

Federal Court



Cour fédérale

Date: 20240516

Docket: T-2068-23

Citation: 2024 FC 750

Toronto, Ontario, May 16, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

DAVID MUSHING

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Applicant seeks judicial review of a decision to deny his request for a disability award entitlement. More specifically, this application concerns a decision of an Entitlement Appeal Panel of the Veterans Review and Appeal Board (the “VRAB Panel”). In that decision, the VRAB Panel affirmed a decision of the Entitlement Review Panel of the Board, which in

turn, had affirmed the decision of Veterans Affairs Canada (“VAC”) to deny the Applicant’s request for a disability award entitlement.

[2] The Applicant applied for a disability award under the *Veterans Well-being Act*, SC 2005, c 21 (the “*VW Act*”) because he has suffered from kidney stones that he contends were caused, at least in part, by dehydration arising from a lack of potable drinking water at a military post where he served.

[3] While I sympathize with the Applicant and recognize the hardship that he has endured due to his medical condition, I have concluded that the decision of the VRAB Panel was reasonable. As such, I must dismiss this application for judicial review. My reasons follow.

II. BACKGROUND

A. *Factual History*

[4] The Applicant, Mr. Daniel Mushing, is a retired military veteran who was posted to Canadian Forces Base (CFB) Shearwater in Nova Scotia from April 2002 to August 2008. From April 2002 to May 2006, he worked as a radar and radio technician in the control tower at Shearwater Building 38A where he maintains that he did not have access to potable water. A water quality report from December 2003 shows that the drinking water on the base was brown and had an elevated iron content, affecting the appearance of the water. Lead and copper were also found in the drinking water as of June 2005, at which point it was declared unsafe for human consumption due to the elevated concentration of lead.

[5] For reasons not articulated in the record, CFB Shearwater did not provide alternative sources of potable water to its personnel in the control tower. The Applicant developed kidney stones in 2005, which have reoccurred on several occasions since that time, most notably in 2006 and 2010. He has had to undergo medical intervention to have some of them removed, and he continues to have periodic episodes. The Applicant claims that the lack of potable water at CFB Shearwater contributed to his kidney stones, because dehydration is one risk factor that can be associated with their onset.

[6] As a result, the Applicant applied for a disability pension under section 45 of the *VW Act* on June 15, 2015. Veterans Affairs Canada denied his claim for benefits on December 29, 2015.

[7] The Applicant appealed this decision to the Entitlement Review Panel (the “ERP”). He provided oral testimony before the ERP, where he confirmed, among other things, that he was not provided with drinking water during work hours, and that he instead drank pop or juice (which was provided). The Applicant further stated that he suspected that the lack of drinking water could have lead to dehydration which could, in turn, have led to his kidney stones. The ERP had before it the Applicant’s medical records dating back to the period in which he was initially diagnosed with kidney stones, and a 2017 medical letter from Dr. H.W. Jung. The medical records contained reference to the Applicant’s father as having experienced kidney stones. The Applicant also submitted a Mayo Clinic article on kidney stones.

[8] On July 18, 2017, the ERP affirmed the VAC’s decision denying the Applicant’s claim. In arriving at this conclusion, the ERP found that the medical evidence – including the opinion

provided by Dr. Jung – was insufficient to establish a causal relationship between kidney stones and the Applicant’s service.

[9] The ERP noted the Applicant had a family history of kidney stones and that the medical opinion did not consider other primary risk factors. The ERP further noted that it could not presume a linkage between the Applicant’s service and his medical condition, “even after applying the fullest benefit of the doubt” as the legislation required it to do.

B. *Decision under review*

[10] The Applicant appealed the ERP’s decision to the VRAB Panel, which affirmed the ERP’s decision on September 6, 2023. The VRAB Panel noted the three questions to be considered when determining whether entitlement should be granted:

1. Is there a valid, existing diagnosis of the claimed condition?
2. Does the claimed condition constitute a permanent disability?
3. Was the claimed condition caused, aggravated or contributed to by military service?

[11] Each of these questions must be answered in the affirmative to grant entitlement. The VRAB Panel found that the first two questions were not in dispute: there was a valid diagnosis of kidney stones and the condition does constitute a permanent disability.

[12] In response to the third question, the VRAB found, after reviewing the evidence in the most favourable light, that the Applicant's kidney stones were "not connected to or aggravated by service."

[13] In arriving at this conclusion, the VRAB Panel noted that in an appeal, the Veteran has the burden of proving a connection between the medical condition and service, and that the connection must be more than a mere possibility. The VRAB Panel considered the medical documentation. It found that Dr. Jung's letter was "extremely vague" and that it indicated merely a "possibility of connection but is not conclusive." The panel further noted that the medical opinion did not consider any of the other risk factors, such as family history.

[14] As with the ERP Panel, the VRAB Panel indicated that it assessed the evidence in the best favourable light, that it drew all inferences from the evidence in favour of the Applicant, and that it weighed the evidence to resolve all doubt in favour of the Veteran. Nevertheless, the VRAB Panel concluded that the Applicant's kidney stones were not connected to or aggravated by his service.

III. LEGISLATIVE FRAMEWORK

[15] This application for judicial review requires consideration of two distinct, but related, legislative provisions. The first is the *VW Act* under which the Applicant applied for disability benefits.

[16] The *VW Act* and its regulations provide compensation and services to military members and veterans who have been injured or died from military service. Section 45 of the *VW Act* provides as follows:

Eligibility

45 (1) The Minister may, on application, pay pain and suffering compensation to a member or a veteran who establishes that they are suffering from a disability resulting from

- (a) a service-related injury or disease; or
- (b) a non-service-related injury or disease that was aggravated by service.

Compensable fraction

(2) Pain and suffering compensation may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.

Admissibilité

45 (1) Le ministre peut, sur demande, verser une indemnité pour douleur et souffrance au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :

- a) soit par une blessure ou maladie liée au service;
- b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.

Fraction

(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — de l'invalidité qui représente l'aggravation due au service donne droit à une indemnité pour douleur et souffrance.

[17] The term “service-related injury” is defined at section 2(1) of the Act:

Definitions

2 (1) The following definitions apply in this act.

service-related injury or disease means an injury or a disease that

- (a) was attributable to or was incurred during special duty service; or
- (b) arose out of or was directly connected with service in the Canadian Forces.

Définitions

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

liée au service Se dit de la blessure ou maladie :

- a) soit survenue au cours du service spécial ou attribuable à celui-ci;
- b) soit consécutive ou rattachée directement au service dans les Forces canadiennes.

[18] The other Act applicable to this matter is the *Veterans Review and Appeal Board Act*, SC 1995, c 18 (the “*VRAB Act*”).

[19] Section 3 of the *VRAB Act* provides guidance as to how both it and the *VW Act* should be interpreted:

Construction

3 The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

Principe général

3 Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s’interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l’égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

[20] The *VRAB Act* also sets out a unique approach to the consideration of evidence that is to be adopted by the Board. Section 39 of the *VRAB Act* states:

Rules of evidence

39 In all proceedings under this Act, the Board shall

- (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;
- (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and

Règles régissant la preuve

39 Le Tribunal applique, à l’égard du demandeur ou de l’appelant, les règles suivantes en matière de preuve :

- a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
- b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l’occurrence;

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

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

[21] Both parties agree that section 39 of the *VRAB Act* requires the Board to consider the evidence adduced by the Applicant liberally and in the best light possible: *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at para 5 [*Wannamaker*]; *Ouellet v Canada (Attorney General)*, 2016 FC 608 at para 38 [*Ouellet*].

IV. ISSUES

[22] The Parties essentially agree that the issue on judicial review is whether the VRAB Panel's decision to deny disability benefits to the Applicant was reasonable.

[23] The Applicant breaks this issue down further, specifically highlighting the VRAB Panel's treatment of Dr. Jung's medical letter. The Applicant queries whether the VRAB Panel's consideration of the letter, which states that "chronic dehydration may have contributed to his development of renal stones" is consistent with the entitlement requirements under the *VW Act*. I will consider this issue in the larger assessment of the reasonableness of the VRAB Panel decision.

V. STANDARD OF REVIEW

[24] The parties agree, as do I, that the VRAB Panel's decision is to be reviewed on a standard of reasonableness: *Pelletier v Canada (Attorney General)*, 2022 FC 1002 at paras 6 and 10.

[25] Reasonableness is a deferential, but robust, standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13, [2019] 4 SCR 653 [Vavilov]. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94, 133-135.

[26] For a decision to be unreasonable, the Applicant must establish that the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

VI. ANALYSIS

A. *Applicant's Submissions*

[27] The Applicant submits that the VRAB Panel's decision is unreasonable because the Panel did not accept the credible and uncontradicted medical evidence before it, and failed to make reasonable inferences and resolve doubts in the Applicant's favour. He notes that Dr. Jung's medical opinion addressed the connection between the Applicant's military service and his

kidney stones, specifying, “chronic dehydration may have contributed to his development of renal stones.”

[28] Relying largely on the *Ouellet* decision, the Applicant states that pursuant to the applicable evidentiary approach and the purpose of the legislation, a ‘possible connection’ to military service was sufficient to establish a claim under the *VW Act*. In *Ouellet*, Justice Strickland considered whether a medical opinion which “spoke only to the possibility of a connection [to military service]” was sufficient evidence that the applicant’s military service had contributed to the claimed condition: *Ouellet* at para 33. In that case, Justice Strickland found that the medical opinion and accompanying medical literature had been treated unreasonably: *Ouellet* at para 52.

[29] The Applicant further submits that the VRAB Panel unreasonably characterized the report of Dr. Jung as “extremely vague.” In the Applicant’s view, the report rather “provides a balanced and accurate medical analysis of the issue.” Though it is not possible to determine the exact causes of kidney stones, Dr. Jung’s opinion speaks to the likelihood that the Applicant’s dehydration, flowing from the lack of potable drinking water at CFB Shearwater, caused, or at least contributed to the onset of his kidney stones.

[30] The Applicant also submits that the VRAB Panel unreasonably referred to a family history of kidney stones, as his father only experienced one kidney stone event, and this was caused by taking a medication whose known side effects include the onset of renal stones.

[31] The Applicant submits that there was, in the record, a clear connection between his persistent kidney stones and his military service, and therefore the VRAB Panel's finding to the contrary was unreasonable.

B. *Respondent's Submissions*

[32] By contrast, the Respondent submits that the VRAB Panel reasonably concluded that the Applicant failed to provide sufficient evidence demonstrating a connection between his kidney stones and his military service. The Jung medical opinion does not consider the Applicant's family history and provides only a general opinion, including that the causes of kidney stones are "complex" and no specific causal factor can be determined for most people who develop them. Moreover, the Respondent points out that there is no medical documentation in the record to establish that the Applicant was chronically dehydrated during his service at CFB Shearwater.

[33] The Respondent further notes that the record before the VRAB Panel contained several medical documents indicating that the Applicant's father had kidney stones. These documents are silent as to the cause of the kidney stones and, as such, it was open to the Panel to mention this family history in its reasons. The Respondent further argues that the lack of any reference to the father's kidney stones in the Jung report further justifies the VRAB Panel's observation that the report lacked specificity.

[34] Lastly, the Respondent submits that each VRAB Appeal Board decision is unique to its facts, and that *Ouellet* is distinguishable because the medical evidence in that case "revealed a nexus between the Applicant's condition and service factors." The Appeal Panel in *Ouellet*

discounted the evidence because the cause of the disease was unknown, not because the medical opinion on the effect of his exposure was not definitive: *Ouellet* at para 66. The Court found there were various facts to support the finding that military service may have contributed to the disease: *Ouellet* at para 66. In fact, the exposure to airborne particles while Mr. Ouellet was onboard the vessel was the only cause identified for the disability: *Ouellet* at para 60.

[35] In contrast, the Respondent submits that the evidence in the present case demonstrates that kidney stones may be caused by various factors and that the Applicant had contributing risk indicators, including a possible genetic predisposition. The evidence before the VRAB Panel was conflicting and ambiguous, and it was open to the Panel to conclude that the Applicant had provided an insufficient basis on which to find a nexus between his medical condition and his service at CFB Shearwater.

C. *Analysis*

[36] Having considered the VRAB Panel's reasons and the evidentiary record that was before it, I have concluded that its decision was reasonable. As noted above, the VRAB Panel accepted that the Applicant had a valid medical diagnosis of renal stones, and that this condition constituted a permanent disability. The sole issue for the Panel to consider was whether the condition was caused, aggravated or contributed to by military service.

[37] I also reiterate at this point that the administrative law context in which the VRAB operates is one that both generally, and specifically, requires it to resolve doubt in favour of veterans. The purpose of the *VW Act* is to "recognize and fulfil the obligation of the people and

Government of Canada to show just and due appreciation to members and veterans for their service to Canada”: *VW Act* at section 2.1. As noted above, the *VRAB Act* further requires that its provisions, and the provisions of the *VW Act*, be liberally construed to fulfill the obligations of the people and Government of Canada to those who have served their country: *VRAB Act* at section 3.

[38] Finally, I refer back to the various ways in which section 39 of the *VRAB Act* requires the VRAB to resolve evidentiary questions in favour of the veterans who appear before it. Together, these provisions help to identify the administrative law context on which I have assessed the reasonableness of the VRAB Panel’s decision.

[39] I also note at the outset of this analysis that the VRAB Panel properly instructed itself on the evidentiary approach it was to take. It stated that it had viewed the evidence in the “best favourable light”; that it had drawn “all inferences from the evidence in favor of the Veteran”; and that it had weighed the evidence “resolving all doubt in favour of the Veteran.” Citing the Federal Court of Appeal’s decision in *Elliot v Canada (Attorney General)*, 2003 FCA 298, the VRAB Panel also correctly noted that the “Veteran has the burden of proving the connection to service and it cannot be a mere possibility [...]” I take it from the Applicant’s submissions that he does not take issue with the VRAB Panel’s articulation of these principles, but rather argues that the Panel’s treatment of the evidence before it indicates that it failed to apply them.

[40] The jurisprudence provides insight as to how the above provisions are to be interpreted. For instance, the Federal Court of Appeal has held that despite the evidentiary considerations of section 39 of the *VRAB Act*, an individual appearing before the VRAB must nonetheless prove

the elements of their claim on a balance of probabilities, and the Board is not required to accept all evidence as presented: *Wannamaker* at paras 5-6. Rather, the provision “has been interpreted to mean that an applicant must submit sufficient credible evidence to show a causal link between his or her injury or disease and his or her time of military service”: *Jeffrey v Canada (Attorney General)*, 2019 FC 467 at para 53 [*Jeffrey*].

[41] I agree with the Respondent that Dr. Jung’s opinion letter was both vague and highly qualified in connecting the Applicant’s kidney stones to his military service. The letter does not state that the Applicant was chronically dehydrated during his service at CFB Shearwater. It does not opine on any connection between the consumption of juices or sodas (which were available to the Applicant) and renal stones. The letter does not consider a family history of renal stones, and nor does it mention that the Applicant had taken a medication which can cause renal stones as a side effect, (points to which I will return below).

[42] Because it is at the core of this application, I reproduce here the essential details that the Dr. Jung letter *does* provide:

The development of renal stones is complex. For some, there is demonstrable metabolic condition to denote someone as recurrent stone former. For most others, metabolic or endocrine investigations are negative and no specific causal factor can be discerned. Based on simple chemistry, it is true that dehydration will lead to higher concentration of minerals in a solution, thus predisposing to precipitation and hence the development of renal stones. However, this relationship is not simple or direct in human beings. The vast majority of people who become dehydrated do not develop renal stones and others who are not dehydrated develop renal stones. This said, it is never a good idea to become dehydrated and while there is no direct and immediate correlation, dehydration does increase one’s chance of developing renal stones.

If Mr. Mushing's recollection that he was constantly dehydrated during his duty in the control tower is to be believed, then it can reasonably be concluded that chronic dehydration may have contributed to his development of renal stones.

[43] Based on the above, I find that it was reasonable for the VRAB Panel to conclude that the Jung medical opinion raises only a possibility of connection between the Applicant's medical condition and his military service. As the case law establishes, and the Applicant acknowledges, an individual appearing before the VRAB must establish something more than a mere possibility of connection to be entitled to compensation: *Elliot* at para 46. As this court has noted, the duty to assess evidence in its best possible light and to the benefit of an applicant does not eliminate the applicant's burden of demonstrating a significant causal connection between the medical condition and military service: *Veilleux v Canada (Attorney General)*, 2019 FC 1184 at para 38. In this case, I am satisfied that the VRAB Panel assessed the evidence before it in light of section 39 of the *VRAB Act*, and reasonably concluded the Applicant had not provided sufficient evidence to establish that his medical condition was connected to his military service.

[44] I also agree with the Respondent that the facts at issue in this case are distinguishable from *Ouellet*. In *Ouellet*, the Court found that the VRAB had erred in failing to consider studies before it which indicated a "prevailing view" that the medical condition in that case – sarcoidosis – occurs as a consequence of exposure to environmental agents such as those to which the applicant had been exposed, combined with genetic factors.

[45] In this case, while there was some evidence contained in both the Mayo Clinic report and the Jung letter that dehydration may contribute to the development of renal stones, there was no

direct medical evidence establishing that the Applicant was chronically dehydrated during his military service. As the VRAB Panel pointed out, the medical documentation did not assess, for example, the Applicant's ability to hydrate outside working hours. The medical documentation similarly did not contemplate that the Applicant did apparently consume juice or soda during working hours, and nor did it consider any connections between the consumption of such liquids and the onset of kidney stones. Recall as well, that a key passage of the Jung letter is based on something of a hypothetical: *if* the Applicant was constantly dehydrated during his service, such service may have contributed to his kidney stones. Cases, however, are established by evidence, not hypotheticals, and I do not think that in these circumstances the VRAB Panel was required to infer that the Applicant was chronically dehydrated, notwithstanding the requirements of section 39 of the *VRAB Act*.

[46] While the Applicant alleges that the VRAB Panel erred in law in interpreting section 39 of the *VRAB Act*, I find that much of the argument boils down to a disagreement with the Panel's appreciation of the facts contained in the Jung letter. In other words, the Applicant's request, stripped down to its essence, is that this court ought to reweigh, and differently evaluate, the evidence contained in the Jung letter. This is not the role of the court on judicial review.

[47] As noted above, the VRAB panel correctly identified the various evidentiary requirements set out at section 39 of the *VRAB Act*. The Applicant may be of the view that the Panel failed to apply these requirements to the Jung letter and, to this extent, his argument raises a question of mixed fact and law. Regardless of how the key questions are characterized, however, the VRAB Panel's decision is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law.

[48] In *Cole v Canada (Attorney General)*, 2015 FCA 119 [*Cole*] the Federal Court of Appeal rejected the notion that an applicant's military service had to constitute a primary cause of the medical condition giving rise to the claim. Rather, the Court held that a sufficient causal connection would be satisfied if the evidence established that military factors were a significant cause of the medical condition: *Cole* at paras 97, 110.

[49] In the present case, the Applicant had to provide evidence to establish, on a balance of probabilities, that there was more than a mere possibility that his military service was a significant cause of his kidney stones. I find that the VRAB Panel reasonably concluded that the Applicant had failed to meet this burden.

[50] Before concluding, I will address two further issues that I alluded to above. The first relates to the VRAB Panel's finding that the Jung letter was vague, at least in part, because it did not mention other known risk factors such as family history. The Applicant argues that this was unreasonable because his father had only a single episode of renal stones, caused by Dyazide, a medication that increases the risk of kidney stones. I disagree. The record before the VRAB Panel contains multiple references to the Applicant's father's kidney stones. The record is completely silent, however, as to the cause or duration of the father's condition. The Jung letter could have specifically addressed the father's experience of kidney stones and ruled it out as a risk factor for the Applicant. Not having done so, however, it was open to the VRAB Panel to refer to the father's condition, as contained in the record, as evidence of the letter's lack of detail.

[51] The second relates to the fact that, in the Record, there was information that the Applicant had been on a medication, Apo-Triazide, for 3 months starting on June 8, 2005, to

address an unrelated medical condition. The Applicant acknowledges in the Record that this drug is associated with the onset of renal stones as a potential side effect, and that he experienced his first kidney stone episode on August 28, 2005, approximately two and a half months after starting the medication.

[52] The Respondent points to this fact as further evidence that the Applicant failed to make out the connection between his kidney stones and his military service. The Applicant objects to the Respondent's reliance on this information, as the VRAB Panel did not refer to it in its reasons. I have some sympathy for the Applicant's position, as it is generally not the role of counsel on judicial review to "bolster" a decision by pointing to possible findings that the decision-maker did not make: *Cruz Ugalde v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 458 at para 34.

[53] However, I do note that in the VRAB Panel's analysis, it mentioned the lack of detail on the Applicant's medical history as one example of the vagueness of the Jung opinion. While unnecessary for the sake of this decision, I find that the omission of the Apo-Triazide treatment in the Jung letter adds further justification to the VRAB Panel's conclusion that the letter was vague and insufficient to establish a connection between the Applicant's kidney stones and his military service.

VII. CONCLUSION

[54] For these reasons, this application for judicial review is dismissed. The respondent has not sought costs and none are awarded.

JUDGMENT in T-2068-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No costs are awarded.

"Angus G. Grant"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2068-23

STYLE OF CAUSE: DAVID MUSHING v CANADA (ATTORNEY
GENERAL)

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MAY 2, 2024

JUDGMENT AND REASONS: GRANT J.

DATED: MAY 16, 2024

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