

**Date: 20070912**

**Docket: T-137-07**

**Citation: 2007 FC 905**

**Ottawa, Ontario, September 12, 2007**

**PRESENT: The Honourable Madam Justice Snider**

**BETWEEN:**

**MOSE MURPHY by his litigation  
guardian IRENE MURPHY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The Applicant, Mr. Mose Murphy (by his litigation guardian Ms. Irene Murphy), seeks judicial review of a decision of the Veterans Review and Appeal Board Canada (VRAB) dated November 23, 2006. In its decision, the VRAB denied Mr. Murphy's claim for a pension based on Post Traumatic Stress Disorder (PTSD) that he alleges arose from a sexual assault suffered in 1952 while he was in military service.

## **VRAB Decision**

[2] The VRAB was sitting in appeal of a decision of the Entitlement Review Panel decision of March 12, 2006 (Review Panel decision), in which decision the Review Panel rejected Mr. Murphy's claim. At the review panel stage, Mr. Murphy's written representations as well as written and oral testimony from Mrs. Murphy was presented. The VRAB review was a written proceeding. In addition to the evidence before the Review Panel, further evidence and submissions were made.

[3] The VRAB's decision is very short. It begins with a list of evidence and a general statement that "the Board has reviewed any previous decisions relevant to this case and has examined all evidence". The Board lists as "Facts", only that Mr. Murphy served in the Regular Force from 1952 to 1958, that the military record "reveals an entry dated 24 April 1957 which provides a diagnosis of psychasthenia", and that a diagnosis of PTSD is found in a medical report dated May 16, 2005. The reasons for the denial are set out in three paragraphs of the decision as follows:

In this case, there is a diagnosis of Post Traumatic Stress Disorder; however, there is insufficient evidence to support a finding that this disability is directly connected to the Appellant's service.

The Board has been provided with a medical opinion that suggests that an incident of sexual assault during military service was the exciting factor in the development of the claimed condition. However, there is no objective evidence in the service documentation to support the medical opinion. The fact that the Appellant has a psychiatric condition is not evidence that establishes that the claimed precipitating event occurred and caused the condition. The Board is of the view that the opinions have a weak factual foundation.

...

The Board has considered all of the facts, circumstances and evidence in this case and, as previously noted, there is an absence of any record of the incident and no record of complaint or treatment related to the incident. The diagnosis is in the very late post-discharge period (53 years post-discharge). Therefore, the Board cannot

reasonable infer that the Appellant's Post Traumatic Stress Disorder arose out of or was directly connected with military service and, therefore, the claim does not satisfy the requirements of subsection 21(2) of the *Pension Act* . . .

### Issues and Analysis

[4] The decision of the VRAB that there was insufficient evidence that the PTSD arose out of or was directly connected to Mr. Murphy's military service is reviewable on a standard of patent unreasonableness (see, for example, *Comeau v. Canada (Attorney General)*, 2007 FCA 68 at para. 9). While acknowledging this highest deferential standard, Mr. Murphy submits that the VRAB erred by:

(a) failing to provide adequate reasons for its decision; or

(b) failing to have regard to the evidence before it.

[5] Mr. Murphy raises other issues. However, since I agree with Mr. Murphy on both of these first two issues and will overturn the decision on that basis, it will be unnecessary to review the other matters argued.

#### *1. Adequacy of Reasons*

[6] Mr. Murphy submits that the reasons, in this case, do not meet the minimum standard required by natural justice (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social*

*Services* (1985), 51 O.R. (2d) 302 (Div. Ct.)). This question of natural justice is reviewable on a correctness standard.

[7] On the other hand, the Respondent asserts that the reasons acknowledge and summarize the relevant evidence, set out the VRAB's reasoning and explain the VRAB's conclusions. The Respondent argues that the Board, in affirming the Review Panel's decision, made additional comments regarding the evidence that was not before the Review Panel and explained why the Board was of the view that the evidence was insufficient to establish the requirements for obtaining a pension under the *Pension Act*. The Respondent submits this is sufficient to satisfy the requirements of natural justice as required by *Baker*, above.

[8] There are a number of problems with the Respondent's arguments on this issue.

[9] The first point is that the hearing before the VRAB is a *de novo* hearing. While it was open to the VRAB to refer to the earlier decision of the Review Panel, the VRAB was obligated to conduct its own assessment of the evidence.

[10] Secondly, and more importantly, the reasons do not, in my view, provide Mr. Murphy with an explanation of why his claim was rejected. There are a number of aspects of the decision that leave the reader struggling to understand why the claim was rejected:

- We can see that the VRAB relied on a “medical opinion”, but which one? Was it the latest opinion from Dr. Kiraly, dated July 17, 2006, or one of the earlier opinions from Dr. Kiraly or Dr. Pankratz?
- Assuming that the opinion referred to was the July 17 opinion of Dr. Kiraly, why did the VRAB reject or discount Dr. Kiraly’s statement that “The diagnosis of *Psychasthenia* in 1957 and its treatment definitely provide corroboration for the event having taken place”?
- Does the statement that there is no “objective evidence in the service documentation to support the medical opinion” take into consideration the 1957 diagnosis of *Psychasthenia*?
- When the VRAB states that Mr. Murphy’s “psychiatric condition is not evidence that establishes that the claimed precipitating event occurred”, is the VRAB rejecting the uncontradicted evidence of Mr. Murphy and his wife that the assault took place?
- What is meant by a “weak factual foundation”?

[11] In my view, it is impossible to ascertain the reasoning of the VRAB in reaching its conclusion that Mr. Murphy’s PTSD arose out of or was connected to his military service. The reasons are inadequate and the decision should not stand.

## 2. Failure to Consider the Evidence

[12] Intertwined with the adequacy of the reasons is the issue of whether I can be satisfied that the VRAB had regard to all of the evidence. Even on a standard of patent unreasonableness, a decision may be overturned where a tribunal made its finding of fact without regard for the evidence (*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d)).

[13] A tribunal is presumed to have considered all of the material before it and is not obliged to refer to each and every document. As stated by Justice Evans in *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at para. 16 (QL):

A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.

[14] However, this presumption may be rebutted and a tribunal's failure to deal with evidence very specific to the claim may lead a reviewing court to a conclusion that the tribunal made an erroneous finding of fact "without regard to the evidence".

[T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. (*Cepeda-Gutierrez*, at para. 17)

[15] In the case before me, the VRAB failed to provide any analysis of much of the evidence before it. Two of the more important omissions of the reasons are the following:

- Dr. Kiraly's medical opinion, which included the opinion that "The diagnosis of Psychasthenia in 1957 and its treatment definitely provide corroboration for the event having taken place";
- The uncontradicted evidence from Mrs. Murphy and Mr. Murphy as to the events of 1952 and Mr. Murphy's subsequent problems in the military and in his personal relationships.

[16] Both of these matters were addressed in the submissions made by Mr. Murphy's advocate to the VRAB. Indeed, the submissions of the advocate were detailed and clear in setting out the basis for the claim and the supporting evidence. Almost none of this was referred to by the VRAB. In the circumstances, I am not persuaded that the VRAB had regard to the totality of the evidence when it reached its decision.

[17] It was certainly open to the VRAB to reject the claim. However, in doing so, it was obliged to address the submissions made to it and to explain why those submissions and the underlying evidence were not sufficient to satisfy the VRAB.

## Conclusion

[18] For these reasons, I conclude that the Court should intervene and allow the application for judicial review.

[19] Mr. Murphy requests that I remit the matter to the VRAB with directions that the VRAB make a determination that Mr. Murphy's PTSD arose out of his military service. In my view, such directions would be inappropriate. The VRAB is an expert tribunal with the skills and experience to assess Mr. Murphy's claim and should do so without direction from this Court. However, I will direct that the reconsideration, based on the same evidentiary record, be carried out by a different panel of the VRAB. I assume that the newly-constituted panel will take note of the decision of this Court and provide adequate reasons that demonstrate that the panel has had regard to the evidence before it.

[20] In what I expect was an oversight, Mr. Murphy did not request costs in his Notice of Motion or submissions. However, in my discretion, I would award costs at the usual level of column III of Tariff B of the *Federal Courts Rules*. In the event that the Respondent wishes to make submissions in opposition to this part of my Order, he may do so in writing within 10 days of the date of this Order. If such submissions are made, Mr. Murphy may respond in a further 10 days.



**ORDER**

**THIS COURT ORDERS** that:

1. The application for judicial review is allowed and the decision of the VRAB dated November 23, 2006 is set aside.
2. The matter is remitted for redetermination, based on the existing evidentiary record and in accordance with these reasons, by a differently constituted panel of the VRAB.
3. The Respondent shall pay costs to Mr. Murphy, in accordance with column III of Tariff B of the *Federal Courts Rules*.
4. In the event that the Respondent wishes to object to the award of costs to Mr. Murphy, he may do so in writing to this Court within 10 days of this Order. If the Respondent objects, Mr. Murphy will have 10 days thereafter to respond.

“Judith A. Snider”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-137-07

**STYLE OF CAUSE:** MOSE MURPHY by his litigation guardian IRENE MURPHY v. ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 6, 2007

**REASONS FOR ORDER AND ORDER:** Snider, J.

**DATED:** September 12, 2007

**APPEARANCES:**

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