Federal Court  Cour fédérale

Date: 20210809

Docket: T-940-20

Citation: 2021 FC 829

Toronto, Ontario, August 09, 2021

PRESENT: Justice A. D. Little

BETWEEN:

JOEL PRIMEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review asks the Court to set aside a decision of the Veterans Review and Appeal Board (the "Board") dated July 20, 2020. In that decision, the Board dismissed a request by the applicant, Mr Joel Primeau, for reconsideration of the merits of a decision of the different panel of the Board dated 16 October 2018.

[2] The applicant suffers from hearing loss related to his service in the Canadian Armed Forces (the "CAF") in 1998. Mr Primeau joined the Royal Canadian Mounted Police (the "RCMP") in

2001 and became a firearms instructor in 2004. He is still employed as a firearms instructor with the RCMP today.

[3] Mr Primeau applied for disability benefits related to his hearing loss. Veterans Affairs Canada initially dismissed his application. Through an appeal and reconsideration process (described in more detail below), Mr Primeau has demonstrated that he is entitled to a disability pension due to the hearing loss.

[4] It is not disputed that Mr Primeau's hearing loss was caused by exposure to loud noises in the workplace, particularly firearms discharges. However, a central substantive issue between the parties concerns causation: whether the applicant's hearing loss was caused by exposure to noise only during his service in the CAF, or noise during both his CAF service and his service in the RCMP. The outcome affects the disability pension to which Mr Primeau is entitled.

[5] In both decisions already mentioned, the Board held that the applicant was entitled to disability benefits only in respect of his CAF service. He had not proved causation in respect of his RCMP service. He was therefore entitled to disability benefits under the *Veterans Well-being Act*, SC 2005, c 21 (the "*VWBA*") but had no proven claim to entitlement under the *RCMP Superannuation Act*, RSC 1985, c R-11 and the *Pension Act*, RSC 1985, c P-6. The latter legislative schemes would have applied (in addition to the *VWBA*) if had he established that his hearing loss stemmed, in part, from his RCMP service.

[6] On the present application, the applicant submitted that the Board's reconsideration decision should be set aside as unreasonable, and the matter returned to the Board for re-determination by a differently constituted panel.

[7] For the reasons that follow, I dismiss this application. In my view, the Board did not make a reviewable error. Specifically, the applicant has not demonstrated that the Board made a reviewable error in its interpretation of subs. 56.5(1) of the *VWBA*. In addition, the applicant's submissions do not persuade me that the Board's determinations concerning causation were unreasonable.

I. **Events Leading to this Application**

[8] Mr Primeau is 42 years old. From May to September 1998, he served in the CAF as part of the Governor General's Foot Guard. During that four-month period, Mr Primeau's participation in basic training exercises exposed him to loud noises and he experienced ringing in his ears.

[9] Mr Primeau joined the RCMP in 2001. In 2004, he became a firearms instructor. In this role, he is exposed to loud noise from firearms discharges. He continues in that role up to the present.

[10] In May 2013, Mr Primeau submitted an application to Veterans Affairs Canada ("VAC") for disability benefits for tinnitus (chronic ringing in the ears) under s. 45 of the *VWBA* in respect of his CAF service and under s. 32 of the *RCMP Superannuation Act*, and subs. 21(2) of the *Pension Act* in respect of his RCMP service. VAC denied his claim on January 16, 2014.

[11] The applicant then made his claim to an Entitlement Review Panel of the Board. It held a hearing and issued a ruling on October 23, 2014. The Panel upheld the decision of the VAC denying disability benefits.

[12] The applicant successfully appealed to an appeal panel of the Board. Following a hearing on October 18, 2016, the appeal panel decided that he was entitled to full disability benefits for tinnitus, and allocated two-fifths of his total benefits entitlement to his RCMP service under the *RCMP Superannuation Act* and the *Pension Act*, and three-fifths to his CAF service under the *VWBA*.

[13] The applicant was not satisfied. He requested that the Board reconsider its decision. His position was that based on the language in *VWBA* subs. 56.5(1), he should be covered in full under the *Pension Act* and *RCMP Superannuation Act* (which would have given him a larger monetary entitlement than under the *VWBA*). Following a hearing on October 16, 2018, a differently constituted panel upheld his entitlement to disability benefits, but allocated five-fifths to his CAF service under the *VWBA* and nothing to his RCMP service under the *RCMP Superannuation Act* and the *Pension Act*.

[14] The applicant again requested that the Board reconsider its decision. Following a hearing before a differently constituted panel of the Board on June 10, 2020, the Board issued a decision dated July 20, 2020 that denied the application for reconsideration and agreed with the prior panel.

[15] The July 20, 2020 reconsideration decision is the subject of the present application for judicial review.

II. **Introduction to the *VWBA***

[16] This application involves provisions in several statutes, including the *VWBA*, the *Pension Act* and the *RCMP Superannuation Act*.

[17] A few additional preliminary notes are needed. The *VWBA* was previously known as the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c. 21. I will refer to it as the *VWBA* unless the context requires otherwise.

[18] Parliament enacted the *VWBA* in 2005 to establish a new statutory scheme to cover disability and other benefits for members of the CAF. Key provisions came into force effective April 1, 2006. As of that date, benefits for CAF members were not to be covered by the *Pension Act* – instead they would receive coverage under Part 3 of the *VWBA*.

[19] When the *VWBA* was enacted, Parliament also revised the *Pension Act* to add s. 3.1 (see *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c. 21, s. 105). Section 3.1 provided that despite any other provision of the *Pension Act*, "no award is payable under this Act in respect of any application made by or in respect of a member of the [CAF] after April 1, 2006" unless – and then there are several exceptions set out. Neither party claimed that any of the exceptions contained in that provision applied to Mr Primeau's claim.

[20] The applicant's legal position in this Court focused on the interpretation of subs. 56.5(1) of the *VWBA*. That provision reads:

> **56.5**(1) No pain and suffering compensation shall be granted in respect of an injury or a disease, or the aggravation of an injury or a disease, if the injury or disease, or the aggravation, has been the subject of an application for a pension under the *Pension Act* and the Minister, or the Commission as defined in section 79 of that Act, has rendered a decision in respect of the application.

[21] From April 1, 2006 until April 1, 2019, *VWBA* subs. 56.5(1) was numbered as subs. 56(1). On April 1, 2019, subs. 56(1) became subs. 56.5(1): *Budget Implementation Act 2018, No. 1*, SC 2018, c. 12, s. 144. These Reasons will refer to the provision as subs. 56.5(1).

[22] As of April 1, 2019, Parliament also amended the opening phrase in subs. 56.5(1) from "No disability award shall be granted in respect of an injury or a disease…" to "No pain and suffering compensation shall be granted in respect of an injury or a disease..." [underlining added]. The rest of the provision remained unchanged. In its reasons in this matter, the Board used the terminology "disability benefit" rather than "pain and suffering compensation". Nothing in this application turns on the meaning of that phrase, so I will continue to use the Board's phrase ("disability benefit") for simplicity and ease of understanding.

III. **The Decision under Review**

[23] The Board made its decision in response to an application to reconsider a decision of a prior panel, which itself was a reconsideration decision. The decision under review was therefore a reconsideration of a reconsideration. I will refer to the decision under review as the "Board's" decision and refer to the first reconsideration panel as the "prior panel".

[24] Because the decision under review is a reconsideration decision, its reasoning cannot be fully separated from the reasons in the prior decision: see *Blount v. Canada (Attorney General)*, 2017 FC 647 (Boswell J.), at para 27, and the cases cited therein. In my view, given the nature of the two decisions and the legal arguments concerning statutory interpretation made to both the prior panel and the Board in this case, the Court must consider the reasoning of the prior panel in the course of determining the reasonableness of the decision under review.

[25] The prior panel's decision found that subs. 56.5(1) had to be considered in the context of the *VWBA* as a whole, and in the context of Part 3 in particular (entitled "Critical Injury, Disability, Death and Detention"). The prior panel also referred to s. 42 of the *VWBA*, which concerns the non-application of Part 3, and provides:

> 42. This Part … does not apply in respect of an injury or a disease, or the aggravation of an injury or a disease, if the injury or disease, or the aggravation, is one for which a pension may be granted under the *Pension Act*.

[26] The prior panel held that the applicant was already experiencing tinnitus in his ears when he applied to join the RCMP. Quoting *VWBA* s. 42, it held that because "his condition was not

caused or aggravated by a service covered by the *Pension Act*, it was not 'one for which a pension may be granted under the *Pension Act*'." By this, the prior panel seems to have meant that Mr Primeau's claim was not captured by any of the exceptions outlined in s. 3.1(1) of the *Pension Act* that could make that *Act* still applicable to him, i.e. to a CAF member who had initiated his claim for disability benefits after the passage of the *VWBA* in 2005 – therefore he was only entitled to receive a disability benefit under the *VWBA.*

[27] The prior panel also held that subs. 56.5(1) of the *VWBA* was a "clarifying provision preserving rights under the *Pension Act* where such rights arose before the application of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, now known as the [*VWBA*]." According to the prior panel, subs. 56.5(1) was "not intended to create jurisdiction under the *Pension Act* where jurisdiction otherwise does not exist." A CAF claimant would only be covered under the *Pension Act* if his or her claim fit into one of the exceptions outlined in *Pension Act* s. 3.1(1). Otherwise, his or her claim would come under the *VWBA.*

[28] I now turn to the Board's reconsideration of the prior panel's decision. The Board started by explaining that it uses a two-stage process to determine the application. First, there is a screening stage. If the application passes the screening, the Board proceeds to stage two, a reconsideration on the merits.

[29] The Board explained that at stage one, it considers the arguments of the appellant (here, Mr Primeau) to determine if the previous panel of the Board made an error of fact or an error in the interpretation of law when reaching its decision. The Board explained that, if applicable, the

panel also evaluates any new evidence on a four-part test set out in *MacKay v. Canada (Attorney General)* (1997), 129 FTR 286 (FC) (Teitelbaum J.), at para 23.

[30] The Board's decision set out, in detail, the history of the applicant's claim applications, appeals and reconsideration applications. Turning to its stage one screening, the Board confirmed that it had reviewed the application for reconsideration and taken into consideration the applicant's submissions, made by a pension advocate. The Board confirmed that in doing so, it had applied the requirements of s. 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18, which required it to do the following:

> (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;
>
> (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
>
> (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.

[31] With respect to s. 39, the Board stated "[t]his means that in weighing the evidence before it, the Panel will look at it in the best light possible and resolve doubt, so it benefits the applicant. However, the Federal Court has confirmed this law does not relieve appellants [i.e. Mr Primeau] of the burden of proving the facts needed in their cases to link the claimed condition to service."

[32] With respect to errors of fact, the Board found that the applicant had not specifically identified any relevant and significant facts that were misstated in the prior panel decision. The

Board stated that, after carefully considering the previous decision, it could not locate examples of where the previous panel had erred in fact.

[33] With respect to errors in the interpretation of the law, the Board began by stating that such an error could include an error made in the application or interpretation of a statutory provision, the rules applying to the weighing of evidence, or the legal effect of findings of fact.

[34] The Board then considered whether the previous panel's interpretation of *VWBA* subs. 56.5(1) was incorrect. The Board found that it was not.

[35] Interpreting *VWBA* subs. 56.5(1), the Board stated that there were several statutes that deal with disability claims for CAF and RCMP members. For CAF personnel, the provisions of the *Pension Act* are applicable to claims made prior to the enactment of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (i.e., the *VWBA*) in 2005/06. Once the *VWBA* was enacted, disability claims automatically fell under the provisions of that statute. In transitioning to the new legislation, Parliament recognized that there were exceptions when the *Pension Act* remained applicable. The Board found that those exceptions were set out in subs. 3.1(1) of the *Pension Act*.

[36] The Board held that apart from the exceptions listed in s. 3.1, all CAF disability claims would be adjudicated under the *VWBA* after the coming into force of that statute. (The applicant submitted his first disability benefits claim to VAC in May 2013.) The Board also held that the *VWBA* prohibits a disability claim from being considered under its provisions if the claim has

already been determined under the *Pension Act* or if a new claim condition cannot be separated, for assessment purposes, from one which has already received entitlement under the *Pension Act*.

[37] The Board held that the statutory provisions it had mentioned serve to transition disability claims from one statute to the other, depending on when a CAF member or veteran applied for disability benefits for a specific disability, so that the claim would be considered under the *Pension Act* or the *VWBA*, but not both. The Board held that claims by RCMP applicants do not fall into the same transitional scheme, due to the application of s. 32 of the *RCMP Superannuation Act*. In situations where claimants have both CAF (i.e. military) and RCMP service, and there is evidence of contributory causes from both periods of service, the Board referred to a policy instructing adjudicators to apportion entitlement "in a manner that properly reflects the contribution related to each period of service".

[38] The Board held that in this case, the prior panel possessed information from the applicant himself that his tinnitus commenced during or following specific occasions of weapons-related noise exposure during his service in the CAF. The Board held that "[a]fter considering the entirety of the evidence, the same panel concluded that his subsequent RCMP service provided no significant contribution to the development of the condition. While the appellant may not agree with those findings, it was ultimately the reconsideration panel's finding to make." Accordingly, the Board concluded that the prior panel did not err in law.

[39] With respect to new evidence, the Board applied the four-part test set out in *MacKay*. The panel considered each of the factors (due diligence, relevance, credibility and prospect of changing

the result). The Board analyzed a Hazardous Occurrence Report that the applicant filed in 2016 concerning an accidental weapons discharge that left the applicant with reduced hearing and tinnitus. However, the panel held that the report provided no objective evidence that his condition was permanently and irreversibly worsened due to the incident.

[40] In a passage that occupied considerable attention at the hearing in this Court, the Board then stated:

> The applicant has clearly articulated that his tinnitus commenced during his Reserve Force peacetime service. Indeed, he specifically requested that the review panel make such a finding. This panel can appreciate that he served longer with the RCMP, which forms part of his argument for apportioning a greater portion, if not all, of his entitlement to that service period. However, the panel is aware that claimed conditions can manifest and worsen, regardless of service length. Unfortunately, there is no credible, objective evidence of him contemporaneously complaining of worsening symptoms. There are also no findings by medical professionals to support that RCMP service factors fully caused or significantly contributed to a permanent worsening of the condition. Because the submitted evidence could not be expected to alter the findings of the October 2018 Reconsideration Panel, it does not meet the four-part test.

[41] Having found that the prior panel did not err in fact or in the interpretation of law, and that there was no new evidence to support a more favourable outcome for the applicant, the Board held that there were no grounds to reopen the decision. It therefore denied the applicant's request for a reconsideration of the merits of his claim.

IV. **Standard of Review in this Court**

[42] As both parties stated in their submissions, the standard of review is reasonableness as described in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65. In conducting a reasonableness review, a reviewing court considers 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: *Vavilov*, at para 15.

[43] The focus of reasonableness review is on the decision made by the decision maker, including both the reasoning process that led to the decision and the outcome: *Vavilov*, at paras 83 and 86; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at para 12. The starting point is the reasons provided by the decision maker: *Vavilov*, at para 84. The reviewing court must read the reasons holistically and contextually and in conjunction with the record that was before the decision maker: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, at para 31; *Vavilov*, at paras 91-97 and 103; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, at para 32.

[44] When reviewing for reasonableness, the court asks whether the decision bears the hallmarks of reasonableness (i.e., justification, transparency and intelligibility) and whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov*, at para 99. A reasonable decision is one that is: (a) based on an internally coherent and a rational chain of analysis and (b) justified in relation to the facts and law that constrain the decision maker: *Vavilov*, at paras 83-86 and 96-97; *Canada Post*, at para 27.

[45] Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov*, at paras 12-13. The reviewing court's review is also disciplined. Not all errors or concerns about a decision will warrant intervention. The reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov*, at para 100; *Delta Air Lines*, at para 27. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or "minor misstep[s]". The problem must be sufficiently fundamental or significant to render the decision unreasonable: *Vavilov*, at para 100; *Mason*, at para 36. In *Vavilov*, the Supreme Court identified two types of fundamental flaws: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it: at para 101.

[46] The submissions in this application raised three specific arguments based on *Vavilov*. First, the Supreme Court set out principles applicable to a reviewing court's analysis of the reasonableness of an administrative decision maker's interpretation of a statute: *Vavilov*, at paras 115-124. Second, the Court in *Vavilov* contemplated that the evidentiary record and the factual matrix act as constraints on the reasonableness of a decision: *Vavilov*, at paras 101, 105 and 125-126; *Canada Post*, at para 61; *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64, at para 30. Third, the Supreme Court contemplated that in assessing reasonableness, the reviewing court may consider the submissions made by the parties to the decision maker, because the decision maker's reasons must meaningfully account for the central issues and concerns raised by the parties: *Vavilov*, at para 127.

[47] I will return to these points as necessary when they are raised in the analysis below.

V. **Analysis**

[48] The applicant's arguments may be conveniently analyzed under two headings: the interpretation of *VWBA* subs. 56.5(1) and questions related to causation.

A. ***Interpretation of VWBA subs. 56.5(1)***

[49] As noted, the Board concluded that the prior panel had committed no legal error in its interpretation of subs. 56.5(1).

[50] In this Court, the applicant submitted that the Board's interpretation of subs. 56.5(1) was unreasonable. The applicant maintained that the text of the provision is clear and unqualified, and is inconsistent with the Board's interpretation. Referring to the Supreme Court's decision in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 SCR 601, at paragraph 10, the applicant submitted that the precise and unequivocal words of the statute must dominate the proper interpretation of subs. 56.5(1).

[51] According to the applicant, subs. 56.5(1) was enacted as part of a statutory scheme that created separate streams for disability benefits for CAF and RCMP members under the *Pension Act* and the *VWBA*, with the *Pension Act* being the primary statute. In that context, *WVBA* subs. 56.5(1) is to be read in conjunction with *VWBA* s. 42. These two provisions were designed to transition the system applicable to members of the CAF from the *Pension Act* to the *VWBA*, with

s. 42 making the *VWBA* applicable prospectively and subs. 56.5(1) ensuring that once a decision is made, it is determinative. The applicant's position was that once an application has been made in respect of an injury or disease, or aggravation of an injury or disease, and the Minister (i.e., VAC) has made a decision in respect of the application (even a negative decision, as in this case), then subs. 56.5(1) applied to put the applicant into the *Pension Act* stream of benefits and bar any compensation under the *VWBA* in respect of that injury or disease or aggravation of it. On this interpretation, if a claimant is later found to have an injury or disease, or aggravation of it, for which there is an entitlement to a disability benefit, any benefit must be provided under the *Pension Act* via subs. 21(2) of the *RCMP Superannuation Act*.

[52] By contrast, the respondent supported the reasonableness (and indeed the correctness) of the Board's interpretation of *VWBA* subs 56.5(1). As discussed, it confirmed the prior panel's conclusion that subs. 56.5(1) did not "create jurisdiction under the *Pension Act* where jurisdiction otherwise does not exist". The respondent made four related arguments to support the position of the Board, which concerned the legislative history of the provision, the influence of s. 3.1 of the *Pension Act*, the interpretation of the provision in certain policies published by VAC, and the plain wording of the provision. The respondent also submitted that the applicant's proposed interpretation of *VWBA* subs. 56.5(1) would, in effect, add an additional paragraph to s. 3.1 of the *Pension Act* – an additional exception in which the *Pension Act* would continue to apply to CAF members. That "new" exception would permit the *Pension Act* to apply when subs. 56.5(1) applied under the interpretation proposed by the applicant, specifically when an individual made an application and the Minister rendered a decision on it (even if that decision was negative). According to the respondent, that would defeat the broader objective of

Parliament in 2005-06 when it created the new scheme in the *VWBA* applicable to members of the CAF. It would create a small subclass of disability benefits applicants whose benefits would be paid not under the new *VWBA*, but under the *Pension Act* that previously applied to CAF members, owing to subs. 56.5(1).

[53] The Court's role on this application for judicial review is not to determine the correct interpretation of subs. 56.5(1) of the *VWBA*. The question is whether the Board's interpretation was reasonable: *Vavilov*, at paras 115-124; *Canada Post*, at paras 40-42 and 65-67.

[54] *Vavilov* contains instructions to the reviewing court when it analyzes the reasonableness of an administrative decision maker's interpretation of a statute. Justice Rowe's reasons for the majority of the Supreme Court in *Canada Post* provide additional guidance by adopting and applying *Vavilov*'s instructions. These two decisions require the reviewing court not to undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Vavilov*, at paras 83 and 116; *Canada Post*, at paras 40-41; *Mason*, at para 20. Instead, the court takes the same approach as with other aspects of judicial review of a decision on its merits: the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached. It does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21.

[55] An administrative decision maker's decision is constrained in that the decision maker must interpret a contested statutory provision in a manner consistent with the provision's text, context and purpose, while applying the decision maker's particular insight into the statutory scheme at issue: *Vavilov*, at para 121; *Canada Post*, at para 40-42; *Court v. Canada (Attorney General)*, 2020 FCA 199, at para 65; *Mason*, at para 42. If the meaning of a statutory provision is disputed, the decision maker must demonstrate in its reasons that it was alive to the essential elements of proper statutory interpretation: *Vavilov*, at para 120; *Canada Post*, at para 42. If the decision maker fails to consider a key element of a statutory provision's text, context or purpose and would have arrived at a different result if it had, the omission may cause the reviewing court to lose confidence in the overall decision. If there is only a single reasonable interpretation of the provision, the reviewing court may intervene and provide its interpretation, albeit hesitantly. As the Supreme Court stated in *Vavilov*, at paragraph 124, a reviewing court "should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker".

[56] In the present case, applying *Vavilov* and *Canada Post*, I conclude that the Board's interpretation of subs. 56.5(1) did not contain a reviewable error. I am not persuaded that in interpreting the words of subs. 56.5(1), the Board failed to follow or was not "alive" to the principles of statutory interpretation set out in *Rizzo* and *Canada Trustco*. I believe that the Board's reconsideration reasons, read alongside the prior panel's decision and reasons, considered the text, context and purpose of subs. 56.5(1) and the intentions of Parliament when it enacted the *VWBA* in 2005-06 and made consequential amendments to the *Pension Act*. The Board therefore committed no reviewable error in its interpretation of subs. 56.5(1).

[57] I have described the reasons of the Board and of the prior panel in detail already and will not repeat them.

[58] The prior panel considered the text, context and purpose of subs. 56.5(1). It first considered the applicant's submission that under subs. 56.5(1), once he had applied under the *Pension Act*, any future entitlement should be granted under that legislation (even if the Minister refused his application under that Act). The prior panel disagreed with that interpretation and briefly explained why. The prior panel found that s. 56 had to be considered in the "context of the [*VWBA*] as a whole", and s. 42 in particular. The prior panel went on to explain the role played by subs. 56.5(1) as a "clarifying provision preserving rights under the *Pension Act* where such rights arose before" the *VWBA* was enacted.

[59] In its reconsideration, the Board's reasons expressly referred to the applicant's submissions that the prior panel incorrectly interpreted subs. 56.5(1). The Board disagreed. Its interpretation and application of subs. 56.5(1) considered the broader context of the *Pension Act* and the *VWBA*, with specific reference to the transition requirements arising from the enactment of the *VWBA* and to s. 3.1 of the *Pension Act* (which, as noted already, lists circumstances when, in effect, that statute will continue to apply). The Board also explained generally how the *Pension Act* may apply, how the *VWBA* may apply, and the policy approach to determining entitlement when personnel have both CAF and RCMP service.

[60] I therefore conclude that the Board's reasons on reconsideration were alive to the text, context and purpose of subs. 56.5(1). I add that the Board, like the prior panel, applied its particular insight into the statutory scheme, as contemplated by *Vavilov* and *Canada Post*.

[61] As noted, it is not the role of a reviewing court to provide the correct interpretation of the provision at issue. However, in my view, the reviewing court may assess the applicant's arguments on the interpretation of a provision to determine whether the decision maker's interpretation is unreasonable on the basis that there is only one correct interpretation of the provision, whether there is applicable case law interpreting the provision that constrained the decision maker's interpretation, and/or whether the applicant's proposed interpretation is itself consistent with statutory interpretation principles: *Vavilov*, at paras 111-112 and 115-124; *Canada (Attorney General) v. Association of Justice Counsel*, 2021 FCA 37, at para 9.

[62] During oral argument, the applicant explained that his interpretation of subs. 56.5(1), when viewed with s. 42, would still apply to an initial VAC decision that is subsequently reversed or revised through the review, appeal and reconsideration processes available to claimants before the Board. A claimant's right to seek a review, appeal and seek reconsideration is found the *Veterans Review and Appeal Board Act* (as amended): see ss. 18, 21, 27 and 32. On the applicant's interpretation, the negative initial decision would, as a matter of law owing to his interpretation of subs. 56.5(1), effectively preclude any reversal or revision of the initial decision on appeal or reconsideration to find entitlement to a disability benefit under the *VWBA* because the initial VAC decision would in law compel any disability benefits entitlement to be granted only under the *Pension Act* and not the *VWBA*. The applicant's proposed interpretation would therefore appear to

undermine the purpose (and create an exception to) of the review, appeal and reconsideration process provisions in the *Veterans Review and Appeal Board Act* if subs. 56.5(1) applies to a claim. One would think that if Parliament intended an initial decision of the VAC to have such an impact on those processes, it would say so expressly by making an initial decision final and without any appeal or reconsideration, or by otherwise carving out an exception to the processes, somewhere in or around subs. 56.5(1) of the *VWBA* or in the *Veterans Review and Appeal Board Act***.** The applicant did not identify a provision that does so anywhere in either statute.

[63] I conclude that the applicant has not demonstrated that the Board's interpretation of subs. 56.5(1), read with the prior panel's decision it was reconsidering, was unreasonable under the *Vavilov* and *Canada Post* standard of review. The Board demonstrated the requisite degree of justification, transparency and intelligibility in explaining the basis for its interpretation. As noted above, that is not to conclude that the Board's interpretation is necessarily the correct or only interpretation of subs. 56.5(1), as it is not the role of the Court to make such a determination on this application.

B. ***Causation Issues***

[64] The applicant made three related submissions concerning causation. First, he argued that the Board failed to apply s. 39 of the *Veterans Review and Appeal Board Act* in its assessment of the evidence and that had it applied that mandatory provision, it would have concluded on the evidence that the applicant had established that that his period of service with the RCMP was a cause, or the cause, of his hearing loss. Second, he submitted that the Board did not grapple with

his written submissions on a key issue of mixed law and fact, namely, whether the prior panel did not consider his argument that the combination of s. 39 and the evidence proved the necessary causation to his RCMP service. Third, the applicant contended that the Board's reasons were insufficient because they did not adequately explain why the Board did not give effect to his submissions on s. 39 and the evidence on causation. In oral argument, the applicant made careful and detailed submissions about these interrelated submissions and the evidence that should have led the Board to conclude that he had proven that noise he was exposed to during his RCMP service caused hearing loss.

[65] In *Vavilov*, the Supreme Court held that absent "exceptional circumstances", a reviewing court will not interfere with the decision maker's factual findings and will not reweigh or reassess the evidence: at para 125. At the same time, a reasonable decision is one that is "justified in light of the facts" that constrain the decision. The decision maker must take the evidentiary record and the general factual matrix that bear on the decision into account, and its decision must be reasonable in light of that record and the factual matrix. A decision "may be jeopardized" if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at para 126.

[66] In addition, *Vavilov* requires that a decision maker's reasons must also meaningfully account for the central issues and concerns raised by the parties: *Vavilov*, at para 127. This is connected to the principle of procedural fairness and the right of the parties to be heard, and listened to. The decision maker is not required to respond to every line of argument or possible analysis or to make explicit findings on every point leading to a conclusion. However, a decision

maker's failure to meaningfully grapple with key issues or central arguments raised by the parties "may call into question whether the decision maker was actually alert and sensitive to the matter before it:" *Vavilov*, at para 128.

[67] In this case, I am satisfied that the Board's decision was reasonable in its assessment of the facts and the applicant's arguments, including its application of s. 39 and its understanding of the evidence.

[68] On s. 39 of the *Veterans Review and Appeal Board Act*, the Board expressly stated that it had applied s. 39, set out its provisions, and explained its understanding of them. The applicant did not challenge that understanding in this Court. Although the Board's reasons did not refer to any specific evidence to which it had applied s. 39, I am not persuaded that the Board failed to apply that provision. In addition, I agree with the respondent that s. 39 does not relieve the applicant of his onus to prove causation: *Canada (Attorney General) v. Wannamaker*, 2007 FCA 126, at para 7.

[69] I agree with the applicant that the Board's decision did not expressly address his submissions about the prior panel's decision as he characterized them as a question of mixed law and fact. However, that does not mean that the Board failed to grapple with those submissions at all. The Board dealt with the substance of the applicant's submissions on the evidence, although it did so during its assessment of the fourth part of the *MacKay* test for new evidence, rather than as a separate matter in its analysis. In that part of its reasons, the Board considered whether the new

evidence adduced by the applicant had the prospect of changing the result. It concluded that the new evidence would not do so.

[70] In its reasoning, the Board stated that "[u]nfortunately, there is no credible, objective evidence of [the applicant] contemporaneously complaining of worsening symptoms. There are also no findings by medical professionals to support that RCMP service factors fully caused or significantly contributed to a permanent worsening of the condition." The applicant challenged these conclusions, pointing to his longstanding role as a firearms instructor, his self-reporting of worsening symptoms of hearing loss, medical evidence from a Dr Souaid and the accidental indoor discharge of a firearm in his presence when he was not wearing protective equipment (the incident that was the subject of the Hazardous Occurrence Report in 2016), all to support his argument that causation to his RCMP service had been proven – i.e. that the evidence proved that his hearing loss was worsening during and as a result of his RCMP service.

[71] The respondent's submissions responded in kind, to show why the evidence disclosed a worsening of the applicant's condition but not a causal link to noise during his RCMP service. The respondent noted that no medical opinion established that causal link and there was no evidence about the comparative intensity of the noise the applicant experienced during his CAF service and his exposures during his RCMP service.

[72] The central issue was causation, which is a question of fact: see *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 SCR 352, at para 36 and the cases cited there. On judicial review, the reviewing court must defer to the decision maker's determinations of fact. In this case, both the

prior panel's reconsideration and the Board's reconsideration concluded that the required causation had not been proven by the applicant. The Federal Court of Appeal's decision in *Wannamaker* established that the applicant has the burden to demonstrate causation even with the application of s. 39 of the *Veterans Review and Appeal Board Act.*

[73] In my view, the applicant has not demonstrated that the evidence in this case placed a constraint on the Board, or the prior panel, to find causation as proposed by the applicant. The conclusions of the prior panel on reconsideration and the Board on re-reconsideration were not untenable and did not fundamentally misapprehended or failed to account for the evidence before them: *Vavilov*, at paras 101 and 126.

[74] In addition, the Board's reasons reasonably grappled with and adequately addressed the applicant's submissions on the evidence. While it did so in its assessment of the potential effect of the new evidence, it is logical that if the evidence as a whole (including proposed new evidence) did not establish the necessary causation, the evidence as a whole without the new evidence must not have proved causation either. I am satisfied that the Board, and the prior panel, were both alert and sensitive to the matter before them.

[75] I conclude therefore that the applicant has not demonstrated that there is any basis for this Court to interfere with the Board's decision on causation issues.

VI. **Conclusion**

[76] For these reasons, the application for judicial review is dismissed.

[77] Counsel for the respondent advised that the respondent did not seek costs of the application if successful, a position I endorse in this case. Accordingly, no costs will be ordered.

JUDGMENT in T-940-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed, without costs.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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