Federal Court  Cour fédérale

Date: 20191025

Docket: T-413-19

Citation: 2019 FC 1329

Ottawa, Ontario, October 25, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

LEE PASSEY

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision of the Veterans Entitlement Appeal Panel [the Appeal Panel] dated February 4, 2019. The Appeal Panel, albeit for different reasons, upheld a decision of the Entitlement Review Panel [the Review Panel] dismissing the Applicant's application for a disability pension. The Applicant alleged his Major Depressive Disorder [MDD] was consequential to left knee osteoarthritis. While Veterans Affairs Canada

[VAC] found the Applicant entitled to compensation for left knee osteoarthritis and MDD consequential to left knee osteoarthritis, it later rescinded the MDD award.

[2] Judicial review is allowed for the reasons that follow.

II. Facts

Factual background

[3] The Applicant served in the Canadian Forces from March 2007 to December 2014. Prior to joining the Canadian Forces, he served in the Australian Navy from 1993 to 2003.

[4] After joining the Canadian Forces, he was awarded compensation for PTSD by the Australian Navy in 2015. The Australian Navy awarded compensation for PTSD because of a number of incidents: the Applicant had been in a submarine which became flooded, there were carbon monoxide issues and fires underwater in the submarine, and he was robbed while on shore leave.

[5] In October, 2008, after joining the Canadian Forces, the Applicant suffered a left knee injury during a fitness test.

[6] He experienced ongoing issues with his left knee and eventually underwent arthroscopic surgery in December 2012.

[7] The Applicant re-injured his left knee in September 2013.

[8] Following the re-injury of the Applicant's left knee, the Applicant was examined and diagnosed with MDD by Dr. Boisvert, a psychiatrist, as outlined in Dr. Boisvert's report dated October 2, 2013 [Dr. Boisvert's Report]. Dr. Boisvert observed the Applicant using a cane and leg brace; he diagnosed the Applicant as suffering physical limitation "because of chronic knee pain." Dr. Boisvert also concluded the Applicant "clearly fits into the picture of a delayed onset PTSD associated with a major depressive episode still not completely resolved."

[9] Critical parts of Dr. Boisvert's Report are as follows:

> **History of Present Illness/Presenting Problems:** Most symptoms have been noted in the past 2 years, but according to the patient have been present for years before. For instance, member doesn't remember when he slept well for the last time. His insomnia is worse now, but has been present for more than 10 years. He has always been cautious and mildly anxious with certain triggers, but not to this point of being distressed or panicked except in the past two years.
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> Around 2008 he had a knee injury that became more and more incapacitating and for which there was no obvious medical cause. He did physiotherapy, didn't improve, got frustrated and irritable and became more and more depressed which culminated in ruining a family holiday when they went to Disney World. Eventually it was found he had scar tissue in his knee and got an operation and things improved afterwards. Before the intervention he was at "the lowest point in his life for about 9 months". It appears that after the depressive episode member started to think more about his work as a submariner and he had a series of very vivid dreams with 3 of them replicating the incident of the submarine taking water.
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> …
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> **Discussion:** Interesting presentation of someone who clearly had at least two traumatic incidents while a submariner, possibly coupled with chronic sleep deprivation that has bad insomnia and mild anxiety issue for years which seems to have been worsened by what appears to be depressive episode in the aftermath of physical limitation because of chronic knee pain. It is only in the last 2 years that member has been significantly anxious about triggers, safety and that his irritability has become unmanageable. Apparently, his perturbed sleep with movement and agitation is a

> relatively recent phenomenon too. Overall this clearly fits into the picture of a delayed onset PTSD associated with major depressive episode still not completely resolved.
>
> [Emphasis in Original]

[10] The Applicant applied for compensation to VAC. VAC awarded compensation for left knee osteoarthritis, and for MDD consequential to his left knee osteoarthritis in 2014. VAC found the left knee osteoarthritis arose out of his military service, and MDD was consequential to the left knee osteoarthritis.

[11] These conditions ended his career.

[12] Master Corporal Passey was released from the Canadian Forces on November 17, 2014, aged 41.

VAC's Rescission decision

[13] In June, 2016, VAC rescinded its award for MDD consequential to left knee osteoarthritis. It told the Applicant he was not eligible because he had a favourable decision from the Australian Department of Veterans Affairs for PTSD.

[14] VAC acknowledged the Applicant had both MDD and PTSD. However, VAC said that in its opinion, PTSD and MDD were "one and the same" psychiatric disability. This was disputed by Dr. Paul Sedge, the accepted expert before the Appeal Panel and the Applicant's treating psychiatrist. The Appeal Panel properly, with respect, rejected VAC's position in this respect.

[15] The Applicant appealed this decision to the Review Panel. He submitted his award for MDD consequential to left knee osteoarthritis should be restored.

Review Panel decision

[16] In March, 2017, the Review Panel decided the Applicant was not entitled to a disability award for MDD. It said there was insufficient evidence that the Applicant's MDD was consequential to left knee osteoarthritis.

Report of Dr. Sedge

[17] After receiving the Review Panel's decision, the Applicant asked Dr. Sedge, an experienced psychiatrist, and his treating psychiatrist, for an opinion. Dr. Sedge treated the Applicant at the Royal Ottawa Mental Health Care and Research Centre's Operational Stress Injury Clinic. He is the agreed expert in this case. He was asked to review the Review Panel's decision and give an opinion on the relationship between the Applicant's MDD and his service with the Canadian Forces.

[18] Dr. Sedge provided a report dated May 26, 2017 [Dr. Sedge Report], which states:

> My name is Dr. Paul Sedge, I am staff psychiatrist with the Operational Stress Injury Clinic in Ottawa Ontario. I have 30 years of military service as a combat arms officer, family physician and psychiatrist. I have been assessing and treating serving and retired veterans with trauma-related mental health injuries for almost 20 years.
>
> Mr. Passey has been under my care at the clinic since July 2015. He has asked me to review his recent Notice of Decision (18 April 2017) from the Veterans Appeal Board [the Review Panel] and provide my opinion regarding the relationship between his diagnosis of Major Depressive Disorder (MDD) and his service with the Canadian Forces (CF).

Based upon my review of Mr. Passey's clinical records, his clinical history can be briefly summarized as follows:

- Mr. Passey was exposed to potentially traumatizing events while serving the Australian Navy in the 1990s
- He joined the CF in 2007 and was largely asymptomatic (fit enrolment)
- He sustained an injury to his knee in September 2008 during military training and went on to develop chronic knee pain
- He developed increasing depressive and anxious symptoms starting as early as 2011 that became progressively debilitating
- He was eventually diagnosed with delayed onset PTSD with comorbid MDD in the setting of chronic knee pain (Dr. Boisvert, 2013)
- Despite multi-modal therapy, this veteran did not improve appreciably and was released from the CF in 2014. His care was transferred to the OSI Clinic where he continues to receive treatment.
- He was pensioned by the Australian government for PTSD
- He continues to suffer from moderate PTSD/MDD and chronic knee pain despite aggressive therapy

From my clinical experience, Mr. Passey's presentation is not atypical. Exposure to a traumatic event may remain sub-clinical for many years in high-functioning individuals. However, with additional injuries or stress, a person's capacity to cope may become overwhelmed to the point that they manifest functionally impairing symptoms. Often there are numerous stressors/factors that lead to the deterioration.

Unlike most physical injuries or diseases, it is almost impossible to identify a single causative factor to explain why an individual develops a specific mental illness.

In the Notice of Decision, page 6, the Panel wrote:

> *"The Panel did not receive any medical evidence form a specialist to indicate that the Applicant's depression is caused solely by his osteoarthritis to the left knee"*

I would argue that no mental health expert would make the claim that a specific mental illness was caused solely by one factor; physical or otherwise. That would be contrary to our current understanding of the biopsychosocial model for mental health. We do know that there is a strong relationship between pain and mood/anxiety. We also know that there is a strong relationship

> between impaired function/performance and self-esteem. In Mr. Passey's case, prior to his knee injury, he perceived himself as a high-functioning member of the CF. His knee injury not only caused him daily pain but impaired his capacity to perform with his peers and eventually cost him his career. His treating team at the time of his release identified the association between depression and his knee injury. I strongly agree with them.
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> In the Notice of Decision, page 6 the Panel also wrote:
>
> *"…PTSD and major depression…are always bracketed by the Department."* and
>
> *"The symptoms of PTSD and depression are generally similar."*
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> I agree that there is certainly an overlap between some of the symptoms of PTSD and depression. However, the two conditions are markedly different in terms of diagnosis and often with treatment modalities. They should not always be grouped or bracketed together. Similarly a veteran with multi-focal arthritis would not necessarily have all his joints grouped under one condition for pension purposes.
>
> I cannot profess to fully understand the pension tables or VAC's approach to managing the complexities associated with providing care for our injured. In this veteran's case, it appears that he stands to benefit from having his diagnosis of MDD identified as at least partially related to his CF service-related knee injury. If such a finding will improve his access to medication or alternative treatment in Canada then I strongly urge you to consider such an approach.
>
> [Emphasis Added]

III. Decision under review

[19] On January 31, 2019, following a *de novo* review of the Applicant's claim, the Appeal Panel decided that the Applicant was not entitled to a disability award for MDD consequential to left knee osteoarthritis [the Decision].

[20] The Appeal Panel found the Applicant could be granted a disability award for MDD notwithstanding his entitlement for PTSD from Australia. In this respect, the Appeal Panel over-ruled VAC.

[21] The Appeal Panel also agreed the Applicant suffers from MDD, and that MDD constitutes a disability.

[22] However, the Appeal Panel rejected Dr. Sedge's Report as not "credible". It said the report was "based in advocacy", and that he failed to rule out possible causal relationships between MDD and three other conditions in the Applicant's medical file, namely PTSD, right knee osteoarthritis and sleep difficulties.

[23] Material parts of the Appeal Panel Decision include:

> His knowledge of the left knee osteoarthritis is incorrect in terms of sequence and symptoms. He fails to note that the symptoms of Major Depressive Disorder and/or PTSD surfaced during a period of time when the Appellant's left knee was asymptomatic (summer of 2013). Dr. Sedge does identify that the two conditions of PTSD and Major Depression can overlap in terms of symptoms. His conclusion is based in advocacy as he suggests that if we can find that the Appellant's Major Depressive Disorder can be, at least, partially related to his left knee injury and if this then would allow him increased access to medication or treatment - then we should take that approach. He fails to explain how he has eliminated the PTSD as a cause or aggravation of the Major Depressive Disorder.
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> …
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> ln coming to his conclusions, Dr. Sedge relied on the facts as reported to him by the Appellant and some of the information in the service medical record. His report — to a certain extent - sits on the fence in terms of overlap of symptoms. He seems to say that if a positive finding would garner medication and treatment — we should rule favourably. This Appeal Panel finds that they are bound by rules of law rather than by those of good intent. We must make decisions based on credible evidence. Dr. Sedge's report

does not consider any other factor in regard to the Appellant's claimed condition of Major Depression and the doctor also fails to identify that the onset of symptoms that compelled treatment-seeking, occurred in concert with treatment-seeking for symptoms of PTSD.

…

What the Appeal Panel really needed in order to grant favourably - was a credible medical opinion who could help unpackage the overlap of symptoms. Such an Opinion would have ruled out the PTSD as a cause of the Major Depressive Disorder and explained why the symptoms were caused separate and due to the Osteoarthritis Left Knee. The Panel finds that while the Appellant may have felt as though he had a depressed mood when his left knee was symptomatic — that this does not fulfill diagnostic criteria. Treatment was directed at the PTSD and the symptoms of PTSD were present when the Appellant's left knee was not symptomatic as well as when the left knee was symptomatic. While the Panel does not doubt the diagnosis of either condition — the concept of "if not for" the left knee osteoarthritis the Major Depression would not have occurred, is not supported by the evidence.

…

The Panel is further reminded that the Entitlement Eligibility Guidelines for Depressive Disorders lists criteria for Depressive Disorders (SOC pages 227 to 228) and recommends that the Department consult with Medical Advisory due to caution regarding the clinical onset being attributable to a substance, medication or another medical condition. In direct comment, the treating health professionals seem to have only considered that the Major Depression arose due to left knee osteoarthritis. There seems to be no consideration of the PTSD or the Right Knee Osteoarthritis or reported sleep difficulties that occurred during the summer of 2013, when the left knee symptoms were controlled.

[Emphasis added]

IV. Relevant legislation and case law

[24] The Applicant applied pursuant to sections 45 and 46 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. Subsections 45(1) and 46(1) of the *Act* provide:

Eligibility	**Admissibilité**
45 (1) The Minister may, on application, pay pain and suffering compensation to a member or a veteran who establishes that they are suffering from a disability resulting from	**45 (1)** Le ministre peut, sur demande, verser une indemnité pour douleur et souffrance au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :
(a) a service-related injury or disease; or	**a)** soit par une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service.	**b)** soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.
…	…
Consequential injury or disease	**Blessure ou maladie réputée liée au service**
46. (1) An injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of	**46. (1)** Est réputée être une blessure ou maladie liée au service la blessure ou maladie qui, en tout ou en partie, est la conséquence :
(a) a service-related injury or disease;	**a)** d'une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service;	**b)** d'une blessure ou maladie non liée au service dont l'aggravation est due

	au service;
(c) an injury or a disease that is itself a consequence of an injury or a disease described in paragraph (a) or (b); or	**c)** d'une blessure ou maladie qui est elle-même la conséquence d'une blessure ou maladie visée par les alinéas a) ou b);
(d) an injury or a disease that is a consequence of an injury or a disease described in paragraph (c).	**d)** d'une blessure ou maladie qui est la conséquence d'une blessure ou maladie visée par l'alinéa c).

[25] In assessing whether an injury has been caused or aggravated by service, reasonable inferences must be drawn and evidence before the Board must be weighed and regarded in favour of the Applicant. These are requirements of sections 3 and 39 of the *Veterans Review and Appeal Board Act*, SC 1995, C 18 [the *VRAB Act*]:

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

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 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.

[26] Importantly, other than as set out in sections 3 and 39, the Appeal Panel must follow the normal rules of evidence. There is no exemption in the statute from the normal rules of evidence. Instead of an exemption, the *VRAB Act* imposes a positive duty on the Appeal Panel (and of course on Review Panels) to treat a veteran favourably in the circumstances specified by section 39, which itself is to be given a liberal construction in accordance with section 3. Equivalent provisions under the *Act* impose the same duty on VAC. In this connection, it is important to note that the Federal Court of Appeal recently ruled that the law of evidence before administrative decision-makers is governed exclusively by their empowering legislation and any

policies consistent with that legislation: *Vancouver Airport Authority v Commissioner of Competition*, 2018 FCA 24 per Stratas, Boivin, Laskin JJA at para 25:

> [25] The law of evidence before administrative decision-makers is not necessarily the same as that in court proceedings. An administrative decision-maker's power to admit or exclude evidence is governed exclusively by its empowering legislation and any policies consistent with that legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.) at para. 16; on how to interpret legislation that empowers administrators, see *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609 (S.C.C.), *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 (S.C.C.), *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) and *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.). The empowering legislation, properly interpreted, might allow an administrative decision-maker to admit material that courts would ordinarily reject as inadmissible.
>
> [Emphasis added]

V. The Issues

[27] The issue is whether the Decision is reasonable. I propose to review the main grounds on which the Appeal Panel dismissed the appeal, which were that Dr. Sedge's Report was not credible because (1) it was "based in advocacy" and (2) because it failed to "rule out" three other causes/aggravators of MDD, namely PTSD, right knee osteoarthritis and sleep issues. I will review these findings individually and review this application as an organic whole.

VI. Standard of Review

[28] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada holds 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 Appeal Panel: see for example *Werring v Canada (Attorney General)*, 2013 FC 240, per Simpson J at para 11. Thus, I agree, as did the parties, that the standard of review is reasonableness.

[29] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, the Supreme Court of Canada explains 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.

[30] The Supreme Court of Canada 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.

VII. Analysis

A. *Was it reasonable for the Appeal Panel to characterize Dr. Sedge's Report as not "credible"?*

(1) Were Dr. Sedge's conclusions "based in advocacy"?

[31] As noted already, the Appeal Panel concluded Dr. Sedge's Report was not credible in part because it was "based in advocacy".

[32] I note the Appeal Panel provided no authority for its advocacy finding. However, the contours of permissible and impermissible advocacy in this context are well-defined by Canadian jurisprudence. To begin with, the jurisprudence recognizes an expert should not assume the role of an advocate. As Sidney N. Lderman, Alan W. Bryant and Michelle K. Fuerst in *Sopinka, Lederman & Bryant: The Law of evidence in Canada*, 5th ed (Toronto: LexisNexis Canada, 2018) at 12.99 [*Sopinka*] put it:

> §12.99 The expert witness should provide independent assistance to the court and should not assume the role of an advocate. An expert should state the facts or assumptions upon which his or her opinion is based, and should not omit to consider material facts which weaken his or her opinion. ...

[33] Very materially for the case at hand, the Supreme Court of Canada, in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, per Cromwell, J. at para 49, put restraints on when an expert's report may be rejected for impermissible advocacy. In summary,

such exclusion of an expert report is to be "quite rare". Further, exclusion should occur only in "very clear cases" in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence.

[34] The Supreme Court ruled that anything less than clear unwillingness or inability to provide the court with fair, objective and non-partisan evidence "should *not* lead to exclusion" [emphasis added], but be taken into account in the overall weighing of costs and benefits of receiving the evidence:

> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. .... Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that <u>exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.</u>
>
> [Emphasis added]

[35] This Court accepts *White Burgess* as governing law with respect to the approach the Appeal Panel must take in conducting an advocacy assessment.

[36] It is readily apparent the Appeal Panel did not take this approach to the expert report provided by Dr. Sedge.

[37] I draw this conclusion because, in my respectful view, the Appeal Panel failed to heed the teachings of our highest Court before finding Dr. Sedge's Report is "based in advocacy". The Appeal Panel made no mention of this law, nor did it apply it to this case as it should have. Specifically, it paid no heed to the Supreme Court's injunction that such a finding is "quite rare", and "should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence". As it stands the Court is left without any transparent or intelligible justification for finding Dr. Sedge's Report was a "very clear case" of advocacy. That conclusion seems unintelligible on its face.

[38] The Supreme Court teaches that "anything less than clear unwillingness or inability to do so should *not* lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence" [Emphasis added]. This very specific prohibition against a finding of advocacy was not considered, followed, or applied by the Appeal Panel. With respect again, there doesn't appear to be anything in Dr. Sedge's Report that suggests either unwillingness or an inability on the part of Dr. Sedge to provide fair, objective and non-partisan evidence. Indeed, the Appeal Panel made no such finding.

[39] The Respondent, in written and oral submission, relied upon *Balderstone v Canada (Attorney General)*, 2014 FC 942, per Mactavish, J, as she then was, where this Court found an expert's report to be impermissible advocacy:

> [21] The Board further noted that Dr. Burlin had stepped beyond the role of an objective medical expert and had assumed the role of advocate for Mr. Balderstone. This was a reasonable finding, given that Dr. Burlin purported to apply legislative provisions to the facts of the case. Indeed, Dr. Burlin went so far as to argue that Veteran Affairs Canada "should be responsible for assisting [Mr. Balderstone] to receive the timely and appropriate ongoing dental care" that he needs because the Armed Forces could not prove "beyond a reasonable doubt that [Mr. Balderstone] received timely and appropriate care".
>
> [22] Whether Mr. Balderstone meets the legal test for disability benefits is not a medical question, and is one wholly outside Dr. Burlin's area of expertise.
>
> [Emphasis added]

[40] The Court asks if any of the indicia of impermissible advocacy identified in the jurisprudence above are found in Dr. Sedge's Report. Upon review, I am unable to find any such indicia. The expert stated the facts and assumptions upon which his opinion is based as required; the Appeal Panel makes no contrary finding. The expert did not omit to consider material facts, a point I will turn to later. And the expert provided the Appeal Panel with fair, objective, and non-partisan evidence supporting his diagnosis of MDD consequential to left knee osteoarthritis. Again, this is not disputed and in my view any such assertion is not supported on the record. Finally, the Appeal Panel does not point to any such error.

[41] In my view, *Balderstone* is distinguishable. Dr. Sedge gave his evidence inside his acknowledged area of psychiatric expertise, and also in his capacity as the treating psychiatrist. The doctor in *Balderstone* spoke outside his field of expertise and his report was therefore properly rejected. *Balderstone* does not assist the Respondent.

[42] To this point, the Appeal Panel's ruling that Dr. Sedge's Report is "based in advocacy" appears unreasonable not only in terms of its failure to meet the threshold constraints established by the Supreme Court, but also because Dr. Sedge's Report does not contain the indicia of advocacy identified by the jurisprudence including *White Burgess* and *Balderstone*.

[43] One must also look at what part Dr. Sedge's Report the Appeal Panel relied on to find it was "based in advocacy". The only part relevant here is the very last paragraph of the Report (the entire Report is found at paragraph 14 above):

> I cannot profess to fully understand the pension tables or VAC's approach to managing the complexities associated with providing care for our injured. In this veteran's case, it appears that he stands to benefit from having his diagnosis of MDD identified as at least partially related to his CF service-related knee injury. If such a finding will improve his access to medication or alternative treatment in Canada then I strongly urge you to consider such an approach.

[44] In my respectful view, neither taken as a whole or in parts, may this report reasonably be construed as constituting impermissible advocacy.

[45] The first sentence is a statement by the treating physician with respect to his relative lack of expertise in matters within the competence of VAC and the Board. Reasonably considered, that does not constitute advocacy, a point conceded at the hearing.

[46] The second sentence is a statement of possible facts relating to possible consequences of a determination that the Applicant's MDD is consequential to his left knee osteoarthritis. Reasonably considered and as conceded at the hearing, this is not advocacy either.

[47] The final sentence urges the Panel to adopt an approach which might, if permitted, favour the Applicant. I agree this urges a finding in support of the Applicant and to that extent advocates for the Applicant. However, I am unable to reasonably construe this sentence as tainting Dr. Sedge's entire report. Instead, after having fulfilled the obligations of an expert as noted above, this sentence is simply a submission by the treating psychiatrist that, if possible, help should be given to this veteran. I cannot condemn the report on this basis as it would be unreasonable to do so.

[48] To reject Dr. Sedge's entire Report as not "credible" because of its last sentence, or indeed because of its last paragraph, would be to throw the baby out with the bathwater.

[49] In my respectful view, there does not appear to be any reasonable basis to find the entire report based in advocacy, where only the last sentence of the last paragraph is problematic. Quite simply, the report was not "based in advocacy" and it was unreasonable to say otherwise.

[50] The rejection of the report denied the Applicant the benefit of the special evidentiary rules set out in sections 3 and 39 of the *VRAB Act*. I say this because if the Appeal Panel had addressed Dr. Sedge's Report as a matter of weight, as required by the Supreme Court of Canada in *White Burgess*, it would have been incumbent on the Appeal Panel to consider the Report in the context of sections 3 and 39. This did not happen. The Appeal Panel's unreasonable not credible finding prevented the Appeal Panel from considering its statutory duty to "draw ... every reasonable inference in favour of" the Applicant under subsection 39(a). This finding also prevented the Appeal Panel from considering its duty to resolve in favour of the Applicant "any

doubt, in the weighing of the evidence, as to whether the applicant ... has established a case", as required by subsection 39(c).

[51] In connection with section 3 of the *VRAB Act*, I draw further support from the findings of the Federal Court of Appeal in *Cole*, which states at para 88:

> [88] In my view, these provisions mandate an interpretation of the level of causal connection that is required by the phrase "directly connected with" that will facilitate, rather than impede, the awarding of pensions to members of the armed forces who have been disabled or have died as a result of military service.
>
> [Emphasis added]

(2) Was it reasonable for the Appeal Panel to fault Dr. Sedge for failing to "rule out" causes three other causes of the Applicant's MDD?

[52] The second key factor relied upon by the Appeal Panel in its credibility finding concerning Dr. Sedge's Report is the doctor's alleged failure to "rule out" the causative effect, in terms of the Applicants MDD, of three other issues facing the Applicant, namely PTSD, his right knee osteoarthritis and reported sleep difficulties. The Decision states:

> What the Appeal Panel really needed in order to grant favourably - was a credible medical opinion who could help unpackage the overlap of symptoms. Such an Opinion would have ruled out the PTSD as a cause of the Major Depressive Disorder and explained why the symptoms were caused separate and due to the Osteoarthritis Left Knee.
>
> ...

> In direct comment, the treating health professionals seem to have only considered that the Major Depression arose due to left knee osteoarthritis. There seems to be no consideration of the PTSD or the Right Knee Osteoarthritis or reported sleep difficulties that occurred during the summer of 2013, when the left knee symptoms were controlled.
>
> [Emphasis added]

[53] A major difficulty with this aspect of the credibility assessment is its lack of justification on the facts i.e., the record. With respect, there is no evidence to suggest the Applicant's MDD was consequential to, or had anything to do with, right knee issues. It seems to me, and with respect, that this objection is drawn out of thin air. Likewise, there was no evidence that sleep issues were a cause of the Applicant's MDD.

[54] With respect, in these two respects the Appeal Panel's conclusions are not defensible on the facts. They seem to constitute untethered speculation.

[55] Further, there is nothing in the record to suggest PTSD was the sole cause of the Applicants' MDD. Indeed, the Respondent was unable to point to any evidence suggesting any one of these issues might have been the sole cause or aggravator of the Applicant's MDD. That is as true of Dr. Sedge's evidence as it is of Dr. Boisvert, the psychiatrist who treated the Applicant before he left the Canadian Forces.

[56] I appreciate that members of the Appeal Panel, while not physicians let alone psychiatric experts, may consider and deal with medical issues. And I appreciate they are entitled to deference. However, *Dunsmuir* requires findings that fall with a range of possible, acceptable

outcomes that are defensible on the facts and the law. I agree the Appeal Panel may propound issues for further consideration by an expert. However, at least in my respectful view, such additional issues must be fairly and reasonably grounded in the record before it, and not entirely or partly speculative.

[57] In the result, I agree with the Applicant that it was unreasonable for the Appeal Panel to require the Applicant's treating psychiatrist to "rule out" [words chosen by the Appeal Panel, I should note] all three of these additional conditions. I also note that if the Appeal Panel had doubts in this respect, section 3 and subsection 39(c) might require the doubt to be resolved in favour of the Applicant in weighing the evidence.

VIII. Conclusion

[58] The Court's duty at this point is to stand back and assess this application for judicial review as an organic whole in terms of its reasonableness, as defined by the jurisprudence. It is not enough to simply add up the plusses and minuses.

[59] Overall, I have suggested that the Appeal Panel's 'credibility' assessment of Dr. Sedge's Report was unreasonable because it did not apply or respect the contours of advocacy law as stated by *White Burgess.* Further, the report itself does not contain any of the indicia of impermissible advocacy recognized by the jurisprudence; indeed the tribunal made no contrary finding having relied only on the last sentence of this fairly detailed report. These aspects of the Decision are not defensible on the facts and law. In addition the Appeal Panel's rejection of the report because it did not "rule out" three other conditions was not evidenced-based and therefore

is not defensible on the facts and the law. Further and again reasonably considered Dr. Sedge's report may not be described as one "based in advocacy" where only its last sentence is problematic: that finding is not available on this record.

[60] It is very relevant also that these matters deprived the Applicant of his right to an assessment of the evidence within the context of sections 3 and 39 of the *VRAB Act*.

[61] Stepping back and looking at the Decision as an organic whole, I find the Decision does not fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law as required by the Supreme Court of Canada in *Dunsmuir*. Therefore judicial review will be granted.

IX. Costs

[62] The parties did not seek costs therefore no costs will be ordered.

JUDGMENT in T-413-19

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted.

2. The Decision of the Appeal Panel is set aside.

3. The matter shall be remanded for redetermination by a differently constituted Appeal Panel.

4. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-413-19
STYLE OF CAUSE:	LEE PASSEY v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	OTTAWA, ONTARIO
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