Date: 20091118

Docket: T-1874-08

Citation: 2009 FC 1183

Ottawa, Ontario, November 18, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GARY BRENT ZIELKE

Applicant

and

ATTORNEY GENERAL OF CANADA
(Style of Cause was changed by oral Direction in Court)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision of the Veterans Review and Appeal Board of Canada (VRAB). The Applicant seeks a writ of certiorari to quash the decision of the Second Reconsideration Panel (Panel), dated July 15, 2008. The Second Reconsideration Panel re-determined a decision of the VRAB, dated December 6, 2005, after the decision of the First Reconsideration Panel was quashed by Justice Sean Harrington, on May 15, 2008 (Consent Order). The Applicant asks the Court to quash the Panel's decision and order a third Reconsideration Panel to consider the Applicant's appeal.

II. Background

[2] The Applicant has been employed by the Royal Canadian Mounted Police (RCMP) since 1978. In 1978, the Applicant dislocated his right shoulder during RCMP self-defence training. Later that year, the Applicant had surgery to repair the damage to his right shoulder. The Applicant alleges that he suffered a partial dislocation of his left shoulder as a result of the 1978 incident (Applicant's Memorandum of Fact and Law at para. 5).

[3] On January 22, 1980, the Applicant suffered a partial dislocation of his left shoulder while walking to his residence (Applicant's Memorandum of Fact and Law at para. 14). Whether the Applicant was on-duty at the time of this injury is a crucial factual finding in the decision under review.

[4] On June 13, 2000, the Applicant was diagnosed with "recurrent subluxation" (dislocation) in his left shoulder (Respondent's Memorandum of Fact and Law at para. 11).

[5] On December 21, 2000, the Applicant applied to Veterans Affairs for disability pension for his left and right shoulders (Applicant's Memorandum of Fact and Law at para. 17). A pension was granted for the Applicant's right shoulder, but not for his left shoulder because there was "no indication that any service-related factors or activities caused or contributed to" the Applicant's left shoulder condition (Applicant's Memorandum of Fact and Law at para. 18).

[6] On February 11, 2004, the Applicant fell while on-duty and dislocated his left shoulder (Applicant's Memorandum of Fact and Law at para. 16).

[7] In 2004, the Applicant appealed the Veterans Affairs decision regarding his left shoulder. On September 23, 2004 a VRAB entitlement review panel denied this appeal on the grounds that the injury was not directly connected to the Applicant's RCMP service. Instead, it was held the 1980 off-duty fall was the basis of the claimed condition (Respondent's Memorandum of Fact and Law at para. 17).

[8] The Applicant appealed the 2004 decision to a VRAB Appeal Panel. On November 30, 2005, the Appeal Panel held a hearing regarding the Applicant's left shoulder (Respondent's Memorandum of Fact and Law at para. 18). During the appeal, the Applicant submitted witness statements of his 1978 wrestling partners, Mr. Gregory Logan and Mr. T.A. Davidson, to show that he suffered an injury to his left shoulder at the same time as he dislocated his right shoulder (Applicant's Memorandum of Fact and Law at para. 23).

[9] In its decision of December 6, 2005, the VRAB refused to grant a pension for the Applicant's left shoulder on the grounds that there was evidence to show that only the right shoulder was injured in 1978 and the 1980 off-duty fall was the primary cause of the Applicant's condition (Respondent's Memorandum of Fact and Law at para. 19).

[10] On June 6, 2007, the Applicant applied for a Reconsideration of VRAB's decision on the grounds that the VRAB Appeal Panel made errors of fact (Respondent's Memorandum of Fact and Law at para. 20). Also, the Applicant submitted new evidence to the Reconsideration Panel consisting of a letter from the Applicant and two letters from the Applicant's physician, Dr. Michael L.H. Gammon, dated January 23, 2006 and July 26, 2006. The January 23 letter states the Applicant suffered a dislocated shoulder and the July 26 letter states the Applicant's 2004 on-duty fall caused "permanent aggravation and worsening condition to injuries of the same shoulder in 1978 and 1980" (Applicant's Record (AR), Tab T at pp.155-156).

[11] The Reconsideration Panel did not find any errors of fact or new evidence which would justify a reconsideration of the Appeal Board's 2005 decision (Respondent's Memorandum of Fact and Law at para. 23).

[12] In December 2007, the Applicant filed an application for judicial review of the Reconsideration Panel's decision (Applicant's Memorandum of Fact and Law at para. 27). This judicial review led to the Consent Order.

[13] The preamble to the Consent Order provided that the Reconsideration Panel erred by:

a. failing to make findings as to the credibility of the evidence of the Applicant and his two witnesses relating to the left shoulder injury that the Applicant may have suffered in 1978;

b. failing to provide reasons for not accepting the un-contradicted evidence of the Applicant and his two witnesses relating to the left shoulder injury that the Applicant may have suffered in 1978;

c. failing to have regard to the material before it concerning the possible reason or reasons for the lack of documentary evidence at that time relating to the left shoulder injury that the Applicant may have suffered in 1978.

d. Failing to have regard to the material before it concerning whether or not the January 1980 slip and fall injury arose out of, or was directly connected with, the Applicant's service in the Royal Canadian Mounted Police, and failing to provide reasons for its negative determination in that regard; and

e. Failing to consider whether or not the February 2004 slip and fall injury resulted in an aggravation of the Applicant's left shoulder condition.

[14] The Order provided that the Reconsideration Panel's decision be quashed and the Appeal Board's decision be re-determined by a Second Reconsideration Panel. The Second Reconsideration Panel released its decision on July 15, 2008.

III. Decision under Review

[15] The Consent Order directed the Second Reconsideration Panel to review the December 6, 2005 decision of the Appeal Board that declined a pension for the Applicant's left shoulder.

[16] The Second Reconsideration Panel reviewed the December 6, 2005 decision and held that the 1978 training incident injured the Applicant's right shoulder, but not the left. The Panel also held that the Applicant's 1980 fall was not related to the performance of RCMP duties (AR, Tab XYZ at p. 179). The Panel held that the injury which caused the first dislocation of the left shoulder was the 1980 off-duty fall (AR, Tab XYZ at p. 180).

[17] The Panel rejected Dr. Gammon's evidence, noting that "recurrent dislocation" was already diagnosed when the Applicant initiated a claim for disability in 2000. The Panel held that it "cannot

understand from the letter … what permanent aggravation and worsening this injury could have caused to the left shoulder which has been already diagnosed with recurrent dislocation." The Panel concluded that it "cannot find evidence of a permanent worsening of the claimed condition of recurrent dislocation of the left shoulder diagnosed before the injury of 2004" (AR, Tab XYZ at p. 180).

IV. Issues

[18] (1) What is the appropriate standard of review?

(2) Taken in context, did the Preamble to the Consent Order issue binding directions to the Second Reconsideration Panel?

(3) Did the Second Reconsideration Panel make unreasonable decisions regarding errors (d) and (e) of the Consent Order?

V. Relevant Legislative Provisions

[19] Sections 3, 38 and 39 of the *Veterans Review and Appeal Board Act*, S.C., 1985, c. 18 (VRAA), state:

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	**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

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.	reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.
…	[...]
Medical opinion	Avis d'expert médical
38. (1) The Board may obtain independent medical advice for the purposes of any proceeding under this Act and may require an applicant or appellant to undergo any medical examination that the Board may direct.	**38.** (1) Pour toute demande de révision ou tout appel interjeté devant lui, le Tribunal peut requérir l'avis d'un expert médical indépendant et soumettre le demandeur ou l'appelant à des examens médicaux spécifiques.
Notification of intention	Avis d'intention
(2) Before accepting as evidence any medical advice or report on an examination obtained pursuant to subsection (1), the Board shall notify the applicant or appellant of its intention to do so and give them an opportunity to present argument on the issue.	(2) Avant de recevoir en preuve l'avis ou les rapports d'examens obtenus en vertu du paragraphe (1), il informe le demandeur ou l'appelant, selon le cas, de son intention et lui accorde la possibilité de faire valoir ses arguments.
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	*a*) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus

reasonable inference in favour of the applicant or appellant;	favorables possible à celui-ci;
(*b*) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	*b*) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(*c*) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.	*c*) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[20] The VRAB is empowered to reconsider its decisions pursuant to Section 32 of the VRAA:

Reconsideration of decisions	Nouvel examen
32. (1) Notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.	**32.** (1) Par dérogation à l'article 31, le comité d'appel peut, de son propre chef, réexaminer une décision rendue en vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.

Board may exercise powers	Cessation de fonctions
(2) The Board may exercise the powers of an appeal panel under subsection (1) if the members of the appeal panel have ceased to hold office as members.	(2) Le Tribunal, dans les cas où les membres du comité ont cessé d'exercer leur charge, peut exercer les fonctions du comité visées au paragraphe (1).
Other sections applicable	Application d'articles
(3) Sections 28 and 31 apply, with such modifications as the circumstances require, with respect to an application made under subsection (1).	(3) Les articles 28 et 31 régissent, avec les adaptations de circonstance, les demandes adressées au Tribunal dans le cadre du paragraphe (1).

VI. Summary of Pertinent Submissions

Applicant's Submissions

Submissions Regarding Errors (a)-(c)

[21] The Applicant submits the VRAB erred by failing to address errors (a) to (c) of the Consent Order in its reasons (Applicant's Memorandum of Fact and Law at para. 32).

Submissions regarding Error (d): 1980 Injury

[22] The Applicant submits that the VRAB improperly ruled on error (d) because there is uncontradicted evidence showing the Applicant was on-duty at the time of the 1980 injury (Applicant's Memorandum of Fact and Law at para. 35). The Applicant submits that Section 39 of the VRAA mandates how the Board is to consider evidence (Applicant's Memorandum of Fact and Law at para. 45) and cites the case of *Mackay v. Canada (Attorney General)* (1997), 129 F.T.R. 286, 71 A.C.W.S. (3d) 270, for the proposition that Section 39 "requires that when new and credible evidence is presented during a reconsideration proceeding, the VRAB has a duty to consider and

weigh the evidence in the applicant's favour" (Applicant's Memorandum of Fact and Law at para. 46). The Applicant submits that Sections 3 and 39 indicate that the VRAB has a duty to accept any uncontradicted and credible evidence (Applicant's Memorandum of Fact and Law at para. 48).

[23] The Applicant also submits that the Panel violated Section 39 by failing to make every reasonable inference in his favour when it determined that he was off-duty when he injured his left shoulder in 1980 (Applicant's Memorandum of Fact and Law at para. 52). The Applicant cites the case of *Wannamaker v. Canada (Attorney General)*, 2006 FC 400, 289 F.T.R. 298, for the proposition that the Board must "not look at an activity in isolation but must appreciate whether the activity was performed within the context of military service" (*Wannamaker* at para. 42). It should be noted that this case was overruled by the Federal Court of Appeal in *Wannamaker v. Canada (Attorney General)*, 2007 FCA 126, 156 A.C.W.S. (3d) 929, on the ground that the trial court misapplied the standard of review. That being said, the trial court directly cited the quoted phrase from the case of *Schut v. Canada (Attorney General)* (2000), 186 F.T.R. 212, 96 A.C.W.S. 93d) 494, at para 28 and *Schut* has not been overruled.

[24] The Applicant emphasizes that there was evidence before the Panel which showed that he was on-duty when he fell in 1980 (Applicant's Memorandum of Fact and Law at para. 54, 55) and the Panel failed to comply with Section 39 because it did not draw every reasonable inference in his favour when it ruled to the contrary (Applicant's Memorandum of Fact and Law at para. 56).

Submissions Regarding Error (e): 2004 Injury

[25] The Applicant submits that the Panel's decision regarding error (e) is flawed because Dr. Gammon provided medical evidence in respect of the Applicant's left shoulder and it was incorrect for the Panel to disregard it (Applicant's Memorandum of Fact and Law at para. 39).

[26] The Applicant submits that the Panel erred by making a ruling before it understood Dr. Gammon's medical opinion regarding the damage caused by the 2004 injury (Applicant's Memorandum of Fact and Law at para. 58). The Applicant submits the Panel has no medical expertise and could have obtained medical opinions pursuant to Section 38 if it questioned Dr. Gammon's medical evidence (Applicant's Memorandum of Fact and Law at para. 59). The Applicant submits that because the Panel did not obtain a medical opinion it had no medical evidence before it to support its conclusion that the 2004 injury did not worsen the Applicant's pre-existing shoulder condition (Applicant's Memorandum of Fact and Law at para. 61).

[27] The Applicant submits that, in the absence of adverse credibility findings, Section 39 obliged the Panel to accept the evidence that the condition in his left shoulder was caused by a 1978 training accident and aggravated by on-duty falls which occurred in 1980 and 2004 (Applicant's Memorandum of Fact and Law at paras. 61-62).

[28] The Applicant seeks an order quashing the decision of the Second Reconsideration Panel and referring the matter back to the VRAB for reconsideration by a differently constituted Tribunal and an order directing the VRAB to make specific rulings regarding the errors listed "a" through "e"

in the Consent Order and that the VRAB's review be carried out in accordance with the interpretative obligations imposed on it by Sections 3 and 39.

Respondent's Submissions

[29] The Respondent submits that there are three issues in this case: (1) the appropriate standard of review; (2) whether the Panel provided adequate reasons for its decision; and (3) whether the Panel's decision to affirm the Board's decision of December 6, 2005 was reasonable (Respondent's Memorandum of Fact and Law at para. 27).

[30] The Respondent submits two standards of review are applicable (Respondent's Memorandum of Fact and Law at para. 28); the standard of correctness is to be applied to a review of the adequacy of a tribunal's reasons (Respondent's Memorandum of Fact and Law at para. 29) and the standard of reasonableness applies to a review of a VRAB Reconsideration Panel. They cite the case of *Bullock v. Canada*, 2008 FC 1117, 336 F.T.R. 73, at paragraphs 11-14, where the Federal Court applied the standard of reasonableness to the VRAB (Respondent's Memorandum of Fact and Law at para. 30).

Submissions Regarding Errors (a)-(c)

[31] In response to the Applicant's submission that the Panel erred by failing to address errors (a) to (c) of the Consent Order, the Respondent submits this issue is properly categorized as concerning the sufficiency of the reasons given by the Panel. The Respondent submits the test for determining adequacy of reasons was established in the case of *Johnson v. Canada (Attorney General)*, 2007 FCA 66, 155 A.C.W.S. 93d) 720 at paragraph 6. In that case, the Court held the appropriate test is

whether a Court is in a position to undertake a meaningful review of the decision against the appropriate standard of review (Respondent's Memorandum of Fact and Law at paras. 31-32).

[32] The Respondent cites the case of *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 at 704-707, to show that when a tribunal has a statutory obligation to provide reasons, it is insufficient for a board to merely state its conclusions, but must also provide the factors taken into account and its reasoning process (Respondent's Memorandum of Fact and Law at para. 34). The Respondent submits the Panel's reasons adequately describe its decision-making process and provide enough detail for a meaningful review (Respondent's Memorandum of Fact and Law at para. 35). The Respondent also submits that the omission of specific issues from the reasons does not mean those issues were not considered. The Respondent cites the case of *Murphy v. Canada*, 2007 FC 905, 160 A.C.W.S. (3d) 641, at paragraph 13, wherein Justice Judith Snider held that a panel is presumed to have considered all of the evidence and its reasons do not have to refer to every document that was before it (Respondent's Memorandum of Fact and Law at para. 37).

[33] The Respondent further submits that there is nothing in the Consent Order directing the Panel to address every error as noted in the preamble, or to issue its findings on each (Respondent's Memorandum of Fact and Law at para. 36).

[34] The Respondent submits the Panel's decision to affirm the Board's ruling is reasonable because the mandate of the Reconsideration Panel is not to make findings of fact, but rather to

determine whether the Board made errors (Respondent's Memorandum of Fact and Law at paras. 39-40).

[35] The Respondent submits that, in spite of the requirements in Section 39, a person seeking to obtain benefits bears the burden of proving a causal link between the injury and their period of service (Respondent's Memorandum of Fact and Law at paras. 41-42). With respect to the Applicant's alleged left shoulder injury, the Respondent submits that insufficient evidence was adduced to prove that the Applicant injured his left shoulder in 1978 (Respondent's Memorandum of Fact and Law at para. 45).

Submissions Regarding Error (d): 1980 Injury

[36] With respect to the 1980 fall, the Respondent submits that the Panel had evidence before it to contradict the Applicant's submission that he was on-duty at the time of the injury, such as a statement from the Applicant that the 1980 fall occurred when he was off-duty (Respondent's Memorandum of Fact and Law at paras. 47, 48). The Respondent concludes that the Panel would have to make generous inferences in the Applicant's favour and disregard his prior testimony in order to find that he was on-duty when the 1980 injury occurred (Respondent's Memorandum of Fact and Law at para. 49).

Submissions Regarding Error (e): 2004 Injury

[37] With respect to Dr. Gammon's evidence, the Respondent submits that the letters lack meaningful analysis and it was open to the Panel to assign little weight to the letters (Respondent's Memorandum of Fact and Law at para. 52).

VII. Standard of Review

[38] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 62, 64, the Supreme Court set out the test for assessing the standard of review. The Court must first ascertain whether past jurisprudence has satisfactorily determined the standard of review with regard to the particular category of question. If the standard of review has not yet been determined, the Court will examine the four following factors: (1) presence of a privative clause; (2) purpose of the tribunal as set out in its enabling legislation; (3) the nature of the question at issue; (4) the expertise of the tribunal.

[39] In the post-*Dunsmuir* case of *Bullock*, above, Justice Richard Mosley of the Federal Court held that the standard of review to be applied to reconsiderations of the Veterans Review and Appeal Board is reasonableness (*Bullock* at para. 13).

[40] In *Dunsmuir*, the Court held that reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para. 47).

VIII. Analysis

[41] A central issue in this case is whether the errors listed in the preamble to the Consent Order are binding directions to the Panel. It is noted that the five errors are not mentioned in the actual "order", but are "noted" in the preamble. As has been said, the Respondent submits the errors do not direct the Panel to address those issues because the errors are not contained in the "order" itself (Respondents' Memorandum of Fact and Law at para. 36).

[42] In the case of *Magan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 888, 161 A.W.C.S. (3d) 623, the Federal Court quashed a decision of the Immigration and Refugee Board (IRB) because it failed to take into account the reasons for the order of Justice Edmond Blanchard in *La Hoz v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 762, 278 F.T.R. 229, which quashed the IRB's previous ruling; (*Magan* at para. 7). In *Magan*, the Court held that Justice Blanchard's reasons illustrated the grounds to be taken into consideration during the IRB's re-determination (*Magan* at para. 8). The ruling in *Magan* was made even though the actual "order" of Justice Blanchard read "…The matter is referred back for a new hearing before a differently constituted panel, solely on the exclusion issue." The reasons for this order were held to be binding on the IRB even though the order itself did not direct the IRB to take those reasons into account.

[43] It is the Court's conclusion that the Respondent's submission that there was nothing in the Order of Justice Harrington requiring the Panel to address each issue does not stand when exposed to the precedent in *Magan*. The case at bar is analogous to *Magan* with the exception that a consent

order was issued, not a judgment. The Second Reconsideration Panel erred in law by not addressing errors (a) to (c) as specified in the Consent Order.

[44] The Applicant submits errors (d) and (e) were improperly decided by the Second Reconsideration Panel. These errors were explicitly addressed by the Second Reconsideration Panel; therefore, these decisions should be reviewed through the lens of reasonableness.

[45] With respect to error (d), the Applicant submits the Panel made an unreasonable decision because it failed to accept uncontradicted evidence showing the Applicant was on-duty when the injury occurred. The Applicant also submits the Panel violated Section 39 because it did not make every reasonable inference in his favour when it determined the Applicant was off-duty when the 1980 injury occurred (Applicant's Memorandum of Fact and Law at para. 52).

[46] Justice Elizabeth Heneghan dealt with a VRAB finding that an injury occurred while a RCMP officer was off-duty in the case of *Lenzen v. Canada (Attorney General)*, 2008 FC 520, 327 F.T.R. 12. In *Lenzen*, the VRAB determined the applicant was not in performance of RCMP duties during a boating accident (*Lenzen* at para. 43). Justice Heneghan held the Board's findings were unreasonable because the evidence contradicted the Board's conclusions (*Lenzen* at para. 46). The evidence consisted of an incident report stating the applicant was on "voluntary overtime", was "on duty" and was wearing "acceptable uniform" at the time of the accident (*Lenzen* at paras. 46-49); therefore, the VRAB made an unreasonable decision because it came to a conclusion that was not supported by the evidence.

[47] The case at bar is distinguishable from *Lenzen*. In this case, the Panel reviewed evidence showing the Applicant was off-duty when he fell, such as two memoranda from 1980, one stating the Applicant fell while returning home "from duty" and the other stating the Applicant suffered a fall "at his residence". Although Sections 3 and 39 of the VRAA shift the balance in favour of pension applicants due to the moral debt that Canada owes to them, the Court in *Lenzen* held the provisions have been interpreted as obliging applicants to adduce sufficient probative evidence to establish a causal link between the injury and his or her period of service (*Lenzen* at para. 38). On the facts of this case, the Panel reasonably concluded the Applicant had not done so.

[48] In this case, on this issue, based on this standard of review, it is not the Court's place to interfere with the Panel's decision. This case is unlike *Lenzen* because, here, there is no evidence which flatly contradicts the Panel's finding that the Applicant was on-duty when he fell. Any weighing of the evidence should be left to the Panel.

[49] With respect to error (e), the preamble to the Consent Order states the Panel erred by "failing to consider whether or not the February 2004 injury resulted in an aggravation of the Applicant's left shoulder condition." It is clear from the reasons that the Panel considered this possibility and rejected the Applicant's claim. The Applicant submits that the Panel's decision was unreasonable given the Panel's statutory obligations regarding new medical evidence under Sections 38 and 39 (Applicant's Memorandum of Fact and Law at paras. 59, 61).

[50] In the case of *Rivard v. Canada (Attorney General)*, 2001 FCT 704, 2009 F.T.R. 43, the Court held that “sections 38 and 39 of the VRAA and the case law, when read together, require that contradictory evidence be adduced in the file before rejecting medical evidence adduced by the applicant. Unless the Board believed that the evidence was not credible, which was not the case here, it could not reject Dr. Sestier's opinion without having contradictory evidence before it” (*Rivard* at para. 43). It is noted that the VRAB’s decision in *Rivard* was reviewed under the old standard of patent unreasonableness, showing that it is indefensible for the VRAB to reject medical evidence on its own accord, absent an explicit ruling regarding credibility (*Rivard* at para. 21).

[51] In addition to *Rivard*, the Court in *Mackay* held that Section 39 requires VRAB Reconsideration Panels to accept new evidence if it is uncontradicted and credible (*Mackay* at paras. 28, 29). The Court held the Panel’s finding that new medical evidence was “speculative” did not amount to a negative credibility finding; therefore, the Panel committed an error when it did not give its reasons for deciding the evidence was “speculative” (*Mackay* at para. 30).

[52] It is difficult to ascertain the meaning of the Panel’s sparse reasons regarding Dr. Gammon’s letters, but it is possible the Panel thought the medical evidence lacked credibility. The Panel held that “[t]he Board cannot understand from the letter of Dr. Michael Gammon dated 26 July 2006 what permanent aggravation and worsening this injury could have caused to the left shoulder which has been already diagnosed with recurrent dislocation” (Applicant’s Record at Tab XYZ, page 180). The Panel also held it “cannot find evidence of a permanent worsening of the claimed condition of recurrent dislocation of the left shoulder diagnosed before the injury of 2004”. The Panel stated that

the injury which caused the first dislocation of the Applicant's left shoulder, the injury which presumably caused the condition, was the 1980 fall that occurred while the Applicant was off-duty. The Panel concluded by stating that they could not relate, in whole or in part, the claimed condition to the Applicant's RCMP duties (AR, Tab XYZ at p. 180).

[53] It is the Court's conclusion that these reasons, as interpreted by the Court, do not constitute a negative credibility finding regarding Dr. Gammon's medical evidence and, therefore, the Panel violated its Section 39 obligation when it did not accept the evidence and weigh it in the Applicant's favour (recognizing the Panel's statutory duty to do so). The Panel's conclusion that it "cannot find evidence of a permanent worsening of the claimed condition of recurrent dislocation" is unreasonable because the Panel had Dr. Gammon's evidence informing it that the opposite was true. Although it was open to the Panel to rule Dr. Gammon's evidence was not credible, to merely state that the Panel "cannot understand from the letter … what permanent aggravation and worsening this injury could have caused" does not constitute a finding that the evidence lacks credibility. These reasons can be interpreted as the Panel coming to its own medical opinion regarding the Applicant's left shoulder, an act that constitutes an unreasonable error; in this vein, in the case of *Rivard*, above, Justice Marc Nadon held that the VRAB has no particular medical expertise; as a result, contrary evidence, or a negative credibility finding, is required before the VRAB rejects medical evidence (*Rivard* at para. 43).

[54] Upon review of the material before the Panel, it is the Court's conclusion that Dr. Gammon's medical evidence was uncontradicted and should have been accepted absent a finding by the Panel that it lacked credibility, which was not provided in the reasons.

IX. Conclusion

[55] It is the Court's conclusion that the errors (a) to (c) in the Preamble to the Consent Order constituted directions with which the Second Reconsideration Panel failed to comply.

[56] It is the Court's conclusion that the Second Reconsideration Panel made a reasonable decision when it held that the Applicant was off-duty when the 1980 injury occurred. When a Court looks at a tribunal decision through the lens of reasonableness, the Court must defer when that tribunal's factual findings are reasonably supported by the evidence. Although the Applicant provided evidence to suggest that he was on-duty at the time of the injury, the Panel also reviewed contrary evidence and came to a reasonable decision based on the evidence before it.

[57] It is the Court's conclusion that the Second Reconsideration Panel erred in dismissing Dr. Gammon's medical evidence without explicitly finding that it was not credible.

[58] Therefore, the Court is obliged to reiterate that this matter be returned to the Board for re-determination by a newly constituted panel which is directed, for a second time, to fully consider each issue of the Consent Order of Justice Harrington, dated May 15, 2008, as particularly specified therein.

JUDGMENT

THIS COURT ORDERS that this matter be returned to the Board for re-determination by a newly constituted panel which is directed, for a second time, to fully consider each issue of the Consent Order of Justice Sean Harrington, dated May 15, 2008, as particularly specified therein, thus, each of the five issues listed, "a" through "e". The panel of the VRAB is to conduct its review in accordance with interpretative obligations as set out in Sections 3 and 39 of the *Veterans Review and Appeal Board Act*.

"Michel M.J. Shore"
Judge

<u>FEDERAL COURT</u>

<u>SOLICITORS OF RECORD</u>

DOCKET:	T-1874-08
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<u>APPEARANCES</u>:

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