Federal Court  Cour fédérale

Date: 20241029

Docket: T-2443-23

Citation: 2024 FC 1722

Ottawa, Ontario, October 29, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

FREDERICK THOMSON CHRISTIE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, a former officer with the Royal Canadian Mounted Police [RCMP], applied to Veterans Affairs Canada [VAC] for compensation and benefits arising from an injury sustained after an assault. The request was denied and the Applicant's appeal of that request was upheld by a panel of the Veterans Review and Appeal Board Canada [VRAB]. In a decision dated June 1, 2023, the VRAB dismissed the Applicant's application for reconsideration of the

VRAB appeal decision on the basis that the Applicant had failed to establish a threshold issue at Stage 1 that would justify the VRAB proceeding to a Stage 2 reconsideration [Decision]. The Applicant challenges the Decision on the basis that the VRAB unreasonably concluded that his injury did not arise out of or was not directly connected to his RCMP service. The Respondent states that the reconsideration panel provided reasons that exhibit the required degree of justification, intelligibility and transparency.

[2] For the reasons that follow, the application for judicial review is granted as the Applicant has demonstrated that the Decision is unreasonable. The reconsideration panel misapprehended evidence on a central issue. The matter is remitted for redetermination by a newly constituted panel.

II. Background and Decision Under Review

[3] The Applicant was a member of the RCMP from April 6, 1982, to November 1, 2013. He was in good health when he joined the force.

[4] On July 23, 2004, while on vacation, the Applicant witnessed a group of young males who were drinking and causing a disturbance in a park. Although the Applicant was not in uniform at the time, he considered it his duty as an off-duty police officer to intervene.

[5] The Applicant directed his children to go home, and then requested that the group of young males clean up their mess and cease the disturbance. The young males refused, at which time the Applicant informed them that he would contact the Calgary Police Service. Two of the

young males then assaulted the Applicant, knocked him to the ground, struck him upwards of 50 times, and rendered him unconscious [Assault]. The Applicant was transported to the emergency department and was hospitalized for six days in a trauma ward with a head injury. The Applicant was ultimately diagnosed with a "Closed Head Injury, brain contusion (L) facial nerve palsy" [Injury].

[6] As a result of the Injury, the Applicant experienced significant and ongoing difficulty. The Applicant was unable to return to work until late 2004, at which time he was only able to work half days in the office for a maximum of three to four days per week. The VRAB panels agreed, as do the parties, that the Applicant suffered post-concussion difficulties, amnesia and cognitive and perceived neurological abnormalities. It is also clear that the Applicant's memory of the events in question was affected as a result of the injuries he sustained.

[7] On January 4, 2005, the Applicant applied to VAC for disability benefits related to the Injury and lower back pain. On July 7, 2005, VAC denied the Applicant's claim for disability benefits on the basis that the Injury did not "arise out of, or [was] not directly connected with" the Applicant's RCMP service, as required for an award under section 32 *RCMP Superannuation Act*, RSC 1985, c. R-11 [Superannuation Act], and subsection 21(2) of the *Pension Act*, RSC 1985, c. P-6 [Pension Act].

[8] On June 19, 2007, a VRAB entitlement review panel confirmed the VAC's Decision. The panel found that on a balance of probabilities, the Applicant "had not approached the youths in his capacity as an RCMP officer," but "as a concerned citizen." The Appeal Panel stated that it

was “unable to find, in the evidence presented, that the Applicant was in fact acting in an official capacity as an RCMP officer at the time of the incident described.” On appeal of that decision, on January 26, 2009, a VRAB appeal panel [Appeal Panel] confirmed the entitlement review panel’s decision [Appeal Decision].

[9] The Applicant then asked for a reconsideration of the Appeal Decision [Reconsideration] on March 25, 2022. The Applicant argued that the Appeal Panel had erred in fact and law in failing to apply the legal benefit of the doubt to the facts on the file and second, that the Appeal Panel’s decision should be reconsidered due to there being new evidence, in the form of an unrelated Review Panel decision.

[10] On June 1, 2023, a panel of the VRAB considered the Applicant’s request [Reconsideration Panel] and dismissed the Applicant’s request for Reconsideration on the basis that the Applicant had failed to establish a threshold issue at Stage 1 that would justify the VRAB proceeding to the next stage in the reconsideration process [Decision]. The Reconsideration Panel found that there was no evidence that the Applicant approached the youths as a police officer, or identified himself as one, nor was there any evidence to show that the applicant perceived the situation as one that required him to intervene in his capacity as a police officer. The Reconsideration Panel also applied the objective factors of *Fournier v Canada (Attorney General)*, 2005 FC 453 [*Fournier*] (confirmed in *Fournier v Canada (Attorney General),* 2006 FCA 19) to determine that the Assault was not an incident that arose out of or is directly connected with service because the Applicant was off-duty and on vacation,

while bicycling with his children, and there was no evidence that the RCMP was exercising any control or direction over the applicant at the time.

[11] The Applicant seeks judicial review with respect to the Decision denying his Reconsideration request.

III. Issues and Applicable Standard of Review

[12] The issue in the present case is whether the Decision was unreasonable.

[13] The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]). To avoid intervention on judicial review, the decision must bear 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).

[14] The jurisprudence has also applied the reasonableness standard of review with respect to a review of the merits of a decision under the VRAB Act, SC 1995, c.18 [VRAB Act] (*Jansen v Canada (Attorney General)*, 2017 FC 8 at para 20 [*Jansen*]).

[15] The question of whether a service member's injuries "arose out of were directly connected with" their service is also reviewable on the reasonableness standard. (*Nicol v Canada (Attorney General)*, 2015 FC 785 at para 22 citing *McAllister v Attorney General of Canada*, 2014 FC 991 at para 38, *Frye v Canada (Attorney General)*, 2004 FC 986, at para 14, aff'd 2005 FCA 264 at para 11, *Fournier* at paras 26-27, *Bullock v Canada (Attorney General)*, 2008 FC 1117, at paras 11-14.). As such, I agree that the applicable standard of review on the merits of the Decision is reasonableness.

IV. Analysis

A. *The Applicable Legal Framework*

[16] This section describes the legal constraints that bear on the Decision. The relevant statutory provisions are also attached to these Reasons as an Annex.

[17] In order to receive compensation and/or benefits under section 21(2)(a) of the Pension Act, the Applicant must establish the following elements: (a) a claimed condition, being an injury or disease, or an aggravation thereof, (b) that the claimed condition "arose out of or was directly connected with" their service as a member of the armed forces or RCMP, (c) that they suffer as a result of the disability and (d) that their claimed disability resulted from the service-related claimed condition (*Cole v Canada*, 2015 FCA 119 at para 37 [*Cole*]).

[18] The *Fournier* factors that were used to objectively determine whether an incident arose out of or is directly connected with service include the location where the accident occurred, the

nature of the activity being carried on by the applicant at the time, the degree of control exercised by the military over the applicant when the accident occurred and whether the applicant was on duty at the time of the incident. However, no one factor is determinative (*Fournier* para 35).

[19] The Reconsideration application pursuant to section 32(1) of the VRAB Act involves a two-stage process:

a) At the first stage, the VRAB analyzes whether the previous panel who rendered the Appeal Decision made an error of law, error of fact, or if the Applicant has introduced new evidence that satisfies a four-part test to be admitted for the purposes of the reconsideration.

b) At the second stage, if the Applicant establishes any of the criteria set out in the first stage, the VRAB proceeds to a full reconsideration of the merits of the decision that is the subject of the application.

[20] The nature of a reconsideration is a distinct type of review function that is not to be confused with appeal proceedings or judicial review applications considered by a Court (*MacKay v Canada (Attorney General)*, 129 FTR 286).

[21] When the Court is reviewing a reconsideration decision, it must not to lose sight of the fact that the decision was a screening decision and not a full, second stage reconsideration decision. The central issue for the Court is whether the Reconsideration Panel reasonably determined that the Appeal Panel did not make an error in law or in fact. The Court must not therefore review the merits of the Applicant's claim, nor reweigh the evidence that the Applicant submitted in the previous proceedings. (*Dmitrienko v Canada (AG)*, 2023 FC 1678 at paras 29-31 citing *Blount v Canada (Attorney General)*, 2017 FC 647 at para 26).

[22] The VRAB Act gives broad instruction on the consideration of evidence in applications before the VRAB.

[23] Section 3 of the VRAB Act provides that the statute "shall be liberally interpreted" to fulfil the recognized obligation to members and veterans. The injunction language in the VRAB Act underscores the importance of a liberal interpretation of the statutory provisions pertaining to compensation and benefits for members and veterans (*Pelletier v Canada (Attorney General of Canada)*, 2022 FC 1002 at para 15 [*Pelletier*]*; Pelletier v Canada (Attorney General)*, 2024 FC 1669, at para 12)

[24] Section 39 of the VRAB Act calls on the Minister and their delegates to give applicants the "benefit of the doubt" in "all proceedings under this Act." The statute is clear that the VRAB 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 (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 (*Pelletier* at paras 16-17).

B. *The Decision was unreasonable*

[25] The Reconsideration Panel found that there was no error in the Appeal Panel's conclusion that the Injury did not arise out of or was not directly connected to the Applicant's RCMP service. By making this finding at the "screening" stage of the process, the

Reconsideration Panel did not continue to Stage 2, which would have involved a full reconsideration of the decision.

[26] The Applicant argues that the Reconsideration Panel was fixated on identifying a criminal offence in progress or whether he identified himself as a police officer. The Reconsideration Panel did not grapple with the Applicant's evidence that as an RCMP officer, he is expected to take appropriate action in certain circumstances even when he is not on duty. The Applicant outlined his statutory duties under the *Royal Canadian Mounted Police Act*, RSC 1985, c. R-10 [RCMP Act] and *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281 [RCMP Regulation] (and the Code of Conduct therein); and his subjective belief that he had a duty to intercede due to his status as an RCMP officer. The Applicant also alleges that the Reconsideration Panel failed to adhere to the evidentiary rules and presumptions which favour the Applicant under section 39 of the VRAB Act. The panel made findings that were not supported by the record.

[27] I agree with the Applicant that the Reconsideration Panel erred in misapprehending contemporaneous evidence that was submitted in support of his application.

[28] The Reconsideration Panel (as did the Appeal Panel) recognized that the Applicant's memory was significantly impaired from the Injury and also found an "absence of other evidence" to support his account of the Assault. The Reconsideration Panel also found that it was not an error in fact or law that the Appeal Panel did not rely on a report by a Sgt. Bray entitled

"Hazardous Occurrence Investigation Report – RCMP Form 3414" dated July 26, 2004 [Report], on the basis that it was "taken on October 21, 2006, more than two years after the Assault."

[29] However, the Reconsideration Panel cited the wrong date. The Report was, in fact, prepared only a few days after the Assault during the Applicant's admission to the hospital. A note in the Report mentioned, "he was off duty but acting in his capacity as a Police Officer."

[30] The Report was a contemporaneous account. I agree with the Applicant that in these circumstances, the Report would have been one of the best available pieces of evidence relating to the Assault.

[31] The Decision erroneously discounted the evidentiary value of the Report in the mistaken belief that it was completed long after the events it recorded. This is a reviewable error, in my view.

[32] This is not the type of error that *Vavilov* describes as a "treasure hunt for errors" that reviewing courts ought to avoid (*Vavilov* at para 102). Rather, given the significance of the Reconsideration Panel's finding that the Report was not reliable, it is a salient factual error that renders the Decision unreasonable. The Reconsideration Panel's conclusion on the Report was referenced in different places in the Decision and it formed an important part of the panel's justification for rejecting the Reconsideration request.

[33] The factual error with respect to the Report is significant and determinative in my view, because the overlying theme in reading the Decision is the Reconsideration Panel's findings of a lack of witness evidence or testimony related to the Assault to substantiate that the Applicant identified criminal offences in the making and that he approached the youths as a police officer. By all accounts, it is acknowledged that the Applicant has no memory of the Assault given his Injury. As such, any evidence that could assist in describing the events surrounding the Assault is important.

[34] The Respondent states that the Reconsideration Panel did not err in applying section 39 of the VRAB Act since this section does not relieve the Applicant of his burden to prove the facts required to establish entitlement to a pension. The Respondent submits that the Decision is clear that the VRAB put significant consideration into section 39 of the VRAB Act.

[35] I agree that the Reconsideration Panel outlined the statutory requirements under section 39 of the VRAB Act. However, given that the panel erred in finding that the Report was not contemporaneous and therefore not reliable, I cannot find that the Reconsideration Panel properly applied itself in the consideration of this Report in light of the statutory requirement to give the Applicant's evidence the "benefit of the doubt" pursuant to the VRAB Act.

[36] Additionally, the Applicant contends that the Reconsideration Panel misconstrued his submissions in finding that he was seeking to assert a broad scope to the causal link between the Injury and his RCMP service. It referred to his submissions that an RCMP officer is never a private citizen, since he is a peace officer at all times and always on duty. The Reconsideration

Panel found that to accept his argument meant that an RCMP officer will always be considered to be on duty even when he or she is on vacation. The Reconsideration Panel also recognized that the Applicant's counsel was trying to establish a special circumstance or status. However, it found that there was no evidence that the RCMP was exercising any type of direction or control over the Applicant at the time.

[37] I agree with the Applicant's submissions. The Reconsideration Panel ought to have assessed the expectations and degree of control that the RCMP exercised over the Applicant (as described in the RCMP Act, RCMP Regulation and Code of Conduct, for example) to the particular circumstances of his case. This is also one of the *Fournier* factors, which should have been assessed positively in light of section 39 of the VRBA Act. Furthermore, I cannot find that the Reconsideration Panel's conclusions were justified given that the legislative passages cited by the Applicant rebuts the Decision's conclusion that there needed to be "potential, imminent or actual danger." There is also no statutory requirement that a criminal offence is required.

[38] The Applicant also states that the Federal Court of Appeal described that the element of a causal connection between the claimed condition and his service requires more than a 1% contribution but not necessarily "a percentage close to 49 percent" (*Cole* at paras 97-99). As such, the causal connection is not as elevated as the Reconsideration Panel had articulated in its Decision.

[39] When looking at the circumstances of the incident itself, the Reconsideration Panel agreed with the Appeal Decision's conclusion that Applicant appeared to have been acting in a

manner consistent with how an officer would operate if he had been on duty with the one exception that he did not identify himself as a police officer. It stated that he should have either displayed identification or made a verbal declaration.

[40] However, in response to my question at the hearing, the Respondent confirmed that there is no authority that requires an officer to identify themselves when approaching a situation to determine if they are on duty or not, or under the *Fournier* factors. This criteria as described by the Reconsideration Panel, in my view, is therefore not transparent.

[41] Accordingly, I also agree with the Applicant that the Reconsideration Panel applied a more stringent threshold to the causal connection between the claimed condition and his RCMP service.

[42] Finally, the panel referenced section 39 of the VRAB Act in the Decision, but did not assess the Applicant's claim and evidence to make a finding to the effect that it did not warrant the "benefit of the doubt." Since the Reconsideration Panel's conclusions went against the presumption of section 39 of the VRAB Act, it should have justified in greater detail its analysis. This is also a reviewable error given the explicit statutory requirement under the VRAB Act (*Jansen* at paras 57-59).

[43] In the Applicantès case, the errors in the Decision are such that I cannot find that the Decision is supported by the legal and factual constraints that bear upon it.

V. Conclusion

[44] For the foregoing reasons, the Decision is not reasonable and this application for judicial review is granted.

[45] While the Applicant sought relief akin to *mandamus,* I cannot find that the circumstances rise to the level of exceptionality that warrants that the Court directs the remedy (*Vavilov* at para 142).

[46] Section 18.1(3)(b) of the *Federal Courts Act*, RSC, 1985, C. F-7, grants the Federal Court the power to "quash, set aside or set aside and refer back [a matter] for determination in accordance with such directions as it considers to be appropriate." In this case, I am of the view that the appropriate remedy is to set aside the Reconsideration Panel's Decision and remit the Applicant's claim to a differently constituted panel for redetermination in accordance with these reasons.

[47] Finally, the Respondent 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

[48] 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].

[49] The parties are strongly encouraged to arrive at an agreement on costs prior to November 29, 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.

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

A. The Applicant will serve and file his written submissions by December 13, 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 27, 2024, not to exceed three (3) pages double-spaced, also exclusive of schedules, appendices and authorities.

JUDGMENT in T-2443-23

THIS COURT'S JUDGMENT is that:

1. For the foregoing reasons, this application for judicial review is granted.
2. The Decision is set aside and the matter is to be remitted to a differently constituted panel for redetermination in accordance with these reasons.
3. The style of cause is amended 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:	FREDERICK THOMSON CHRISTIE v VETERANS REVIEW AND APPEAL BOARD CANADA, ET AL.
PLACE OF HEARING:	CALGARY (ALBERTA)
DATE OF HEARING:	SEPTEMBER 23, 2024
JUDGMENT AND REASONS:	NGO J.
DATED:	OCTOBER 29, 2024

APPEARANCES:

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Alexander Brooker	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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Attorney General of Canada Calgary (Alberta)	FOR THE RESPONDENTS

Annex

RCMP Superannuation Act, RSC, 1985, c. R-11

32. Subject to this Part and the regulations, an award in accordance with the *Pension Act* shall be granted to or in respect of the following persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force:

(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability or has died; and

(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died.

32. Sous réserve des autres dispositions de la présente partie et des règlements, une compensation conforme à la *Loi sur les pensions* doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service dans la Gendarmerie, à toute personne, ou à l'égard de toute personne :

a) visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant ou après cette date, a subi une invalidité ou est décédée;

b) ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

Pension Act, RSC, 1985, c. P-6

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.

Service in militia or reserve army and in peace time

21.

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

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.

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

21.

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

time,

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

(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

service militaire en temps de paix :

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

b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

Veterans Review and Appeal Board 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 reasonable inference in favour of the applicant or appellant;

(b) accept any uncontradicted evidence

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;

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.

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.