Federal Court Cour fédérale

Date: 20241024

Docket: T-2573-23

Citation: 2024 FC 1669

Ottawa, Ontario, October 24, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

JONATHAN PELLETIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] Jonathan Pelletier [Applicant], served in the Canadian Armed Forces [CAF] for over twenty years. In 2016, the Applicant applied for a critical injury benefit [Critical Injury Benefit] under the *Veterans Well-Being Act*, SC 2005, c 21 [VWA] after suffering an injury while participating in a mandatory team sports event on June 28, 2016 [Injury]. The Injury resulted in a left hip femoral neck fracture that required surgery consisting of a total hip replacement and insertion of a prosthesis into the femur on June 29, 2016 [Surgery].

[2] On February 9, 2017, Veterans Affairs Canada [VAC] denied the Critical Injury Benefit. The Applicant sought a review of this decision and a review panel dismissed the review on February 14, 2018. The Applicant appealed this decision. On June 3, 2021, an appeal panel [First Appeal Panel] of the Veterans Review and Appeal Board [VRAB] denied the appeal on the basis that the Injury was not the result of a "sudden and single incident."

[3] The Applicant sought a judicial review of the First Appeal Panel's decision. On July 7, 2022, in *Pelletier v Canada (Attorney General of Canada),* 2022 FC 1002 [*Pelletier*], Justice McHaffie granted the application for judicial review and remitted the matter to a freshly constituted appeal panel. A second appeal panel of the VRAB [Second Appeal Panel] considered the Critical Injury Benefit application on the same record that was before the First Appeal Panel. On June 27, 2023, the Second Appeal Panel denied the Critical Injury Benefit, but for different reasons than those articulated by the First Appeal Panel who had originally found that the Applicant met the "severe impairment and severe interference" criteria. The Second Appeal Panel found that the Injury was the result of a "sudden and single incident" [Decision]. However, it found that the Injury did not cause a "severe impairment and severe interference" in the Applicant's quality of life as the criteria were not met under the applicable statutes, regulation and policy.

[4] The Applicant now seeks judicial review of the Second Appeal Panel Decision. The Applicant challenges the reasonableness of the Decision. He further states that should he be successful on judicial review, the circumstances of this case warrant the Court's intervention in

declining to remit the matter for reconsideration, directing the remedy and declaring that the Applicant is eligible for the Critical Injury Benefit.

[5] The Respondent states that the Decision is transparent, intelligible and justified in relation to the facts and law that constrained the Second Appeal Panel's Decision. The Second Appeal Panel reasonably found that the Applicant's injury did not immediately cause a "severe impairment and severe interference" in the Applicant's quality of life, as it did not meet the statutory requirements for the Critical Injury Benefit.

[6] For the reasons that follow, the application for judicial review is granted. The Applicant has demonstrated that the Decision is unreasonable. I also find that the facts of this case meet the exceptional circumstances where the Court should decline to send the matter back for another redetermination by a third appeal panel and direct the result that should follow.

II. Issues and Standard of Review

[7] The Applicant submits that the issue before the Court on judicial review is whether the Second Appeal Panel erred by finding that the Injury did not immediately cause a "severe impairment and severe interference" in the Applicant's quality of life by finding that he did not require the assistance of at least one person to perform at least three activities of daily living [ADL] for a minimum of 112 consecutive days; or, that the Applicant did not receive "complex treatments" as a result of the Injury.

[8] The parties agree that the applicable standard of review with respect to the merits of the VRAB's decisions is reasonableness (*Pelletier* at para 6, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17, 23-15; *Abdulle v Canada (Attorney General*), 2021 FC 708 at para 9). The Applicant has also cited this Court's jurisprudence that the standard of review applicable for a review of a decision under the *Veterans Review and Appeal Board Act,* SC 1995, c. 18 [VRAB Act] is reasonableness. This includes the VRAB's rules of evidence under the VRAB Act (*Jansen v Canada (Attorney General)*, 2017 FC 8 at para 20 [*Jansen*]*; Canada (Attorney General of Canada) v Wannamaker*, 2007 FCA 126 at para 13*; McAllister v Canada (Attorney General)*, 2014 FC 991 at paras 38-40) and the VRAB's consideration of medical evidence (*Trainor v Canada (Attorney General),* 2011 FC 484 at para 28).

[9] I agree that the applicable standard of review in respect of the merits of the Decision is reasonableness.

[10] When assessing a decision on judicial review, the Court must determine whether the decision at issue bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

III. Analysis

[11] I will not repeat those facts described in *Pelletier* surrounding the Injury and the Surgery. The relevant statutory provisions are also attached to these Reasons as an Annex.

[12] In *Pelletier* at paragraphs 11 to 17, Justice McHaffie also summarized the applicable legislative framework or the "legal constraints" that define when a member or veteran is eligible for a Critical Injury Benefit. The framework or "legal constraints" that continue to apply to the Applicant in this judicial review are the following:

a) The criteria and requirements for entitlement to a Critical Injury Benefit are set out in section 44.1 of the VWA and section 48.3 of the *Veterans Well-Being Regulations*, SOR/2006-50 [Regulations].

b) The VWA is designed 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. It seeks to fulfil this purpose by providing for a variety of services, assistance, benefits, and compensation to Canadian Forces members and veterans (*Pelletier* at para 11, s. 2.1 of the VWA).

c) The Decision was constrained by provisions in both the VWA, and the VRAB's constating statute, the VRAB Act, that give broad instructions regarding the application of the VWA and the consideration of evidence (*Pelletier* at para 14).

d) The "purpose" section of both section 2.1 of the VWA and section 3 of the VRAB Act contains similar language, and provides that the statute "shall be liberally interpreted" to fulfil the recognized obligation to members and veterans. The injunction language in both the VWA and VRAB Act underscores the importance of a liberal interpretation of the statutory provisions pertaining to compensation and benefits for members and veterans (*Pelletier* at para 15).

e) This approach is reinforced by section 43 of the VWA, which calls on the Minister and their delegates to give applicants the "benefit of the doubt" in making decisions on compensation and benefits. This includes (a) drawing from the circumstances of the case, every reasonable inference in favour of an applicant; (b) accept any uncontradicted evidence presented that the Minister considers to be credible in the circumstances; and, (c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case (*Pelletier* at para 16). Nearly identical language is found at section 39 of the VRAB Act requiring the VRAB to apply the three principles above in "all proceedings under this Act" (*Pelletier* at para 17).

[13] Pursuant to section 44.1 of the VWA, an applicant seeking a Critical Injury Benefit must establish that they "sustained one or more severe and traumatic injuries, or developed an acute disease, and that the injury or disease":

a) was a service-related injury or disease;

b) arose from a sudden and single incident that took place after April 1, 2006; and,

c) immediately caused a severe impairment and severe interference in the quality of life.

[14] In the Applicant's case, the First Appeal Panel found the criteria under paragraphs 44.1(1)(a) and (c) of the VWA had been met. On redetermination, the Second Appeal Panel found the criteria under paragraphs 44.1(1)(a) and (b) of the VWA to be satisfied but not 44.1(1)(c). The Second Appeal Panel's assessment and finding of criteria under paragraph 44.1(1)(c) of the VWA in the Decision is the subject of this application for judicial review.

[15] Section 48.3 of the Regulations further elaborates the factors that must be considered for the purpose of section 44.1(1) of the VWA. The relevant passages in this application for judicial review are found in paragraphs 48.3(e) and (h) of the Regulations as follows:

48.3 For the purpose of subsection 44.1(2) of the Act, the Minister shall consider whether the member or the veteran	**48.3** Pour l'application du paragraphe 44.1(2) de la Loi, le ministre tient compte des facteurs suivants :
(e) required the assistance of at least one person to perform at least three activities of daily living for a minimum of 112 consecutive days;	**e)** la période pendant laquelle le militaire ou le vétéran a eu besoin de l'aide d'au moins une personne pour accomplir au moins trois activités de la vie quotidienne est d'au moins cent douze jours consécutifs;
…	…
(h) was admitted to a hospital for acute or rehabilitative inpatient care for less than	

84 consecutive days during which the member or the veteran received complex treatments.	**h)** dans le cas de l'hospitalisation pour des soins de courte durée ou de réadaptation qui dure moins de quatre-vingt-quatre jours consécutifs, le militaire ou vétéran a subi des interventions complexes.

[16] The Applicant underlines that although he relied on the factors described in paragraphs 48.3(e) and (h) of the Regulations, an applicant seeking the Critical Injury Benefit only needs to meet one of the factors. He states that he met both factors.

A. *The Decision is unreasonable*

(1) The Decision with respect to paragraph 48.3(e) of the Regulations is not reasonable

[17] The Applicant argues that the Second Appeal Panel did not grapple with the Applicant's supporting evidence that he required assistance with ADL described in paragraph 48.3(e) of the Regulations. The Applicant argues that the Second Appeal Panel did not address a critical piece of evidence and in so doing, rendered the Decision unreasonable.

[18] In support of his application for the Critical Injury Benefit, the Applicant provided a letter from his partner, Ms. Tremblay, dated February 1, 2018 [Tremblay Letter]. Ms. Tremblay described the assistance she provided to the Applicant for the sixteen-week period after his accident. She outlined four ADL, namely, "hygiène personnelle," "habillage," "transfert et mobilité dans le lit" and "déplacement." Under each heading, Ms. Tremblay described how she assisted the Applicant with each ADL and the limitations that the Applicant had in each respect.

[19] During the hearing, I asked what constituted ADL for the purposes of the Critical Benefit Injury. The Respondent indicates that a policy existed that sets out examples of ADL. However, the policy was not included in the Certified Tribunal Record or any of the parties' record before the Court. The Respondent confirmed that with respect to the Tremblay Letter, the four headings of ADL that she set out are those found in the policy. I therefore find that the Tremblay Letter addresses the ADL as contemplated in the VWA and Regulations for the Critical Benefit Injury.

[20] In the Decision, the Second Appeal Panel found that they were unable to find evidence that supported the requirement of assistance of at least one person to perform at least three ADL for a minimum of 112 consecutive days to meet the requirement in paragraph 48.3(e) of the Regulations. The Second Appeal Panel refers to a medical record dated July 19, 2016, that stated, "[…] Gets up several times a day to go to bathroom, cook supper, shower, etc. Surgical site healing well." It also found that seven weeks post-surgery, the Applicant sold his house and moved to a new home. Another medical record noted that he went on vacation in Mexico. The Second Appeal Panel stated that it could only conclude that in the two months following the Surgery, the Applicant moved homes and took a plane to Mexico. It found that these examples constituted activities that arose from the usual definition of ADL, such as mobility, washing and dressing. The Second Appeal Panel stated the documentary evidence contradicted the Applicant's assertion that he needed assistance for ADL. As a result, he did not satisfy the requirement in paragraph 48.3(e) of the Regulations.

[21] The Applicant argues that the Decision is completely silent on the Tremblay Letter, a first-hand account of what type of assistance for ADL that the Applicant needed. This failure to

account for critical evidence in the Decision is a hallmark of an unreasonable decision (citing *Vavilov* at para 126).

[22] The Respondent states that the Decision did not need to list every document that the Second Appeal Panel reviewed and that it is assumed that the decision maker has considered all of the documents before it (citing *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 CSC 67 at paras 30 and 52; *Vavilov* at para 129). It was open to the Second Appeal Panel to prefer the contemporaneous medical records to the Tremblay Letter. This evidence represented the most credible and useful evidence. The Respondent states that the Second Appeal Panel also had other documents before it, including a report from a Dr. Toms dated January 31, 2017 where he provided his opinion that the Applicant only met two of the ADL criteria required under paragraph 48.3(e) of the Regulations. The Respondent argues that the Applicant is asking the Court to reweigh the evidence in a manner more favourable to him.

[23] I agree with the Applicant's argument that the Second Appeal Panel erred in not grappling with the evidence in the Tremblay Letter. As Justice McHaffie underlined in *Pelletier*, it is important that reviewing courts not reweigh and reassess the evidence considered by the decision maker. However, this cannot prevent a reviewing court from reviewing the evidence to determine whether the evidence is capable of supporting the factual findings of an administrative decision maker. A decision that is not supported by or consistent with the evidence may be regarded as unreasonable (*Pelletier* at para 29, citing *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184 at para 86, citing *Vavilov* at para 126).

[24] In the Decision, the Second Appeal Panel addressed the Applicant's assertion that he meets two of the factors under section 48.3 of the Regulations. However, it concluded that none of the factors were met given the absence of evidence that could substantiate the Applicant's claim ("Cependant, le comité se retrouve devant une absence de preuve qui pourrait soutenir les affirmations"). The Second Appeal Panel also stated, "Le comité n'a pas été en mesure de trouver des éléments de preuve qui soutiennent un besoin d'aide d'au moins une personne pour accomplir au moins trois activités de la vie quotidienne pour une durée d'au moins 112 jours consécutifs afin de répondre au facteur e)." The Decision clearly concluded that there was no evidence or that it could find no evidence to support the Applicant's claim that he needed assistance for ADL under the Regulations.

[25] However, there was evidence on this matter, in the form of the Tremblay Letter. This letter was part of the Applicant's submissions and key arguments and part of the record before the Second Appeal Panel. The Tremblay Letter provided evidence on "the circumstances of the case" with respect to assistance for ADL. This evidence is also not subordinate evidence as it went to the heart of the issue regarding the Applicant's eligibility requirements.

[26] Despite the Respondent's reference to Dr. Toms' report at the hearing, the Second Appeal Panel did not cite his opinion on this issue in the Decision. I also note that Dr. Toms' opinion predated the Tremblay's Letter by one year and I was not directed to any updated report.

[27] I agree that not every argument or piece of evidence needs to be addressed in a decision. However, the principles of justification and transparency require that an administrative decision

maker's reasons meaningfully account for the central issues and concerns raised by the parties. A decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it (*Vavilov* at para 126, 128). In the present case, the Second Appeal Panel's failure to meaningfully grapple with the Tremblay Letter is a reviewable error.

[28] The error is further compounded by the constraints that bear on the Second Appeal Panel under section 43 of the VWA and section 39 of the VRAB Act, with the statutory requirement for the Applicant's evidence to be given the "benefit of the doubt." Under these circumstances, the Second Appeal Panel ought to have considered Ms. Tremblay's evidence and to (a) draw from the circumstances of the case, every reasonable inference in favour of an applicant; (b) accept any uncontradicted evidence presented that the Minister considers to be credible in the circumstances; and, (c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case under section 43 of the VWA and section 39 of the VRAB Act.

[29] If the Second Appeal Panel did not find that Ms. Tremblay's evidence warranted the "benefit of the doubt" in that it was not credible, or if other evidence contradicted her account, it needed to assess this evidence and make a finding to that effect. The Decision's silence on Ms. Tremblay's evidence in this regard is also a reviewable error (*Jansen* at paras 57-58).

[30] As such, I find that the Second Appeal Panel's conclusion on the criteria described in paragraph 48.3(e) of the Regulations is not reasonable in light of the legal and factual constraints that bear upon the decision maker.

[31] As stated above, the Applicant only needed to satisfy one of the criteria listed in section 48.3 of the Regulations in order to qualify for the Critical Injury Benefit. The error with respect to paragraph 48.3(e) of the Regulations would be determinative and would be sufficient, in my view, to grant this application for judicial review. However, for completeness, I will also address the parties' arguments with respect to the Decision's conclusion on the second criteria that the Applicant did not receive "complex treatments" or "interventions complexes" pursuant to paragraph 48.3(h) of the Regulations.

(2) The Decision with respect of 48.3(h) of the Regulations is not reasonable

[32] The Applicant contends that the manner in which the Second Appeal Panel addressed the criteria in paragraph 48.3(h) of the Regulations that he did not receive "complex treatments" or "interventions complexes" was not coherent, transparent, intelligible or justifiable. The crux of the debate between the parties whether the use of the terms "complex treatments" or "interventions complexes" means multiple interventions.

[33] The initial review panel in February 2018 found that the Applicant had undergone "complex treatments" but not multiple interventions. On appeal from that decision, the First Appeal Panel found that the Applicant had undergone "interventions complexes" and met the criteria of 48.3(h) of the Regulations and 44.1(1)(c) of the VWA. The Second Appeal Panel

found that the Applicant did not undergo “interventions complexes” because he did not receive multiple surgeries and thus, he did not meet the criteria of 48.3(h) of the Regulations and 44.1(1)(c) of the VWA.

[34] The Applicant appropriately recognizes that the principle of *stare decisis* does not apply to the Second Appeal Panel and that they were not bound by the First Appeal Panel’s decision. However, he states that the Second Appeal Panel was required to clearly justify its Decision especially because both VRAB appeal panels arrived at different conclusions on the same record, legislative provisions and policy.

[35] The Second Appeal Panel relied on a policy entitled “Indemnité pour blessure grave” that came into effect on April 1, 2019 [Policy]. A copy of this Policy was not in the Certified Tribunal Record, nor was in found in any of the parties’ Records. The relevant passage cited in the Decision that referred to the Policy states:

> “13. Interventions complexes : Peuvent comprendre, notamment, de multiples chirurgies, de multiples procédures invasives ou douloureuses (p. ex. traitement de brûlures graves), une alimentation parentérale prolongée ou une ventilation artificielle des poumons. ”

[36] In its assessment of “interventions complexes,” the Second Appeal Panel states that the relevant statute and regulations relating to the Critical Injury Benefit “sont très rigides et limitatives” and that the legislator has stated unequivocally that all criteria must be met. According to the Second Appeal Panel, this meant that these references are not subject to any interpretation or discretion. The Second Appeal Panel then listed examples of terms that would have given it the ability to exercise more discretion, such as “notamment, entre autres, non

exhaustif, ou tout autre critère jugé pertinent.” The Second Appeal Panel underlined that section 48.3 of the Regulations specifically listed eight factors and found that none of the factors were met given the absence of evidence to substantiate the Applicant’s claim. The Applicant did not meet the “interventions complexes” criteria because he did not have more than one hospitalization, additional procedures or subsequent follow-up with specialists.

[37] I read the Decision to mean that the Second Appeal Panel interpreted the Policy narrowly as it uses the terms “spécifique et détaillée.”

[38] In contrast, the First Appeal Panel indicated that while the Policy provided assistance for the definition of what could constitute “intervention complexes” by providing certain examples, the list was not exhaustive. The First Appeal Panel also cited the same passage from the Policy as the Second Appeal Panel. The First Appeal Panel also stated that there would well be other types of interventions that would be considered and accepted as complex. The First Appeal Panel accepted the report of Dr. Rancourt, the surgeon who performed the Applicant’s Surgery, which set out her opinion on the nature of the Surgery in its assessment of “interventions complexes.”

[39] The First Appeal Panel determined that the Policy was intended to be non-exhaustive whereas the Second Appeal Panel described the Policy as being more rigid and strict. The Applicant states that the First Appeal Panel applied the Policy liberally and its assessment was not challenged on judicial review in *Pelletier*.

[40] The First Appeal Panel's finding that the Applicant met the "intervention complexes" criteria was based on Dr. Rancourt's medical opinion, and not on the number of procedures that the Applicant underwent. The Second Appeal Panel, meanwhile, interpreted the same term to mean that multiple interventions, among other things, were required. The Decision acknowledged Dr. Rancourt's opinion that the Surgery was complex. However, the Second Appeal Panel then stated that surgery is complex by its nature, but that under the Regulations, which is "spécifique et détaillée," not all surgeries are automatically considered complex under section 48.3 of the Regulations.

[41] It is well-established law that although administrative bodies are not necessarily bound by their previous decisions, a decision may be unreasonable where an administrative body departs from its prior decisions without a clear justification for doing so (*Vavilov* at paras 129-132). The conflict here is that one appeal panel's findings appears based on a qualitative assessment of the procedures, whereas the other appeal panel required what appears to be a quantitative threshold. These are diametrically opposite approaches on the same issue and based on the same statutory references and Policy. Further, the Applicant had submitted cases to the Second Appeal Panel where the VRAB previously found that undergoing one surgery was sufficient to meet the threshold for "interventions complexes" under section 48.3 of the Regulations.

[42] Again, although the Second Appeal Panel was not bound by previous VRAB decisions, where an administrative body departs from its prior decisions without a clear justification for doing so this can raise doubt as to the reasonableness of the decision (*Vavilov* at paras 129-132). I find that the Second Appeal Panel did not sufficiently address or justify its differing

conclusions. I also agree with the Applicant that the Decision did not distinguish the cited VRAB decisions where a panel found undergoing one surgery was sufficient to meet the statutory thresholds for “interventions complexes.”

[43] Notwithstanding the conflicting conclusions, I also find that the Second Appeal Panel’s Decision on its own does not provide a coherent or consistent interpretation of the Regulations.

[44] A reviewing Court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. Furthermore, reasons that simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion will rarely assist a reviewing court in understanding the rationale underlying a decision and “are no substitute for statements of fact, analysis, inference and judgment” (*Vavilov* at paras 102-103).

[45] I find that the conclusion reached by the Second Appeal Panel with respect to “interventions complexes” cannot follow from the analysis undertaken. The Second Appeal Panel stated that the legislation’s specific language gives it no discretion and listed the type of language that would have given it a wider berth. The Second Appeal Panel specifically included the term “notamment” as part of the list of language that would have permitted it to exercise more discretion in the analysis of “interventions complexes” in paragraph 48.3(h) of the Regulations. However, the Policy actually uses the term “notamment” in the passage cited with examples for “interventions complexes.” Despite this, the Second Appeal Panel stated that the

complexity of a procedure was “spécifique et détaillée” in justifying its rejection of the Applicant’s benefit.

[46] The Second Appeal Panel’s statement and its application of the factors for “interventions complexes” under the Policy contradict its reasoning that the term “notamment” would have given it more discretion. The Decision ignored the use of the term “notamment” in the Policy and failed to apply its discretion that the Second Appeal Panel specifically described.

[47] The Applicant also pointed to the record to clarify that the Applicant did, in fact, continue to see specialists post-operatively. The Second Appeal Panel was therefore incorrect when it stated that there was no subsequent follow-up with specialists and the record does not support its conclusion. I also agree.

[48] Given the above, I am unable to “connect the dots” to understand the Second Appeal Panel’s conclusion on the criteria for paragraph 48.3(h) of the Regulations. As a result, the Decision with respect to paragraph 48.3(h) of the Regulations is not reasonable because it lacks transparency, intelligibility and coherence.

IV. The Appropriate Remedy

[49] The Applicant states that if the Court is to find in his favour, his particular circumstances warrant that the Court decline to remit the matter to a third appeal panel and direct that the Applicant be granted the Critical Injury Benefit. The Applicant submits that should I find the conclusions on either paragraph 48.3(e) or (h) of the Regulations unreasonable, there is nothing

left to analyze. As well, given the previous procedural history and outcomes, it is possible that a third appeal panel will arrive at yet another determination that could result in another application for judicial review. In support of this position, the Applicant relies on *Vavilov* at paragraph 142, which also cites the Federal Court of Appeal in *D'Errico v Canada (Attorney General)*, 2014 FCA 95 [*D'Errico*]. The Applicant submits that his case resembles that in *D'Errico*, where the Court directed the result after finding the underlying decision to be unreasonable.

[50] The Supreme Court confirmed that there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended (*Vavilov* at para 142, citing *D'Errico* at paras 18-19). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose (*Vavilov* at para 142).

[51] I find that the circumstances of this case meet the threshold of exceptionality. I am of the view that it is appropriate for this Court to make its own assessment on the record before it and direct the result that should follow, in the interests of justice.

[52] In *D'Errico*, the issue related to a judicial review of the Pension Appeal Board's decision on whether the applicant had a severe and prolonged disability. The applicant asked the Federal Court of Appeal to quash the decision and grant her disability benefits, in effect, granting the

remedy of *certiorari* and *mandamus*. The Federal Court of Appeal described that the usual remedy after the Court grants *certiorari* is to remit the matter for reconsideration, as it is for the board to decide the merits of the cases, and not the Court (*D'Errico* at para 14-15). However, there are exceptions, and the Federal Court of Appeal found the threshold of exceptionality was met based on the substantial delay and additional delay caused by remitting the matter. This would threaten to bring the administration of justice into disrepute. In such instances, the Court exceptionally may direct that a certain result be reached.

[53] The applicant in *D'Errico* had applied for benefits six years before. If the matter were remitted for redetermination, and if a party applied for judicial review, a further two years could pass, bringing the total to eight years. The other factors that the Federal Court of Appeal considered included sparse evidence in support of the Board's outcome and that the applicant was not guilty of any unreasonable delay. The nature of the benefits in the regulatory scheme also favoured the Court's discretion. The Court determined that under the circumstances, it could make its own assessment on the record and direct the result that should follow on the facts and the law (*D'Errico* at para 21).

[54] In response to my question at the hearing, the Respondent acknowledged the absurdity of the situation where the matter could, indeed, be sent back for reconsideration by this Court and be denied again by a third appeal panel. The Respondent states that the Court can still remit the matter and a third appeal panel would have to consider this Court's reasons on both judicial review decisions involving the Applicant.

[55] However, I agree with the Applicant that this scenario would be indeed the “endless merry-go-round” that *Vavilov* seeks to avoid. The Court’s concerns about the undue delay and additional delay would also not be addressed with a further redetermination. The matter has already reached eight years, from the date of the Injury and initial application for the benefit in 2016. A further delay of two more years if the matter is remitted to a third appeal panel and if any party seeks judicial review of that decision would total ten years. Furthermore, the parties described the Critical Injury Benefit to the Court as a “one time payment” to a veteran who has been injured. I also do not believe that Parliament could have intended for the final disposition of a Critical Benefit Injury application for a “one time payment” to take so long (*D'Errico* at para. 19). This is a significant delay that threatens to bring the administration of justice into disrepute.

[56] This is also a case where a particular outcome is inevitable and remitting the case would therefore serve no useful purpose. The Applicant was required to meet either paragraph 48.3(e) or (h) of the Regulations to qualify for the Critical Injury Benefit. I have found that the Decision failed to take into account the evidence in the Tremblay Letter on the ADL. The Tremblay Letter described at least three eligible ADL for the 112 days (or 16 weeks) period. Applying the principle of the “benefit of the doubt” to her evidence based on section 43 of the VWA and section 39 of the VRAB Act would mean that her evidence (in the absence of reliable contradictory evidence) would be treated favourably. As such, the criteria in paragraph 48.3(e) of the Regulations were met. If that is the case, then the Applicant would qualify for the Critical Injury Benefit under paragraph 44.1(1)(c) of the VWA.

[57] A similar assessment on paragraph 48.3(f) of the Regulations applies. The Policy itself was not in the Certified Tribunal Record, and there is no information before the Court on the instruction provided about its use, whether it is binding or other passages of the Policy that could have been relevant. However, if the Second Appeal Panel had applied its own reasoning that the use of the term "notamment" in the Policy would have given it wider discretion in considering what would constitute "interventions complexes," then its interpretation of the Policy would not have been so narrow. Other VRAB decisions have permitted benefits with one surgery meeting the "interventions complexes" criteria. In addition, applying the "benefit of the doubt" principle to Dr. Rancourt's medical evidence on the Surgery as the First Appeal Panel had, the criteria of "interventions complexes" under paragraph 48.3(h) of the Regulations would have been met. If that is the case, then the Applicant would qualify for the Critical Injury Benefit under paragraph 44.1(1)(c) of the VWA.

[58] Finally, the First Appeal Panel found that the criteria under paragraphs 44.1(1)(a) and (c) of the VWA but not (b). The Federal Court in *Pelletier* found that the decision with respect to paragraph 44.1(1)(b) was not reasonable. Then, the Second Appeal Panel found that the criteria under paragraphs 44.1(1)(a) and (b) were met but not (c). I have found that the decision with respect to paragraph 44.1(c) was not reasonable. Between two appeal panels, the Applicant met the three statutory criteria under the section 44.1 of the VWA.

V. Conclusion

[59] In conclusion, the application for judicial review is granted and the Decision is set aside. The Court directs the appropriate section of VAC to grant the Applicant's appeal of the decision denying his Critical Injury Benefit.

[60] The Respondent also asks that the style of cause be corrected to name the Attorney General of Canada as the Respondent and not the VRAB. The Applicant consents. Accordingly, the style of cause will reflect the "Attorney General of Canada" as the Respondent.

VI. Costs

[61] Given that the Applicant was successful, he is entitled to his costs. The parties did not discuss the issues of costs prior to the hearing. However, the Applicant indicated if he were to be successful, he would seek reasonable costs in accordance with Tariff B of the *Federal Courts Rules*, SOR/98-106 [Rules].

[62] The parties are strongly encouraged to arrive at an agreement on costs prior to November 22, 2024. If the parties reach an agreement by then, they may deliver a letter on consent to the Court confirming their agreement as to costs. The Court will consider whether the agreement as to costs is appropriate in accordance with Rule 400 of the Rules.

[63] In the event that the parties are unable to agree on costs:

a) The Applicant will serve and file his written submissions by December 6, 2024, not to exceed three (3) pages double-spaced, exclusive of schedules, appendices and authorities.

b) The Respondent will serve and file his written submissions by December 20, 2024, not to exceed three (3) pages double-spaced, also exclusive of schedules, appendices and authorities.

JUDGMENT in T-2573-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. Costs are awarded to the Applicant and the Court directs the appropriate section of VAC to grant the Applicant's appeal of the decision denying his Critical Injury Benefit.

3. The style of cause is corrected with the Attorney General of Canada as the Respondent.

4. The parties are directed to make submissions on the appropriate award of costs to the Court as described in this judgment.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2443-23
STYLE OF CAUSE:	JONATHAN PELLETIER v VETERANS REVIEW AND APPEAL BOARD CANADA, ET AL.
PLACE OF HEARING:	CALGARY (ALBERTA)
DATE OF HEARING:	SEPTEMBER 24, 2024
JUDGMENT AND REASONS:	NGO J.
DATED:	OCTOBER 24, 2024

APPEARANCES:

Matthew Schneider Aidan Paul	FOR THE APPLICANT
Alexander Brooker	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Barristers and Solicitors Calgary (Alberta)	FOR THE APPLICANT
Attorney General of Canada Calgary (Alberta)	FOR THE RESPONDENTS

Annex – Relevant Legislative Provisions

Veterans Well-being Act, SC 2005, c 21[VWA]:

Purpose

2.1 The purpose of this 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. This obligation includes providing services, assistance and compensation to members and veterans who have been injured or have died as a result of military service and extends to their spouses or common-law partners or survivors and orphans. This Act shall be liberally interpreted so that the recognized obligation may be fulfilled.

Objet

2.1 La présente loi a pour objet de reconnaître et d'honorer l'obligation du peuple canadien et du gouvernement du Canada de rendre un hommage grandement mérité aux militaires et vétérans pour leur dévouement envers le Canada, obligation qui vise notamment la fourniture de services, d'assistance et de mesures d'indemnisation à ceux qui ont été blessés par suite de leur service militaire et à leur époux ou conjoint de fait ainsi qu'au survivant et aux orphelins de ceux qui sont décédés par suite de leur service militaire. Elle s'interprète de façon libérale afin de donner effet à cette obligation reconnue.

Benefit of doubt

43 In making a decision under this Part or under section 84, the Minister and any person designated under section 67 shall
(a) draw from the circumstances of the case, and any evidence presented to the Minister or person, every reasonable inference in favour of an applicant under this Part or under section 84;
(b) accept any uncontradicted evidence presented to the Minister or the person, by the applicant, that the Minister or person considers to be credible in the circumstances; and
(c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case.

Décisions

43 Lors de la prise d'une décision au titre de la présente partie ou de l'article 84, le ministre ou quiconque est désigné au titre de l'article 67 :
a) tire des circonstances portées à sa connaissance et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible au demandeur;
b) accepte tout élément de preuve non contredit que le demandeur lui présente et qui lui semble vraisemblable en l'occurrence;
c) tranche en faveur du demandeur toute incertitude quant au bien-fondé de la demande.

Eligibility

44.1 (1) The Minister may, on application, pay a critical injury benefit to a member or veteran who establishes that they sustained one or more severe and traumatic injuries, or

Admissibilité

44.1 (1) Le ministre peut, sur demande, verser une indemnité pour blessure grave au militaire ou vétéran si celui-ci démontre qu'il a subi une ou plusieurs blessures graves et traumatiques ou a souffert d'une maladie

developed an acute disease, and that the injury or disease

(a) was a service-related injury or disease;
(b) was the result of a sudden and single incident that occurred after March 31, 2006; and
(c) immediately caused a severe impairment and severe interference in their quality of life.

Factors to be considered

(2) In deciding whether the impairment and the interference in the quality of life referred to in paragraph (1)(c) were severe, the Minister shall consider any prescribed factors.

Regulations

(3) The Governor in Council may, for the purpose of subsection 44.1(1), make regulations respecting the determination of what constitutes a sudden and single incident.

aiguë et que les blessures ou la maladie, à la fois :

a) sont liées au service;
b) ont été causées par un seul événement soudain postérieur au 31 mars 2006;
c) ont entraîné immédiatement une déficience grave et une détérioration importante de sa qualité de vie.

Facteurs à considérer

(2) Pour établir si la déficience est grave et la détérioration de la qualité de vie importante, le ministre tient compte des facteurs prévus par règlement.

Règlements

(3) Le gouverneur en conseil peut prendre des règlements concernant ce qui constitue, pour l'application du paragraphe 44.1(1), un seul événement soudain.

Veterans Well-being Regulations, SOR/2006-50 [Regulations]:

48.3 For the purpose of subsection 44.1(2) of the Act, the Minister shall consider whether the member or the veteran

(a) sustained an amputation at or above the wrist or ankle;

(b) sustained legal blindness in both eyes — meaning that their best corrected visual acuity is less than or equal to 6/60 or they have less than 20 degrees of visual field remaining — for a minimum of 84 consecutive days;

(c) sustained quadriplegia, paraplegia, hemiplegia or complete paralysis of a limb for a minimum of 84 consecutive days;

(d) sustained total loss of urinary or bowel function for a minimum of 84 consecutive days;

48.3 Pour l'application du paragraphe 44.1(2) de la Loi, le ministre tient compte des facteurs suivants :

a) dans le cas d'une amputation, elle est effectuée au niveau ou au-dessus du poignet ou de la cheville;

b) dans le cas de la cécité légale, elle s'étend aux deux yeux, elle dure au moins quatre-vingt-quatre jours consécutifs et l'acuité visuelle corrigée est égale ou inférieure à 6/60 ou le champ visuel est de moins de 20 degrés;

c) dans le cas d'une hémiplégie, d'une paraplégie, d'une quadraplégie ou d'une paralysie complète d'un membre, elle dure au moins quatre-vingt-quatre jours consécutifs;

(e) required the assistance of at least one person to perform at least three activities of daily living for a minimum of 112 consecutive days;

(f) was admitted to an intensive care unit for a minimum of five consecutive days;

(g) was admitted to a hospital for acute or rehabilitative inpatient care for a minimum of 84 consecutive days; or

(h) was admitted to a hospital for acute or rehabilitative inpatient care for less than 84 consecutive days during which the member or the veteran received complex treatments.

d) dans le cas de la perte totale de la fonction urinaire ou intestinale, elle dure au moins quatre-vingt-quatre jours consécutifs;

e) la période pendant laquelle le militaire ou le vétéran a eu besoin de l'aide d'au moins une personne pour accomplir au moins trois activités de la vie quotidienne est d'au moins cent douze jours consécutifs;

f) dans le cas d'une admission aux soins intensifs, elle dure au moins cinq jours consécutifs;

g) dans le cas de l'hospitalisation pour des soins de courte durée ou de réadaptation, elle dure au moins quatre-vingt-quatre jours consécutifs;

h) dans le cas de l'hospitalisation pour des soins de courte durée ou de réadaptation qui dure moins de quatre-vingt-quatre jours consécutifs, le militaire ou vétéran a subi des interventions complexes.

S. 3 *Veterans Review and Appeal Board Act*, [VRAB Act], SC 1995, c 18

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.

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

Règles régissant la preuve

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

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

(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.

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