Federal Court  Cour fédérale

Date: 20141017

Docket: T-470-14

Citation: 2014 FC 991

Ottawa, Ontario, October 17, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BASIL MCALLISTER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Veterans Review and Appeal Board (VRAB or the Board) dated January 30, 2014 refusing to reconsider, pursuant to subsection 32(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 (*VRAB Act*), the earlier entitlement appeal decision dated August 11, 2009 that denied the Applicant, Mr. Basil McAllister, pension entitlements on the basis that the Applicant's new evidence was neither new nor credible.

[2] For the reasons that follow, I have determined that this application for judicial review ought to be granted.

I. Facts

[3] The Applicant served in the Canadian Armed Forces for 20 years, retiring in 1975 at the age of 43. At 63 years of age, he was diagnosed with adenocarcinoma of the prostate (prostate cancer). The Applicant claims that he was exposed to an herbicide known as "Agent Orange" during the summer of 1967, while he performed field training at CFB Gagetown, New Brunswick, in preparation for a peacekeeping deployment to Cyprus.

[4] In May 2005, the Applicant requested pension entitlement for his prostate cancer. The VRAB denied his request. This decision was upheld in a series of other decisions. The first appeal decision was issued on August 11, 2009 and two reconsideration decisions were issued on March 29, 2010 and July 9, 2012. The basis for denial in all cases was the lack of evidence that the Applicant was indeed exposed to Agent Orange. A thorough and detailed procedural history of these various decisions can be found in Justice Strickland's decision (*McAllister v Canada (Attorney General)*, 2013 FC 689, [2013] FCJ No 751), [*McAllister*], to which I will revert shortly, and there is no need to revisit it here.

[5] In the last July 9, 2012 reconsideration decision, the Applicant submitted new evidence in the form of two witness statements, one from Gordon A. Gravelle, Sgt. (R) and the other from H.J. Harkes, Lieutenant-Colonel (R). The Board rejected that evidence because it could neither be considered new nor credible. The Board reasoned that these two statements were not new

because they reiterated a contention made before the Board in the first reconsideration, and failed the credibility test as it did not align with the findings of Dr. Dennis Furlong, who researched Agent Orange for the Federal Government and reported his conclusions in August 2007 (the "Furlong Report", reproduced in the Respondent's Record, p. 50).

[6] The Applicant sought judicial review of that decision, which was allowed by my colleague Justice Strickland (*McAllister*, *supra*). In particular, she found that the Board had erred by refusing to admit the new evidence and, as a result, in declining to reconsider the second reconsideration decision. She also noted that the Certified Tribunal Record did not contain the Furlong Report. On the basis of the record that was before her, she found that the evidence did not support the VRAB assertion that this Report determined that Agent Orange was never sprayed in training areas but only in remote areas where no training was held. Accordingly, the Court found that the Board's finding that the new evidence was not credible, and therefore not admissible (because it was contradicted by the Furlong Report), was unreasonable. In addition, the Court concluded that the evidence, if believed, could reasonably be expected to have affected the result.

[7] The Court ordered the matter to be remitted to a differently constituted panel of the VRAB for re-determination and a new reconsideration was released on January 30, 2014.

II. The impugned decision

[8] In its most recent decision, the VRAB examined the two pieces of evidence previously submitted by the Applicant as well as other additional new evidence that was not previously seen

by the Board. It acknowledged that if the new evidence is admitted, it must reopen and reassess the original August 11, 2009 decision, whereas that decision will be final if the new evidence is not admitted.

[9] The VRAB also explained that when determining an application for a reconsideration based on new evidence, a four-part test prescribed by the Supreme Court of Canada in *R v Palmer*, [1980] 1 SCR 759 a p 775, 106 DLR (3d) 212 and adopted by this Court in *MacKay v Canada* (1997), 129 FTR 286, [1997] FCJ No 495 at para 23 and *Canada (Chief Pensions Advocate) v Canada (Attorney General)*, 2006 FC 1317 at para 6, 302 FTR 201, aff'd 2007 FCA 298, 370 NR 314 is to be applied in determining if the evidence should be accepted:

> (1) The evidence should generally not be admitted, if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (4) It must be such that if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> [footnotes omitted]

[10] As noted by Justice Strickland in her 2013 decision (at para 21), the two pieces of evidence submitted by the Applicant in the second reconsideration of July 9, 2012 were the following:

> a) Statement of Gordon A. Gravelle Sgt (R) (Gravelle statement) which stated:

> I was Platoon Sgt. of 7 Platoon "C" Company and Sgt. McAllister Basil J. was 12 Platoon "D" Company which was on our right flank when Agent Orange was sprayed on us.
>
> We were ordered before that to put on respirators and ponchos for the attack. This occurred when 2nd Battalion the Black Watch (RHR) of Canada were Enemy Force of 1st Battalion The Black Watch (RHR) of Canada in the summer of 1967.

b) Statement of H. J. Harkes, MC, CD, Lieutenant-Colonel (R) (Harkes statement) that the Applicant was a member of Mr. Harkes' battalion, The Black Watch (Royal Highland Regiment), at CFB Gagetown, which was assigned to design and conduct a training program to prepare the 1st battalion of The Black Watch for a six month deployment to Cyprus and that:

> The practical phase of the training included a series of field training exercises conducted throughout Gagetown's manoeuvre area… The training culminated with a major field exercise involving almost every soldier from both battalions in the middle of June 1967 – just days after parts of the training area had been sprayed with 'Agent Orange'. Mr. McAllister, a rifle platoon sergeant at the time, participated in the exercise. Moreover, as an element of the exercise control staff, he would have been in the training area in the weeks prior to the final exercise conduction reconnaissance and making the preparations necessary to ensure that the exercise provided for realistic training.
>
> Although I cannot state that I personally witnessed Mr. McAllister being sprayed or otherwise in contact with 'Agent Orange', I am certain that he would have been in or around the affected area at, and in the days immediately after, the spraying took place.

[11] The additional evidence that the VRAB assessed as well in this reconsideration were the following:

- An affidavit of Dave Tucker sworn on October 12, 2012;

- A statement from the Applicant dated May 12, 2009;
- An excerpt from a veterans advocacy website;
- A statement from the Applicant dated August 5, 2013;
- An excerpt from the Department of Veterans Affairs' (VAC or Department) adjudication policy for Agent Orange claims; and
- An "over 40" medical examination of May 26, 1971 noting an enlarged (but not tender) prostate.

[12] In regard to the first part of the four-part test, due diligence, the VRAB held that the statements of Messrs. Gravelle, Harkes and Tucker are new but they break no new ground or do not provide insight on the two main decisive issues, being the possibility of exposure to Agent Orange and the prospect that said exposure reasonably led to the Applicant's prostate cancer. The excerpt from a veterans' advocacy website and the statement from the Applicant dated August 5, 2013 are new. However, the excerpt from the Department's adjudication policy for Agent Orange is not new as it has already been considered in previous decisions. The medical examination of May 26, 1971 is certainly not a new document and neither is the Applicant's statement dated May 12, 2009. Having said that, the VRAB acknowledged that the Court cautioned of not being preoccupied with the first part of the test and as such went on to analyze the other three parts of the test.

[13] In regard to the second part of the four-part test, relevance, the VRAB concluded that all documents submitted are generally relevant to one of the two key issues in this case, which is whether the Applicant was reasonably exposed to the Agent Orange chemical.

[14] As for the third part of the test, credibility, the VRAB analyzed all the evidence presented: the Furlong Report, the statements from the Applicant, and the affidavits of Messrs. Gravelle, Harkes and Tucker. The Board noted as a starting point that it did not believe that the Applicant, nor any of his comrades, had knowingly issued misleading statements. As noted by the Board, however, the challenge is "to decide whether they were in a position to truly know what was sprayed"; the Board is "further challenged when [it tries] to infer with some accuracy, from the statements, the intensity of exposure to Agent Orange, if any". The Board noted that such an analysis is necessary in order to assist it with arriving at a credible and reasonable prospect of exposure. The Board then acknowledged that in its evaluation of this claim, it is not "blindly surrendering our decision making to any report or study".

[15] In discussing the Furlong Report, the Board said that, since its release, it has been used as a guideline for adjudicators on Agent Orange claims. It identifies the types of diseases that may have a possible association with Agent Orange, and it also guided adjudicators in determining whether a claimant was likely exposed to the substance during his or her service, based on their occupation and individual circumstances. The Board has concluded, in many decisions, that the research underpinning the Furlong Report represents the "best evidence" on the issue of exposure.

[16] The Board's approach to the general topic of exposure is that the available information rebuts any presumption of exposure of Agent Orange due to merely serving at CFB Gagetown during the relevant time periods (June 1966 and July 1967 or, for other herbicides, during the period from 1952 to 2004). Consequently, in the absence of evidence to the contrary, the

numbers of those who actually experienced exposure of any significance during and after the spraying were very low. Specifically, an individual's presence on the Base during the relevant time periods would not have constituted exposure that would place an individual at risk for any long-term health effects. In light of the findings in the Furlong Report, the Board requires evidence of direct, service-related exposure, beyond merely training at CFB Gagetown during the relevant periods.

[17] In concluding that the Furlong Report represents the "best evidence", the Board recognized that the "issue of Agent Orange is emotional and highly charged" and that while the Board generally finds that the Furlong Report credibly lays out the history and the science, it recognized that veterans are able to submit rebuttal evidence on the intensity of their own exposure when they were serving. In this case, there are various statements from the Applicant himself, as well as statements from comrades of the Applicant.

[18] The Board then summarized the Applicant's statements and the statements of his comrades in support of the Applicant's position that he was exposed to Agent Orange during his time spent at CFB Gagetown, be it for training or recreational activities. The Applicant claims that during the training in 1967, he was at the Base and no part of the Base was restricted for training purposes. He remembers being sprayed on multiple occasions along with other colleagues. The Applicant claims in his statement that the Furlong Report is not valid as it was performed more than 40 years after the spraying. The Applicant submits as well that he trained troops on the Base in the years following the conclusion of the spray testing and that his

exposure would have included eating, sleeping and being exposed to water that had been contaminated.

[19] The affidavits of Messrs. Gravelle and Harkes have been summarized above from Justice Strickland's decision. As for the affidavit of Mr. Tucker, the VRAB noted that he was in the same Company as the Applicant and that before the training, "parts of the training area was sprayed by Agent Orange, known as brush kill". Mr. Tucker alleged that they were sprayed again during the training and they slept and drank water from that area. He also indicated that barrels of Agent Orange "had been buried throughout different locations in the training area".

[20] In suggesting that exposure to Agent Orange has caused his prostate cancer, the Applicant's statements, and those of his comrades, are at odds with the research and conclusions set out in the Furlong Report that resulted in the rebuttable presumption that the activities cited by the Applicant would not have resulted in exposure such that the Applicant could expect to experience any long-term effects. As noted by the Board: "[e]ven if they were in those occupations [associated with the testing program itself] and were exposed to some quantity of the substance, according to the report, the prospect of long-term health effects is expected to be minimal". The Board acknowledged, however that "each case must be decided on its own facts, so we are alive to the requirement to weigh all the evidence" and that "it is therefore still open to us to conclude that the Appellant's evidence is of a higher quality or persuasiveness than the study".

[21] The Board went on to discuss various elements of the Furlong Report, including the portions that were not quoted in the previous decision. The Board noted that the Furlong Report forms the basis for the general presumption that "ordinary soldiers doing their training at the Base did not train in the areas known to have been sprayed with Agent Orange", as the area where the testing took place is equivalent to 0.03% of the total area which comprise CFB Gagetown and is situated in a remote and heavily forested part of the Base.

[22] The Board addressed the divergence between the science and the anecdotal evidence Dr. Furlong was hearing. Dr. Furlong commented that the studies concluded, in summary, that "people who lived near or worked at the Base, including most soldiers, were not at risk for long-term adverse health effects from the products used…[p]otential long-term health risks were identified as a possibility for only those individuals directly involved with the application of the herbicides or clearing of treated brush". The Applicant is not one of those individuals.

[23] The Board cited Dr. Furlong's conclusion that soldiers "who were directly down-wind less than 800 meters at the time of the aerial spraying may have experienced elevated short-term exposures to some of the herbicides". However, this "would not have put them at increased risk for long-term, adverse health effects".

[24] The Board found that the main elements of departure between all of the Applicant's evidence versus the Furlong Report involve the location of the spraying of Agent Orange. Specifically, the supporting statements allege Agent Orange was sprayed either on the training troops directly or over an area where the troops gained access and trained shortly afterward. Yet

the comprehensive scientific study says otherwise and relying on the Furlong Report, the Board drew a distinction between the manoeuvre areas, where the Applicant would have been and the impact areas, which were the only ones used for the spray program.

[25] The Board went on to comment on the nature of the aerial spraying, namely, that various appellants coming before the Board have earnestly claimed that they were sprayed with ordinary, fixed-wing, aircraft; however, the Agent Orange spray program (as opposed to other spraying) was done exclusively with helicopters and the Furlong Report is unequivocal on that point. The Board concluded that the absence of any witness reports of helicopter spraying was significant, given that, while the affidavit of Mr. Tucker referred to helicopters, he did not state that he saw helicopters spraying anything on him or on the Applicant in 1967.

[26] The Board concluded, based on all the evidence before it, that the Furlong Report is the most credible evidence. The Board noted that none of the statements came from persons in any position to know about the scope of the spray program in 1967, such that those statements should be considered more credible than the documented sources cited by Dr. Furlong. This assessment led the Board to the following conclusions:

- soldiers were not sprayed with Agent Orange while they were training in the manoeuvre areas of the Base
- soldiers did not approach with any proximity to the Agent Orange-sprayed area, as it was densely wooded and not used for formal training after the program concluded
- the statements claiming a specific substance (Agent Orange) was sprayed are not credible for that purpose, as none of them were prepared by people in a position to know at the time

- none of the statements distinguish between Agent Orange (by helicopter only) and any other spray programs that were active at the time

- none of the statements place the Appellant into any of the possible elevated risk groups, such as spotters, flaggers, mixers, loaders, etc.

- in the absence of "evidence of direct, service-related exposure" it is highly unlikely, if not impossible, that the Appellant was exposed to any amount of the Agent Orange chemical.

[27] Despite the Board's finding that the Applicant failed the third part of the test, the Board went on to consider the final element of the four-part test which requires the material to have a chance of affecting the outcome of the previous decision or decisions. The Board concluded that the new evidence provided by the Applicant did not advance knowledge of his degree of exposure and, more importantly, did not draw any stronger link between his military service and his prostate cancer.

[28] The Board noted that Veterans Affairs Canada adopted, after the Furlong Report was released, an entitlement test that was based on the Institutes of Medicine (IOM) tiers of possible relationship between Agent Orange exposure and specific diseases. Prostate cancer is included in the second level of the IOM groupings, which is entitled "Limited or Suggestive Evidence of an Association". Veterans Affairs Canada has elected to treat the top two tiers as similar for entitlement purposes: if a veteran can establish exposure to Agent Orange and has a diagnosis of one of the diseases in the top two tiers, then he or she can benefit from the presumptive approach of the Department. This requires exposure, however, and the Board concluded, on the basis of the Furlong Report, that the Applicant could not have access to the test area and could not have

been exposed to the chemical in other ways. That being the case, the Board was unable to apply the presumption that Veterans Affairs has created for the first two tiers and had to revert to the standard questions and proofs that surround more typical environmental exposure claims.

[29] The Board then stated that the Applicant was noted to have an enlarged prostate in a medical examination in 1971, but that by the time he presented for his release medical examination in 1974 his prostate was remarked to be normal. The Board concluded:

> We have not been presented with any medical evidence that establishes an enlarged prostate is possibly a result of Agent Orange exposure, nor that it was a precursor of our Appellant's cancer. Neither do we have any medical evidence that a temporary finding of an enlarged prostate, that resolves in the subsequent examination some years later, is clinically significant or predictive of early prostate cancer.

[30] The Board considered the Applicant's arguments in respect of precedent decisions where some panels have awarded pensions to others who have claimed Agent Orange exposure. The Board concluded that, while attractive, administrative tribunals do not operate on precedent because each case is factually unique. Moreover, the Board indicated that the favourable decisions submitted by the Applicant represent the outlier minority of the Board's work, and that the Applicant's case falls within the 86% of appeal cases where there was insufficient evidence of exposure to the substance to ground an entitlement.

[31] The VRAB concluded that claims are decided on the civil standard of the balance of probabilities, and that the new evidence when considered and weighed against the Furlong Report does not establish that the Applicant was exposed to Agent Orange. The VRAB decided not to reopen the final and binding decision of July 9, 2012.

[32] One VRAB member dissented. The dissident VRAB member found that the Furlong Report is open to interpretation and that in reviewing this Report, he was unable to find any reference that military personnel were restricted from the spray sites and therefore, he was satisfied that military personnel did have access to these sites. The VRAB member considered in particular one witness statement from James W. Bloomfield, Captain, who was the Applicant's Platoon Commander during the spray period in 1967 and is now retired. In his statement, Mr. Bloomfield noted that his role was to prepare and train soldiers for deployment and that he was "in a position to know if there were any areas in the Base that were not to use". He further indicated that "…we were never instructed to not enter those spraying areas nor any other part of the training area…".

[33] The VRAB dissident member further noted the following in his decision:

> The record establishes that a former colleague of the Appellant received full pension for prostate cancer on the basis of Agent Orange exposure in a decision by a Review Panel of the Veterans Review and Appeal Board on 6 August 2008. This Client served in the same platoon as the Appellant. The decision has become a part of the permanent record of the appellant's case as it was submitted as a redacted exhibit. This decision also references another colleague who served in the same area as the Appellant and was awarded pension entitlement for prostate cancer on the same basis as the Appellant. The Panel who awarded pension entitlement accepted the credible oral testimony, the medical opinion of an oncologist, and resolved all doubt in favour of the client as per Section 39 of the *Veterans Review and Appeal Board Act*. It was also interesting to note that while this client had a family history of prostate cancer, the Appellant has no such history. Additionally, this decision was rendered subsequent to the "Furlong Report".

[34] Quoting from the Furlong Report according to which "…Herbicides have been applied through ground and aerial applications (helicopter or fixed-wing aircraft) from 1956 to 2004 on

CFB Gagetown…", the dissident Board member believes that this lends credibility to the various witness statements of not only the occurrence of chemical spray but that the spray was conducted by both aircraft and helicopters.

[35] The VRAB dissident member therefore concluded:

> The evidence before me has raised sufficient doubt that it is reasonable to conclude, on the balance of probabilities, that the appellant may have been exposed to Agent Orange. Whether or not military personnel suffered direct or indirect exposure may be a subject of debate for many years to come. However, the Veterans Affairs Canada policy with respect to, "Benefit of Doubt – CFB Gagetown" does not state "direct" exposure must be established. It states, "the Benefit of Doubt cannot be used as a substitute for lack of reasonable evidence of exposure (My Emphasis). Additionally, in this case, I find there is reasonable evidence of exposure (My Emphasis) given the supporting Appellant's statements, witness statements as well as the fact that the independent report of Dr. Furlong did not conclude that military personnel were restricted from the spray sites. In fact most of the evidence concludes that military personnel in training had access to these sites both during the spray period and in the years to follow.

[36] On that basis, that member concluded that the Applicant is entitled to pension benefits pursuant to subsection 21(2) of the *Pension Act*, RSC 1985, c P-6.

III. Issues

[37] The present case raises the following two issues:

A. What is the standard of review for a reconsideration decision of the VRAB?

B. Did the VRAB err in finding that the new evidence is not capable of establishing the Appellant was exposed to Agent Orange, and therefore in refusing to reopen the 2009 Entitlement Appeal Decision of the Board?

IV. Analysis

A. *The standard of review*

[38] Prior jurisprudence has held that the standard of review for a reconsideration decision by the VRAB is reasonableness: *McAllister*, at para 30; *Bullock v Canada (Attorney General)*, 2008 FC 1117 at paras 11-13, 336 FTR 73; *Rioux v Canada (Attorney General)*, 2008 FC 991 at paras 15 and 17, [2008] FCJ No 1231; *Dugré v Canada (Attorney General)*, 2008 FC 682 at para 19, [2008] FCJ No 849; *Lenzen v Canada (Attorney General)*, 2008 FC 520 at para 33, 361 FTR 16; *Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21, 375 FTR 13.

[39] The question of whether the VRAB gave proper effect to section 39 of the *VRAB Act* also attracts a standard of reasonableness (*Wannamaker v Canada (Attorney General)*, 2007 FCA 126 at para 13, 361 NR 266).

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

B. *Is the impugned decision reasonable?*

[41] Pursuant to section 31 of the *VRAB Act*, decisions of the VRAB are "final and binding". Section 32 of the *VRAB Act*, however, permits reconsideration of such decisions when an error of fact or law has been revealed or when new evidence has come forward from which an applicant

should be allowed to benefit. Reconsiderations are not meant to provide an opportunity to reargue a case already determined by the Board; there must be a justifiable reason for reopening a final and binding decision. New evidence can obviously be such a justifiable reason to reopen a final decision.

[42] In a proceeding before the Board, an applicant is required to prove his or her case on a balance of probabilities. In applying this standard of proof, the Board is guided by section 39 of the *VRAB Act*, which states the following:

39. In all proceedings under this Act, the Board shall	39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	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.

[43] The critical issue before the Board and in this proceeding is whether the Applicant has been exposed to Agent Orange. As noted by the Board, Veterans Affairs Canada adopted an entitlement test that was based on the American IOM tiers of possible relationship between Agent Orange exposure and specific diseases. Veterans Affairs Canada has elected to treat the

top two tiers as similar for entitlement purposes under its decision framework. If a veteran can establish exposure to Agent Orange and has a diagnosis of one of the diseases in the top two tiers (and prostate cancer is included in the second tier), then he or she can benefit from the presumption that the disease is likely caused by some element of military service.

[44] The Furlong Report was not part of the record before Justice Strickland, and she therefore had to rely on the summaries of the Fact-finding projects commissioned by the Federal Government. After carefully reviewing that evidence, she came to the following conclusion:

> Based on the record before me, the evidence does not support the VRAB assertion that the "Furlong Report" determined that Agent Orange was never sprayed in training areas, but only in remote areas where no training was held. Accordingly, the VRAB's finding that the new evidence was not credible, and therefore not admissible, because as it was contradicted by the Furling Report, is unreasonable. Further, the excluded evidence is relevant and is such that, if believed, it could reasonably, when taken with the other evidence adduced by the Applicant, be expected to have affected the result.

[45] In its reconsideration decision following Justice Strickland's findings, the Board claims that the Furlong Report, which consists of a 16 page analysis based on the appended background scientific tasks and which is now part of the record, is the best evidence on the issue of exposure. To the extent that the Applicant and his comrades' statements that they trained in contaminated areas are at odds with the Furlong Report, the Board once again chose to prefer the findings of that Report. A careful reading of that Report, however, leads me to the conclusion that the Board read more into it than it actually states. I am unable to find, in particular, a clear finding in that Report that ordinary soldiers were restricted from the spray sites and did not have access to these sites.

[46] First of all, it is interesting to note "salient information" in Dr. Furlong's covering letter to the Minister of National Defence dated August 27, 2007:

> - The degree of exposure of an individual to any chemical sprayed was indeterminable.
>
> - Precedent has been set by the Government of Canada regarding compensation for exposure to the 'rainbow chemicals' tested by the American Army at Base Gagetown.
>
> - Connectivity between exposure to the contaminants, dioxins and hexachlorobenzene has not been secured in the scientific world literature, only loose association as yet. Threshold dosage has not been determined either in quantity or duration that would indicate human health risk.

[47] These words of caution are highly relevant in balancing the findings of that Report with the evidence submitted by the Applicant.

[48] The Board relied on the following statement at page 12 of the Furlong Report as the basis for the general presumption that ordinary soldiers doing their training at the Base did not train in the areas known to have been sprayed with Agent Orange:

> The testing took place in an area of 83 acres in a remote and heavily forested part of the Base. Eighty three acres is equivalent to 0.03% of the total two hundred and seventy one thousand eight hundred and sixteen (271 816) acres which comprise Base Gagetown. I have been informed by the Base that the specific areas used by the Americans for testing in 1966 and 1967 have not been used since for formal training by the Base.
>
> Respondent's Record, p. 66.

[49] There is nothing in this statement that could lead the Board to conclude, as it did, that the sprayed area was not accessible for training purposes. The Report merely suggests that the areas used for testing by the Americans have not been used for "formal training" since the spraying

took place. It does not mean that these areas were not in use at the time of the spraying, or that they were inaccessible for ordinary soldiers.

[50] The Board then quotes extensively from the Furlong Report. These excerpts suggest that the testing was conducted in remote areas of the Base under strictly controlled conditions ensuring minimal spray drift, that a limited number of people were involved with the two test events, that most soldiers were not at risk for long-term adverse health effects, and that potential long-term health risks were identified as a possibility for only those individuals directly involved or in direct contact with the spray (Decision, pp 13-15; Respondent's Record, pp 131-133).

[51] Yet, there is nothing in these quotes establishing that military personnel were restricted from the spray sites, as stressed by the VRAB dissident member. Indeed, Dr. Furlong could not have gone that far, as the underlying Fact-finding reports do not warrant such a conclusion and appear to show the contrary. In her careful review of those reports, Justice Strickland found that none of the documents to which she was privy established that the areas sprayed with Agent Orange were not accessible for regular training and there were some indications that sprayed areas were in fact accessible by military personnel for training.

[52] The focus of Task 3A-1, Tier 1, as stated in that document, was on the contaminants in the products tested by the US military in 1966 and 1967, dioxins and hexachlorobenzene. Risks were assessed for mixers/loaders, applicators, flaggers, post-application scouts and on-site military trainees. The latter is defined as "those who may have spent significant amounts of time in various areas of the base while completing military training, including survival training". The Executive Summary of that same report goes on to say that "[f]or the 1966-67 scenarios, it was assumed that training exercises occurred in direct proximity to the spray areas, during the time of

the spraying". This would seem to suggest, as noted by Justice Strickland, that sprayed areas could have been used by military personnel for training. The Board disputed that inference, and claimed that the purpose was to presume the worst-case scenarios of all possibly affected persons and occupations for the purposes of assessing the methods of exposure. This may well be the case, but the fact that on-site military trainees were considered as a representative group of people tends to show that their exposure to the Agent Orange could not definitely be ruled out. Indeed, the Executive Summary of Task 3A-1, Tier 1 ends with the caution that uncertainties surround the identification of the people most at risk and how they are exposed to chemicals, thereby explaining why assumptions and estimations were made to err on the side of caution (Tribunal Record, p. 337).

[53] In light of the foregoing, and considering that these studies were performed 40 years after the fact, the Board could not reasonably come to the conclusion that the Furlong Report is the best evidence and that none of the new evidence offered by the Applicant to the Board withstands the credibility test. The Applicant provided statements from witnesses who were serving with him in CFB Gagetown. These witnesses were found credible, yet the Board questioned their knowledge about what was sprayed and where, as well as the intensity of the exposure to Agent Orange. In light of the fact that there is nothing in the Furlong Report or in the Fact-finding reports to suggest that the military personnel training in CFB Gagetown in 1966-1967 were prohibited from entering the sprayed area, and of the Applicant's Platoon Commander's statement that they were never instructed to not enter the spraying areas, I believe that the Applicant was entitled to the benefit of the doubt pursuant to section 39 of the *VRAB Act*. Since the inclusion of prostate cancer in the second level of the IOM groupings allows those who have been exposed to Agent Orange to benefit from the presumption that Veterans Affairs has

created for its adjudicators, it is clear that the new evidence had the prospect of changing the result, thereby meeting the fourth leg of the four-part test.

[54] I need not decide, for the purpose of this application for judicial review, whether the Applicant was exposed to Agent Orange to such an extent that the presumption of a relationship with prostate cancer arises. It is clear that the mere fact of having been at CFB Gagetown during the summers of 1966 or 1967 would not be sufficient to conclude that one has been exposed to Agent Orange. That being said, there is no requirement of "direct" exposure for the presumption set out in subparagraph 21(3)(g) of the *Pension Act* to apply. Pursuant to that section, a disease shall be presumed, in the absence of contrary evidence, to have arisen out of or to have been directly connected with military service if the disease was incurred in the course of the performance by the member of any duties "that exposed the member to an environmental hazard" that might reasonably have caused the disease. Similarly, the VAC Policy (Exposure to Agent Orange – Disability Benefits, Dec 1, 2010; Tribunal Record, p. 288) states that an applicant must provide reasonable evidence of "service-related exposure" consistent with the findings of DND research Task 3A-1, Tier 1. As mentioned by the VRAB Dissident Member, it would in any event be unreasonable to conclude that direct exposure can be proven by the Applicant given the events occurred more than 40 years ago.

[55] In the result, I am of the view that the Board erred in finding that the new evidence from the Applicant is not credible and that the Furlong Report is the best evidence. It was unreasonable to discard the statements of the Applicant and his comrades because they were not in "any position to know about the scope of the spray program in 1967, beyond what they would have learned from the Furlong Report and other sources in the many years that followed". These people were on the ground, shoulder-to-shoulder with the Applicant, they were of good standing

in the military (some even high ranking), and many of them are in receipt of entitlement for a similar disease. Their testimony could not be swept aside simply because it did not jive with a Fact-finding report written 40 years after the fact, especially when that report does not explicitly contradict these witnesses' recollections.

[56] As much as I would have liked to issue directions in the nature of a directed verdict, I must refrain from doing so in the circumstances of this case. The determination of the Applicant's claim involves issues of facts (whether the Applicant was exposed to Agent Orange and the extent to which he was exposed) which are better left to the Board. That being said, the Court understands the frustration of Mr. McAllister, who has been trying to obtain compensation and to seek redress from Veterans Affairs Canada for almost ten years now. It is worth repeating that justice delayed is justice denied, especially for an 83 year old veteran. I therefore strongly urge the Board to resolve this matter as expeditiously as possible, in a fair and respectful manner.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted and the matter is therefore remitted to the Board for a fresh and expeditious reconsideration of the entitlement appeal decision dated August 11, 2009.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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