Federal Court  Cour fédérale

Date: 20210527

Docket: T-1220-20

Citation: 2021 FC 494

Ottawa, Ontario, May 27, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

PAULA TRACHY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Trachy asks the Court to review and set aside a decision made by Veterans Affairs Canada [VAC] denying her request for reimbursement of personal training sessions under the *Veterans Affairs Health Care Regulations*, SOR/90-594 [*VHCR*].

[2] For the reasons that follow, I find that the decision under review is unreasonable, and thus the application must be allowed.

Ms. Trachy's Background

[3] Ms. Trachy served in the Canadian Forces from 1993 to 2008. In June 2004, she sustained an injury to her lower back while on duty and subsequently received a pension award. She was later diagnosed with lumbar posterior derangement and stenosis with pain to the left lower extremity of her back. Since 2008, she has received regular treatment for this injury from her family doctor, chiropractor, physiotherapist, massage therapist, and personal trainer.

[4] The Respondent raises a preliminary objection to the admissibility of some statements and exhibits in Ms. Trachy's affidavit. Specifically, the objection relates to documentation pertaining to Ms. Trachy's previous applications for the benefits at issue here that were made in 2013, 2014, and 2015. It is submitted that this information was not before the decision-maker. It is also submitted that she is improperly raising a "new argument" not raised before the decision-maker; namely, that the requested personal training sessions "consist of preventative health care approved by the Minister under section 4(c) of the VHCR."

[5] The objection was taken under reserve. A proper ruling on the first objection requires a detailed recital of the relevant facts. In light of my findings, I need not address the second objection.

Ms. Tracy's 2019 Application for Benefits

[6] Ms. Trachy's application for reimbursement of personal training expenses was made pursuant to the *VHCR* and VAC's guidance document entitled "Related Health Services (POC 12)" [POC 12].

[7] By letter of December 11, 2019, bearing the subject line "Approval of Personal Training Services under paragraph 30 of POC 12" Ms. Trachy wrote as follows:

> As part of a long-term pain management strategy, I am writing to request authorization for Personal Training as a benefit under paragraph 30 - Pain Management. The requested treatment meets the principles identified in paragraph 31 (a) - (c) in that:
>
> > a) There can be no adverse effect caused to my health by extending authorization for Personal Training as a health benefit,
> >
> > b) All medical professionals involved in my pain management strategy have identified sufficient improvements to my health outcomes to support the continued use of Personal Training as an effective pain management strategy, and
> >
> > c) lt is clear that this treatment will only help mitigate daily pain, not alleviate it.
>
> In accordance with the intention of paragraph 32, I have included supporting evidence of how this benefit meets the requirements under Paragraphs 17 & 18 - Approval of Services Appearing on Benefit of Related Medical Services (POC 12).
>
> In accordance the requirements identified the above noted paragraph, please attached the following supporting documentation:
>
> > a) Approval Letter 2014-2015 Personal Training sessions March 2014
> >
> > b) Physician's Prescription September 18, 2019 Dr. Minjeong Eom;
> >
> > c) Chiropractor's Prescription for personal training to be included a defined treatment plan dated September 23, 2019 from Dr. Isaac Cristoveanu;

> d) Written evaluation from physiotherapist Amira Abdelshahid dated December 2, 2019;
>
> e) Written statement need and anticipated outcomes and estimated cost dated November12, 2019 from Darcy Surette
>
> These documents satisfy the conditions established sub-paragraphs (a) – (e) of Paragraph 17, specifically:
>
> a) Personal Training qualifies as a related health service;
>
> b) Personal Training considered clinically necessary to maintain my health;
>
> c) My overall condition would be negatively affected by the absence of Personal Training; and
>
> d) Personal Training, in conjunction Massage, Chiropractic and Physiotherapy is necessary for long-term effective treatment of the injury and management of pain.
>
> I am therefore seeking authorization for the purchase of 144 personal training sessions for 2020.
>
> As identified in the letter from Darcy Surette the cost of these session is $12 204.00 ($75 per session) to be paid in full at the time of benefit purchase. Your timely attention to this matter is greatly appreciated as my current sessions expire in February 2020.
>
> [emphasis added]

[8] In a very brief letter dated January 7, 2020, the request was denied:

> VAC cannot approve this request because Darcy Surette is not recognized or approved by the Department to provide personal training.

[9] Ms. Trachy appealed the denial after discovering that there is no list of recognized or approved personal trainers, and it is impossible to become one.

[10] In her appeal dated February 10, 2020, she references that the requested personal trainer benefits (provided by Mr. Surette) have previously been approved by VAC under paragraphs 17 and 18 of POC 12:

> Personal Training sessions three-times a week has been an approved medical treatment, prescribed by my physician and supported by my Chiropractor and Physiotherapists, for which I have received benefits from Veterans Affairs Canada since 2012. To date, these benefits have always been approved under paragraph 17 & 18 as << Other Benefits Not Appearing on the Grid >>. Following Ms. Fahey-Budd's letter I was encouraged to understand that Personal Training had become a standard benefit for which my Personal Trainer could register under POC 12. As a result, my trainer and I undertook the following actions in order to comply with the requirement.
>
> On January 20, 2020, I called the general information number with Veterans Affairs Canada (VAC) and spoke with Nancy. Nancy confirmed that VAC does not have a list of Personal Trainers as Registered Providers. She then transferred me to Carla with Blue Cross. Carla advised me that Blue Cross doesn't have a list of Personal Trainers as Registered Providers either. She recommended that Mr. Surette contact the Blue Cross Provider line and register himself.
>
> On January 25, 2020, Mr. Surette followed the instructions received from Blue Cross in an attempt to register, however, the option to register as a personal trainer is not provided. A screen capture image is included with this letter.
>
> Therefore, given that there is no way I can use a Personal Trainer who is or can become a Registered Provider, I would reiterate my initial request that VAC authorizes the reimbursement of the 144 training sessions for a total of $12 204.00, as it was always done to date. This will allow for my benefit to continue uninterrupted while VAC undertakes the work to correct the oversight in their registration process to allow Personal Trainers to become Registered Providers.
>
> [emphasis added]

[11] Her appeal was denied by decision dated March 23, 2020. In so doing, the Appeals Officer references swimming and exercise programs:

Veterans Affairs Canada (VAC) has reviewed your decision dated January 7, 2020, made by the Medical Authorization Centre regarding coverage of Personal Training Sessions.

We are not able to approve your request.

The following information was considered when making this decision:

- Veterans Health Care Regulations
- Policy: Related Health Services (POC 12)
- Original decision: 2020/01/07
- Request for review: 2020/02/10
- VAC National Program Service Specialist consultation: 2020/03/23

The policy objective of the Related Health Services program is to offer eligible clients a range of health professional services aimed at improving, restoring, or maintaining physical and mental health.

Swimming and/or exercise programs can be provided to clients who need exercise or swimming therapy in response to an identified health need. Generally, swimming and/or exercise programs are not to be provided when they are being used strictly as a regular exercise, or as a preventative measure.

Swimming and/or exercise programs may be approved by VAC when:

a. the program is part of a structured rehabilitation plan or the program is required for rehabilitation of an acute condition or of an acute flare-up of a chronic condition that requires a short period of rehabilitation, and

b. it has been developed and is being monitored by an approved health care practitioner. Monitored means that the health professional periodically reviews the program and the client's progress and adjusts the program as required, and

c. the client's participation in the program is being directly supervised by the approved health care practitioner who developed the plan or by an individual working under the guidance of the approved health care practitioner who developed the plan. Directly supervised means that the health professional or another designated individual is present to provide guidance and assistance when the client is carrying out the prescribed exercise or swimming plan.

We have reviewed the evidence on your file. In order for VAC to consider personal training sessions, we would require medical documentation indicating that the exercise program is part of a

> structured rehabilitation plan or the program is required for rehabilitation of an acute condition or of an acute flare-up of a chronic condition that requires a short period of rehabilitation and the program has been developed and is being monitored and directly supervised by a health professional approved by VAC. We understand that as per VAC decision letter dated October 14, 2015 (enclosed), that you did not meet the required criteria for the swimming and/or exercise programs above, however, you were approved on a one-time exceptional basis for an additional one year of Personal Training Sessions to allow you to make alternate arrangements.
>
> Based on the available information and in consultation with the VAC National Program Service Specialist, we have determined that your request for Personal Training Sessions does not meet the intent of the Related Health Services Policy and therefore, we are unable to approve your request.
>
> We are therefore confirming the original decision.
>
> [underlining added, and bolding added for emphasis]

[12] The portions of the letter I have underlined are taken *verbatim* from sections 27 and 28 of POC 12 under the heading "Swimming and Exercise Programs".

[13] It is notable that the decision-maker indicates that the decision was made after having reviewed the evidence on Ms. Trachy's file. It is also of note that the decision-maker references the VAC decision on reimbursement of personal training made in a letter dated October 14, 2015. This letter had not been provided by Ms. Trachy with her application, thus it must have been found by the decision-maker on reviewing Ms. Trachy's file. Accordingly, historical documents relating to previous claims for reimbursement of personal trainer expenses apparently were before this decision-maker, but are not included in the certified tribunal record.

[14] Ms. Trachy sought a review of this decision to the second level by letter dated May 14, 2020. She raised three grounds of review:

> a. The reasons failed to substantively respond to Ms. Trachy's request because they considered it under s. 27-29 of the Related Health Services Policy (Effective Date: May 18, 2012) ("POC 12") when Ms. Trachy actually made her request under s. 17, 18 and 30.
>
> b. The reasons do not substantively respond to Ms. Trachy's request because they fail to consider the fact that Ms. Trachy's personal trainer could not register POC 12 as described in her letter of February 10, 2020.
>
> c. The reasons mischaracterize the history of Ms. Trachy's past claims for personal training benefits by improperly relying on an October 14, 2015 decision letter.

[15] With respect to item c, she provides a detailed explanation of why she considers the characterization of the October 14, 2015 letter as improper. It was not a final decision as she made an application to this Court to judicially review it, and the VAC settled that application under Minutes of Settlement "that do not speak to a one time exception" but rather, at paragraph 19, provided that she

> will not apply for personal training benefits to VAC before September 2019. Any new application for personal training services made during or after September 2019 cannot include a request for reimbursement of services received before September 2019.

[16] Accordingly, she advised VAC that it was improper to consider and rely on the information contained in the October 14, 2015 decision letter as it "is not a final decision and does not represent how Ms. Trachy's previous requests were resolved" [emphasis added].

[17] The second level appeal was denied in a letter dated September 17, 2020. It is that decision that is under review. The relevant portions of that decision are the following:

> Your file has been reviewed with care and consideration, taking into account the information available. I regret to inform you that I

> must confirm the previous decision and decline your request. Please allow me to explain my decision.
>
> Veterans Affairs Canada may approve a swimming or exercise program when the program is part of a structured rehabilitation plan. It can also be approved when it is required for rehabilitation of an acute condition (such as post-operative) or an acute flare up of a chronic condition requiring a short period of rehabilitation. Per the *Veterans Health Care Regulations*, this program must be developed and monitored by an approved health care practitioner and directly supervised by the approved health care practitioner or by an individual working under the guidance of the health care practitioner who developed the plan.
>
> Many of VAC's clients suffer from some form of chronic pain which by nature will generally be expected to persist to some degree despite medical intervention. VAC will provide access to a wide range of services and interventions to clients to assist them in managing their chronic pain. As with swimming or exercise programs, these services and interventions must be developed and monitored by an approved health care practitioner and directly supervised by the approved health care practitioner or by an individual working under the guidance of the health care practitioner who developed the plan.
>
> The information submitted by your family physician, Dr. Eom, indicated that the requested exercise program is recommended for pain management for strengthening back muscles for back injury. Although recommended by Dr. Eom, and supported by Dr. Cristoveanu and Dr. Abdelshadid, the program has not been developed and monitored by an approved health care practitioner nor is it directly supervised by an approved health care practitioner or by an individual working under the guidance of the health care practitioner who developed the plan. lt has been developed and will be monitored by personal trainer, who is not an approved health care practitioner.
>
> Therefore, because of the above reasons, the requested exercise program cannot be covered under a swimming or exercise program of the Related Health Services policy. [emphasis added]

[18] Despite having reviewed Ms. Trachy's "file" the decision-maker: (1) fails to address her objection that she has applied pursuant to sections 17, 18 and 30 of POC 12, not sections 27 and

28, and (2) does not address her previous requests for coverage of personal training expenses nor how they were resolved by VAC.

The Preliminary Issue

[19] The Respondent correctly notes that it is generally the case that evidence that was not before the decision-maker and that goes to the merits of the matter, with certain limited exceptions, is not admissible: see *Association of Universities and Colleges of Canada v Canadian Copyrights Licensing Agency*, 2012 FCA 22. Three exceptions are noted in that decision: An affidavit that (1) provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, (2) brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the Court can fulfill its role of reviewing for procedural unfairness, and (3) highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[20] Ms. Trachy submits that her affidavit and the exhibits thereto fall under the first exemption as relevant background material. Specifically, they are: (1) VAC's letter dated September 24, 2013, approving her request for reimbursement of personal training sessions for 2012 and 2013, (2) her application dated January 27, 2014, requesting approval of the same benefits for 2014 and 2015, and (3) the VAC letter dated March 7, 2014, approving the benefits for 2014, her letter dated March 2, 2015, requesting approval of the same benefits for 2015 and 2016 and the VAC letter dated May 25, 2015, denying her those benefits, her appeals of that decision, and application for judicial review and the fact that it was settled by VAC.

[21] The Respondent submits that the burden was on Ms. Trachy to provide these documents with her appeals, and not on the VAC to search them out. I disagree for several reasons.

[22] First, as noted by Ms. Trachy, the documents at issue are all VAC documents consisting either of applications for benefits made by her to VAC or decisions on those applications rendered by VAC officials. Second, it is evident as indicated earlier that many, if not all of these documents were already in her file. Third, Ms. Trachy advised VAC on numerous occasions that the benefits she sought had been previously approved and one would have thought that a decision-maker who claims to have carefully reviewed her file would have simply retrieved them. Lastly, the decision-maker here asserts that he or she has reviewed, among other things, "the evidence on your file" which, given the history of the Applicant's claims and her specific reference to providing them to the Respondent, would reasonably be expected to be her complete file.

[23] I agree with Ms. Trachy that the impugned facts and documents are admissible in this application. They provide the background as to how her earlier applications were dealt with and, as her application states, they had been approved under sections 17, 18, and 30 of POC 12.

[24] In the alternative, the Respondent submits that these facts and documents are irrelevant to the decision under review. For reasons that will become obvious, I disagree.

The Reasonableness of the Decision under Review

[25] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 15, the Supreme Court of Canada instructed reviewing courts on the proper approach when conducting a reasonableness review:

> In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified.

[26] The Federal Court of Appeal in *Jog v Bank of Montreal*, 2020 FCA 218 held that when a decision-maker fails to grapple with all the relevant evidence before him or her, then the decision "lacks the transparent, intelligible and justified explanation required by Vavilov (at para. 15) and thus, is unreasonable."

[27] The decision-maker here failed to grapple with the evidence and statements made in the application in many respects.

[28] First, the decision-maker fails to address the fact that the application was brought by Ms. Trachy pursuant to sections 17, 18 and 30 of POC 12. It could be that the decision-maker believed that the application did not fall under those sections, but there is no such finding in the decision. There is not one word in the decision that relates to or addresses those provisions. A decision that completely fails to address the issue raised cannot be said to be a reasonable decision.

[29] Second, the decision-maker fails to address the fact raised in the appeal that "in the past, these benefits were all approved under s. 17 and 18 of the POC 12." There is a complete lack of any recognition that this was not the first time Ms. Trachy applied for the reimbursement of the personal trainer expenses.

[30] What makes this particularly egregious is that a review of the earlier approved applications indicates that the applications and supporting letters from health care professionals are almost identically worded to those made in 2019.

[31] The Respondent submits that the decision-maker here is not bound by previous VAC decisions. In its memorandum, the Respondent writes: "One panel of an administrative board may disagree with a later panel of the same board as long as there is sufficient transparency and justification in the reasoning" citing *CMRRA-SODRAC Inc v Apple Canada Inc*, 2020 FCA 101 [*Apple Canada*], at paragraph 17 which cites *Canada (Attorney General) v Bri-Chem Supply Ltd*, 2016 FCA 257, at paragraph 40. As the Federal Court of Appeal noted in *Apple Canada* on the review of tariff rates, circumstances vary from time to time and it found that "the Board has adequately, indeed amply, explained its reasoning for setting the rates."

[32] The Supreme Court's decision in *Vavilov* at paragraphs 131 to 132 is directly on point:

> Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the

> parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.
>
> As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.
>
> [emphasis added]

[33] In the matter before the Court, the VAC had approved the requested benefits pursuant to sections 17 and 18 of POC 12 on at least three previous occasions for Ms. Trachy, and based on nearly identical supporting documents. There is no justification offered for the departure in the 2020 decision. As a consequence, as the Supreme Court of Canada notes, this suggests arbitrariness and undermines confidence in POC 12 decision-makers and in the Veteran's Health Care system as a whole. The decision is unreasonable.

[34] Ms. Trachy invited the Court to offer its interpretation of the *VHCR* and POC 12 as guidance for future decision-makers. I do not find that to be necessary or desirable. However, I will reiterate what I said to Respondent's counsel at the hearing. If the VAC now takes the view

that these benefits are not reimbursable under sections 17, 18 and 30 of POC 12, then it must conclude that its earlier interpretations to the contrary were not reasonable, and it must provide cogent reasons for that conclusion.

[35] Ms. Trachy is entitled to her costs. The parties advised the Court that they were agreed that if Ms. Trachy were successful, her costs should be fixed at $5,467.22, all in. That strikes the Court as a reasonable figure.

JUDGMENT IN T-1220-20

THIS COURT'S JUDGMENT is that the application is allowed, the decision of Veterans Affairs Department dated September 17, 2020, denying Ms. Trachy reimbursement of her personal trainer costs, is set aside and her appeal is to be reconsidered by a different officer in the second level appeals unit consistent with these Reasons, and she is awarded her costs fixed at $5,467.22.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	PAULA TRACHY v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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APPEARANCES:

Nigel McKechnie Colleen Hoey	FOR THE APPLICANT
Julie Chung	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mann Lawyers LLP Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ottawa, Ontario	FOR THE RESPONDENT