Federal Court Cour fédérale

**Date: 20221104**

**Docket: T-1645-21**

**Citation: 2022 FC 1504**

**Toronto, Ontario, November 4, 2022**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

**CHELSEY WOOD**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, Chelsey Wood, seeks judicial review of a September 22, 2021 decision [Decision] of the Veterans Review and Appeal Board [VRAB], denying the Applicant's request for a second reconsideration of a denial of pension benefits sought under paragraphs 21(2)(a) and 21(3)(f) of the *Pension Act*, RSC 1985, c P-6 [Pension Act].

[2] For the reasons that follow, the application is granted as it is my view that the Decision is not transparent or sufficiently justified as the VRAB's second reconsideration panel [Second

Reconsideration Panel] did not clearly address in its analysis the central argument raised by the Applicant, which was the applicability of paragraph 21(3)(f) of the Pension Act.

## I. Background

[3] The Applicant is a 71-year-old veteran who served with the Regular Forces of the Canadian Armed Forces [CAF] for close to six years.

[4] On October 31, 1971, the Applicant attended a Halloween party at the Junior Rank Club on a Canadian Forces Base (the Wolseley Barracks) in London, Ontario [Event]. At around midnight, a glass was thrown at the Applicant by an unknown person for an unknown reason [Incident]. The Applicant was taken to the hospital and underwent emergency surgery. He was diagnosed with a traumatic hyphema and cataract formation and is considered blind in his left eye [Condition]. In 1972, the Career and Medical Review Board recommended the Applicant be released from the CAF because of the Condition, and he was subsequently discharged.

[5] The Applicant first applied for pension benefits in 1977. In July 1979, the Canadian Pension Commission denied his Application. It concluded that the Condition did not arise out of, or have a direct connection to, the Applicant's CAF Peacetime service and therefore did not meet what was then subsection 12(2) of the Pension Act [now subsection 21(2) of the Pension Act].

[6] The Applicant submitted a request for pension entitlement in November 1979. In January 1981, the Canadian Pension Commission Entitlement Board [Entitlement Board] denied his

request [Entitlement Decision] on the basis that, contrary to subsection 12(2) of the Pension Act, the Applicant was not on duty at the time of the injury and neither the Condition nor any aggravation arose out of, or was directly connected with, CAF Peacetime service. The Entitlement Board also noted that what was then paragraph 12(3)(f) of the Pension Act [now paragraph 21(3)(f) of the Pension Act] did not apply.

[7] In November 2003, the Appeal Panel of the Veteran Review and Appeal Board [Appeal Panel] affirmed the Entitlement Decision [Appeal Decision]. The Appeal Panel found that although the injury occurred during CAF service, the Incident was not attributable to service. It found that there was no evidence that the Applicant was in the performance of military duty or was participating in any form of physical recreation organized with service orders. The Appeal Panel concluded that the Condition did not arise out of, and was not directly connected with, the Applicant's CAF service.

[8] The Applicant sought reconsideration of the Appeal Decision in 2013. The Applicant argued that there was an error of law and that paragraph 21(3)(f) of the Pension Act applied. However, the first reconsideration panel of the VRAB [First Reconsideration Panel] found it did not have cause to reopen the case as there was insufficient objective evidence to establish that it was a military custom for the Applicant to attend the event or that the Applicant was in the performance of his duties at the time of his injury. The First Reconsideration Panel concluded that the evidence did not establish a service-relationship between the Condition and service factors and did not establish that service duties aggravated the Condition.

[9] On January 19, 2021, the Applicant sought a second reconsideration of the Appeal Decision and provided new evidence to the Second Reconsideration Panel indicating that the Applicant was required by military custom to attend the Event. However, the Second Reconsideration Panel found that there was no evidence that the Applicant was required to drink alcohol or to stay at the Event until the early hours of the morning when the Incident occurred. The Second Reconsideration Panel did not consider the Condition to arise out of, or be directly connected to, military service.

## II. Statutory Framework

[10] The Decision is governed by the Pension Act and the *Veterans Review and Appeal Board Act*, SC 1995, c 18, s 18 [VRAB Act].

[11] Paragraph 21(2)(a) of the Pension Act sets out the conditions for the grant of a disability pension for military service during peace time as follows:

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| (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 respect of the member in accordance with the rates for basic and additional pension set out in Schedule I; | 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 d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire; |

[12] Paragraph 21(3)(f) of the Pension Act creates a presumption in favour of an Applicant for the purposes of subsection 21(2) as follows:

| **Presumption** | **Présomption** |
| --- | --- |
| **(3)** For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of | (3) Pour l'application du paragraphe (2), une blessure ou maladie — ou son aggravation — est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce paragraphe si elle est survenue au cours : |
| [...] | […] |
| **(f)** any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member; | **f)** d'une opération, d'un entraînement ou d'une activité administrative militaires, soit par suite d'un ordre précis, soit par suite d'usages ou pratiques militaires établis, que l'omission d'accomplir l'acte qui a entraîné la maladie ou la blessure ou son aggravation eût entraîné ou non des mesures disciplinaires contre le membre des forces; |

[13] Sections 3 and 39 of the VRAB Act "establish the overall intention of Parliament to recognize that those who serve this country in the military are deserving of special care and attention when they are injured or killed": *Bradley v AG*, 2011 FC 309 at para 20.

[14] Section 3 “sets the tone of the legislation”:

| **Construction** | **Principe général** |
| --- | --- |
| **3** The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled. | **3** Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s’interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l’égard de ceux qui ont si bien servi leur pays et des personnes à leur charge. |

[15] Section 39 sets out the rules as to how the VRAB is to consider and weigh evidence to arrive at its decisions:

| **Rules of evidence** | **Règles régissant la preuve** |
| --- | --- |
| **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 | **b)** il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l’occurrence; |

| | |
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| it considers to be credible in the circumstances; and | |
| **(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. |

III. Issue and Standard of Review

[16] The following issues are raised by this application:

1. Did the Second Reconsideration Panel fail to properly apply and address the presumption set out in paragraph 21(3)(f) of the Pension Act?
2. Did the Second Reconsideration Panel err in its handling of the evidence?
3. Did the Second Reconsideration Panel err in failing to find that the Condition arose from and applied to military service?

[17] The parties submit and I agree that the standard of review is reasonableness. The reasonableness standard applies where a tribunal is interpreting its home statute: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 25, 115-116. The VRAB has exclusive jurisdiction to hear, determine and deal with all applications for review under the Pension Act, and all matters relating to those applications: VRAB Act, s 18.

[18] In exercising the reasonableness standard, the Court must determine whether the Decision is “based on an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at paras 83, 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31. A

reasonable decision bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at para 99.

## IV. Analysis

[19] The Applicant argues that paragraph 21(3)(f) of the Pension Act should have been the starting point for the Second Reconsideration Panel's analysis. He asserts that this provision creates a presumption that there is a causal connection between the Condition and military service absent evidence to the contrary if the Second Reconsideration Panel accepts that the Applicant's attendance at the Event was required by military culture, custom or practice. He argues that the Decision is devoid of any meaningful analysis of paragraph 21(3)(f) and the presumption even though the reasons suggest that the Second Reconsideration Panel accepted that Mr. Wood was required by military culture to attend the Event.

[20] The Respondent argues that paragraph 21(3)(f) of the Pension Act does not apply as there was no evidence to suggest that Mr. Wood was required to stay at the Event as late as he did, or to connect his attendance at the time of the Incident to his military service. Paragraph 21(3)(f) only applies after the application of paragraph 21(2)(a) has been considered and where there is no evidence to the contrary: *Fournier v Canada (Attorney General)*, 2005 FC 453 [*Fournier*] at para 34, aff'd 2006 FCA 19. The Respondent argues that there was insufficient evidence to establish a causal connection between the Condition and military service under the factors set out in *Fournier*.

[21] In *Fournier* at paragraph 35, the Court set out four factors to be considered when determining whether an injury arises out of, or has a direct connection, to military service, none of which are determinative on their own:

1. where the accident occurred;
2. the nature of the activity being carried out by the applicant at the time;
3. the degree of control exercised by the military over the applicant when the accident occurred; and,
4. whether the applicant was on duty at the time.

[22] While I agree that the VRAB Act and the presumption under paragraph 21(3)(f) of the Pension Act do not relieve an applicant from needing to establish their case (*Fournier* at para 33; *Whitty v Veterans Review and Appeal Board*, 2019 FC 1125 at para 55), in my view paragraph 21(3)(f) must be considered along with subsection 21(2) of the Pension Act for paragraph 21(3)(f) to have any meaning.

[23] In this case, the Applicant argued before the First Reconsideration Panel that paragraph 21(3)(f) applied to the facts at issue. In its decision, the First Reconsideration Panel indicated that the challenge for the panel was in obtaining a true understanding of the events of the evening in question in the absence of corroborating evidence. It noted that the panel had not been provided with any objective evidence to suggest that the Applicant was under orders from the military "to attend the event, for which he could possibly face reprisals, for non-attendance and the evidence did not establish that the [Applicant] was in the performance of his duties at the time of the injury." The Applicant had argued that the Event was an established military custom, and as such, that a service relationship was established. However, the First Reconsideration

Panel concluded that it was unable to reasonably infer that such was the case due to the absence of objective evidence on which to rely.

[24] In the submissions before the Second Reconsideration Panel, the Applicant submitted his own affidavit as well as two other affidavits from former non-commissioned officers, one of whom was also at the Event, to support his assertion that he was required to attend the Event as part of military custom. As acknowledged by the Second Reconsideration Panel, the central argument before that panel was that paragraph 21(3)(f) of the Pension Act was applicable and that the presumption of service relationship applied. However, in dismissing the Applicant's request, the Second Reconsideration Panel did not refer to paragraph 21(3)(f) of the Pension Act in its analysis and did not conclude whether the presumption under paragraph 21(3)(f) applied. Instead, the focus of the analysis was on whether the Applicant had established that his injury arose out of, or was directly connected to, military service in peacetime based on the application of the *Fournier* factors.

[25] The Decision acknowledged that the Applicant's new evidence established that he was required by military culture to attend the Event. However, in consideration of the third *Fournier* factor (*i.e.*, the degree of control exercised by the military over the applicant when the accident occurred), the Second Reconsideration Panel found that:

> ...beyond attendance at the event, the Panel does not see any control over the [Applicant]. There is no evidence before the Panel that he was required to drink alcohol. And there is no evidence before the Panel that shows that he would have been required to stay until the early hours of the morning.

[26] It further found that *Fournier* factors 2 and 4 were not satisfied.

[27] As concluded by the Second Reconsideration Panel:

> While the Panel acknowledges that the Appellant may have felt required to attend the Halloween party, he would not have been required to consume alcohol, nor required to stay until the early hours of the morning. Further, he was clearly not on duty at the time. Being physically present on a military base is not sufficient evidence to establish that an injury arose out of or was directly connected to service. In considering all of the factors noted above and giving the Appellant the full benefit of the doubt, the Panel finds that military service was neither the cause nor the aggravation of his claimed condition. Accordingly, entitlement with respect to Regular Force service is denied.

[28] The Respondent argues that it is implicit from the Decision that paragraph 21(3)(f) of the Pension Act was considered, but that it was found not to apply. However, I do not agree that the Second Reconsideration Panel's consideration of paragraph 21(3)(f) is transparent from the reasons given, or that if it has been considered sufficient justification has been given for why the presumption does not apply.

[29] As noted, there is no mention of paragraph 21(3)(f) in the Second Reconsideration Panel's analysis, nor is paragraph 21(3)(f) listed in the Second Reconsideration Panel's itemization of the Applicable Statutes considered for the Decision.

[30] As stated at paragraphs 127-128 of *Vavilov*:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be hard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the

> primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” (*Newfoundland Nurses*, at para. 25), or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion” (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[31] The Decision indicates that the Second Reconsideration Panel accepted the Applicant’s evidence that it was military custom to attend the Event. However, the panel appears to have drawn a line at some point before the Incident occurred where it no longer views the Applicant to be attending the Event as part of his military service. It is unclear from the reasons when and how that line was drawn and on what evidence it was found. The reasons do not address this issue in the context of paragraph 21(3)(f) despite the Applicant’s submissions having been directed to that paragraph.

[32] In *Ewing v Canada (Veterans Review and Appeal Board Canada)*, (1997), 137 F.T.R. 298 (T.D.), 1997 CanLII 11573 (FC) [*Ewing*], the Court commented on the obligation to consider paragraph 21(3)(f) of the Pension Act as part of the analysis under paragraph 21(2)(a). As stated by the Court at paragraphs 8 and 11 of *Ewing*:

> I conclude that the Board, in the portion of its reasons for decision cited above, cited the proper test to determine whether the applicant is entitled to be awarded a pension under

> paragraph 21(2)(a) of the Act but then went on to ignore that test and determined against the applicant on the basis that he was not "on duty" at the time of the accident that resulted in his injuries. Whether or not he was on duty is simply not the test. The test is whether or not the applicant's injuries leading to disability "...arose out of or [were] directly connected with ... military service [in peace time]". Further, the Board appear not to have considered paragraph 21(3)(f) of the *Pension Act*, whether the injuries arose out of training or administration as a result of a specific order or "...established military custom or practice...". Given its error regarding the appropriate test and paragraph 23(1)(f), the Board never got to the point of taking into account the interpretive obligations imposed on it by section 2 of the *Pension Act* and sections 3 and 39 of the *Veterans Review and Appeal Board Act.*
>
> [...]
>
> I find that the error of the Board in adopting the wrong test to determine the applicant's entitlement to a pension is a jurisdictional error. The Board simply refused or neglected to enter upon an examination of the question as to whether or not the applicant's disability resulted from injuries that arose out of or were directly connected with his military service in peace time, taking into account paragraph 21(3)(f) of the *Pension Act*. In so refusing, it failed to consider the evidence before it and the relevant provisions of law in accordance with the interpretive obligations imposed on it by section 2 of the Pension Act and sections 3 and 39 of the *Veterans Review and Appeal Board Act*.

[33] In this case, I agree with the Applicant that the Second Reconsideration Panel rigidly applied the *Fournier* factors in analyzing whether Mr. Wood's injuries arose out of, or were directly connected to, military service and in doing so, failed to address the applicability of paragraph 21(3)(f) of the Pension Act and whether the presumption applied.

[34] The approach taken does not sufficiently grapple with the central argument raised by Mr. Wood and as such, the decision is unreasonable as a result.

[35] In view of this finding, I need not consider the remainder of the Applicant's arguments. The application will be sent back to the VRAB for reconsideration under a newly constituted panel.

[36] As the Applicant has been successful on this application, I will also award him his costs of the application on the normal scale in accordance with the middle of column III of Tariff B.

## JUDGMENT IN T-1645-21

**THIS COURT'S JUDGMENT is that**

1. The application is granted, the Decision is quashed, and the matter is sent back to be redetermined by a differently constituted reconsideration panel of the Veterans Review and Appeal Board in accordance with this Court's decision.

2. The Applicant shall be entitled to his costs assessed at the middle of column III of Tariff B.

"Angela Furlanetto"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1645-21 |
| **STYLE OF CAUSE:** | CHELSEY WOOD v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HEARD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | MAY 11, 2022 |
| **JUDGMENT AND REASONS:** | FURLANETTO J. |
| **DATED:** | NOVEMBER 4, 2022 |

**APPEARANCES:**

| | |
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| Sam Campbell | FOR THE APPLICANT |
| Yamen Fadel | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
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