Federal Court  Cour fédérale

Date: 20210615

Docket: T-481-20

Citation: 2021 FC 606

St. John's, Newfoundland and Labrador, June 15, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ROBERT JAMES THOMSON

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Mr. Robert John Thomson (the "Applicant") seeks judicial review of the decision of the Veterans Review and Appeal Board (the "Board"), signed on March 10, 2020. In that decision, the Board refused his request for reconsideration of a decision of an Entitlement Appeal Panel, denying his application for an Exceptional Incapacity Allowance ("EIA"), made pursuant to section 72 of the *Pension Act*, R.S.C., 1985, c. P-6 (the "Act"). The Applicant sought

reconsideration pursuant to section 32 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the "VRAB Act").

[2] The Applicant's request for reconsideration is dated August 21, 2019. He also submitted an Amended Request for Reconsideration dated August 21, 2019.

[3] The Attorney General of Canada is the Respondent (the "Respondent") in this application pursuant to Rule 303(2) of the *Federal Courts Rules*, S.O.R./98-106 (the "Rules").

II. **BACKGROUND**

[4] The Applicant was a passenger on board a Canadian Forces Aircraft on October 30, 1991 when that aircraft crashed and he suffered catastrophic permanent injuries. At the time, he was a civilian employee of the Department of National Defence and was on duty.

[5] On January 21, 1994, the Applicant chose to receive a pension pursuant to the *Flying Accidents Compensation Regulations*, C.R.C., c. 10 (the "Regulations").

[6] In November 1992, the Applicant applied for an EIA. This application was denied by Veteran Affairs Canada (the "VAC") in a decision made on April 18, 2008. The VAC found that section 3 of the Regulations provided for compensation according to Schedule 1 of the Act but not for other benefits or allowances, including the EIA.

[7] The Applicant sought review of this decision before an Entitlement Review Panel. After a hearing that was held on October 16, 2013, his request for EIA was denied.

[8] The Applicant appealed to an Entitlement Appeal Panel. A hearing was held on June 19, 2014. In its decision, the Entitlement Appeal Panel denied the Applicant's Appeal.

[9] In the meantime, the Applicant had requested review by an Entitlement Review Panel of the denial of his requests for the Attendance Allowance and Clothing Allowance, and a hearing was held on August 1, 2008, relative to that request. The Allowances were not granted. Following an appeal to an Entitlement Appeal Panel, a hearing was held on July 22, 2010 and the request was again denied.

[10] The Applicant submitted a request for reconsideration of the decision of that Entitlement Appeal Panel. A hearing took place on December 12, 2011. In a decision dated December 12, 2011, the reconsideration request was dismissed.

[11] The denial of the Attendance Allowance and Clothing Allowance was not an issue before the Board at the hearing on June 19, 2014, and is not an issue in the present application.

[12] The Applicant sought judicial review of the June 2014 decision. In a decision reported as *Thomson v. Canada (Attorney General)*, 2015 FC 985, the application for judicial review was dismissed. The trial judge made the following observations in paragraph 105 of his Reasons:

> For the above mentioned reasons, I must dismiss Mr. Thomson's application as I cannot conclude that the Appeal Panel's decision

> regarding the interpretation of the FAC Regulations was unreasonable and not within the range of acceptable possible outcomes, or that its interpretation led to a discriminatory treatment in violation of Mr. Thomson's *Charter* rights.

[13] The Applicant proceeded with an appeal to the Federal Court of Appeal and in a decision reported as *Thomson v. Canada (Attorney General)*, 2016 FCA 253 (leave to appeal to S.C.C. refused, 37351 (30 March 2017)), the appeal was dismissed. At paragraph 44 of its Reasons, the Federal Court of Appeal said the following:

> One final point bears mention and repeats something the Federal Court also noted. I agree with the appellant that there does not seem to be any principled reason to justify why he has been treated differently from so many others who are entitled to the benefits he seeks. Indeed, it is probable that the failure to amend the *FAC Regulations* to extend entitlement to allowances is simply an oversight. If that is the case, it is to be hoped that any pleas the appellant might make to have the *FAC Regulations* amended to afford him the benefits he seeks will be favourably received by the Governor in Council.

[14] The details below are taken from the Statement of Case produced by the Board, as well as from the affidavit of the Applicant, sworn on May 13, 2020. The Applicant attached several exhibits to his affidavit.

III. **THE DECISION OF THE BOARD**

[15] The Board considered the Applicant’s request for reconsideration of the Entitlement Appeal Panel’s decision denying his request for the EIA. The Board enjoys the power to reconsider a decision pursuant to section 32(1) of the VRAB, which provides as follows:

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

[16] The Board noted that the Applicant based his request for reconsideration upon an error of law, on the part of the Entitlement Appeal Panel, and upon the availability of new evidence.

[17] The Board identified the process that applies in response to a request for reconsideration pursuant to section 32 of the VRAB Act, as follows:

> A Reconsideration hearing involves a two-stage process. Stage 1 is a screening stage in which the Reconsideration Panel considers whether there are grounds for reconsideration. The Panel considers if the Appeal decision made an error of fact or an error of law and if new evidence meets the Four-Part (Fresh Evidence) Test. If none of the grounds are met, the request for Reconsideration is denied. If any of the grounds are met, the Panel moves to Stage II which is a full reconsideration of the claim based on its merits.

[18] The Applicant alleged an error of law on the part of the Entitlement Appeal Panel in that it adopted an inappropriately narrow interpretation of subsection 3(1) of the Regulations “by relying on the plain meaning rather than performing a purposive and contextual analysis”. The Board noted that the Applicant’s arguments on this point were set out in detail in his Amended Request for Reconsideration.

[19] The Board found that the Federal Court of Appeal had addressed this argument in its decision made on October 19, 2016, and quoted paragraphs 32 and 33 of that decision. At page 7 of its decision, the Board said the following:

> In reaching its decision, the Federal Court of Appeal considered the very arguments that are now put forward by the Appellant on his Reconsideration application. The Federal Court was definitive in its finding that "no purposive interpretation that would allow ignoring these clear words in favour of finding that a pension includes the allowances set out in Schedule III of the Pension Act" and that "a review of the history of the relevant provisions supports the interpretation of the Appeal Board." The Federal Court agreed with the Appeal Panel's interpretation of the *FAC Regulations* and the *Pension Act* and with its conclusion that the Appellant was entitled only to a pension but was not entitled to an exceptional incapacity allowance. The Federal Court of Appeal found that the Appeal Panel's interpretation was both reasonable and correct.

[20] The Board concluded, in the following terms, that the Applicant had failed to show an error of law on the part of the Entitlement Appeal Panel:

> This Panel therefore finds that the Appellant's present arguments with respect to an error of law have already been determined by the Federal Court of Appeal in its 19 October 2016 decision. In accordance with the reasoning of the Court, the Reconsideration Panel finds no error of law was made by the Appeal Panel in relation to the interpretation of the relevant provisions of the FAC Regulations and the Pension Act.

[21] The Applicant submitted three documents as new evidence, as follows:

> Annex A: *Veterans Treatment Regulations* from the Consolidated Regulations of Canada (1978),
>
> Annex B: Treasury Board Proposal to the Privy Council #715891 dated 12 January 1973, and
>
> Annex C: Treasury Board Proposal to the Privy Council #732702 dated 20 December 1974.

[22] The Board then addressed the Applicant's reconsideration request that was based upon the availability of new evidence and identified the relevant criteria as follows:

> The criteria are as follows:
>
> > The evidence should generally not be admitted if, by due diligence, it could have been adduced at a previous hearing,
> >
> > The evidence must be relevant in the sense that it bears upon the decisive, or potentially decisive, issue in the adjudication,
> >
> > The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > It must be such that if believed, it could reasonably, when taken with other evidence adduced earlier, be expected to affect the result.

[23] The Board considered each document that the Applicant identified as new evidence, against each of the four criteria and determined that none of the three documents met the test to be considered "new evidence".

[24] The Board applied each criterion of the test to each document tendered by the Applicant. In respect of the Veterans' Treatment Regulations, it found that this material was not "evidence"

but subordinate legislation, that is regulations. Nonetheless, it applied each of the four parts of the test. It gave the benefit of the doubt to the Applicant about the availability of this material before earlier hearings, and did not hold the lack of due diligence against him. It found that this material was credible, but not relevant and would not have changed the outcome of the matter before the Entitlement Appeal Panel.

[25] The Board looked at the Treasury Board Proposal to the Privy Council. Again, it found a lack of due diligence but did not reject the evidentiary value of the material on that basis alone. It found it to be relevant and credible, yet this material "could not reasonably be expected to change the outcome" of the Entitlement Appeal Panel's decision.

[26] Finally, the Board looked at the third document, that is Treasury Board document number 732702. It found that this document had been previously submitted to an Entitlement Reconsideration Panel in 2011 and forms part of his Statement of Case before the Board. In these circumstances, it then found that this document is not "new evidence" for the purpose of the reconsideration application.

[27] The Board concluded that the Applicant had not satisfied the first stage of the reconsideration process that is contemplated by section 32 of the VRAB Act: he had not shown an error of law and he had not produced evidence that met the legal test for "new evidence". The Board declined to proceed to the second stage and dismissed the request for reconsideration.

IV. **SUBMISSIONS**

[28] The Applicant acknowledges that the decision of the Board is reviewable on the standard of reasonableness; he argues that the decision is not reasonable.

[29] The Respondent submits that the decision meets the relevant standard of review, that is, reasonableness.

[30] The Respondent also argues that the issue raised in the Applicant's application to the Board for reconsideration, about the meaning of subsection 3(1) of the Regulations, is *res judicata* since the issue of statutory interpretation was decided by the Federal Court and the Federal Court of Appeal, upon an application for judicial review of the 2014 decision made by the Entitlement Appeal Panel.

V. **DISCUSSION AND DISPOSITION**

[31] The first matter to be addressed is the applicable standard of review.

[32] In the fairly recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.), the Supreme Court of Canada decided that presumptively, decisions of administrative decision makers, including the Board, are reviewable on the standard of reasonableness.

[33] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court said that the hallmarks of a reasonable decision are that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[34] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[35] The Respondent objected to the inclusion of Exhibit 5, that is a copy of the *Flying Accidents Compensation Order*, P.C. 6538, dated December 29, 1949, on the basis that this document was not before the Board in earlier appeals or before the Board that dealt with the request for reconsideration.

[36] Exhibit 5 does not meet the exceptions to the general rule that only the material that was before the decision maker should be presented to a Court upon an application for judicial review; see the decision in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)* (2012), 428 N.R. 297 (F.C.A.).

[37] In the exercise of my discretion, the exhibit was not struck out and was not considered.

[38] I will briefly address the Respondent's argument that the issue about the Applicant's entitlement to the EIA is *res judicata*.

[39] According to the decision in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, the doctrine of *res judicata* requires a party to establish three elements as follows:

1. that the same question has been decided;
2. the decision was final;
3. and the parties in both proceedings are the same.

[40] I agree with the Respondent's position.

[41] To the extent that the Applicant's reconsideration request involves the interpretation of subsection 3(1) of the Regulations, that question has been decided. The decision of the Federal Court of Appeal is final, following dismissal by the Supreme Court of Canada of the Applicant's application for leave to appeal. The parties are the same, that is the Applicant and the Respondent.

[42] However, the application of the doctrine of *res judicata* does not dispose of this matter.

[43] The Applicant seeks reconsideration of a decision of an Entitlement Appeal Panel, pursuant to section 32 of the VRAB Act. That provision allows the Board to reconsider a decision in two circumstances, that is when an applicant can show that the previous panel had committed an error of law or where there is new evidence.

[44] The status of "new evidence" is assessed upon a legal test.

[45] Sections 3 and 39 of the VRAB Act set out a framework within which evidence is to be considered by the Board, that is to allow the drawing of inferences in favour of an applicant. Those sections provide as follows:

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.

[46] The VRAB Act allows the Board to reconsider an earlier decision, pursuant to subsection 32(1) which provides as follows:

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

[47] Pursuant to subsection 32(1), an applicant can submit new evidence to the Board.

[48] Although the words “new evidence” are not defined in the VRAB Act, a test for such evidence was set out by the Supreme Court of Canada in *R. v. Palmer*, [1980] 1 S.C.R. 759 at page 775 as follows:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[49] In *MacKay v. Canada* (1997), 129 F.T.R. 286 at page 4 (Fed. T.D.), Justice Teitelbaum described the nature of a reconsideration decision as follows:

> It is important to clarify the nature of a reconsideration, a distinct type of review function that is not to be confused with appeal proceedings or judicial review applications considered by a Court. Essentially, under Section 111 of the *Veterans Review and Appeal Board Act*, the VRAB may reconsider the earlier decision on two broad grounds: (i) on application for new evidence; or (ii) on its own motion for errors in fact or law.

[50] In the present case, the Applicant submits that the three documents he submitted constitute “new” evidence.

[51] The Board found otherwise. It found that the documents presented are not “new evidence,” within the test for “new evidence” referred to above.

[52] The question for the Court in this application for judicial review is whether this finding of the Board meets the legal standard of reasonableness.

[53] In other words, is this finding justified, pursuant to the teaching in *Vavilov, supra*, where the Supreme Court of Canada said the following:

> 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.

[54] On the basis of the material in the record, I am satisfied that the Board reasonably concluded that the Applicant has failed to present "new evidence" that would change the decision about his entitlement to the EIA.

[55] The Board assessed each article that was submitted by the Applicant as "new evidence". It clearly expressed its opinion about each article, against each of the four criterion that apply to the acceptance of "new evidence".

[56] The findings of the Board meet the test of reasonableness according to *Vavilov, supra*. The Board did not err in acknowledging and applying the findings of the Federal Court and of the Federal Court of Appeal, cited above.

[57] These decisions are relevant to the Applicant's situation.

[58] The Board also reasonably acknowledged and followed the decision in *Canada (Chief Pensions Advocate) v. Canada (Attorney General)* (2006), 302 F.T.R. 201 (F.C.), aff'd (2007), 370 N.R. 314 (F.C.A.).

[59] There is no legal error in the Board's conclusion that the material submitted by the Applicant did not meet the legal definition of "new evidence" and the Board was not required to proceed further.

[60] Likewise, I see no breach of procedural fairness in the process followed by the Board in dealing with the Applicant's request for reconsideration.

[61] Although the Applicant did not directly address procedural fairness in his written argument, he alluded to a breach of procedural fairness in his Notice of Application for Judicial Review as follows:

> a. The Applicant submits that the decision is unreasonable and reviewable because he was denied natural justice. More specifically, the Reconsideration Panel at first instance found that there was no error in law, and only afterwards considered the evidence, when in fact they should have initially addressed whether the new evidence could reasonably be expected to affect the prior decision.
>
> b. Further to this procedural error, the Applicant contends that the Reconsideration Panel's unwarranted rejection of new evidence and its failure to evaluate the evidence on its merits, is unreasonable and constitutes a reviewable error on the part of the Reconsideration Panel.

[62] There was no breach of procedural fairness resulting from the fact that the Board first considered whether the Applicant has shown an error of law on the part of the Entitlement Appeal Panel, as the basis for his request for reconsideration.

VI. **CONCLUSION**

[63] In conclusion, the Board reasonably applied the two-stage test that is contemplated by section 32 of the VRAB, that is to determine if there are grounds to proceed to the reconsideration of an earlier decision of the Board. It addressed the Applicant's allegation of an error of law and found that there was no such error. That conclusion meets the legal standard of reasonableness.

[64] The Board examined the documents submitted by the Applicant as "new evidence" and assessed those documents against the applicable statutory provisions and the legal test for "new evidence". The Board determined that the new documents did not satisfy the criteria for "new evidence". That conclusion also meets the legal standard of reasonableness.

[65] There is no breach of procedural fairness established in terms of the process followed by the Board in making its decision.

[66] In these circumstances, there is no basis for judicial intervention and the application for judicial review will be dismissed.

[67] The Respondent does not seek costs and no costs will be awarded.

JUDGMENT in T-481-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-481-20
STYLE OF CAUSE:	ROBERT JAMES THOMSON v. CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 16, 2020
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	JUNE 15, 2021

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