previous decision of this Court in *MacLeod v Canada*, [1998] FCJ No 428 [*MacLeod*]. In that matter, the Court rejected the argument "that retroactivity should be considered for the exceptional incapacity allowance" back to the effective date of the Class 1 pension. However, the Court based this decision on the wording of the earlier pension policy manual that delimited EIA eligibility to "the date he became a class 1 pensioner", which appears to refer to the decision date.

[44] In retrospect, it seems most likely that had the absurdity of the proposed interpretation (whereby the amount of EIA paid is affected by the administrative delays in awarding a pension)

been drawn to the Court's attention in *MacLeod*, it would have reconsidered the wisdom of its interpretation of the former policy statement, and not followed it. The point however, is that the *MacLeod* decision was based upon a former policy, which was abrogated in 2006 and replaced by a direction making EIA eligibility available upon the effective date of the Class 1 pension.

[45] Furthermore, the *MacLeod* decision would appear to undermine the Panel's aforementioned contention that the Pension Policy could not address the entitlement of the allowance. It is evident that the Court in *MacLeod* considered the Policy a useful tool in assessing the timing of EIA eligibility, as the Panel reasonably ought to have done in this matter.

(3) Conclusion rejecting the Panel's interpretation of the delimiting commencement date for an EIA

[46] In summary, the Court concludes that the Panel's decision is unreasonable in its construction of section 72 so as to limit payment of a Class 1 pensioner's eligibility for an EIA to commence upon the decision date of the pension. The interpretation that ensures the attainment of the Act's objectives and best aligns with its context is that the commencement of payment of an EIA should be limited by the effective date of being in receipt of a Class 1 pension.

B. *Was the Reconsideration Panel's assessment of the Applicant's exceptional incapacity date reasonable?*

[47] In order to determine whether the VRAB's decisions were reasonable, it is necessary to understand what evidence was before it, and at what time. The following discussion will divide the relevant evidence before the EAP in reaching its 2015 Decision and before the Panel in

reaching its 2016 Decision and will consider the reasonableness of each decision in light of the available evidence.

(1) The 2015 Decision

(a) *Evidence before the 2015 EAP*

[48] The EAP considered the Applicant's own statements filed along with his first application on February 17, 2009. Therein, he notably describes the effect of PTSD on his quality of life as preventing him from normally engaging in all of his regular activities except driving a vehicle and using public transportation.

[49] Dr. Genest, the Applicant's psychologist, has provided many letters and reports. The first report, dated October 7, 2008, and written after six consultations, states that the Applicant "clearly ought not to return to the workplace for some time" and that his PTSD is "serious and complex". The second report, dated December 15, 2008, and written after approximately ten further consultations, states that the Applicant's "mood has stabilized considerably", that "it is certain to take several months of work before a consideration of a return-to-work timetable is possible" and that "it would be prudent to anticipate that Sgt. Stoyek will need at least until mid-February before we review his status". In a February 16, 2009 letter, Dr. Genest states that the Applicant "has experienced some exacerbations of depressed mood, but he has recovered well from them". He recommended an additional two-months leave, stating he was "hopeful that by that time a return-to-work plan can be considered".

[50] In reaching its conclusion, the EAP explicitly referred to Dr. Genest's two reports from April 2009. On April 24, 2009, Dr. Genest stated:

> Sgt. Stoyek has continued to work diligently in therapy, and has made good progress. His mood has improved considerably, and although he has experienced occasional setbacks, these have been no more significant than would be expected in carrying out this work.
>
> […]
>
> I continue to be optimistic that we are nearing the time to consider return-to-work options, and in fact, have had some preliminary discussions along these lines. There is still, however, some further exposure work to be accomplished, and we need to ensure ongoing emotional stability prior to making specific plans. I recommend two more months' extension to his medical leave, so that we can work in these directions.

[51] On April 28, 2009, Dr. Genest described the Applicant's response to treatment as follows: "Excellent. Sgt. Stoyek has been compliant with all aspects of treatment and has made very good progress." He further described the prospect of a return to work as follows:

> Not at present, soon, however, I expect he will be ready to begin return-to-work planning. Within the next two months, I anticipate that he will be in touch with the RCMP concerning a return. At that point, the specifics of his return will need to be addressed, but I believe we should focus on completing the current phase of therapy before turning attention to those matters.
>
> It has, as you note, been a long progress. I am extremely pleased, however, with Sgt. Stoyek's progress, and I believe that he will emerge healthier than he has been for many years.
>
> [Emphasis added]

[52] In May 2009, the Applicant was scheduled for an Independent Medical Examination [IME]. Dr. Genest, in response to this development, wrote to the RCMP Health Services on June 1, 2009. He stated, referring to his prior comments that,

> That is still my assessment—that it would take some additional time for this most intensive phase of therapeutic work to wrap up, and before that, exposing Sgt. Stoyek to the sort of inquiry that may occur during an IME could well constitute a significant set-back. Indeed, even contemplating that has unfortunately stimulated some emotional reactions that are tied to the traumatic experiences we are working hard to neutralize and has necessitated some diversion from the therapeutic path.

[53] Upon the RCMP Health Services deciding to go ahead with the IME, Dr. Genest wrote, in a letter dated July 6, 2009:

> Nevertheless, facing the prospect of having to recount specifics of his traumatic past has led him to be afraid—not unreasonably—of re-traumatization. In fact, the anticipation of the diagnostic inquiry prior to our having finished the exposure work, which has been so demanding for him, has already led to significant elevations in symptoms of anxiety, to the point that our progress has been derailed.
>
> […]
>
> Because Sgt. Stoyek has recently decided that he plans to retire now, perhaps the whole assessment is unnecessary in any case.
>
> Should Sgt. Stoyek have to return to work, it is clear that he could not return to operational policing for the foreseeable future, nor to his previous posting in any capacity. For him to do so would place him at unacceptably high risk of further disability.

[54] The Applicant retired in January 2010.

[55] Thereafter, a further medical questionnaire completed by Dr. Genest, dated March 1, 2010, stated that no further medical improvement was expected, that the Applicant "will continue to wrestle with symptoms over the long term" and that "any improvement beyond this point is likely to be marginal and very slow". He further states that the Applicant "decided to leave the RCMP because he could not return to operational policing, and did not want to jeopardize the progress he had made or risk exacerbating his condition by attempting a return to work." That being said, Dr. Genest stated that the Applicant had made "good progress in therapy", that his "symptoms feel more manageable to him now, although they are still present and trouble him on a regular basis", and that he was expected to "continue to experience improvement, but it will be slow and very gradual."

[56] Upon applying for an EIA on October 29, 2012, the Applicant included an updated narrative. In this narrative, he mentions that his kidney cancer diagnosis "exasperated" the stress he experienced from symptoms related to PTSD. He states:

> It is impossible for me to be hopeful or enthusiastic about the future knowing I have suffered a heart attack at age 48, have coronary artery disease, have had cancer, have to deal daily with being a Type 1 insulin dependent diabetic, suffer from hearing loss, have struggle with the depression and other symptoms I experience with having PTSD and MDD.
>
> [Emphasis added]

[57] He continues to speak at length of the impact of his non-pensioned conditions (including cancer) on his pensioned conditions. He concludes:

> The physical and psychological effects and symptoms I experience as a result of my non-pensioned medical conditions of heart condition, coronary heart disease, diabetes, and cancer have an immensely negative affect on my quality of life and ability to complete the daily tasks of living. I live with the stress of wondering whether I will suffer another heart attack or if the cancer will return.
>
> [Emphasis added]

[58] On November 1, 2012, an Area Counsellor conducting the mandatory assessment to be included in the EIA application recommended a grade 2 EIA effective March 25, 2010. In her reasons, however, she took notice of all of the Applicant's existing conditions at the time of the report, stating that the Applicant "has had the onset of 4 major medical conditions", but including cancer.

[59] Finally, the EAP considered a further report from Dr. Genest dated May 30, 2013. With regards to the PTSD, Dr. Genest states:

> By early 2011, he had achieved a level of reduction of intrusive recollections that allowed him to begin to turn his attention toward rebuilding other aspects of his life. He was dealing with some family challenges and was experiencing some periods of low mood and energy. At that time, the very recent improvement from lessening of intrusive memories felt quite fragile to him, and he repeatedly expressed worry about the recurrence of PTSD symptoms.
>
> It is also worth noting that Mr. Stoyek was physically unwell at that time and was undergoing tests between March and June of 2011, which confirmed a diagnosis of kidney cancer, leading to surgery in October of that year. His increased frequency of appointments with me during that spring and summer attest to an elevation of his distress.
>
> [Emphasis added]

(b) *Construction of Section 39*

[60] Section 39 of the *VRABA* is meant to assist claimants in meeting their burden of proving entitlement to a benefit. The VRAB is to draw every reasonable inference from the evidence in favour of the claimant, to accept as true credible and trustworthy evidence produced by the claimant, and in weighing the evidence, to resolve any doubt in favour of the claimant. While not placing a reverse onus on the Respondent, this provision has been interpreted as "requiring, in effect, that claimants be given the benefit of any reasonable doubt." (*Metcalfe v Canada* (1999), 160 FTR 281 at para 17; confirmed in *Elliot v Canada (Attorney General)*, 2003 FCA 298 at para 6). Again, while this provision does not mean that the VRAB must accept any submission by a claimant, "the evidence must be accepted if it is credible and reasonable, and uncontradicted." (*Macdonald v Canada (Attorney General)* (1999), 164 FTR 42 at para 22)

(c) *The 2015 Decision was Reasonable*

[61] Considering all this evidence, the EAP found it was the Applicant's kidney cancer diagnosis that led to a fundamental change in his condition and, as such, and in extending the greatest benefit of the doubt to the Applicant, it found that he suffered an exceptional incapacity in March 2011, the date when the physical symptoms leading to a cancer diagnosis first manifested.

[62] I find that it was reasonable for the EAP to reach this decision. There was no medical evidence on file directly supporting a claim for EIA prior to March 2011. The 2012 lay opinion of the Area Counsellor that did support an earlier EIA claim lacked credibility as, in reaching

this conclusion, it failed to separate the impact of the kidney cancer from the conditions existing prior to March 2011. Instead, the available evidence supports the EAP's finding that it was only after the onset of kidney cancer that the Applicant became exceptionally incapacitated. The medical evidence from 2008-2010 points to some future or current improvement. In his EIA application in 2012, the Applicant himself acknowledges the impact of his 2011 kidney cancer diagnosis on his condition. Dr. Genest, in 2013, confirms this with his letter supporting a change in early 2011 from a positive trajectory to an exacerbation of issues following the cancer diagnosis.

[63] Contrary to what is alleged by Dr. Genest in his 2015 letter, the EAP did not cherry-pick evidence but rather appears to have reached its 2015 Decision based on a reasonable assessment of the evidence available demonstrating an improving position to the point of considering returning to work. The EAP noted that "It appears the RCMP wanted to accelerate the process of returning to work unacceptably. As a result, the Appellant chose to retire from the force." In his narrative to his 2012 EIA application he states that "[d]ue to the amount of service I had at the time I made a decision to retire without making any attempt at trying to return to work and exasperate my recovery". There is therefore, no suggestion that his return to work was prevented by a relapse or that his situation was not improving until the cancer diagnosis came to light.

(2) The 2016 Decision

[64] The requirement to consider the new evidence from Dr Genest In applying for reconsideration of the 2015 Decision, the Applicant submitted three pieces of new evidence. He attached copies of doctor consultations and medical diagnostic reports previously not filed before

the VRAB, a letter of Dr. Silburt dated June 22, 2015, and a letter of Dr. Genest dated July 7, 2015. Only the letter of Dr Genest is relevant.

[65] The ERP noted that the situation resembled that of a dissatisfied applicant thinking of some additional information or evidence or a slightly new variation of an argument in order to try to resurrect what had turned out to be an unsuccessful argument in the first appeal. However, it did not explicitly reject the key evidence of Dr. Genest. The Respondent, on the other hand argued that the evidence should be treated as inadmissible. In the special circumstances of the Act and this matter, I disagree.

[66] The construction provision in the *VRABA* directs the Panel to adopt liberal interpretations. This is reinforced by section 39, which requires doubts in the weighing of evidence to also be favourably considered. These stand for the proposition that the Panel should avoid an overly technical approach in reaching these decisions. This sets the VRAB somewhat apart from other tribunals with reconsideration or similar review provisions in their enabling legislation.

[67] More substantively though, I find that the focus of these appeals in regard to the Applicant suffering an exceptional incapacity is reasonably on the narrow time frame between the Applicant’s effective Class 1 pension award and the onset of symptoms associated with his cancer diagnosis. The central issue is whether he was exceptionally incapacitated before the onset of cancer. The Applicant’s physicians do not appear to have been fully aware of this issue, which is demonstrated by the fact that there were no medical reports dealing with this specific

scenario before the EAP. Perhaps the Applicant relied upon the Area Counsellor's decision including the cancer diagnosis in concluding that the Applicant was exceptionally incapacitated in 2009.

[68] In any event, Dr. Genest's additional report was specifically directed to respond to the determinative issue of the Applicant's health prior to the cancer diagnosis. Dr. Genest's intention was to correct what he considered to be a misinterpretation of his prior reports that, he says, were never intended to deal with that issue in the first place. In such circumstances, I conclude that it would have been an error on the part of the Panel not to admit this new report on a determinative issue that may not have been apparent or considered in earlier reports. Ultimately, the Panel did consider these reports in its review, so this is not a reviewable error in this matter.

(a) *New evidence before the 2016 Panel*

[69] Dr. Genest's letter dated July 7, 2015, which best addresses his opinions on the medical condition of the Applicant prior to the cancer diagnosis, seeks to correct the Panel's use of his 2009 opinions that point to optimism, even when considering an eventual return to work. He states:

> As a result, in what were still the early stages of therapeutic work with him, it appeared as though progress was going to be much more rapid and complete than it turned out to be. I was, as I noted in the 2009.04.24 letter, optimistic at that time, but I also clearly appreciated that there was further work to be done and that one could not take for granted Mr. Stoyek's emotional stability at that point.
>
> My report of 2010.03.01 to the VAC makes it clear that my earlier assessment had unfortunately been excessively optimistic. In that

> report, I documented "persistent" symptoms of PTSD and "recent" symptoms of Major Depressive Disorder. I also noted that Mr. Stoyek "will continue to wrestle with symptoms over the long term. Any improvement beyond this point is likely to be marginal and very slow." And I assessed the GAF at 58.
>
> Clearly, Mr. Stoyek was no less impaired between early 2009 and March 2011 than he was after that time. The panel's extraction of a brief notation of mine from the extensive records available provides an inaccurate picture of the severity of Mr. Stoyek's condition at that time and it is hard to account for except as a deliberate misrepresentation.
>
> If, on the other hand, the panel has somehow been misled by reading my letter of 2009.04.24, I should clarify now without ambiguity that Mr. Stoyek's PTSD was very severe from the beginning of our work together and that my hope that we could soon "begin" to consider return to work options in 2009 was incorrect.
>
> [Emphasis added]

(b) *The 2016 Decision was Reasonable*

[70] Dr. Silburt's opinion, dated June 22, 2015, was deemed to be not credible. In fact, it was not relevant inasmuch as it did not distinguish between the Applicant's health when he was first diagnosed with kidney cancer and his prior condition, which forms the basis of his reconsideration request. Instead, the letter states that "all the conditions under consideration (that were seen by the board as relevant enough to grant him Exception status) can indeed by traced at least back to February 2009", thereby lumping in the Applicant's cancer diagnosis, clearly found to be relevant by the VRAB, with his other conditions. As it lacked relevance, it was reasonable for the Panel to not give this letter any weight.

[71] The Panel found that Dr. Genest's letter dated July 7, 2015, was not relevant to the issue at hand as it only dealt with the severity of the Applicant's PTSD, an issue that the ERP stated was not before the VRAB. The Court is not aware whether there are forms or letters of instruction to help physicians respond to the issue of demonstrating at what point a patient suffers an exceptional incapacity, but it finds the distinction between the severity of a condition and whether the applicant is exceptionally incapacitated at some point, a fine one, if not previously adverted to as a distinction that needs to be addressed. I suspect many treating physicians would not specifically address the point of at what time an exceptional incapacity arose unless specifically requested to do so. A forensic medical expert would of course address the issue, as that is the sort of question they are retained to opine on as an issue raised upon review of the statute.

[72] In any event, the EAP's focus was reasonably on the Applicant's improving situation in 2010, and if it committed an error in adopting this approach, this would be a significant factor in having the decision set aside as unreasonable. As I understand from Dr. Genest's reports, he stated that although, at one time, he thought the Applicant was improving and that a return to work could be contemplated, in reality he remained seriously disabled and any optimism of his being able to return to work was not borne out.

[73] The Applicant submits that the VRAB failed to act in accordance with section 39 of the VRAB Act in rejecting this uncontradicted evidence from his physicians in support of his claim. Two points counter this submission. First, the Panel did not err in relying on Dr. Genest's earlier opinion expressing optimism of improvement based on his assessment of the Applicant's

medical condition. The extensive medical evidence quoted above along with Dr. Genest's 2015 letter says as much. Therefore, the ERP cannot be accused, as it was, of extracting a brief notation from extensive records to provide an inaccurate picture to the point of being "a deliberate misrepresentation". Second, a trending improvement in a depressive mental state, the Applicant's principal health deficit, to the point of optimism with regards to an eventual return to work, does not reasonably indicate an extraordinary incapacity. Indeed, as the Court understands how disability pensions work, a return to work ends not only any issue of an EIA, but also affects the pension itself.

[74] Dr. Genest's 2015 letter therefore, lacks credibility in the sense that it is inconsistent and contradicts his earlier letters, written prior to the cancer diagnosis, and in particular his 2013 letter. These all point to a general improvement in the Applicant's condition from March 2010 to early 2011 followed by deterioration upon his kidney cancer diagnosis. This clearly contradicts Dr. Genest's statement in his 2015 letter to the effect that "Mr. Stoyek was no less impaired between early 2009 and March 2011 than he was after that time." Dr. Genest also makes no mention of his 2013 letter in his 2015 letter, and the Applicant's continuing improvement into 2011, when the cancer diagnosis interceded.

[75] Moreover, in Dr. Genest's March 1, 2010 letter, which in 2015 he states was "excessively optimistic", nevertheless indicates that the Applicant made "good progress in therapy", that his "symptoms feel more manageable to him now, although they are still present and trouble him on a regular basis", and that he was expected to "continue to experience improvement, but it will be slow and very gradual." His 2013 letter indicates that whatever the problems in 2010, the

Applicant decided to retire and that the problems appear to have subsided a year later in early 2011, when "he had achieved a level of reduction of intrusive recollections that allowed him to begin to turn his attention toward rebuilding other aspects of his life". The Applicant's mental anxiety appeared to stem from "worry[ing] about the recurrence of PTSD symptoms", as opposed to actually suffering them. Thereafter, the main dialogue in the 2013 letter was the negative impact of the cancer diagnosis on his mental state.

[76] While the Panel is bound by section 39 of the *VRABA* to consider the Applicant's evidence in the best light possible, it must still be satisfied that the new evidence is credible and reasonable, and establishes an error of law or fact in the decision of the EAP. In this case, the Court concludes that the VRAB reasonably found the new evidence lacked this requisite credibility and, it thus reasonably concluded it would not reconsider its conclusion on this factual question in accordance with the *Dunsmuir* principles of review that apply (*Dunsmuir v New Brunswick*, 2008 SCC 9).

II. Conclusion

[77] The application for judicial review is dismissed. No costs are awarded as success on the issues argued before the Court was divided.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

"Peter Annis"
Judge

ANNEX

Pension Act, RSC 1985, c P-6 [*Pension Act*]

Construction	*Règle d'interprétation*
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.	**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.
How extent of disability assessed	*Estimation du degré d'invalidité*
35 (2) The assessment of the extent of a disability shall be based on the instructions and a table of disabilities to be made by the Minister for the guidance of persons making those assessments.	**35 (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.
Amount of allowance	*Montant de l'allocation*
72 (1) In addition to any other allowance, pension or compensation awarded under this Act, a member of the forces shall be awarded an exceptional incapacity allowance at a rate determined by the Minister in accordance with the minimum and maximum rates set out in Schedule III if the member of	**72 (1)** A droit à une allocation d'incapacité exceptionnelle au taux fixé par le ministre en conformité avec les minimums et maximums de l'annexe III, en plus de toute autre allocation, pension ou indemnité accordée en vertu de la présente loi, le membre des forces qui, à la fois :

the forces

(a) is in receipt of

a) reçoit :

(i) a pension in the amount set out in Class 1 of Schedule I, or

(i) soit la pension prévue à la catégorie 1 de l'annexe I,

(ii) a pension in a lesser amount than the amount set out in Class 1 of Schedule I as well as compensation paid under this Act or a disability award paid under the Canadian Forces Members and Veterans Re-establishment and Compensation Act, or both, if the aggregate of the following percentages is equal to or greater than 98%:

(ii) soit, d'une part, une pension moindre et, d'autre part, l'indemnité prévue par la présente loi, l'indemnité d'invalidité prévue par la Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes ou ces deux indemnités, lorsque la somme des pourcentages ci-après est au moins égale à quatre-vingt-dix-huit pour cent :

(A) the extent of the disability in respect of which the pension is paid,

(A) le degré d'invalidité pour lequel la pension lui est versée,

(B) the percentage of basic pension at which basic compensation is paid, and

(B) le pourcentage de la pension de base auquel l'indemnité lui est versée,

(C) the extent of the disability in respect of which

(C) le degré d'invalidité pour lequel l'indemnité

the disability award is paid; and	d'invalidité lui est versée;
(b) is suffering an exceptional incapacity that is a consequence of or caused in whole or in part by the disability for which the member is receiving a pension or a disability award under that Act.	**b)** souffre d'une incapacité exceptionnelle qui est la conséquence de l'invalidité pour laquelle il reçoit la pension ou l'indemnité d'invalidité prévue par cette loi ou qui a été totalement ou partiellement causée par celle-ci.
Determination of exceptional incapacity	*Détermination d'incapacité exceptionnelle*
72 (2) Without restricting the generality of paragraph (1)(b), in determining whether the incapacity suffered by a member of the forces is exceptional, account shall be taken of the extent to which the disability for which the member is receiving a pension or a disability award under the Canadian Forces Members and Veterans Re-establishment and Compensation Act has left the member in a helpless condition or in continuing pain and discomfort, has resulted in loss of enjoyment of life or has shortened the member's life expectancy.	**72 (2)** Sans que soit limitée la portée générale de l'alinéa (1)b), pour déterminer si l'incapacité dont est frappé un membre des forces est exceptionnelle, il est tenu compte du degré auquel l'invalidité pour lequel le membre reçoit soit une pension, soit l'indemnité d'invalidité prévue par la Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes l'a laissé dans un état d'impotence ou dans un état de souffrance et de malaise continus, a entraîné la perte de jouissance de la vie ou a réduit son espérance de vie.

***Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRABA*]**

Reconsideration of decisions	*Nouvel examen*
32 (1) … an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.	**32 (1)** […] le comité d'appel peut, de son propre chef, réexaminer une décision rendue en vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.
[Emphasis added]	[Je souligne]
Rules of evidence	*Règles régissant la preuve*
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	**b)** il accepte tout élément de preuve non contredit que lui présente celui-ci et qui

applicant or appellant that it considers to be credible in the circumstances; and	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.

Date Payable – Disability Benefits, Allowances, and Prisoner of War/Detention Benefit Compensation, ss. 21-22 (Current policy)

Exceptional Incapacity Allowance (Pension Act)	*Allocation d'incapacité d'exceptionnelle (Loi sur les pensions)*
21. An award or increase for an exceptional incapacity allowance (EIA) may be payable from the earlier of;	**21**. L'allocation d'incapacité exceptionnelle (AIE) ou son augmentation est payable à compter de la première des deux dates suivantes :
a. the date that it is medically shown that the pensioner became exceptionally incapacitated, or in the case of an increase, the date it is medically shown that the increase is warranted; or	**a.** La date à laquelle il a été prouvé médicalement que le pensionné était atteint d'une incapacité exceptionnelle, ou dans le cas d'une augmentation, la date à laquelle il a été prouvé médicalement que l'augmentation était justifiée; ou
b. in the absence of such evidence, the date that the pensioner first took action to obtain the EIA or an increase thereof.	**b.** À défaut d'éléments probants de ce type, la date d'entrée en vigueur à laquelle le pensionné a fait la démarche requise pour obtenir l'AIE ou une augmentation de celle-ci.

22. In no case shall the effective date of the EIA predate the effective date of the decision awarding a Class 1 pension under the Pension Act or a combination of disability pension and compensation under the Pension Act and disability award under the Canadian Forces Members and Veterans Re-establishment and Compensation Act (CFMVRCA) that total 98% or more.

22. La date d'entrée en vigueur de l'AIE ne doit en aucun cas précéder la date d'entrée en vigueur de la décision accordant une pension de catégorie 1 aux termes de la Loi sur les pensions ou une combinaison de pension d'invalidité et d'indemnités aux termes de la *Loi sur les pensions* et d'une indemnité d'invalidité aux termes de la *Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes* (LMRIMVFC) totalisant au moins 98 %.

Article 72(1) – Exceptional Incapacity Allowance, ss. 5 (Policy in place at the time of the *McLeod* decision)

5. *Effective Date*

a) General: The effective date of an Exceptional Incapacity Allowance award shall not pre-date the date of the decision awarding a Class 1 pension.

b) First application and reapplication

(i) An award of Exceptional Incapacity Allowance may be payable from the date an application is made to the Department (including by facsimile or a telephone call followed by a signed

5. *Date d'entrée en vigueur*

a) Généralités : La date d'entrée en vigueur du droit à l'allocation d'incapacité exceptionnelle ne précède pas la date de la décision donnant droit à la pension de la catégorie 1.

b) Première et nouvelle demande :

(i) Une allocation d'incapacité exceptionnelle peut être versée à compter de la date à laquelle le membre indique au Ministère qu'il a l'intention de présenter une demande (soit, entre

application) by a Class 1 pensioner. If the application is received from a representative, the effective date will be the date the application is received or date stamped by the Department.	autres, par téléphone ou télécopieur, suivi de la soumission d'un formulaire de demande d'allocation d'incapacité exceptionnelle, dûment rempli). Si la demande est envoyée par le représentant du membre, la date d'entrée en vigueur retenue est celle à laquelle le Ministère la reçoit ou y appose le timbre-dateur.
(ii) If a favourable decision is reached based on a reapplication for Exceptional Incapacity Allowance, the effective date of the award would be the date the reapplication was received by the Department.	**(ii)** Si une décision favorable est rendue à la suite d'une nouvelle demande d'allocation d'incapacité exceptionnelle, la date d'entrée en vigueur de l'allocation est réputée être la date à laquelle le Ministère reçoit la nouvelle demande.

2006 Table of Disabilities, Chapter 7, s 7.08

Effective Date	*Dat[e] d'entrée en vigueur*
The Minister will notify new Class 1 pensioners of their eligibility to apply for this allowance, at which time they may choose whether or not to apply for it. The date the pension indicates his/her wish to apply for an Exceptional Incapacity Allowance would be considered the "date of application". If the pensioner	Le ministre informera les nouveaux pensionnés de la catégorie 1 de leur droit de présenter une demande pour cette allocation, et il en reviendra aux pensionnés de présenter ou non une demande. La date à laquelle le pensionné indique son désir de présenter une demande pour une allocation d'incapacité

is found to be suffering an exceptional incapacity that is a consequence of or caused by the disability or disabilities for which s/he receives pension and an award at Class 1 rates, the effective date of an Exceptional Incapacity Allowance cannot pre-date the effective date of the decision awarding a Class 1 pension under the *Pension Act* or a combination of Disability Pension and compensation under the *Pension Act* and Disability Award under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* that total 98% or more.

exceptionnelle sera considérée comme la « date de la demande ». Si le pensionné souffre d'une incapacité exceptionnelle qui est la conséquence de l'invalidité pour laquelle il reçoit une pension ou une indemnité d'invalidité (au taux prévu à la catégorie 1) ou qui a été causée par celle-ci, la date d'entrée en vigueur d'une allocation d'incapacité exceptionnelle ne peut pas être antérieure à celle de la décision accordant une pension de catégorie 1 aux termes de la *Loi sur les pensions* ou une combina[is]on pension d'une d'invalidité et une indemnité aux termes de la Loi sur les pensions et une indemnité d'invalidité aux termes de la *Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes* totalisant au moins 98 %.

[Emphasis in original]

1995 Table of Disabilities, Chapter 7, s 7.08

Effective Date

The Minister will notify new Class 1 pensioners of their eligibility to apply for this allowance, at which time they may choose whether or not to apply for it. The date the

Dat[e] d'entrée en vigueur

Le ministre informera les nouveaux pensionnés de la catégorie 1 de leur droit de présenter une demande pour cette allocation, et il en reviendra aux pensionnés de

pensioner indicates his/ her wish to apply for an Exceptional Incapacity Allowance would be considered the "date of application." If the pensioner is found to be suffering an exceptional incapacity that is a consequence of or caused by the disability or disabilities for which s/he receives pension at Class 1 rates, the effective date of the award would be the date of application. In no case shall the effective date of an Exceptional Incapacity Allowance pre- date the date of the decision awarding a Class 1 pension.

présenter ou non une demande. La date à laquelle le pensionné indique son désir de présenter une demande pour une allocation d'incapacité exceptionnelle sera considérée comme la « date de la demande ». Si on découvre que le pensionné souffre d'une incapacité exceptionnelle causée ou consécutive à l'invalidité ou aux invalidités pour lesquelles il reçoit une pension au taux de la catégorie 1, la date d'entrée en vigueur de cette allocation sera la date de la demande. En aucun cas la date d'entrée en vigueur d'une allocation d'incapacité exceptionnelle ne doit être antérieure à la date de la décision octroyant une pension à la catégorie 1.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-807-16
STYLE OF CAUSE:	PETER BRIAN STOYEK v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 1, 2016
JUDGMENT AND REASONS:	ANNIS J.
DATED:	JANUARY 13, 2017

APPEARANCES:

Natalia Rodriguez	FOR THE APPLICANT
Daniel Caron	FOR THE RESPONDENT

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