

**Date: 20060529**

**Docket: T-1746-05**

**Citation: 2006 FC 646**

**Ottawa, Ontario, May 29, 2006**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**NICOLAS MATUSIAK**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] In 2002, after a military career lasting some 25 years, Nicolas Matusiak was discharged from the Canadian Forces for medical reasons. Mr. Matusiak had been suffering from a major depression for several years prior to his discharge, and was unable to work.

[2] The Veterans Review and Appeal Board initially refused Mr. Matusiak's application for a disability pension on the grounds that his disability did not arise out of his military service. On judicial review, Justice Teitelbaum set aside that decision, and referred the matter back to the VRAB for redetermination.

[3] The VRAB then determined that Mr. Matusiak was entitled to 2/5 of a full pension, on the basis that other factors, not directly connected to his peacetime service, played a role in the development of his depression. This is an application for judicial review of that decision.

[4] At the conclusion of the hearing in this matter, I advised the parties that I would be allowing this application. These are my reasons for doing so.

### **Mr. Matusiak's Military Career**

[5] After enlisting in the Canadian Forces in 1977, Mr. Matusiak enjoyed a successful military career until he began to develop psychiatric problems in the mid-1990's. In early 1996, Mr. Matusiak was diagnosed with dysthemia, or mild depression. He was treated with anti-depressant medication, and continued to work.

[6] In 1997, Mr. Matusiak was assigned to a new position, in which he was required to report to a Major Burke. Mr. Matusiak states that Major Burke told him in their initial interview that he had heard from other officers that Mr. Matusiak was a "troublemaker", and that he was "disloyal", and "unprofessional". Things went downhill from there.

[7] Mr. Matusiak was still taking anti-depressants when he began reporting to Major Burke, and he began seeing a doctor more frequently because of the stress that he was feeling.

[8] In April of 1998, Mr. Matusiak was told that he would be receiving a promotion. However, this promotion was subsequently cancelled.

[9] Mr. Matusiak had received a disciplinary sanction from Major Burke in the form of a Recorded Warning. This Recorded Warning evidently played a role in the withdrawal of Mr. Matusiak's promotion, and was subsequently found by the Canadian Forces Grievance Board to have been unjustified. While the Warning was removed from Mr. Matusiak's service file two weeks after it had been issued, Mr. Matusiak says that the damage to his reputation and his career had already been done.

[10] On June 19, 1998, Mr. Matusiak filed a grievance with respect to the Recorded Warning. The grievance was dismissed on July 8, 1998. Although he was not yet aware of the decision, that same day, Mr. Matusiak was diagnosed as suffering from a major depression. When Mr. Matusiak was notified of the dismissal of his grievance two days later, he says that he suffered a "nervous breakdown".

[11] Mr. Matusiak went on sick leave at this point, and never returned to work. He continued to receive medical attention, showing some signs of improvement until December of 1998, when an application for the reconsideration of his grievance was itself dismissed.

[12] Mr. Matusiak continued to pursue his grievance, and on March 26, 2002, the Canadian Forces Grievance Board found that the Recorded Warning imposed by Major Burke was inappropriate. The Board also found that Mr. Matusiak's grievance had been handled in an

inappropriate manner by the military. Mr. Matusiak was pursuing his pension claim at the time, and the Board recommended that he be compensated through the provision of a disability pension.

### **Mr. Matusiak's Pension Application**

[13] Mr. Matusiak applied for a disability pension on January 24, 2000. He received some compensation for a knee injury, but his application was otherwise refused by the Department of Veterans Affairs, based upon the finding that his major depression was not connected to his military service.

[14] Mr. Matusiak appealed this decision to an Entitlement Review Panel of the VRAB , which heard his case on October 30, 2001. The Panel granted Mr. Matusiak some additional compensation for carpal tunnel syndrome, but once again found that his major depression was not connected to his military service.

[15] Mr. Matusiak then appealed this decision to the VRAB itself. In a decision dated December 22, 2003, the VRAB found that while Mr. Matusiak suffered from depression, it was not connected to his military service.

[16] Mr. Matusiak's application for judicial review of this decision was allowed by Justice Teitelbaum. As the scope of Justice Teitelbaum's decision, and the directions he provided to the VRAB are in issue in this proceeding, it is necessary to examine this decision in some detail.

[17] Both parties agree that it is implicit in Justice Teitelbaum's decision that he found that Mr. Matusiak's original dysthemia, or mild depression, did not arise out of his service in the military. Rather, Justice Teitelbaum identified the question for the VRAB as whether this pre-existing condition was subsequently aggravated by events in Mr. Matusiak's workplace.

[18] In addressing this question, Justice Teitelbaum reviewed the medical evidence that was before the VRAB, as well as the evidence regarding what was going on in the workplace as Mr. Matusiak's condition worsened. In this regard, Justice Teitelbaum noted the numerous references in the medical reports to the stress that Mr. Matusiak was experiencing at work. Justice Teitelbaum also observed the temporal relationship between the issuance of the Recorded Warning, the loss of Mr. Matusiak's promotion, and his complete psychological collapse.

[19] Justice Teitelbaum noted that the VRAB had placed great reliance on one medical report, which could be read as suggesting that Mr. Matusiak had imagined the problems that he was experiencing at work. In so doing, the VRAB did not explain why the opinion expressed in this report outweighed numerous contrary opinions in other reports in the record from different doctors.

[20] Justice Teitelbaum concluded that the VRAB had committed patently unreasonable errors in ignoring clear, objective evidence before it, and in giving undue weight to part of one doctor's report, without adequate explanation.

[21] Justice Teitelbaum also found that the VRAB did not take the proper approach to the issue of causation, and thus erred in law. In this regard, he stated that:

[82] ... [T]he requirement of proximity is not part of the "arising out of" standard applicable to the case before the Court. Even if it were to be applied under the "directly connected" half of the test, and even if the Board found the Applicant to be a 'thin skulled' claimant owing to his existing depressive condition ... this would not necessarily relieve the Canadian Forces of responsibility...

[22] Finally, in remitting this matter to the VRAB, Justice Teitelbaum stated that the matter was to be redetermined:

[85] ... in a manner that accords with its governing statutes and these reasons. I would add that the actions of Major Burke in his dealing with the Applicant have a great deal to be desired. I am satisfied from reading the documents that Major Burke severely contributed to the Applicant's major depression.

### **The VRAB's Second Decision**

[23] In its second decision, the VRAB identified the issue to be determined as whether Mr. Matusiak's major depression was caused, in whole or in part, by service-related stressors which arose out of his service with the Canadian Forces. The VRAB found that the evidence did not support a finding that the development of Mr. Matusiak's major depression, and his breakdown in 1998, were entirely related to his military service. Instead, the VRAB concluded that 3/5 of the pension should be withheld because of the existence of other factors that allegedly contributed to the development of Mr. Matusiak's psychiatric disability.

[24] In coming to this conclusion, the VRAB found that the evidence indicated that other psychiatric traits, including a paranoid personality, as well as possible psychosis and delusions, were non-service factors which played a role in the development of Mr. Matusiak's major depression.

[25] The VRAB observed that the stressors to which Mr. Matusiak attributed his breakdown and the development of his major depression in 1998 involved issues secondary and incidental to his work. The Board stated that “while they may have arisen in the workplace environment, the stressors did not arise out of the work itself. Rather, the stressors were a product of these interactions with his colleagues and arose directly out of conflicts and disputes with the individuals with whom he worked”.

[26] The VRAB did not accept that Major Burke’s actions played a significant role in the development of Mr. Matusiak’s major depression, noting that Mr. Matusiak had difficulties with other co-workers, apart from Major Burke. Instead, the VRAB found that the conflicts that eventually culminated in Mr. Matusiak’s disabling breakdown were caused by his personality traits and his ever-increasing paranoia.

[27] In this regard, the VRAB had this to say:

In the initial stages of the disputes which eventually led to the Appellant’s grievance, he was, to a significant degree, the author of his own unhappiness and stress.

[28] The Board also found that Mr. Matusiak’s other, non-psychiatric, health-related issues caused him stress during the period of time in which his depression was worsening. In addition, the Board found that the fact that his anti-depressant medication had stopped working was another, non-service-related, factor contributing to the deterioration in Mr. Matusiak’s condition.

[29] The VRAB did find that the manner in which the Canadian Forces dealt with Mr. Matusiak's grievance created stress for Mr. Matusiak, as the grievance had not been handled properly. The Board found it reasonable to infer that the Forces' handling of the grievance was the "straw which broke the camel's back", playing a contributing role in the deterioration of Mr. Matusiak's mental health.

[30] Based on all of the evidence and circumstances, the Board concluded that the most significant factors in the development of Mr. Matusiak's psychiatric disability were not related to, nor did they arise out of, his military service. As a consequence, the VRAB held that 2/5 of a pension represented fair compensation for the role that stressors arising out of the mishandling of Mr. Matusiak's grievance may have played in the aggravation of his condition.

### **Statutory Framework**

[31] The VRAB decision centres on the interpretation of subsections 21(2) and 21(2.1) of the *Pension Act*, which defines entitlement to a military disability pension in peacetime. It provides as follows:

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

( a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in

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

a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas

respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;

d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

(2.1) Where a pension is awarded in respect of a disability resulting from the aggravation of an injury or disease, only that fraction of the total disability, measured in fifths, that represents the extent to which the injury or disease was aggravated is pensionable.

(2.1) En cas d'invalidité résultant de l'aggravation d'une blessure ou maladie, seule la fraction — calculée en cinquièmes — du degré total d'invalidité qui représente l'aggravation peut donner droit à une pension.

[32] Also relevant to this matter is section 39 of the *Veterans Review and Appeal Board Act*, which provides that:

**39.** In all proceedings under this Act, the Board shall

**39.** Le Tribunal applique, à l'égard du demandeur ou de l'appellant, 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.

## Standard of Review

[33] The parties are in agreement that the standard of review applicable to this case was properly described by Justice Teitelbaum in his earlier decision in this matter, where, after reviewing the jurisprudence, he stated that:

[35] Having traced the standard of review analysis in cases such as these back to its root, I find that the standard of review is reasonableness *simpliciter* for the question of whether the Board failed to interpret the evidence as a whole in the broad manner required by the statute. The standard of patent unreasonableness is applicable solely to the Board's weighing of conflicting medical evidence to determine whether the disability was caused or aggravated by military service.

[34] I agree with Justice Teitelbaum's conclusion in this regard, and adopt his analysis as my own.

## Analysis

[35] The decision under review largely turns on the VRAB's finding that much of the difficulty that Mr. Matusiak encountered in the workplace was attributable to his paranoid personality traits. The VRAB also found that Mr. Matusiak had possibly been delusional and psychotic as well.

[36] It is true that there was some evidence before the VRAB to suggest this could possibly have been the case. In particular, there was the opinion of Dr. Bourgon referred to in VRAB's decision. There were, however, significant frailties associated with this evidence. For example, Dr. Bourgon only saw Mr. Matusiak on one occasion, approximately one year after his breakdown. Thus, he was endeavouring to reconstruct what Mr. Matusiak's condition might have been a year before, based upon a single interview.

[37] Moreover, Dr. Bourgon's evidence is at odds with the evidence of Mr. Matusiak's own treating psychiatrist, who stated that she had never observed any indications of a thought disturbance or perceptual abnormality on the part of Mr. Matusiak during her numerous sessions with him. A number of other physicians made the same observation.

[38] Counsel for the respondent candidly acknowledged that it was patently unreasonable for the VRAB to selectively accept the evidence of Dr. Bourgon, while ignoring the considerable body of evidence running directly contrary to its conclusion, without any explanation. Counsel also conceded that this error was sufficiently serious as to require that Mr. Matusiak's application for judicial review be allowed.

[39] I agree that this error, by itself, was sufficiently grave as to warrant the decision of the VRAB being set aside. The VRAB's error is all the more egregious having regard to the statutory requirement that any doubt in the weighing of the evidence is to be resolved in favour of an applicant.

[40] There were, however, other errors in the VRAB's handling of this matter. Because this matter is being remitted to the VRAB, yet again, for redetermination, I am of the view that these errors should be drawn to the Board's attention, so as to avoid the possible repetition of these errors in future proceedings.

[41] First of all, when one reads the decision as a whole, one is left with the overwhelming impression that the VRAB was seeking to find a way to limit Mr. Matusiak's entitlement to a

pension. Where more than one inference could be drawn from the evidence, the VRAB chose the inference least favourable to Mr. Matusiak, contrary to the statutory guidance provided by section 39 of the *Veterans Review and Appeal Board Act*.

[42] In addition, the VRAB was of the view that many of Mr. Matusiak's difficulties in the workplace were attributable to his paranoid personality traits, and to the delusions and psychoses that he may have been experiencing. In this regard, the Board found that Mr. Matusiak was, to a significant degree, the author of his own unhappiness and stress.

[43] I have already concluded that the VRAB's finding regarding Mr. Matusiak's alleged paranoid personality traits, and his possible delusions and psychoses, was fundamentally flawed. Nevertheless, the Board found that he did. To then go on to suggest that someone suffering from these serious psychiatric conditions was "the author of his own unhappiness and stress" is simply astonishing. In my view, this comment by the VRAB shows a remarkable lack of understanding of, and insensitivity to, the realities of mental illness.

[44] Finally, the VRAB simply disregarded the clear finding contained in Justice Teitelbaum's decision. In this regard, it bears repeating that, in remitting this matter to the VRAB, Justice Teitelbaum stated that the matter was to be redetermined:

[85] ... in a manner that accords with its governing statutes and these reasons. I would add that the actions of Major Burke in his dealing with the Applicant have a great deal to be desired. **I am satisfied from reading the documents that Major Burke severely contributed to the Applicant's major depression.**  
[emphasis added]

[45] Counsel for the respondent submits that this comment was merely *obiter*, and was not intended as a direction to the Board. I do not agree. When read in its context, in the paragraph dealing with the remittal of the matter to the VRAB, it was clear that Justice Teitelbaum intended that the redetermination of Mr. Matusiak's case be carried out based upon his finding regarding Major Burke's significant contribution to Mr. Matusiak's illness.

[46] Nevertheless, the VRAB went on to find that Major Burke's actions did not materially contribute to the onset of Mr. Matusiak's major depression. With respect, such a finding was simply not open to the VRAB, in light of Justice Teitelbaum's finding specifically on this point.

### **Conclusion**

[47] For these reasons, this application for judicial review is allowed. The decision of the VRAB is set aside, and the matter is remitted to the VRAB for redetermination with the following directions:

1. The re-hearing of Mr. Matusiak's case is to be expedited; and
2. The decision of the VRAB is to reflect Justice Teitelbaum's finding that the actions of Major Burke in his dealings with Mr. Matusiak severely contributed to Mr. Matusiak's major depression.

### **Costs**

[48] Mr. Matusiak asks for his costs on a solicitor and client basis, asserting that he should not be out of pocket as a result of the failure of the VRAB to comply with the direction of Justice Teitelbaum.

[49] While conceding that Mr. Matusiak should be entitled to an order of costs, counsel for the Attorney General nevertheless submits that an order of solicitor and client costs would not be appropriate, given that her client has done nothing wrong in this matter, and that the errors that have been committed in this case were those of the VRAB.

[50] In *King v. Canada (Attorney General)*, [2000] F.C.J. No. 196, another case involving the VRAB, Justice Pelletier was also confronted with a situation where the VRAB had not complied with a direction of this Court. Justice Pelletier noted that:

With the greatest respect for the Board this is not what they were called upon to do. It is unfortunate that the Board did not seek directions if it was unclear as to what MacKay J.'s order required it to do. In the end result, the review of entitlement which MacKay J. ordered did not occur. [at ¶ 28]

[51] In awarding the successful applicant his solicitor and client costs, Justice Pelletier stated:

[35] In view of the fact that Mr. King might have been spared the expense of this application had MacKay J.'s order been complied [with] according to its terms, Mr. King shall have his costs of this application on a solicitor and client basis.

[52] On appeal, the Federal Court of Appeal affirmed Justice Pelletier's award of costs, ruling that:

[5] In exercising his discretion under Rule 400 the Chambers Judge was entitled to consider a number of the factors outlined in Rule 400 (3) including the result of the proceeding before the Board. Clearly, Justice Pelletier was of the view that the Board's handling of this case was cumbersome and unfair to the respondent.

[6] Overall, we are not persuaded that a legal error has been committed in the exercise of discretion below. The appeal will be dismissed with costs to the respondent. (*King v. Canada (Attorney General)*, [2000] F.C.J. No. 1558.)

[53] Had the VRAB accepted Justice Teitelbaum's finding in this case, as it was bound to do, this application for judicial review may not have been necessary. I am of the view that, in all of the circumstances, and in the exercise of the discretion conferred upon me by Rule 400 of the *Federal Courts Rules*, Mr. Matusiak should be entitled to his costs, on a solicitor and client basis.

**JUDGMENT**

For the reasons set out above, this Court orders and adjudges that:

1. The decision of the Veterans Review and Appeal Board dated September 7, 2005 is set aside;
2. The matter is remitted to the Veterans Review and Appeal Board for re-determination in accordance with these reasons and the directions of this Court;
3. The re-hearing of Mr. Matusiak's case is to be expedited;
4. The decision of the VRAB is to reflect Justice Teitelbaum's finding that the actions of Major Burke in his dealings with Mr. Matusiak severely contributed to Mr. Matusiak's major depression; and
5. Mr. Matusiak shall have his costs of this application, on a solicitor and client basis.

“Anne Mactavish”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1746-05

**STYLE OF CAUSE:** NICOLAS MATUSIAK v.  
ATTORNEY GENERAL OF CANADA

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