Federal Court  Cour fédérale

Date: 20170704

Docket: T-1975-16

Citation: 2017 FC 647

Ottawa, Ontario, July 4, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

NORMAN ALLAN BLOUNT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Norman Allan Blount, is a retired member of the Canadian Forces who served as an infantryman with the Black Watch Battalion for 25 years. He was stationed at CFB Gagetown in New Brunswick from 1965 until 1971 and, in June 1967, he claims he was exposed to an herbicide known as Agent Orange while training at the base. After being diagnosed with Parkinson's disease, he applied for disability benefits pursuant to section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21, on the basis that his Parkinson's disease was possibly linked to his exposure to Agent Orange. On

February 10, 2011, a disability adjudicator at Veteran Affairs Canada denied the Applicant's claim for disability benefits because he had not provided evidence that he had direct contact with and exposure to Agent Orange. The Applicant appealed this denial to the Veterans Review and Appeal Board [Board]. Ultimately, in a decision dated October 12, 2016, an Entitlement Reconsideration Panel of the Board refused to reconsider a decision of an appeal panel of the Board upholding the initial denial of disability benefits. The Applicant has now applied for judicial review of the Reconsideration Panel's decision.

I. Background

[2] On October 26, 2011, an Entitlement Review Panel of the Board heard the Applicant's appeal of the disability adjudicator's decision. The Applicant testified that he was an infantryman posted to CFB Gagetown during the time when Agent Orange was sprayed at the base. The Applicant told the Review Panel he did not recall being required to handle chemicals or hold flags at designated spray plots, but he did recall a helicopter spraying a fine mist about 50 metres away from him and a damp mist drifted in his direction. He also stated that he entered the defoliated areas which had been sprayed and that he did not believe any special precautions were taken regarding the spraying of Agent Orange or that the tests were conducted in a disciplined manner. The Applicant further testified that he believed there was no limitation to access the sprayed areas since soldiers regularly conducted military exercises in such areas. The Applicant also told the Review Panel he had been awarded $20,000 under the Agent Orange ex Gratia Payment program for Chloracne, a condition associated with exposure to Agent Orange.

[3] The Review Panel affirmed the adjudicator's decision to deny the Applicant disability benefits on the basis that there was insufficient evidence to link his Parkinson's disease with his military service. The Review Panel assigned little weight to the Applicant's medical evidence, including a medical report from Dr. Juan Alas which stated that "it is highly probable [the Applicant's] Parkinsons is a result of the use of Agent Orange at CFB Gagetown" and that the Applicant had previously been diagnosed with Chloracne, another condition related to Agent Orange. In the Review Panel's view, Dr. Alas' report did not thoroughly review the Applicant's military medical file, did not reference the tremors recorded upon enrollment to the military, and did not make any specific references to the medical evidence regarding the diagnosis of Chloracne.

[4] Although the Review Panel acknowledged that Parkinson's disease is identified as having an association with exposure to Agent Orange, and that the Applicant had been posted at CFB Gagetown in June 1967 during the second known time that Agent Orange was sprayed at the base, it rejected the Applicant's evidence that he had been in an area in close proximity to a spraying helicopter and had entered a defoliated area. The Review Panel cited the findings of Dr. Dennis Furlong, who researched Agent Orange for the Federal Government and reported his conclusions in August 2007 [the Furlong Report]. The Review Panel summarized the Furlong Report's pertinent conclusions, noting that the report clearly indicates that the spraying of Agent Orange was a disciplined study using designated test plots in strips of 200 feet by 600 feet with buffer strips between plots, and that the location of the test sites was conducted in an area of the Base that was difficult to access and was under strictly controlled conditions. Based on the Furlong Report, the Review Panel concluded that the spray tests had been conducted in a

disciplined manner in isolated areas inaccessible to the Applicant. The Review Panel further determined it did not have medical evidence of a diagnosis of Chloracne and, therefore, found insufficient evidence to establish that the Applicant had been exposed to Agent Orange at CFB Gagetown.

[5] The Applicant appealed the Review Panel's decision to an Entitlement Appeal Panel of the Board and the appeal was heard on May 22, 2013. The main issue before the Appeal Panel was whether the evidence established that the Applicant's Parkinson's disease was related to his service in the Canadian Forces pursuant to section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*. The Appeal Panel outlined its role in considering evidence under section 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [the *VRAB Act*], which requires it to:

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.

[6] The Appeal Panel explained that this section requires it to resolve doubts in favour of the Applicant. However, in view of *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at paras 5-6, 156 ACWS (3d) 929 [*Wannamaker*], the Appeal Panel noted that section 39 "does not relieve the pension applicant of the burden of proving on a balance of probabilities the facts required to establish entitlement to a pension" and does not require the Board "to accept evidence presented by the applicant if the Board finds that evidence not to be credible, even if the evidence is not contradicted."

[7] The Appeal Panel accepted that the Applicant had been at CFB Gagetown when Agent Orange was sprayed and that he suffers from a medical condition identified as having an association with exposure to Agent Orange. However, based on the evidence, the Appeal Panel concluded there was no more than a slight possibility that the Applicant had experienced direct exposure to Agent Orange, and that even if he was exposed to Agent Orange or other herbicides or pesticides, the scientific evidence did not suggest he would have been at increased risk for a long-term illness. In reaching this conclusion, the Appeal Panel referenced the Furlong Report, noting that:

> …the spraying of Agent Orange herbicides was conducted under strictly controlled conditions in an unused and remote area of the Base, not proximate to any residential working areas. Signs were posted at the perimeters of designated areas of the grid to be sprayed and flags were used so that the helicopter pilots would know the area to be sprayed.

The Appeal Panel also cited the historical human health risk assessment from the Furlong Report, finding that individuals "who were not directly involved with the application of the herbicide used, or with the cleanup after their use, were not at risk for long term effects from the herbicides and their contents." The Appeal Panel concluded that the Furlong Report represented the best evidence available as to what took place at CFB Gagetown.

[8] Ultimately, the Appeal Panel rejected the Applicant's appeal and affirmed the Review Panel's decision. One member of the three-member Appeal Panel dissented on the basis that the Applicant had received an ex gratia payment for his Chloracne condition and the evidence from Dr. Alas' medical report said it was highly probable his Parkinson's disease is a result of the use of Agent Orange at CFB Gagetown; the dissenting member would have granted the Applicant disability benefits.

II. The Reconsideration Request

[9] On March 2, 2016, the Applicant requested a reconsideration of the Appeal Panel's decision, alleging that there was both an error of fact and one of law. The Applicant did not submit any new evidence, but he did provide written submissions which included a copy of this Court's decision in *McAllister v Canada (Attorney General)*, 2014 FC 991, 466 FTR 70 [*McAllister (2014)*], copies of nine previous Board decisions, and five statements from Canadian Forces members that had been reviewed in *McAllister (2014)*. In his request for reconsideration, the Applicant submitted that the decision in *McAllister (2014)* overruled the Appeal Panel's findings on several issues related to his claim for disability benefits. First, the Court in *McAllister (2014)* concluded that the Furlong Report could not be taken as the best evidence as

to what occurred at CFB Gagetown during the 1960s since credible testimony evidence that contradicted certain conclusions from the report could be accepted. Second, the Court held that the applicable legislation does not require proof of direct contact or exposure to obtain benefits. Third, the Court ruled that exposure to Agent Orange could be established by credible testimony. And, finally, the Court stated that there is nothing in the Furlong Report "establishing that military personnel were restricted from the spray sites" and that "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" (*McAllister (2014)* at para 51). In summary, the Applicant argued that the Appeal Panel's legal and factual findings were inconsistent with *McAllister (2014)* and therefore should be reconsidered.

[10] The Applicant further submitted that his case was on all fours with that of Mr. McAllister, in that both he and Mr. McAllister were members of the Black Watch Battalion at CFB Gagetown and each of them had been exposed to Agent Orange while training in sprayed areas. According to the Applicant, the Appeal Panel erred by finding a legal requirement of "direct" exposure to Agent Orange and dismissing the credibility of the Applicant's narrative. In the Applicant's view, the witness statements filed in support of Mr. McAllister's case corroborated his testimony, and these statements proved that other members of the Black Watch Battalion trained in areas sprayed with Agent Orange and confirmed that they were directly sprayed during training.

[11] The Applicant also argued that the Court in *McAllister (2014)* made "conclusions of fact" that were never challenged by the Attorney General of Canada by way of an appeal. Specifically,

the Applicant noted that the Court found that members of the Black Watch Battalion trained in areas sprayed with Agent Orange and that the Furlong Report did not indicate that soldiers were restricted from entering or training in those areas. The Applicant further pointed out that the Court in *McAllister (2014)* found:

> [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...

III. The Reconsideration Decision

[12] In its decision dated October 12, 2016, an Entitlement Reconsideration Panel [the Panel] noted that there are two stages to a reconsideration request. First, the Panel screens the request to determine whether there are grounds for reconsideration, such as an error in fact, an error in law, or relevant new evidence which meets the fresh evidence test. If the request satisfies the first stage, the Panel will then proceed to reconsider the decision under appeal and render a reconsideration decision explaining why reconsideration is in order and whether, and to what extent, the previous decision will be varied, reversed or affirmed.

> After reviewing the case history and the Applicant's submissions for his reconsideration request, the Panel noted section 39 of the *VRAB Act* and stated it would look at the evidence "in the best light possible and resolve doubt so that it benefits the Applicant." It also cited *Wannamaker*, noting that section 39 does not relieve an applicant of the burden of proving the facts required to establish entitlement to a pension and does not require the Board to accept evidence if it finds that evidence not to be credible, even when the evidence is not contradicted. The Panel concluded that the Applicant did not satisfy the initial screening stage because he had not demonstrated an error of fact or an error of law in the Appeal Panel's decision. The Panel stated it was not bound by other decisions of the Board and it was "unable to find that there is probative value to the previous decisions filed in this case for the

> purposes of the Reconsideration." The Panel also stated there was little probative value to the statements that had been submitted in *McAllister (2014)* since they applied to a different individual and could only be of general interest to the Applicant. In the Panel's view, "the Applicant would have benefitted from providing statements that apply to him and not another litigant."

[13] The Panel then discussed this Court's decision in *McAllister (2014)*, concluding that the decision had not "changed anything as it pertains to proving that exposure to Agent Orange has led to the claimed condition." The Panel noted that the Court in *McAllister (2014)* had directed that the Board "apply a different test than that which normally would be applied." The Panel remarked that the Court had found there was no evidence that Mr. McAllister was restricted from entering the spray areas, and without such evidence the benefit of the doubt should be given to Mr. McAllister. Specifically, the Panel stated:

> …the Federal Court also gave much credence to the statements of the Applicant's comrades, and when it came to assessing those statements against the Furlong Report, the Federal Court found the Furlong Report should not be used to rebut claims of exposure when those claims can be substantiated with credible witness statements.

[14] The Panel further stated that the Court did not make any unfavourable findings about the scientific conclusions or the underlying information in the Furlong Report. As a result, the Panel found the Furlong Report still had considerable value, and that the identification of areas which were sprayed in 1966 and 1967 had not been disputed. In the Panel's view, "the Furlong Report provides unrebutted factual evidence concerning the two areas of the Base that were sprayed and the location of these areas vis-à-vis the other areas of the Base that were generally accessible and used for training." The Panel remarked that:

> CFB Gagetown consists of 271,816 acres (page 12 of the Furlong Report), of which 83 acres were sprayed. This represented 0.03% of the total Base property. Dr. Furlong reported the testing:
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> > . . . was conducted in an area of the Base that was difficult to access, under strictly controlled conditions, ensuring minimal spray drift. Helicopters were used and flew low over the treetops to ensure a spray swatch of 50 feet. Records indicate that spraying was conducted when there was very little wind. ...

[15] The Panel described the locations of the testing and found that no evidence had been produced to dispute or call into question the fact-based conclusions in the Furlong Report. The Panel also stated that the Furlong Report indicated that short-term exposure to Agent Orange could be associated with acute adverse health effects if exposure occurred within 24 hours of the application of Agent Orange. Based on the Furlong Report, the Panel said applicants appearing before the Board claiming adverse health effects caused by Agent Orange are "expected to show how they were in a particular locale during or within 24 hours of it being sprayed." The Applicant had not presented any such evidence to the Panel which remarked that he could have provided evidence such as unit records, exercise operating orders, movement logs, and after-action reports, to indicate where his unit was exercising.

IV. Issues

[16] This application for judicial review raises the following issues:

1. What is the appropriate standard of review?
2. Was the Panel's decision unreasonable?

3. Did the Panel breach its duty of procedural fairness by failing to allow the Applicant an opportunity to provide oral submissions?

V. The Parties' Submissions

[17] The Applicant maintains that the Panel acted contrary to law by failing to provide accurate reasons for its conclusions and, also, that the Panel erred in its interpretation and application of this Court's decision in *McAllister (2014)*. The Applicant contends that the Panel erred in its assessment and treatment of the evidence by erroneously rejecting his medical evidence and by concluding that he had not provided any evidence to dispute or question the fact-based conclusions in the Furlong Report. The Applicant says he submitted evidence at the previous hearings which disputed the Furlong Report's conclusions.

[18] The Applicant says the Panel erred in finding that he chose not to attend his reconsideration hearing and it was unreasonable to rely only on his written submissions. The Applicant claims he provided evidence to his representative which was not filed with the Panel. Specifically, the Applicant says he provided his representative with a partial list of places in the base training area where he had trained in as well as a letter from Dr. Dana Hanson dated September 25, 2013.

[19] The Respondent says the Panel weighed the evidence and made a reasonable decision. The Respondent further says the Panel was required, pursuant to subsection 32(1) of the *VRAB Act*, to determine only whether an error had been made with respect to any finding of fact or the interpretation of any law or if new evidence was presented. According to the Respondent, the

evidentiary rules in section 39 of the *VRAB Act* are meant to provide the Applicant with the benefit of the doubt, but that section does not relieve the Applicant from providing evidence to establish the causal link between his disability and his military service. In this regard, the Respondent highlights subsection 39(b) which states that the Applicant's uncontradicted evidence can only be accepted if the Board considers it to be "credible in the circumstances."

[20] The Respondent says the Panel reasonably reviewed the medical letter from Dr. Alas and gave it little weight because it lacked a thorough review of the Applicant's military record, most notably the Applicant's tremors which predated the Agent Orange spraying. The Respondent further says the Panel reasonably placed little probative value on the witness statements provided in *McAllister (2014)* since they were not tendered as new evidence and did not assist nor reference the Applicant's case. In the Respondent's view, the Panel could not have blindly assumed that these statements applied equally and factually to the Applicant's case. The Respondent notes that the Applicant could not overcome the Furlong Report's findings that Agent Orange was sprayed over a statistically remote area of CFB Gagetown. According to the Respondent, the Panel reasonably concluded that the Applicant failed to provide sufficient credible evidence to meet his burden.

[21] The Respondent maintains that the Panel did not err in determining that *McAllister (2014)* was not applicable to the Applicant's case because it was based on a different set of facts. According to the Respondent, the Court's comments that a doubt had been raised in Mr. McAllister's case were confined to Mr. McAllister's claim and supporting statements, and these comments do not establish a precedential doubt to cover all service personnel at CFB Gagetown

who were exposed to Agent Orange. Furthermore, the Respondent says *McAllister (2014)* did not relieve the Applicant of his burden to adduce some relevant new evidence.

VI. Analysis

A. *Standard of Review*

[22] The standard of review for a reconsideration decision made under subsection 32(1) of the *VRAB Act* is reasonableness (*McAllister (2014)* at para 38; *Stoyek v Canada (Attorney General)*, 2017 FC 47 at para 17, [2017] FCJ No 30; *McAllister v Canada (Attorney General)*, 2013 FC 689 at para 30, [2013] FCJ No 751 [*McAllister (2013)*]; *Rioux v Canada (Attorney General)*, 2008 FC 991 at para 17, 169 ACWS (3d) 338). Furthermore, in *Newman v Canada (Attorney General)*, 2014 FCA 218 at para 13, 378 DLR (4th) 242, the Federal Court of Appeal stated that "a reconsideration decision by an Appeal Panel is not reasonable if its initial decision was based on an error of law or fact that should have been corrected on reconsideration and was not." The question of whether the Panel gave proper effect to section 39 of the *VRAB Act* also attracts a standard of reasonableness (*Wannamaker* at para 13; *McAllister (2014)* at para 39).

[23] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to

determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[24] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). Whether an administrative decision was fair is generally reviewable by a court. However, the analytical framework is not so much one of correctness or reasonableness, but instead one of fairness. As noted by Jones & deVillars (*Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014) at 266):

> The fairness of a proceeding is not measured by the standards of "correctness" or "reasonableness". It is measured by whether the proceedings have met the level of fairness required by law. Confusion has arisen because when the court considers whether a proceeding has been procedurally fair, the court…decides whether the proceedings were correctly held. There is no deference to the tribunal's way of proceeding. It was either fair or not.

[25] Under the correctness standard of review, a reviewing court shows no deference to the decision maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision maker's determination (see: *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC

154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 471 FTR 71).

B. *Was the Panel's decision unreasonable?*

(1) *The Court's role in judicially reviewing a reconsideration decision*

[26] Subsection 32(1) of the *VRAB Act* allows a reconsideration panel to reconsider an appeal panel's decision if an applicant "alleges" an error of law or fact, or if any new evidence is presented. The threshold is fairly low. A reconsideration panel approaches subsection 32(1) by, firstly, screening the reconsideration request to determine whether there is a ground for reconsideration and, if there is, embarks on a second stage to reconsider the decision under appeal. In this case, the Panel only made a decision at the first stage, although it also commented on the merits of the Applicant's claim for disability benefits. While both parties' submissions address the merits of the Applicant's claim, it is important not to lose sight of the fact that the Panel's decision here was a screening decision and not a full, second stage reconsideration decision. The central issue therefore is whether the Panel reasonably determined that the Appeal Panel did not make an error in law or in fact.

[27] The Court's role in reviewing the Panel's decision necessarily entails a review of the Appeal Panel's decision to determine whether it made any errors of fact or law. In *McAllister (2013)*, Justice Strickland explained the Court's function in reviewing reconsideration decisions:

> [43] This judicial review is of the VRAB's Second Reconsideration Decision refusing to reconsider, on the basis of new evidence, the August 11, 2009 Entitlement Appeal Decision. The Second Reconsideration Decision is the last in a chain of five

decisions concerning the pension benefit entitlement sought by the Applicant. Therefore, as a preliminary matter, it is necessary for the Court to determine to what extent it can look to the previous decisions in assessing the decision under review.

[44] In *Furlong*, above, at para 17, Justice Blanchard stated that the line of demarcation between a decision refusing to reconsider and an earlier decision is unclear because "a reconsideration, by its very nature, requires some hearkening back to the substance of the earlier decision". He quotes Justice Teitelbaum in *Mackay*, above, who explained this as follows:

> [17] […] Effectively in a reconsideration, the VRAB is required to look backwards to the substance of the earlier decision. In a similar vein, in a judicial review application concerning the VRAB's failure to reconsider an earlier decision, the Court must equally look backwards to the earlier decision. Thus, the Court in the case at bar cannot decide in a vacuum if the VRAB on June 21, 1996 properly exercised its discretion. The Court must also pay some attention to the earlier decision of the VAB dated January 19, 1994 because it was at issue in the VRAB reconsideration proceeding.
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> However, I wish to emphasise that it is not for the Court in the current proceeding to conduct a full-fledged judicial review of the January 19, 1994 decision of the VAB. The validity of the earlier decision of January 19, 1994 cannot properly be challenged in a judicial review of the VRAB's June 21, 1996 reconsideration decision. The Court does not have jurisdiction to overturn the earlier decision. By its very nature, a reconsideration under the auspices of the Veterans Review and Appeal Board Act is backward looking but there cannot be a point of infinite regression. […]
>
> [Emphasis in original]

[45] Justice Blanchard in *Furlong*, above accepted this analysis and concluded, that the Court could not disregard the decisions made prior to the appeal panel's last decision. Although the Court did not have jurisdiction to set aside these earlier decisions because they were not the subject of the judicial review before it, the Court must nevertheless consider them retrospectively to better understand the basis of the decision that is under judicial review.

> [46] *Mackay*, above, was also followed in *Caswell v Canada (Attorney General)*, [2004] FCJ No 1655 [*Caswell*] at para 20 which concluded:
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> > [20] Therefore in order for me to assess whether the Board properly exercised its jurisdiction pursuant to s. 111 of the Act, I must also look to the earlier decision of the Panel to determine whether any errors of law or fact were made in its assessment of whether the evidence submitted by Mr. Caswell in support of his request for reconsideration was in fact new evidence. In order to determine whether the Board properly assessed the Panel's reasons, the Board has to look at the Panel's reasons. It appears to me that the Court, as the reviewing body of the Board's decision, has to be in the same position as was the Board when it reviewed the Panel's decision, and it cannot do so without also looking at the Panel's reasons. By not doing so, the Court would not have the full understanding of the situation and would not be in a position to make a determination on the merits of the Board's decision.
>
> [47] Therefore, in this case, the Court must look to the First Reconsideration Decision and Entitlement Appeal Decision to understand the basis of the Second Reconsideration Decision and to determine whether the VRAB made any errors of law or fact in assessing whether the evidence submitted by the Applicant in support of his request for a second reconsideration was, in fact, new evidence.

(2) *Did the Panel reasonably determine that the Appeal Panel did not make any errors of law or fact?*

[28] The Applicant's primary argument is that the Appeal Panel's decision was inconsistent with this Court's decision in *McAllister (2014)*. Specifically, the Court found that the Furlong Report did not establish that military personnel were restricted from the spray sites and that claimants did not have to prove direct contact or exposure to obtain pension entitlements. In *McAllister (2014)*, the Court said it was reasonable to rely on the evidence from Mr. McAllister

and his fellow servicemen. According to the Applicant, the Panel in this case discounted the Court's comments in *McAllister (2014)*, stating that that decision has not "changed anything as it pertains to proving that exposure to Agent Orange has led to the claimed condition".

[29] In my view, the Panel's comments in this regard are an unreasonable attempt to narrow and limit this Court's findings in *McAllister (2014)*. Justice de Montigny reviewed the Furlong Report and concluded that the Board had unreasonably determined that the Furlong Report established that military personnel were restricted from entering the spray sites (*McAllister (2014)* at paras 51-53). The Court stated that "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" (*McAllister (2014)* at para 51). The Court made the following comments about the Furlong Report's conclusions in this regard:

> [52] …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).

[30] Given that the Furlong Report did not establish that military personnel were restricted from the spray sites, the Court in *McAllister (2014)* found the Board could not reasonably

conclude that it was the best evidence on this point when it was faced with conflicting evidence from Mr. McAllister and witnesses who served with him at CFB Gagetown. Justice de Montigny determined that section 39 of the *VRAB Act* favoured an interpretation of the evidence in favour of Mr. McAllister, stating that:

> [53] …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*…

[31] The Court's comments in *McAllister (2014)* cannot be, as the Panel unreasonably did in this case, dismissed as having no precedential value. Furthermore, the Court in *McAllister (2014)* did not, as the Panel's decision states, require the Board to "apply a different test than that which normally would be applied." Rather, the Court required the Board to apply section 39 based on the totality of the evidence then before it.

[32] It is important to appreciate the context of the decision under review. The Applicant was requesting the Panel to reconsider whether he was entitled to disability benefits because the Appeal Panel's decision was based upon an error in view of *McAllister (2014)*. The Panel's role pursuant to subsection 32(1) of the *VRAB Act* was to decide whether the Appeal Panel's decision was based upon an error. The Appeal Panel's decision, which was rendered before the decision in *McAllister (2014)*, made the following comments:

> According to these studies, the spraying of Agent Orange herbicides was conducted under strictly controlled conditions in an unused and remote area of the Base, not proximate to any residential areas.

> …
>
> The Panel is satisfied that these studies represent the best evidence available at this time as to what took place at CFB Gagetown.

[33] In making these comments, the Appeal Panel referenced the Furlong Report. The Appeal Panel's conclusion that Agent Orange was sprayed in an "unused" area cannot be inferred from the Furlong Report, as the Court found in *McAllister (2014)*. This is a factual error in the Appeal Panel's decision which the Panel either overlooked or ignored. The Furlong Report does say that the sprayed area was remote, but it does not say the area was "unused." Dr. Furlong merely stated in his report that he had 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." This does not preclude the possibility, as the Applicant argues, that this area was used for training during the spraying activities in June 1967. The Furlong Report cannot stand as conclusive evidence that Agent Orange was sprayed in an "unused" area. In view of this error by the Appeal Panel, it was unreasonable for the Panel to conclude that the Applicant had failed to establish any error.

[34] Moreover, the Appeal Panel's determination that the Furlong Report was "the best evidence" as to what took place at the Base can no longer be considered as being valid in view of *McAllister (2014)*. The Appeal Panel relied on this "best evidence" to conclude that "there is no more than a slight possibility that the Veteran experienced direct exposure to Agent Orange." Even if this conclusion may have been reasonable at the time of the Appeal Panel's decision, the findings in *McAllister (2014)* make it open to question and, in my view, it was unreasonable for the Panel not to reconsider it.

[35] In short, the Panel unreasonably screened out the Applicant's reconsideration request without proper regard for the evidence before it and in light of *McAllister (2014)*.

C. *Did the Panel breach its duty of procedural fairness by failing to allow the Applicant an opportunity to provide oral submissions?*

[36] The Applicant's submissions to the Panel explicitly indicated that he was only providing written submissions and not requesting an oral hearing. Based on the Applicant's submissions, it was not unfair for the Panel to proceed without an oral hearing.

VII. Conclusion

[37] For the reasons stated above, the Panel's decision in this case to refuse to reconsider the Appeal Panel's decision is unreasonable. The matter must be returned to a different Entitlement Reconsideration Panel for redetermination in accordance with these reasons for judgment. The Applicant may make additional submissions and provide further evidence for purposes of the redetermination.

[38] Neither party requested their costs of this matter; accordingly, none will be ordered.

JUDGMENT in T-1975-16

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is allowed; the matter is returned for redetermination by a different Entitlement Reconsideration Panel in accordance with the reasons for this judgment;
2. the Applicant shall be permitted to provide additional submissions and evidence for purposes of the redetermination;
3. the Veterans Review and Appeal Board shall be and is hereby removed as a named respondent and the style of cause shall be amended accordingly; and
4. there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1975-16
STYLE OF CAUSE:	NORMAN ALLAN BLOUNT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	MAY 9, 2017
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 4, 2017

APPEARANCES:

Norman Allan Blount	FOR THE APPLICANT (ON HIS OWN BEHALF)
Jan Jensen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT