Federal Court  Cour fédérale

**Date: 20220920**

**Docket: T-1367-22**

**Citation: 2022 FC 1307**

**Ottawa, Ontario, September 20, 2022**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**KHALID ABDULLE**

**Applicant**
**(Responding Party)**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**
**(Moving Party)**

# JUDGMENT AND REASONS

[1] The Attorney General of Canada, on behalf of Her Majesty the Queen in Right of Canada, has brought a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, seeking:

1. An order striking out the Notice of Application for Judicial Review dated July 4, 2022, in its entirety without leave to amend;

2. An order dismissing this Application; and

3. Any other such relief as this Honourable Court may deem just.

[2] The Attorney General submits that the grounds of its motion are that:

1. The Application is improper because the decision the Applicant is challenging is an informative letter from Veterans Affairs Canada [VAC]. This letter cannot qualify as an official decision of any kind, let alone a final decision subject to judicial review pursuant to section 18.1 of the *Federal Courts Act*.

2. In the alternative, the Application is premature because adequate alternative remedies were not exhausted. The Applicant had the right to challenge a separate, appropriate decision (the decision to cancel his Rehabilitation Plan) that was communicated to him prior to receipt of the informative letter. He failed to exhaust the internal review process available to him pursuant to the *Veterans Well-being Act*, SC 2005 c 21 [*VW Act*] and the *Veterans Well-being Regulations*, SOR/2006-50 [*VW Regulations*].

3. The Application is bereft of any possibility of success and should be struck accordingly, without leave to amend.

*The Notice of Application*

[3] The subject Notice of Application filed by the Applicant, who is self-represented, challenges what the Applicant refers to as a decision letter from VAC dated June 13, 2022 [VAC Letter]. In the Notice of Application, the Applicant claims that the VAC Letter makes it clear that the VAC will not conduct a Diminished Earning Capacity [DEC] determination. The Applicant asserts that this fails to comply with s 18(5) of the *VW Act*. The Applicant seeks an Order requiring VAC to complete the DEC determination.

[4] As to the grounds of the application, the asserted factual backdrop to the application states, in essence, that VAC approved the Applicant's applications for Rehabilitation Services for Right and Left Knee Osteoarthritis as well as for Degenerative Disease of the Lumbar Spine under s 8(1) of the *VW Act*. The Applicant asserts that he participated in the VAC Rehabilitation

Program reaching maintenance status from a medical perspective and substantially meeting his rehabilitation goal. The Applicant asserts that his file was then sent to the DEC Unit to undergo a vocational assessment in order to determine a DEC. He was to complete a vocational assessment between April 21 and June 21, 2021. In that regard, VAC made two appointments for the Applicant to undergo a Functional Capacity Assessment during that period but it subsequently cancelled them. VAC then advised that a DEC determination would not be made due to non-participation of the required assessments.

[5] In support of the application, in addition to the allegation that the VAC failed to comply with s 18(5) of the *VW Act*, the Applicant refers to, among other things, the VAC Letter, other documentation to be filed, the VAC Diminished Earning Capacity Determination Policy [DEC Policy] and, the VAC Rehabilitation Services and Vocational Assistance Plan: Assessment, Development and Implementation policy [Rehabilitation Policy], providing hyperlinks to those policies.

*The Legislation, Regulations and Policy*

[6] The most relevant provisions of *the VW Act*, *VW Regulations*, DEC Policy, Rehabilitation Policy and, the VAC Review of Part 1, Part 1.1, Part 2 and Part 3.1 Decisions under the *Veterans Well-being Act* Policy [Review Policy] are found in Annex A to these reasons.

*The Law Concerning Motions to Strike Applications for Judicial Review*

[7] As set out in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 [*JP Morgan*]:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf.*. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

[8] Further, the Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form (*JP Morgan* at para 50 citing: *Canada v Domtar Inc.*, 2009 FCA 218 at para 28; *Canada v Roitman*, 2006 FCA 266 at para 16; *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 at para 78).

[9] Moreover, as a general rule, affidavits are not admissible in support of motions to strike applications for judicial review (*JP Morgan* at para 51):

> [52] This general rule is justified by several considerations:
>
> > ● Affidavits have the potential to trigger cross-examinations and refused questions and, thus, can delay applications for judicial review. This is contrary to Parliament's requirement that applications for judicial review proceed "without delay" and be heard "in a summary way."
> >
> > ● A respondent bringing a motion to strike a notice of application does not need to file an affidavit. In its motion, it must identify an obvious and fatal flaw in the notice of application, *i.e.*, one apparent on the face of it. A flaw that can be shown only with the assistance of an affidavit is not obvious. A respondent's inability to file evidence does not normally prejudice it. It can file evidence later on the merits of the review, subject to certain limitations, and often the merits can be heard within a few months. If an application has no merit, it will be dismissed soon enough. And if there is some need for faster determination of the merits, a respondent can always move for an order expediting the application.
> >
> > ● As for an applicant responding to a motion to strike an application, the starting point is that in such a motion the facts alleged in the notice of application are taken to be true: *Chrysler Canada Inc. v. Canada*, 2008 FC 727 at paragraph 20, aff'd on appeal, 2008 FC 1049. This obviates the need for an affidavit supplying facts. Further, an applicant must state "complete" grounds in its notice of application. Both the Court and opposing parties are entitled to assume that the notice of application includes everything substantial that is required to grant the relief sought. An affidavit cannot be admitted to supplement or buttress the notice of application.
>
> [53] Exceptions to the rule against admitting affidavits on motions to strike should be permitted only where the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice.
>
> [54] For example, one exception, relevant in this case, is where a document is referred to and incorporated by reference in a notice

> of application. A party may file an affidavit merely appending the document, nothing more, for the assistance of the Court.

*Affidavit filed by the Attorney General*

[10] In support of its motion to strike, the Attorney General has filed the affidavit of Bianca Côté-Le Vasseur, Legal Assistant for the National Litigation Sector in the Civil Litigation Section of the Department of Justice, affirmed on August 17, 2022 [Vasseur Affidavit]. This appends as exhibits the VAC Letter, the DEC Policy as well as the Review Policy. The affidavit does not otherwise address the Notice of Application.

[11] The Attorney General acknowledges that, generally, a motion to strike an application for judicial review should be adjudicated on the face of the notice of application, without any supporting evidence. It submits, however, that the Vasseur Affidavit falls within an exception to that rule where a document is referred to and incorporated by reference in a notice of application. It submits that, in those circumstances, a party may file an affidavit merely appending the document, without more, for the assistance of the court (citing *Blair v Canada (Attorney General)*, 2022 FC 957 at para 12). Further, the Attorney General submits that this Court has also previously considered affidavit evidence regarding adequate alternative remedies on motions to strike judicial review applications on the basis that it "is in the interests of justice to allow such evidence by way of affidavit in order to properly assess whether the Notice of Application should be struck on this basis" (citing *Picard v Canada (Attorney General)*, 2019 CanLII 97266 at paras 17-18 [*Picard*]).

[12] The Attorney General submits that the Vasseur Affidavit appends the VAC Letter and the DEC Policy which are both referenced in the Notice of Application.

[13] In my view, the Vasseur Affidavit is admissible to the extent that it appends, in an uncontroversial way, the VAC Decision and the DEC Policy, both of which are referenced in the Notice of Application and "on a fair reading, are incorporated into the notice of application by reference" (*JP Morgan* at para 64).

[14] As to the VAC Review Policy, the Respondent submits that this is appended to the Vasseur Affidavit as it is relevant to the question of appropriate alternative remedy.

[15] As indicated in *JP Morgan*, the existence of an adequate and effective remedy in another forum may serve to ground a motion to strike out an application for judicial review:

> [84]..... A judicial review brought in the face of adequate, effective recourse elsewhere or at another time cannot be entertained: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Peepeekisis Band v. Canada*, 2013 FCA 191 at paragraphs 59-62; *Association des compagnies de téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 203 at paragraph 26; *Buenaventura v. Telecommunications Workers Union*, 2012 FCA 69 at paragraphs 22-41. This is subject to unusual or exceptional circumstances supportable in the case law: see, *e.g.*, *C.B. Powell Ltd. v. Canada*, 2010 FCA 61, *supra* at paragraphs 30, 31 and 33 and authorities cited thereto.
>
> [85] This principle is justified by the fact that judicial review remedies are remedies of last resort: *Addison & Leyen*, *supra* at paragraph 11; *Cheyenne Realty Ltd. v. Thompson*, [1975] 1 S.C.R. 87 at page 90; *Eli Lilly & Co. v. Apotex Inc.* (2000), 266 N.R. 339 (F.C.A.) at paragraph 9; *Kingsbury v. Heighton*, 2003 NSCA 80 at paragraph 102; Lord Woolf, "Judicial Review: A Possible Programme for Reform," [1992] P.L. 221 at page 235. Further, improper or premature recourse to judicial review can frustrate

> specialized schemes set up by Parliament and cause delay: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 36; *C.B. Powell*, *supra* at paragraphs 28 and 32; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 at paragraph 68 and 69; Mullan, *supra* at page 489.
>
> [86] Administrative law cases and textbooks express this principle in many different ways: adequate alternative forum, the doctrine of exhaustion, the doctrine against fragmentation or bifurcation of proceedings, the rule against interlocutory judicial reviews and the rule against premature judicial reviews. They all address the same idea: someone has rushed off to a judicial review court when adequate, effective recourse exists elsewhere or at another time.

[16] In *Picard* this Court held that the justifications for the general rule of inadmissibility are not undercut by admitting affidavits when the evidence adduced in those affidavits was relevant to the issue of whether an adequate alternative remedy existed. Because a notice of application does not typically set out allegations of fact on this issue, it was in the interests of justice to allow such evidence by way of affidavit in order to properly assess whether a notice of application should be struck on this basis (*Picard* at paras 17-18).

*Applicant's Affidavit*

[17] The Applicant has also filed an affidavit in response to the Respondent's motion to strike affirmed on August 20, 2022. This attaches two documents, which are intended to support that the Applicant substantially completed his rehabilitation plan and that VAC initiated a DEC determination. However, the facts as set out in the Applicant's Notice of Application are, for the purposes of assessing a motion to strike, as taken to be true. This documentation is accordingly not necessary. The Applicant also attaches to his affidavit the Rehabilitation Policy. This document is admissible as it is specifically referenced in the Notice of Application.

[18] The remainder of the Applicant's Affidavit is not admissible. It mostly restates and reinforces his position as set out in the Notice of Application. It also includes argument. To the extent that the argument would properly be contained in written submissions filed in response to the motion to strike, I will consider them as such.

*Essential nature of the application for judicial review*

[19] The Applicant asserts that the VAC Letter demonstrates that VAC will not conduct a DEC determination which is contrary to the requirements of s 18(5) of the *VW Act*. He seeks an order compelling the VAC to complete the DEC determination, which he claims the VAC prematurely cancelled purportedly on the basis that the Applicant had not completed a vocational assessment.

[20] The question is whether the VAC Letter is a decision refusing to conduct a DEC determination or whether, as the Attorney General asserts, it is merely an informational letter, the reviewable decision being the decision to cancel the DEC determination.

[21] The June 13, 2022 VAC Letter states, in part:

> Dear Captain Khalid Abdulle (retired):
>
> This letter is regarding your inquiry as to why a Diminished Earning Capacity (DEC) Determination was not completed when the your [*sic*] rehabilitation plan was cancelled effective 2021-05-25. As per Sections 9 and 10 of the Diminished Earning Capacity Determination policy:
>
> VAC will not undertake a DEC determination for Veterans in the following circumstances:

> 1. The rehabilitation plan has been cancelled, including Veterans who choose to stop participating in their rehabilitation plan (referred to as a withdrawal); or
>
> 2. The rehabilitation plan has been completed due to the veteran's death.
>
> Veterans, whose rehabilitation plans have been cancelled prior to a DEC determination, will have to re-establish eligibility for the Rehabilitation Program for a health problem resulting primarily for service under section 8 of the Act in order to have DEC determination".
>
> Therefore, a DEC would not be completed with respect to your previous rehabilitation plan. For more information with respect to cancellation of a rehabilitation plan, please refer to the Rehabilitation Services and Vocational Assistance Plan – Assessment, Plan Development and Implementation Policy.
>
> If you have a current health problem, that is primarily related to service and is causing a current barrier to re-establishment in life after service, you may consider submitting a complete Rehabilitation Services and Vocational Assistance application. Any health problems and associated barriers that were part of the earlier rehab plan are not automatically approved simply based on the fact that they were made eligible in the past. If your application meets the eligibility requirements, you will be required to participate in an assessment(s) of your eligible health problem(s) to determine if a rehabilitation plan will be developed. You would be required to actively participate in any rehabilitation services to meet your plan goals. A DEC Determination decision is only made after you have participated in the rehabilitation process and the evidence supports the need for this decision.
>
> …..

[22] As to section 18(5)(a) of the *VW Act*, relied upon by the Applicant, this states:

> (5) If a rehabilitation plan is developed under section 10 for the physical or mental health problem referred to in subsection (1) for a veteran who is entitled to the income replacement benefit, then the Minister shall, in accordance with the regulations, determine whether the veteran has a diminished earning capacity that is due to that health problem, before the earlier of

> (a) the day on which the veteran completes the rehabilitation plan, and
>
> (b) the day on which the veteran attains the age of 65 years.

[23] However, s 17 of the *VW Act* permits the Minister to cancel a rehabilitation plan or a vocational assistance plan in the prescribed circumstances. In that regard, s 14(1) of the *VW Regulations* states:

> 14 (1) For the purposes of section 17 of the Act, the Minister may cancel a person's rehabilitation plan or vocational assistance plan if
>
> (a) the person does not participate to the extent required to meet the goals of the plan;
>
> (b) the person's eligibility for the plan or the development of the plan was based on a misrepresentation or the concealment of a material fact; or
>
> (c) the person, at least 6 months after the effective date of a suspension, continues to fail to comply with a request made under subsection 12(1).
>
> (2) On cancelling a rehabilitation plan or vocational assistance plan, the Minister shall provide the person with written notification of the reasons for the cancellation, the effective date of the cancellation and their rights of review.

[24] Section 9(a) of the *DEC Policy* states that the VAC will not undertake a DEC determination for veterans if the rehabilitation plan has been cancelled, including for veterans who choose to stop participating in their rehabilitation plan. Further, pursuant to s 10, veterans whose rehabilitation plans have been cancelled prior to a DEC determination must re-establish

eligibility for the Rehabilitation Program under s 8 of the *VW Act* in order to have a DEC determination.

[25] As the Applicant submits, s 69 of the *Rehabilitation Policy* states that the rehabilitation or vocational assistance plan is completed when the goals are met or no further improvement is anticipated. However, s 97 permits an entire rehabilitation plan to be cancelled after written notice has been provided to the participant, for any one of the listed reasons. Section 100 states that on cancelling a rehabilitation or vocational assistance plan, VAC should provide the participant with written notification of the reasons for the cancellation, the consequences of the cancellation, the effective date of the cancellation and the rights of review. Under s 101, after a rehabilitation or vocational assistance plan is cancelled, a participant may re-apply and may be eligible for the Rehabilitation Program provided he/she meets the eligibility requirements.

[26] What is apparent from the above legislation, regulations and polices is that a DEC will be conducted prior to the completion of a rehabilitation plan. However, a DEC will not be conducted if the rehabilitation or vocational plan is cancelled before its completion.

[27] Given this, I agree that the VAC Letter is explanatory in nature. It is not a decision refusing to conduct a DEC determination but rather it explains the basis for why the DEC will not be conducted. Here, specifically, it was because the Applicant's rehabilitation plan was cancelled effective May 25, 2021. While I appreciate that in the Notice of Application the Applicant asserts that a DEC had been initiated, accepting this fact as true means that the rehabilitation plan had not been completed prior to its cancellation.

[28] Viewed in whole, the essential nature of the Applicant's application for judicial review is that his rehabilitation plan was wrongly cancelled before his DEC was completed. This is also demonstrated by the relief that Applicant seeks an order requiring VAC to complete the DEC determination, which he claims was prematurely cancelled. In that regard, I note , in view of the legislative scheme, that the Court would not be in a position grant the relief sought. That is, there could be no failure to comply with s 18(5) of the *VW Act* if the rehabilitation plan was validly cancelled.

[29] Accordingly, I agree with the Respondent that the cancellation was the underlying decision which was subject to challenge. Whether the VAC failed to comply with s 18(5)(a) of the *VW Act*, that is, failed to determine whether the Applicant has a DEC, is entirely dependant upon that preliminary question.

[30] Given this, I need not consider the Respondent's alternative argument that the application for judicial review is premature because the Applicant failed to exhaust alternative remedies available to him under the *VW Act* and the *VW Regulations*.

**JUDGMENT IN T-1367-22**

**THIS COURT'S JUDGMENT is that**

1. The Respondent's motion is granted;

2. The Notice of Application for Judicial Review dated July 4, 2022, is struck in its entirety without leave to amend; and

3. The whole without costs.

"Cecily Y. Strickland"

Judge

ANNEX A

***Veterans Well-being Act***, S.C. 2005, c.21

Rehabilitation Services and Vocational Assistance
Eligibility — rehabilitation need

8 (1) The Minister may, on application, provide rehabilitation services to a veteran who has a physical or a mental health problem resulting primarily from service in the Canadian Forces that is creating a barrier to re-establishment in civilian life.

Assessment of needs

10 (1) The Minister shall,

> (a) on approving an application made under section 8, assess the veteran's medical rehabilitation, psycho-social rehabilitation and vocational rehabilitation needs; and
>
> (b) …...

Rehabilitation plan

(2) The Minister may develop and implement a rehabilitation plan to address the rehabilitation needs that are identified in the assessment.

…..

Examination or assessment

15 (1) The Minister may, when evaluating a rehabilitation plan, require the person for whom the plan has been developed to undergo a medical examination or an assessment by a person specified by the Minister.

Assessment

(2) The Minister may, when evaluating a vocational assistance plan, require a person for whom the plan has been developed to undergo an assessment by a person specified by the Minister.

Non-compliance

(3) If a person who is required to undergo a medical examination or an assessment fails without reasonable excuse to do so, the Minister may cancel the rehabilitation plan or the vocational assistance plan.

…..

Cancellation

17 The Minister may cancel a rehabilitation plan or a vocational assistance plan in the prescribed circumstances.

Income Replacement Benefit
Veterans
Eligibility

18 (1) The Minister may, on application, pay, in accordance with section 19 or 19.1, an income replacement benefit to a veteran who makes an application under section 8 and who has a physical or a mental health problem resulting primarily from service in the Canadian Forces that is creating a barrier to re-establishment in civilian life.

Veteran's participation

(2) Subject to subsection (9), a veteran who is informed by the Minister of their entitlement to an income replacement benefit is required

> (a) to participate in the assessment of their needs under subsection 10(1); and
>
> (b) if the Minister determines, as a result of that assessment, that a rehabilitation plan should be developed for the veteran, to participate in the development and implementation of the plan.

…….

Determination — diminished earning capacity

(5) If a rehabilitation plan is developed under section 10 for the physical or mental health problem referred to in subsection (1) for a veteran who is entitled to the income replacement benefit, then the Minister shall, in accordance with the regulations, determine whether the veteran has a diminished earning capacity that is due to that health problem, before the earlier of

> (a) the day on which the veteran completes the rehabilitation plan, and
>
> (b) the day on which the veteran attains the age of 65 years.

……

Review
Review of decision under Part 1, 1.1, 2 or 3.1

83 Subject to the regulations, the Minister may, on application or on the Minister's own motion, review a decision made under Part 1, 1.1, 2 or 3.1 or under this section.

***Veterans Well-being Regulations*** SOR/2006-50

PART 2

Rehabilitation Services, Vocational Assistance and Financial Benefits

Interpretation

6 (1) The definitions in this section apply for the purpose of Part 2 of the Act.

……

*diminished earning capacity* means, in relation to a veteran, that the veteran is incapacitated by a permanent physical or mental health problem that prevents them from performing any occupation that would be considered to be suitable gainful employment. (*diminution de la capacité de gain*)

14 (1) For the purposes of section 17 of the Act, the Minister may cancel a person's rehabilitation plan or vocational assistance plan if

> (a) the person does not participate to the extent required to meet the goals of the plan;
>
> (b) the person's eligibility for the plan or the development of the plan was based on a misrepresentation or the concealment of a material fact; or
>
> (c) the person, at least 6 months after the effective date of a suspension, continues to fail to comply with a request made under subsection 12(1).

(2) On cancelling a rehabilitation plan or vocational assistance plan, the Minister shall provide the person with written notification

of the reasons for the cancellation, the effective date of the cancellation and their rights of review.

***Diminished Earning Capacity Determination Policy***

Purpose

This policy describes the requirements and considerations for determining whether a Veteran has or continues to have a diminished earnings capacity (DEC) for suitable and gainful employment. This diminished capacity must be due to the health problem(s) resulting primarily from service for which the Veteran has been made eligible for the Income Replacement Benefit and / or the Rehabilitation Services and Vocational Assistance Program (Rehabilitation Program) under the *Veterans Well-being Act* (VWA).

Authority

Subsections 10(1), 11(1) and 18(5) of the *Veterans Well-being Act* (VWA).

……

VAC will not undertake a DEC determination for Veterans in the following circumstances:

a. the rehabilitation plan has been cancelled, including Veterans who choose to stop participating in their rehabilitation plan (referred to as a withdrawal); or

b. the rehabilitation plan has been completed due to the Veteran's death.

For more information with respect to cancellations and completions please refer to the Rehabilitation Services and Vocational Assistance Plan - Assessment, Plan Development and Implementation policy.

9. Veterans, whose rehabilitation plans have been cancelled prior to a DEC determination, will have to re-establish eligibility for the Rehabilitation Program for a health problem resulting primarily for service under section 8 of the Act in order to have a DEC determination.

***Rehabilitation Services and Vocational Assistance Plan: Assessments, Development and Implementation***

**Purpose**

This policy provides the following direction for rehabilitation plans or vocational assistance plans as authorized by the Rehabilitation Services and Vocational Assistance Program (subsequently referred to as the Rehabilitation Program) under Part 2 of the *Veterans Well-being Act*: the assessment of rehabilitation needs; plan development including authorization of services and sequence of payments; plan implementation; plan evaluations; and plan suspension, completion or cancellation for participants residing in or out of Canada.

**Duration of a Plan**

……..

69. The rehabilitation or vocational assistance plan is completed when the goals are met or no further improvement is anticipated. Any other outstanding non rehabilitation needs, including ongoing maintenance services, may be addressed through other VAC programs (e.g. Treatment Benefits Program related to disability benefit conditions and the PSHCP) and/or through provincial/territorial and community-based services.

**Participation in a Rehabilitation or Vocational Assistance Plan**

70. Specific expectations regarding participation in the plan will be based on the individual needs of the participant as outlined in their plan which was acknowledged by both the participant and VAC. In developing a plan, VAC is to make participants aware of their participation requirements (see section of this policy on Development of a Rehabilitation or Vocational Assistance Plan).

71. Evaluations will provide VAC with information to determine whether an eligible person is participating to a satisfactory level in meeting the requirements and goals of the rehabilitation or vocational assistance plan.

…….

76. Failure to participate in a rehabilitation plan:

> a. May lead to suspension of a Veteran's IRB, where non-participation pertains to the health condition(s) for which the Veteran is eligible for the Rehabilitation Program and

IRB subject to subsection 18(2)(b) of the Act (see Income Replacement Benefit policy for more details); or

b. may lead to cancellation of the Rehabilitation Plan for any eligible participant (see section Cancellation of a Rehabilitation or Vocational Assistance Plan in this policy).

**Completion of a Rehabilitation or Vocational Assistance Plan**

….

80. DEC determinations must be rendered while an eligible Veteran is participating in a rehabilitation plan (before completion) and, where relevant, before the Veteran's 65th birthday (For more details, see Diminished Earnings Capacity Determination policy).

81. After a rehabilitation or vocational assistance plan is completed, a participant may re-apply and may be eligible for the Rehabilitation Program provided he/she meets the eligibility requirements (for more details, see Rehabilitation Services and Vocational Assistance – Eligibility and Application Requirements policy).

82. When a Veteran completes the component(s) of a rehabilitation plan for a health problem(s) for which the Veteran is IRB-eligible, their IRB will end - unless they have a DEC. (See the Income Replacement Benefit policy for more detail).

**Cancellation of a Rehabilitation or Vocational Assistance Plan**

96. Cancellation refers to cancellation of the entire rehabilitation or vocational assistance plan and will result in the IRB no longer being payable to the Veteran, unless VAC has already determined that the Veteran has a DEC.

97. An **entire** rehabilitation or vocational assistance plan may be cancelled after written notice is provided to the participant, for any **one** of the following reasons:

a. the participant refuses, without reasonable cause, to undergo a medical examination or other assessment required as part of an evaluation of a plan;

b. the participant does not participate to the extent required to meet the goals of the plan (see section within this policy on Participation in a Rehabilitation or Vocational Assistance Plan);

c. the participant's eligibility for the Rehabilitation Program was based on a misrepresentation or the concealment of a material fact; or

d. rehabilitation or vocational assistance services have been suspended and the participant continues to fail to provide the required information for at least six months.

96. Prior to cancelling a plan for not participating to the extent required, every reasonable effort (e.g., contact the participant or reports from providers) should be made to determine whether or not there is reasonable cause for the non-participation or the plan needs to be evaluate to ensure that it remains realistic and achievable.

97. If a participant indicates that they no longer intend to continue their plan as a whole, VAC will consider the eligible participant as not participating to the extent required to substantially meet the overall goals of the plan. As a result, their plan will be cancelled.

98. On cancelling a rehabilitation or vocational assistance plan, VAC should provide the participant with written notification of the reasons for the cancellation, the consequences of the cancellation, the effective date of the cancellation and the rights of review.

99. After a rehabilitation or vocational assistance plan is cancelled, a participant may re-apply and may be eligible for the Rehabilitation Program provided he/she meets the eligibility requirements (for more details, see Rehabilitation Services and Vocational Assistance – Eligibility and Application Requirements policy).

***Review of Part 1, Part 1.1, Part 2 and Part 3.1 Decisions under the Veterans Well-being Act Policy***

**Purpose**

The purpose of this policy is to provide guidance on the review of decisions concerning benefits and services provided under Part 1, Part 1.1, Part 2 and Part 3.1 of the *Veterans Well-being Act.*

……

Part 2 of the *Veterans Well-being Act* provides the authority for the provision of Rehabilitation Services and the Vocational Assistance Program and financial benefits which include the Income

Replacement Benefit and the Canadian Forces Income Support Benefit.

…..

**General**

11. A person who has received a decision made under:

a. Part 1, Part 1.1 or Part 2 of the *Veterans Well-being Act*; or

b. …..

12. VAC may initiate a review of a decision on the Minister's own motion at anytime.

13. A decision that is subject to review may be confirmed, amended, or rescinded.

a. A decision has been confirmed when the review decision is the same as the previous decision that is now under review, i.e., where the decision maker, having reviewed the relevant law and facts, concurs with and upholds the previous decision.

b. A decision has been amended when the review decision is different from the previous decision that is now under review.

i. Rationale for an amended decision may include new evidence that the previous decision was made on the basis of an error of a finding of fact or the interpretation of the law.

c. A decision has been rescinded when the review decision voids the previous decision that is now under review. This effectively returns the person to the status he or she held before the previous decision (i.e. the one that is now under review) was made.

i. Rationale for a rescinded decision may include that the previous decision was not authorized by statute (i.e. there was jurisdictional error).

14. An application for review must be in writing. Additionally, the application must either be signed or submitted via My VAC

Account. If it is not, its legitimacy must be verified – i.e. staff must verify that it originated from the person to whom the decision applies (or his or her legal representative).

15. A review must not be conducted by the same official who made or was involved with the decision under review. Each level of review must be conducted by an official who was not involved with the previous decision(s).

16. All decisions must be communicated to the applicant in writing and must state the reason(s) for the decision and provide information regarding rights for review (where applicable), the process for exercising rights for review, and time limits for applying for a review (as described in this policy).

….

**Reviews on Application — First Level Review Decisions**

21. A person who is dissatisfied with an original decision may apply for a first level review of that decision. There is no requirement for the person to present the grounds or reason for the review.

22. A person who is dissatisfied with a decision made on the Minister's own motion may apply for a first level review of that decision. There is no requirement for the person to present the grounds or reason for the review.

23. An application for a first level review must be in writing and be submitted no later than:

    a. 60 days after the day on which the member is released from the Canadian Armed Forces, for a decision referred to in section 75.2 of the *Veterans Well-being Act*; or

    b. 60 days after receiving notice of the decision.

24. Applications submitted after 60 days may be considered if circumstances beyond the control of the applicant necessitate a longer period.

25. The first level review is based only on written submissions.

26. The decision under first level review may be confirmed, amended or rescinded.

**Reviews on Application — Second Level Review Decisions**

27. A person who is dissatisfied with a first level review decision may apply for a second level review of that decision.

28. An application for a second level review must include the grounds for review.

29. An application for a second level review must be in writing, and must be submitted within 60 days of receiving notice of the first level review decision.

30. Applications submitted after 60 days may be considered if circumstances beyond the control of the applicant necessitate a longer period.

31. The second level review is based only on written submissions.

32. The decision under second level review may be confirmed, amended or rescinded.

33. Second level review is the final level of review that may be made on application.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1367-22 |
| **STYLE OF CAUSE:** | KHALID ABDULLE v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES* |
| **JUDGMENT AND REASONS:** | STRICKLAND J. |
| **DATED:** | SEPTEMBER 20, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Khalid Abdulle | FOR MR. ABDULLE (ON HIS OWN BEHALF) |
| Emily Keilty | FOR THE RESPONDENT (MOVING PARTY) |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT (MOVING PARTY) |