

Date: 20071123

Docket: T-30-07

Citation: 2007 FC 1237

Ottawa, Ontario, November 23, 2007

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

GLENN REED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Reed seeks judicial review of the decision of the Veterans Review and Appeal Board of Canada (the VRAB) refusing his application for a pension under subsections 21(1) and (2) of the *Pension Act*, R.S.C. 1985 Ch. P-6 (the Act). This matter involves an issue rarely reviewed in the case law.

[2] For the reasons that follow, the Court finds that this decision should be set aside, particularly because the VRAB failed to consider whether Mr. Reed's Post-Traumatic Stress Disorder (PTSD)

was “incurred during” his military service in the Special Duty area of Cyprus, a consideration mandated by subsection 21(1) of the Act.

BACKGROUND

[3] In light of what transpired at the hearing, the Court will review in more detail than is strictly necessary the factual background of this application. In 1974, Mr. Reed joined the Reserve Force and served as a reservist for 1.5 years. In July 1977, he joined the Regular Force. In April 1980, his battalion was sent to Cyprus to participate in the peacekeeping operations. Mr. Reed remained there until September 5, 1980.

[4] Up to the time of his deployment, his medical record indicates that he had no history of psychological disorder; in fact, he was described up to that time as a very confident, well motivated, hard working soldier who displayed a lot of leadership potential. He successfully completed sniper training and after his medical examination on February 6, 1980, he was declared fit for service in Cyprus¹.

[5] It also appears from the recorded entries made later that year that Mr. Reed had broken off an engagement with his fiancée of two years sometime prior to leaving for Cyprus.

¹ During said medical examination, he stated that he drank 2 or 3 drinks daily (average).

[6] In Cyprus, Mr. Reed was assigned to sentry duty, which meant that he had to keep an irregular schedule. He had difficulty sleeping and about a month and a half after his deployment, that is on May 16, 1980, he was prescribed Valium.

[7] In June 1980, the Applicant was sent to the Swedish peacekeeping contingent on an exchange. It appears that his sentry duty while there followed a different schedule than that of the Canadian contingent. Swedish practice was for two men to go on sentry duty for 24 hours together, which period would be followed by a day off².

[8] A couple of days after the beginning of his exchange, and during the festivities for the Swedish national holiday, Mr. Reed apparently consumed a large amount of alcohol and became ill with alcohol poisoning. He also became violent and was taken to hospital. Although he still did not feel well, he was sent back in the morning for his 24 hour observation post duty. According to Mr. Reed, it is during that shift that his emotional breakdown really started, as he was overcome with thoughts of killing himself, flashbacks of sexual abuse suffered when he was a young child (of which he had never thought before), and panic and guilt that he might be a homosexual and want to have sex with his buddies on the platoon, etc.

[9] Contemporary medical notes indicate that he sought medical help on June 10, 13, 16 and 25, 1980. The notes for June 10 and 13 refer to his heavy drinking after his deployment to Cyprus, his

² As related in Mr. Reed's statement dated April 5, 2004.

broken engagement, sleeplessness and his threats of killing himself. He is described as being “in a highly agitated state, word pressure, anorexic, almost crying”.

[10] These notes also corroborate Mr. Reed’s allegation that he received little help at that time. On June 10, 1980, relaxation techniques and positive thinking were recommended. On June 13, the doctor recorded the following personal comments: “this man is unrealistic and looks for instant gratification ie. I want to go to Canada now, not tomorrow...doubtful that he will finish his tour here, will talk to supervisor if trip home can be arranged.”³

[11] A few days later, on June 16, it appears that Mr. Reed was calmer but very indecisive as to whether or not he wanted to go home. He said to the doctor: “I am going crazy”. He was apparently afraid that his thinking was affected and that “they will put me in a nut house”. He was noted as “ruminating and fearful about his own sexual prowess, wonders whether he is a queer, etc. afraid that he will be called a failure if he quits...” Again, this appears to corroborate the statement of Mr. Reed about his fear of homosexuality, as a result of his reliving his sexual abuse⁴.

[12] By June 25, the notes indicate that Mr. Reed had decided that he would “stick it out” and finish his tour. He still had insomnia, however, and was given another prescription for Valium.

³ According to the 2001 Report of the Military Ombudsman on PTSD, this attitude would not have been uncharacteristic during that period.

⁴ Mr. Reed stated that he was afraid of actually disclosing his prior sexual abuse.

[13] Mr. Reed confirms in his statement that his condition was noticed by his superiors who told him to shape up (“get [his] shit together”). He was also apparently advised that a discharge on medical ground could have long-term effect on his future (“I would never get a government job again because it was like being kicked out”). According to him, he did what the military does best: “tough it out”, despite the fact that he “was in a lot of pain mentally”.

[14] He was released upon his return to Canada. On his release, it was noted in his record that he had been investigated for anxiety, stress and alcohol abuse while in Cyprus. He also signed a document stating that he had suffered no illness or injury in Cyprus.

[15] There is no evidence of any other special trauma since Mr. Reed’s release apart from a practical joke played on him by coworkers in 2003 (his face was pasted on a picture of a convicted pedophile in a newspaper article). However, he states amongst other things that he never recovered his mental health. Since then, he has had significant symptoms of anxiety and depression⁵ with reoccurring thoughts and dreams about his suicidal behaviour, his deployment in Cyprus as well as his sexual abuse. He also continued to fear molesting his niece, and after 1985, his daughter (fear of becoming himself a pedophile).

[16] His wife, whom he met some months after his return from Cyprus, stated that his family told her that he was not the same man since his return from Cyprus.

⁵ Dr. Richardson also diagnosed major depression, recurrent with the initial episode during the Deployment in Cyprus.

[17] Mr. Reed unsuccessfully sought help in 1983 (group therapy that did not work) then in 1991-1992. Finally in 2003, after he broke down as a result of the aforementioned practical joke, he sought further help and was diagnosed as suffering from chronic PTSD with delayed onset.

[18] He decided to apply for a pension pursuant to subsections 21(1) and (2) of the *Act*. On August 30, 2004, Dr. Albina Abaya-Comendador, his psychiatrist, filled out a Veterans Affairs Canada assessment worksheet for psychiatric disability. It was presented in support of Mr. Reed's pension application to a pension adjudicator for the Department of Veteran Affairs, who denied the application on March 21, 2005, on the basis that "there was insufficient evidence to conclude that his claim of Post-Traumatic Stress Syndrome was incurred during or attributable to his special duty area service." In that respect, the only further comment referred to the lack of evidence that the PTSD "has developed as a result of" special duty.

[19] Mr. Reed then obtained with the assistance of the Veterans Affairs Bureau of Pensions Advocates a more detailed report from Dr. Comendador dated June 30, 2005 in which she indicates that the traumatic event to which he was exposed was his early childhood sexual abuse and that his PTSD was "triggered by his experiences in Cyprus". A statement from Mr. Reed's former platoon commander, Lieutenant Colonel Slater, was also obtained. In this statement, dated September 15, 2005, Lieutenant-Colonel Slater wrote that he retains a fairly clear memory of the incident involving the applicant in Cyprus. This includes, among other things, recollections that at some point during the exchange week, Mr. Reed began thinking about personal issues back in Canada (something about a girlfriend and family members pressuring him to get married), and that "these thoughts

culminated in his decision to take his own life. Apparently he went so far as to place the barrel of his service rifle under his chin whereupon he came into his senses and called for help”.

[20] Lieutenant Colonel Slater also notes that “in those days and in certainly in Cyprus, we had little if any capacity to deal with such matters as attempted suicide”⁶.

[21] The statement does not indicate who related this information about what happened that night to Lieutenant Colonel Slater; was it a member of the Swedish contingent, or the medical officer who had agreed to talk to Mr. Reed’s superior (note of June 13, 1980)?

[22] After a hearing, at which Mr. Reed testified, the Entitlement Review Panel rejected the pension application on November 2, 2005. In its decision, the panel notes that there is no question in its mind that “the Applicant suffers significantly from some kind of psychiatric disorder, and since he had a diagnostic of post-traumatic stress disorder, the Panel accepts that this is the psychiatric illness from which he suffers”. It states that it was clear that he had enormous difficulty testifying.

[23] Thus, the issue for the panel was not whether the Applicant had PTSD but “whether or not this condition can be linked to his military service”. It concluded that that it could not. In that respect, the panel notes that in her report, Dr. Comendador “lays absolutely no foundation for [her]

⁶ Lieutenant Colonel Slater was the first one to describe what happened in Cyprus as a “suicide attempt”. Up until then, Mr. Reed had described the incident by referring to his thoughts, intentions and army rifle, but he had not labeled it in any way.

conclusion” that his PTSD was triggered by his experiences in Cyprus. Also, the panel understood the child abuse suffered by Mr. Reed to be **one of the precipitating events** and found that it had nothing to do with his military service. It also concluded that this destructive alcohol abuse could not “be attributed to anything that happened to him during his military service”.

[24] It is in that context that once again, the Advocate at Veterans Affairs sought additional evidence in February 2006 from Dr. Richardson, a consultant psychiatrist for Veterans Affairs Canada. The report of this expert confirmed Dr. Comendador’s diagnosis of chronic PTSD with delayed onset “**precipitated** by his suicide attempt during his deployment in Cyprus which reactivated **childhood trauma**”.

[25] On October 17, 2006, the VRAB issued its decision. After reviewing the facts and the evidence⁷, the VRAB finds among other things:

Under subsection 21(1) of the Pension Act, the PTSD must be attributable to or incurred during service in the Special Duty Area of Cyprus. In this case, and according to the doctors, it is this sexual abuse which is the cause of PTSD. There is evidence that the Appellant was having problems with sleeping during his deployment. There is also evidence of excessive drinking and evidence of problems with a broken engagement, and that these problems were the cause of his anxiety during his Special Duty area service.

While the Board has taken into consideration the Appellant’s statement that he had thoughts and fears of suicide in Cyprus, there is no evidence of a suicide attempt.

Based on all the evidence, the Board finds that the PTSD was not caused or aggravated by the Appellant’s service in Special Duty Area of Cyprus under subsection 21(1) of the Pension Act.

⁷ There is no mention of the statement of Lieutenant Colonel Slater at all in the decision.

The VAC Entitlement Eligibility Guidelines on PTSD and the DSM IV (The Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition, published by the American Psychiatric Association) from which the Entitlement Eligibility Guidelines are derived, do not state that PTSD can be caused by one’s own thoughts and feelings. An external threatening event is required, among other criteria. Thereafter, the Board cannot accept that the opinions offered as evidence are credible opinions which could form the basis of a pension award, as opposed to well-meaning attempts to insure that the Appellant is able to access treatment for his psychiatric difficulties. Cram v. Canada (Attorney General), 2006, FC 638.

The Board would note that were the opinion of Dr. Richardson meant to assist in obtaining the Appellant a pension, as opposed to treatment, it would have been produced at an earlier point in the pension adjudication process, rather than very belatedly, when the Department for whom Dr. Richardson was working, had already dealt with the pension adjudication...

[26] Both parties agree at the hearing that the above quoted passage was the most relevant to the application pursuant to subsection 21(1) of the Act. It is the portion of the decision on which both sides focused their comments.

STATUTORY PROVISION

[27] Subsections 21(1), (2) and (3) of the Act reads as follows:

<p>21. (1) <i>In respect of service rendered during World War I, service rendered during World War II other than in the non-permanent active militia or the reserve army, service in the Korean War, service as a member of the special force, and special duty service,</i></p> <p>(a) <i>where a member of the forces suffers disability resulting from <u>an injury or</u></i></p>	<p>21. (1) <i>Pour le service accompli pendant la Première Guerre mondiale ou la Seconde Guerre mondiale, sauf dans la milice active non permanente ou dans l’armée de réserve, le service accompli pendant la guerre de Corée, le service accompli à titre de membre du contingent spécial et le service spécial :</i></p> <p>(a) <i>des pensions sont, sur</i></p>
---	---

disease or an aggravation thereof that was attributable to or was incurred during 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;

(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that was attributable to or was incurred during such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

(c) no deduction shall be made from the degree of actual disability of a member of the forces who has rendered service in a theatre of actual war, service in the Korean War or special duty service on account of a disability or disabling condition that existed in the member before the member's period of service in World War I or World War II, service in the Korean War or special duty service, as the case may be, except

(i) to the extent that the member is receiving a

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 — survenue au cours du service militaire ou attribuable à celui-ci;

b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — survenue au cours du service militaire ou attribuable à celui-ci;

c) l'invalidité ou l'affection entraînant incapacité dont était atteint le membre des forces qui a accompli du service sur un théâtre réel de guerre, du service pendant la guerre de Corée ou du service spécial, et qui est antérieure au service accompli pendant la Première ou la Seconde Guerre mondiale, au service accompli pendant la guerre de Corée ou au service spécial n'autorise aucune déduction sur le degré d'invalidité véritable, sauf dans la

pension for that disability or disabling condition, or

(ii) to the extent that that disability or disabling condition was obvious or was recorded on medical examination prior to enlistment;

(d) an applicant shall not be denied a pension in respect of disability resulting from injury or disease or aggravation thereof incurred during military service or in respect of the death of a member of the forces resulting from that injury or disease or the aggravation thereof solely on the grounds that no substantial disability or disabling condition is considered to have existed at the time of discharge of that member;

(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

mesure où il reçoit une pension à cet égard ou si l'invalidité ou l'affection était évidente ou a été consignée lors d'un examen médical avant l'enrôlement;

d) un demandeur ne peut être privé d'une pension à l'égard d'une invalidité qui résulte d'une blessure ou maladie ou de son aggravation contractée au cours du service militaire, ou à l'égard du décès d'un membre des forces causé par cette blessure ou maladie ou son aggravation, uniquement du fait que nulle invalidité importante ou affection entraînant une importante incapacité n'est réputée avoir existé au moment de la libération de ce membre des forces;

(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

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;

(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

(c) where a member of the forces is in receipt of an additional pension under paragraph (a), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner dies, except where an award is payable under subsection 34(8), the additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in

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;

b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

c) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa a), du paragraphe (5) ou de l'article 36 continue d'être versée pendant l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui il cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

respect of another spouse or common-law partner is awarded to the member commencing during that period, until the date that it so commences; and

(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 :

[My emphasis]

The other provisions referred to herein are reproduced in Annex A.

Post-Traumatic Stress Disorder

[28] Before delving further into the issues raised by this matter, it may be useful to give a bit more detail about the disorder or mental disease to which this application relates. First, symptoms of the disorder do not necessarily appear when the trauma at its root occurs. The Veterans Affairs

Canada Entitlement Eligibility Guidelines on PTSD⁸ and the DSM IV (The Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition, published by the American Psychiatric Association) (hereinafter the Guidelines) indicate that there must be at least six months between the traumatic event(s) and the onset of symptoms to qualify for “delayed onset” PTSD (page 4 of the Guidelines).

[29] PTSD is deemed “chronic” when the symptoms last three months or longer. One of the most characteristic symptoms of PTSD is the re-experiencing of the traumatic event, often accompanied by intense psychological distress when the person is exposed to a situation that resembles an aspect of the traumatic event or that symbolizes such event, e.g., an anniversary of the event (page 6 of the Guidelines).

[30] The Guidelines make it clear that while trauma is a necessary factor, few consider it sufficient to cause PTSD. One must look to predisposing factors and environmental factors either before or after the trauma to understand the etiology of PTSD. “In most instances, occurrence of the disorder represents the outcome of an interaction amongst these three groups of factors,” the Guidelines state at page 4. Among the vulnerability factors described in the Guidelines, one notes the inclusion of poor peer and social support.

⁸ The Guidelines are referred to in subsection 35(2) of the Act. An incomplete copy of the 2002 Guidelines was in the Certified Record (i.e. there were missing pages). The Court consulted the February 2005 revised version currently available on the Veterans Affairs website. A Veterans Affairs policy document indicates that upon implementation of new Guidelines, all claims pending are adjudicated using the latest version. It is not clear which version the VRAB actually refers to in its decision.

[31] With respect to the nature of the traumatic event, the Guidelines describe it in general as an “extremely traumatic stressor especially if the individual response involves intense fear, helplessness or horror”. The trauma may be personal or witnessed. Various examples are given which include “an event that involves actual or threatened death or serious injury or other threat to ones physical integrity”.

ANALYSIS

[32] As mentioned, the main argument raised by the applicant is that the VRAB used the wrong test, or at least an incomplete test, to determine the validity of his pension claim pursuant to subsection 21(1) of the Act. In this respect the applicant draws the Court’s attention to the following conclusion: “the Board finds that the PTSD was not caused or aggravated by the applicant’s service and special duty area of Cyprus under subsection 21(1) of the *Pension Act*”.

[33] The applicant submits that the Board’s failure to come to any conclusion on whether his PTSD was *incurred during* his special duty service, as opposed to *caused or aggravated by* said service, is fatal to its decision.

[34] The respondent admits that the wording used by the VRAB in its conclusion is unfortunate and inaccurate, but submits that read in the context of the decision in its entirety, the statement does not show that the VRAB failed to apply the correct test.

[35] The standard of review applicable to decisions of the VRAB was analyzed and discussed in *McTague v. Canada (A.G.)*, [1999] F.C.J. No. 1559. The pragmatic and functional analysis set out in that case was adopted by the Federal Court of Appeal in *Frye v. Canada (Attorney General)*, [2005] F.C.J. No. 1316, at paras.11-13, and recently affirmed in *Wannamaker v. Canada (Attorney General)*, 2007 F.C.J. No. 466, at para. 12. In *Frye*, Justice Linden commented at para. 12, that “when the [VRAB] interpretation of the Act is in issue, it is subject to review for error of law on the standard of correctness”. The issue raised by the applicant obviously falls within this category, and both parties are in agreement that the applicable standard of review is correctness.

[36] The Court notes that the first paragraph of the section of the VRAB’s decision entitled “Decision” begins with an acknowledgment of the Advocate’s argument that the events in Cyprus initiated the applicant’s PTSD symptoms, that said symptoms were not treated there, and that therefore, the applicant’s PTSD was incurred in the special duty area and full pension entitlement is warranted.

[37] Notwithstanding this acknowledgement of the Advocate’s position, such arguments are neither reviewed nor discussed anywhere else in the decision.

[38] Moreover, while the VRAB correctly describes the test under subsection 21(1) in the first sentence of the passage quoted above at paragraph 25, this description is followed by comments focusing exclusively on the causes of the PTSD and of Mr Reed’s anxiety in Cyprus. Yet nowhere

does the VRAB deal with the issue of when Mr. Reed's PTSD with delayed onset was incurred, or how it construed that particular criterion of eligibility.

[39] It is obvious that the identification of the actual trauma and other environmental factors contributing to the onset of the applicant's PTSD are relevant to the VRAB's duty to determine, pursuant to subsection 21(1), whether the disorder (or its aggravation) was attributable to the applicant's special service in Cyprus. However, it is far from obvious how this exercise alone could enable the VRAB to determine whether the disorder (or its aggravation) was incurred during said special duty service, or as the French version of the Act has it, "si une blessure ou maladie – ou son aggravation – (est) survenue au cours du service militaire".

[40] There is little case law dealing with subsection 21(1) of the Act as opposed to subsection 21(2). In fact, the parties only referred the Court to the decision of Justice Marcel Joyal in *Page v. Canada (Veterans Appeal Board)* 1994 FCJ No. 1206. Although the main issue before the Court in that case was different than the one at issue in the case at bar, the Court made some general comments which are nonetheless relevant here. The Court in *Page* construed the terms "incurred during" and "in the course of" as meaning "occurred" or "happened during" the course of service (see, for example, paragraphs 45, 47 and 48). Also, it applied the principle that the Act must be given a liberal and generous interpretation, in finding that the enactment under review (then Vote 58A) was meant to confer on peacekeepers the status of World War II combatants when they serve in designated areas. The Court notes that "as in World War II, when universal coverage applied, it should not matter one wit where the casualty occurs, as any World War II veteran will testify".

Although the Court was focusing in *Page* on location, the applicant contends that the same wide universal coverage enjoyed by World War II veterans in respect of the timing of pensionable injuries should carry over to veterans of special duty service; i.e., it should not matter one wit what caused an injury or a disease if the injury or disease occurred or happened during the applicant's service in Cyprus.

[41] In light of Driedger's⁹ modern approach to statutory interpretation, which directs that the words of an Act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, the Court is satisfied that the words "incurred during" in subsection 21(1) are meant to provide for a distinct and alternative criterion of pension eligibility. This criterion focuses on a temporal connection rather than a causal connection to the military service it covers, that is, service during World War I, World War II, the Korean War, or as a member of a Special Force or Special Duty Service.

[42] In coming to this conclusion, the Court adopted the liberal and generous approach described in *Frye* (at paras. 14-26) and considered both the French and the English version of the Act, the French version being particularly clear and precise. It also considered other instances where the word "incurred" appears in the Act, for example at subsection 21(3), where the causal connection denoted by the phrases "arising out of" and "having direct connection with" is clearly distinct from the temporal aspect denoted by the phrase "incurred in the course of". The Court also took note of

⁹ E.A. Driedger, page 87 of his "Construction of Statutes" (2nd edition, 1983)

the difference in the language used to describe the test applicable to subsections 21(1) versus subsection 21(2) of the Act.

[43] That said, given that the Guidelines clearly indicate that PTSD with delayed onset does not occur simultaneously with the traumatic event at its root, the VRAB cannot be presumed to have addressed the issue of when the disorder occurred or happened without referring to the concept of delayed onset and the appearance of symptoms that could help determine the clinical onset of PTSD.¹⁰

[44] Thus, despite the presumption referred to by the respondent that the decision-maker has considered all of the arguments presented, the Court must conclude that in this particular case, the VRAB failed to turn its mind to the second and distinct criterion set out in subsection 21(1) of the Act. This constitutes a reviewable error that is sufficient by itself to justify setting the decision aside.

[45] Nevertheless, as this matter will need to be reconsidered, the Court will briefly comment on other issues raised by Mr. Reed.

¹⁰ As mentioned, the copy of the Guidelines included in the Certified Record was incomplete thus the Court does not know if the 2002 version contained the Chapter entitled “Pension Considerations” found at pages 9-10 of the February 2005 version. It is worth noting however, that although the current version refers to the notion of clinical onset, it is in a paragraph entitled “Causes and/or Aggravation”. There is no section dealing specifically with when PTSD is incurred. This may explain the lack of focus of the VRAB on this criterion. It would certainly be advisable to deal with this specific issue in the next decision given the importance of PTSD and the current deployment of our military.

[46] The applicant argued that the VRAB could not have applied sections 3 and 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, as its analysis of the only two medical opinions on file is flawed (see the fourth paragraph of the passage quoted at paragraph 25, above).

[47] First, the Court notes that the general principles in respect of the application of sections 3 and 39 are set out at paragraphs 22 to 26 of my decision in *Hunt v. The Attorney General*, 2006 FC 1029.

[48] Also, as noted in *Hunt* at paragraph 45 and in *Cramp v. Canada (Attorney General)*, 2006 FCJ No. 815 at para. 25 (a decision cited by the VRAB), there is no doubt that in appropriate circumstances; the VRAB may rely on the Guidelines in its assessment of medical evidence presented to it.

[49] This being said, in order to validly conclude that the Guidelines conflict with medical opinions on file, the VRAB must properly construe both the opinions and the Guidelines.

[50] It is worth noting that contrary to what was applied¹¹ in *Cramp*, above, the Federal Court of Appeal recently indicated in *Wannamaker*, at paragraph 13, that the proper application of section 39 involves a decision “on a question of mixed fact and law which is subject to the standard of reasonableness” and that there is “no reason to adopt a different standard of review where questions arise as to whether the Board has properly assessed the credibility evidence, or whether the Board has properly given effect to section 39”.

¹¹ There the Court applied the standard of patent unreasonableness.

[51] This standard of review implies that after a probing examination, the explanation(s) or reason(s) given by the VRAB must be tenable.

[52] Here, the VRAB, after noting that the Guidelines do not state that PTSD can be caused by one's own thoughts or feelings, apparently concluded on that basis that the opinions (thus of both Drs. Richardson and Comendador) were not credible.

[53] Even accepting the respondent's submission that the VRAB's reference to "thoughts and feelings" refers to its finding that there was no evidence of an actual suicide attempt,¹² both psychiatrists indicated in their reports that the traumatic event in this case was the sexual abuse suffered by Mr. Reed as a child. In fact, the VRAB refers to the abuse as the cause of the PTSD "according to the doctors" earlier in its decision. Neither doctor found that Mr. Reed's own thoughts or feelings caused the PTSD; rather, they indicated that the disorder was triggered or precipitated by Mr. Reed's experiences in Cyprus (Dr. Comendador) and the suicidal attempt (Dr. Richardson).

[54] If one properly construes the opinions on file, it is difficult to see why childhood trauma accompanied with other factors experienced in Cyprus would not fit within the general description of possible causes of PTSD referenced in the Guidelines. Also, if the VRAB was referring to factors other than the traumatic event at the root of the PTSD (i.e., the main event which recurs in dreams and thoughts), and which according to the Guidelines are generally present in some level of

¹² It is not clear what one should qualify as an attempt when the method one chooses to kill oneself is a rifle. Certainly, a lay person such as Lieutenant Colonel Slater appears to believe that this qualified as a suicidal attempt. Dr. Richardson appears to distinguish Mr. Reed's current passive thoughts of suicide with no active plan and intent (bottom of page 5 in the report) from the events in Cyprus to which he refers as "a suicide attempt".

interaction (see paragraph 30, above), its statement that PTSD cannot be caused by one's own thoughts and feelings also appears off the mark. In fact, as mentioned in discussing the occurrence of PTSD, the Guidelines specifically reference factors such as lack of peer support, which certainly appears to involve one's own perception or feeling of the outside world.

[55] The VRAB also discredits the opinion of Dr. Richardson by commenting that if it were meant to assist in obtaining the appellant's pension as opposed to obtaining treatment, it would have been produced at an earlier point in the pension adjudication process rather than just before the appeal hearing, considering that the department for which Dr. Richardson was working had already dealt with the pension adjudication.

[56] The respondent had much difficulty explaining this statement at the hearing. The Court finds that this inference is illogical and arbitrary, in circumstances where clearly the Advocate thought it necessary to obtain additional evidence, since a prior decision-maker had indicated that existing evidence was insufficient to support the claim advanced. Suffice it to note that Dr. Comendador's analysis was two-pages in length, whereas Dr. Richardson prepared an in-depth analysis which included a review of Mr. Reed's contemporary medical records, and a more complete assessment.

[57] Thus whether considering all of the above or only the VRAB's failure to apply the proper test, the application is granted.

[58] The applicant sought costs on a solicitor-client basis. However, he provided no details as to special circumstances which would justify a departure from the general rule of granting cost on a

party-to-party basis, normally in accordance with Column III, Tariff B. The Court has carefully considered this matter and it is clear that there are no special circumstances here that would justify the granting of the order requested. Costs will therefore be granted on the basis of Column III Tariff B.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is granted with costs (Tariff B, Column III).

"Johanne Gauthier"

Judge

ANNEX A

Pension Act, R.S., 1985, c.P-6

2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

S.R., ch. 22(2^e suppl.), art. 1.

2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

S.R., ch. 22(2^e suppl.), art. 1.

Veterans Review and Appeal Board Act, 1995, c. 18

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.

(...)

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

(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;

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that 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.

39. Le Tribunal applique, à l'égard du demandeur ou de l'appellant, les règles suivantes en matière de preuve :

a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;

b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;

c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-30-07

STYLE OF CAUSE: Glenn Reed v. Attorney General of Canada

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 8, 2007

REASONS FOR JUDGMENT: Gauthier, J.

DATED: November 23, 2007

APPEARANCES:

Mr. Dougald E. Brown FOR APPLICANT

Ms. Jennifer Francis FOR RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP FOR APPLICANT
Ottawa, Ontario

John H. John H. Sims, Q.C. FOR RESPONDENT
Deputy Attorney General of Canada
Ottawa, Ontario K1A 0H8