Federal Court  Cour fédérale

Date: 20180712

Docket: T-1991-17

Citation: 2018 FC 727

Ottawa, Ontario, July 12, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

CAROL ANN HISCOCK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of the decision of the Veterans Review and Appeal Board Canada Entitlement Reconsideration Panel [the Reconsideration Panel] heard October 18, 2017, which denied a request to reopen a decision of the Veterans Review and Appeal Board Canada Entitlement Appeal Panel [the Appeal Panel]. The claim for reconsideration was made under subsection 50(g) of the *Veterans Review and Appeal Board Regulations,* SOR/2006-50 [*Regulations*]. A previous Appeal Panel had heard an earlier appeal

of this matter on November 7, 2013, but denied the Applicant's disability claim in respect of her late husband. The veteran's claim was made pursuant to section 45 and subsection 50(3) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005 c 21 [the Act]. In 2018, this statute was renamed the *Veterans Well-being Act*, SC 2005, c 21.

[2] For the reasons that follow, this application for judicial review is granted.

II. Facts

[3] The Applicant is the surviving spouse of her late husband, Master Warrant Officer Hiscock [Mr. Hiscock], who served in the Canadian Armed Forces as a Refrigeration and Mechanical Technician and a Mechanical Systems Technician. His military service ran from 1963 to 1984. During his twenty-one years of service, he was exposed to a variety of toxins, including mercury, various refrigerants, and hydrocarbons, including carbon tetrachloride – a now-known toxic organic solvent.

[4] The uncontested evidence is that the Applicant's late husband was not given protective clothing including masks, boots or gloves when performing his service duties.

[5] In October 2010, Mr. Hiscock was diagnosed with a progressive supranuclear palsy type dementia [PSP], an incurable condition with a prognosis of seven to ten years. In fact he died within three years, aged 68.

[6] In June 2012, Mr. Hiscock applied for a disability award pursuant to section 45 of the Act, alleging his PSP diagnosis resulted from his years of service in a hazardous work environment, and environment that carried with it exposure to the now known toxins mentioned.

[7] In September 2012, Veterans Affairs Canada [VAC] dismissed Mr. Hiscock's application in relation to his PSP diagnosis.

[8] Mr. Hiscock appealed the VAC decision to the Veterans Review and Appeal Board Canada Entitlement Review Panel [the Review Panel] which heard the matter in January 2013. The Review Panel upheld the VAC decision regarding the PSP diagnosis. The Review Panel found no established medical consensus linking Mr. Hiscock's exposure to the toxic/noxious substances he was exposed to in his work environment during his service, and the development of his PSP disease.

[9] Mr. Hiscock died in June 2013. He was only 68 years old.

[10] Review Panel decisions may be appealed to the Appeal Panel. In November 2013, the Applicant, in her capacity as the veteran's surviving widow, appealed the Review Panel's dismissal to the Appeal Panel pursuant to subsection 50(3) of the Act. The Appeal Panel affirmed the Review Panel's decision.

[11] Appeal Panel decision are final, with limited exceptions. One exception is where new evidence demonstrates a factual basis for a disability entitlement. Where an applicant meets the four-part new evidence test set out in *Chief Pensions Advocate v Canada (Attorney General),* 2006 FC 1317 at para 6 per Heneghan, J, aff'd 2007 FCA 298 [*Chief*], the Appeal Panel may reopen and reconsider its decision pursuant to subsection 32(1) of the *Veterans Review and Appeal Board Act,* SC 1995, c 18. The Reconsideration Panel may order a new hearing.

[12] The Applicant found new evidence supporting her claim that her late husband's PSP arose as a result of his military service as a Refrigeration and Mechanical Technician, and the hazardous environmental toxins to which he was exposed. In light of this new evidence, she asked a Reconsideration Panel to review the Appeal Panel's decision. This was heard in November 2017, four years after the November, 2013 Appeal Panel hearing. However, and notwithstanding the new evidence, the Reconsideration Panel rejected the Applicant's request for reconsideration [the Decision]. Judicial review is sought in respect of the Decision.

III. The Reconsideration Decision

[13] The Applicant asked for reconsideration on the basis of new evidence. The request proceeded on the basis of subsection 50(g) of the *Veterans Review and Appeal Board Regulations,* SOR/2006-50 [*Regulations*], which provides:

50 For the purpose of subsection 45(1) of the Act, a member or veteran is presumed, in the absence of evidence to the contrary, to have established that an injury or disease is a service-related injury or disease, or a non-service-related injury or disease that was aggravated by service, if it is demonstrated that the injury or disease or its aggravation was incurred in the course of [...]	**50** Pour l'application du paragraphe 45(1) de la Loi, le militaire ou le vétéran est présumé démontrer, en l'absence de preuve contraire, qu'il souffre d'une invalidité causée soit par une blessure ou une maladie liée au service, soit par une blessure ou maladie non liée au service dont l'aggravation est due au service, s'il est établi que la blessure ou la maladie, ou leur aggravation, est survenue au cours: […]
(g) the performance by the member or veteran of any duties that exposed the member or veteran to an environmental hazard that might reasonably have	**g)** de l'exercice, par le militaire ou le vétéran, de fonctions qui l'ont exposé à des risques liés à l'environnement qui auraient raisonnablement

caused the injury or disease or its aggravation	pu causer la blessure ou la maladie, ou leur aggravation.

[Emphasis added] [Je souligné]

[14] The Applicant's "new evidence" centred on a medical opinion from a very specialized neurologist, Dr. Heather Rigby, who had also identified and relied in her opinion on two new PSP related studies.

[15] Dr. Rigby is a medical doctor with speciality in movement disorder neurology. Importantly for this matter, Dr. Rigby also has sub-specialty expertise in parkinsonian disorders including PSP. Her expertise was not challenged; her qualifications were conceded by the Respondent as indeed was her evidence; the dispute was on its impact in this case.

[16] Dr. Rigby's new evidence and new studies are outlined in an opinion dated January 6, 2017. It concluded that Mr. Hiscock's "condition could reasonably be attributed to his exposure" to environmental hazards:

> ...Mr. Hiscock was exposed to refrigerants and radiation during his lengthy military service. According to a letter included in his file by Russell Power, he would have been exposed to "all types of refrigeration gasses and liquids" as well as "corrosive agents and solvents, one of which was carbon tetrachloride." [...]
>
> PSP is a neurodegenerative disorder characterized by abnormal accumulation of tau protein in regions of the brain. The cause is unknown but recent evidence suggests that exposure to environmental toxins may be important risk factors. In May 2016, Litvan and colleagues published a case control study of 284 cases of PSP (see attached). They hypothesized that exposure to chemicals such as organic solvents (which I understand is found in refrigerants) could be associated with PSP because 1) they are known to inhibit mitochondrial enzymes (there is impaired mitochondrial activity in PSP patients'' muscle and blood cells) or 2) alter oxidative state (oxidative injury is observed in the brains of

> PSP patients). Their study found a significant association between years of drinking well water and the development of PSP.
>
> Though they did not find an association with occupational exposures, they do acknowledge that it is possible that statistically significant differences were not found because of the overall low frequency of these jobs in the cohort. Importantly, this study does support an association between PSP and environment factors but has limited statistical power to establish associations with rare chemical exposures.
>
> The link between PSP and environmental exposures is also supported by a recent report by Caparros-Lefebvre et al. of a cluster of PSP patients in France in a geographical area with severe environmental contamination by industrial metals (see attached).
>
> Mr. Hiscock developed his condition years after the exposure. In parkinsonian neurodegenerative disorders, pathologic studies suggest that the degeneration typically begins many years before the development of signs and symptoms.
>
> In conclusion, the literature supports an association between environmental exposure and the development of PSP. There is scientific evidence to support the plausibility of an association with organic solvents. As such, I think that in the case of Mr. Hiscock, his condition could reasonably be attributed to his exposure.
>
> [Emphasis added]

[17] The Reconsideration Panel applied the four-part test from *Chief* and found that while the new evidence met the first and second test, it did not meet the third and fourth. On this basis, the Reconsideration Panel held that Dr. Rigby's "new evidence" did not meet the conditions for reconsideration. The Applicant's request was denied.

[18] The Reconsideration Panel relied upon web based and other extrinsic evidence in reaching its decision to deny the request for reconsideration; it revealed this extrinsic research in its Decision:

> This Panel has also consulted other known medical consensus, literature and research such as the website of the Mayo Clinic, *Merck Manual of Diagnosis and Capital Therapy*, 19th edition, as well as the website of the National Institute of Neurological Disorders. All of these resources indicate that the cause of PSP is unknown.

[19] Of relevance to this judicial review, however, it is not known if this research was done before or after the hearing. And it is not known if the material relied upon was generated before or after the hearing. In any event, the Reconsideration Panel did not disclose any of its research to the Applicant, not even the web page addresses. It is common ground the Applicant did not have an opportunity to respond.

[20] It is also common ground that the Reconsideration Panel did not refer to subsection 50(g) of the *Regulations*, which the basis for his claim for reconsideration.

[21] The Reconsideration Panel also faulted the Applicant's evidence related to his exposure to environmental hazards. It asserted that, "the Panel does not know what chemicals he was exposed to, or for what duration, or for what quantities and whether exposure to occupational chemicals in itself would have reasonably contributed to the claimed condition."

[22] It is common ground that this assertion was not entirely accurate; I have concluded it was inaccurate. In fact, there was uncontested evidence going to these issues in a written report filed by Chief Warrant Officer Russell Power [Mr. Power], a former colleague of Mr. Hiscock, whose evidence appears to have been based on first-hand. In addition, Mr. Power corroborated some of Mr. Hiscock's own evidence in this regard.

IV. Issues

[23] The Applicant submitted a number of issues for determination including:

i. Did the Reconsideration Panel breach procedural fairness and principles of natural justice by failing to raise with the Applicant extrinsic evidence it obtained, or give the Applicant the opportunity to make additional submissions or to supplement the medical evidence that she had already submitted?

ii. Did the Reconsideration Panel err by basing its decision on an incorrect statement of facts?

iii. Did the Reconsideration Panel err by failing to properly apply the presumption contained in subsection 50(g) of the *Regulations* to the effect that it is presumed, in the absence of evidence to the contrary, that a disease is service-related if it is demonstrated it was incurred in the course of the performance by the veteran of any duties that exposed the veteran to an environmental hazard that might reasonably have caused the disease?

[24] In my view, these issues should be decided in the context of asking whether the Reconsideration Panel's decision is reasonable, and whether the Reconsideration Panel breached the Applicant's right to procedural fairness.

V. Standards of Review

[25] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has determined that reasonableness is the standard of review for decisions of the Reconsideration Panel, including whether the Reconsideration Panel gave proper effect to section 39 of the Act: *McAllister v*

Canada (Attorney General), 2014 FC 991 at paras 38-40 per de Montigny J (as he then was). Section 39, as will be seen, obliges these tribunals to view a veteran's claim in the "best light possible" according to the Federal Court of Appeal: *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at para 5.

[26] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "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; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[27] The Supreme Court of Canada further instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron*

Inc, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[28] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. Correctness is the standard of review for the second issue: per *Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69. That said I note that in *Bergeron v. Canada (Attorney General*, 2015 FCA 160 at paragraph 69, the Federal Court of Appeal said that a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42."

[29] In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[30] The Applicant notes that the Federal Court of Appeal stated the following regarding procedural fairness in the context of reconsideration decisions in *Ladouceur v Canada (Attorney General)*, 2011 FCA 247 at paras 21-22:

> [21] Finally, I note that the level of procedural fairness to be afforded in cases such as this should be quite high given the importance of the matter to the claimant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 25.

> [22] By receiving the medical advisor's advice without disclosure to Mr. Ladouceur and without giving him an opportunity to test, challenge or rebut it, the Board worked a fundamental unfairness to Mr. Ladouceur. Had Mr. Ladouceur been afforded that opportunity, he might have been able to convince the Board that his disability falls under Table 17.9 rather than Table 17.12, or, alternatively, he might have been able to convince this Court that the Board's choice of Table 17.12 was unreasonable in light of all of the evidence. In light of this, I do not accept the Attorney General's submission that if there were a procedural error in this case, it was minor and should be disregarded.
>
> [Emphasis added]

VI. Analysis

[31] In my respectful view, judicial review must be granted in this case. I have come to this conclusion for three reasons. In limiting this decision to these points, the Court should not be taken to have rejected other submissions by the Applicant, particularly those related to the Reconsideration Panel's several considerations of the new evidence; those issues will be decided on the fresh reconsideration to be conducted by a different panel.

[32] The three reasons follow. First, procedural fairness was breached by the Reconsideration Panel in failing to disclose and afford the Applicant an opportunity to respond to the results of extrinsic research conducted by it. Secondly, material findings made by the Reconsideration Panel regarding the nature of possible environmental hazards to which Mr. Hiscock was exposed are not defensible on the record. Third, the Reconsideration Panel's failure to consider the relationship between the new evidence and subsection 50(g) of the *Regulations* is not defensible on the law; while underlying and therefore central to the Applicant's claim, it was ignored.

A. *Did the Reconsideration Panel breach procedural fairness?*

(1) Extrinsic research not shared with Applicant

[33] The Applicant submits the Reconsideration Panel breached procedural fairness by failing to inform the Applicant the secondary sources it consulted and by failing to give the Applicant an opportunity to respond to such extrinsic information reviewed by the Reconsideration Panel and relied upon.

[34] It is trite that persons such as the Applicant generally have the right to know and respond to the case against them. This is particularly true if the extrinsic evidence relied upon by the decision-maker is dated after the hearing. While an Applicant may reasonably be expected to know the contents of material posted on the Internet on a particular subject for some reasonable period of time before a hearing, an Applicant such as Ms. Hiscock has no way of knowing about material posted after the hearing; in such a case, fairness demands that the Applicant be provided with the extrinsic material relied upon.

[35] The Respondent submits the Applicant had notice that web-based research would be carried out, and in an extremely general sense that is not disputed. But that cannot assist the Respondent in relation to content posted on the web after the hearing if it was reviewed by the Reconsideration Panel; the Applicant had no way of knowing of and/or to respond to such information.

[36] The Respondent says that web-based material was relied upon in earlier stages of this litigation. Indeed, that was the case regarding the Review Panel hearing in January, 2013.

However, I am unable to see how that validates the Reconsideration Panel's decision to conduct post-hearing research and then to rely, possibly, on material that may have been posted on the web after the hearing. In addition, I believe I can take judicial notice of the fact that medical science evolves and advances over time. Therefore, if the same information considered in 2013 was relied upon again in 2017 without updating web-based research, procedural fairness issues may arise because the previous material would be more than four years old, and quite possibly out of date. I note that it would also be unreasonable for the Reconsideration Panel to favour four year old medical evidence over more recent studies such as those relied upon by Dr. Rigby without explaining why it would favour dated information over recent information.

[37] The underlying problem for the Respondent is that neither the Court nor the Applicant knows what extrinsic evidence the Reconsideration Panel considered. We do not know when it was written or posted – and whether it was published before or after the hearing. We do not know what the articles or studies actually state. We do not know the degree of certainty with which any conclusions were made. Nor does the Court or the Applicant know what secondary studies or reports went into the extrinsic evidence considered.

[38] The Applicant received no proper notice or opportunity to respond; such a response could have changed the result. It is in my respectful view, unsafe to rely on the Reconsideration Panel's assessment of extrinsic evidence that was not tested as it might have been. The extrinsic evidence relied upon may be entirely determinative; but it may not be. It might be perfectly fine in the case of articles posted a reasonable time before the hearing that the Applicant should have

known of it. But the Applicant has no such assurance. Neither the Applicant nor the Court should be asked to speculate on matters such as this.

[39] Turning to the specifics, and to recall, the Reconsideration Panel said:

> This Panel has also consulted other known medical consensus, literature and research such as the website of the Mayo Clinic, Merck Manual of Diagnosis and Therapy, 19th edition, as well as the website of the National Institute of Neurological Disorders. All of these resources indicate that the cause of PSP is unknown.

[40] Notice had been given that the Mayo Clinic website might be reviewed, but again, that might very well be a moving target given changes and advances in medicine over time. The Applicant does not know what specifically was relied upon, and does not know whether or not the Mayo Clinic material was generated within a reasonable time before the hearing – in which case it might be admissible, or whether it was written and or posted only after the hearing – in which case it would not likely be admissible. Regarding the National Institute of Neurological Disorders [NIND] website, counsel for the Respondent indicated the Applicant put this material before the Review Panel. That said, the fact remains that the Applicant does not know if what was filed before the Review Panel – which sat in early 2013 - was the same material that was identified after the hearing by the Reconsideration Panel. If it was, then this material might be quite out of date after four years as discussed regarding the Mayo Clinic web material. As to the Merck Manual, the Court is left to speculate if this is a book or a website. If it is a website, it suffers from the same difficulties as the Mayo Clinic and NIND web-based in terms of when the material was written or posted and what exactly was considered. If it is a book, as it may be given the reference to it being the 19th edition, the information relied upon may be very out of

date considering the same edition (19th) was relied upon by the Review Panel four years earlier in 2013.

[41] In my view this is an unsatisfactory situation, and more importantly it was procedurally unfair to the Applicant.

[42] In addition to breaching the rules of procedural fairness in neither allowing the Applicant to see or respond to extrinsic evidence relied upon in reaching its decision, the process adopted by the Reconsideration Panel breached the "best possible light" rules enacted by Parliament in section 39 of the Act and as underscored by the Federal Court of Appeal in *Wannamaker*. Section 39 provides:

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 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	c) il tranche en sa faveur toute incertitude quant au

evidence, as to whether the applicant or appellant has established a case.	bien-fondé de la demande.
[Emphasis added]	[Je souligné]

[43] Section 39 makes it clear that a veteran is entitled to every reasonable inference to be drawn from the evidence presented to the Reconsideration Panel. This benefit of course applies to the new evidence presented in Dr. Rigby's report and related studies. However, it also applies to the extrinsic evidence the Reconsideration Panel considered and relied upon but failed to disclose to the Applicant.

[44] I am unable to see how the Applicant could advance submissions based on section 39 on the "evidence presented to it", i.e., presented to the Reconsideration Panel, without knowing what extrinsic evidence the Reconsideration Panel considered. It cannot be that the Reconsideration Panel alone not only determines what extrinsic post-hearing evidence it may consider, but also how and to what extent the presumptions created by section 39 may or may not apply, without input from the member or veteran before it. I am unable to accept that such unilateral consideration and decision, occurring after and outside the hearing, conforms with the substance of section 39's evidentiary benefits conferred on veterans by Parliament. In my view, to conclude otherwise empties section 39 of important content intended to benefit members and veterans of the Canadian Armed Forces.

[45] The resolution of these procedural and statutory breaches does not lie in adopting some new or different practice; rather, it lies in simply respecting the general rule of administrative law: persons in the position of the Applicant are entitled to see respond to the case against them.

In this case, this means they are entitled to see the results of a Reconsideration Panel's extrinsic research. The Reconsideration Panel should have given the extrinsic material it relied upon to the Applicant with an opportunity to respond. Not giving this material to the Applicant deprived her of the ability to respond. With respect, in all the circumstances, that was not fair and breached procedural fairness.

[46] Practically, in my view, the Reconsideration Panel at a minimum should have given the Applicant the web page addresses of the material relied upon and allowed her to respond to it. Or it could have supplied copies of the pages themselves. Here however, the Reconsideration Panel did neither.

[47] This breach of procedural fairness entitles the Applicant to judicial review. To the extent the process followed failed to respect section 39 of the Act, this aspect of the Decision is unreasonable because it falls outside of the range of possible, acceptable outcomes that are defensible on the law.

(2) Failure to consider subsection 50(g) of the *Regulations*

[48] It is common ground that the Reconsideration Panel made no mention of subsection 50(g) of the *Regulations*. Subsection 50(g) sets out a presumption that, in the absence of evidence to the contrary (of which there was none), a disease is service-related if it is demonstrated it was incurred in the course of the performance by the veteran of any duties that <u>exposed the veteran to an environmental hazard that might reasonably have caused the disease</u> [Court's emphasis].

[49] Here, it was not disputed that the Applicant's case centred on subsection 50(g). The veteran's argument was that he was exposed to environmental hazards during his military service which might reasonably have caused his PSP. The new medical evidence to be assessed by the Reconsideration Panel, spoke directly to this very point: Dr. Rigby's conclusion was:

> [I]n conclusion, the literature supports an association between environmental exposure and the development of PSP. There is scientific evidence to support the plausibility of an association with organic solvents. As such, I think that in the case of Mr. Hiscock, his condition could reasonably be attributed to his exposure."

[50] In my respectful view, in the circumstances of this case, the Reconsideration Panel was obliged to assess the new evidence in the context of subsection 50(g) of the *Regulations*: subsection 50(g) provided the context within which Dr. Rigby's new evidence needed to be assessed. The new evidence was not being tendered in the abstract or without a purpose: it was tendered to support a claim under subsection 50(g). Frankly I cannot see how the Reconsideration Panel could properly make a reconsideration decision in this case without considering the statutory basis underlying the request before it.

[51] The Respondent submitted it was reasonable for the Reconsideration Panel to reject the new evidence because there was no causal link between military service and the veteran's PSP. However, it seems to me that the causal link in a case like this is set out in subsection 50(g) of the *Regulations* itself, which asks: was Mr. Hiscock exposed to an environmental hazard that might reasonably have caused his PSP.

[52] In my respectful view, the Reconsideration Panel's decision is also not defensible on the law because it ignored the regulatory basis on which reconsideration was requested, i.e., subsection 50(g) of the *Regulations*.

(3) Evidence of Mr. Power

[53] As reported above, the Reconsideration Panel faulted the Applicant's evidence relating to his exposure to environmental hazards. The Reconsideration Panel stated that "the Panel does not know what chemicals he was exposed to, or for what duration, or for what quantities and whether exposure to occupational chemicals in itself would have reasonably contributed to the claimed condition."

[54] With respect, the Reconsideration Panel's finding in this respect is simply not accurate. In fact, good uncontested evidence going to these issues was supplied in a written report filed by Chief Warrant Officer (Ret.) Power, a former colleague of Mr. Hiscock. Moreover, Mr. Power corroborated evidence in this regard provided by the veteran himself.

[55] I am left to conclude that the Reconsideration Panel overlooked the evidence of Mr. Power. The difficulty in doing so is that the Reconsideration Panel overlooked material evidence going to a critical issue raised by Dr. Rigby's new evidence, namely, Mr. Hiscock's exposure to possible environmental hazards, including high levels of radiation, corrosive agents, and toxic organic solvents including carbon tetrachloride. Overlooking material evidence is also contrary to the evidentiary benefits intended to assist veterans enacted in section 39.

[56] In *Dunsmuir* terms, the Reconsideration Panel's conclusion in this regard is not defensible on the facts or the law. Thus, this aspect of the Decision is unreasonable as per *Dunsmuir*.

VII. Summary

[57] In this case, the Applicant's right to procedural fairness was breached by the failure of the Reconsideration Panel to disclose its extrinsic evidence and resulting abrogation of the Applicant's right to respond to it. I am not persuaded this procedural unfairness may be cured even if deference is given to the Reconsideration Panel. In addition, the Reconsideration Panel's mischaracterization of the evidence of Mr. Power was not defensible on the facts. The Reconsideration Panel ignored the regulatory basis for the request for reconsideration in the first place, namely the veteran's claim under subsection 50(g) of the *Regulations*. The Reconsideration Panel also failed to respect the "best possible light" rules set out in section 39 of the Act.

[58] While I appreciate that judicial review is not a treasure hunt for errors, I am satisfied, considering this matter as a whole, that judicial review is warranted not only for breach or procedural fairness, but also because the Decision falls outside the range of possible, acceptable outcomes which are defensible on the facts and law. It should be reconsidered on an expedited basis.

VIII. Costs

[59] The parties agreed that if the Applicant succeeds, she will be entitled to an all-inclusive award of costs in the amount of $4,000.00. The Respondent does not seek costs. Therefore, there will be an all-inclusive award of costs in the amount of $4,000.00 payable by the Respondent to the Applicant.

JUDGMENT in T-1991-17

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision of the Reconsideration Panel is set aside, the matter shall be reconsidered by a differently constituted Reconsideration Panel on an expedited basis, and the Respondent shall pay the Applicant an all-inclusive award of costs in the amount of $4,000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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