Federal Court Cour fédérale

Date: 20220222

Docket: T-1088-21

Citation: 2022 FC 245

Ottawa, Ontario, February 22, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CAROL NICOL DOWE

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

[1] This is the application for judicial review of a decision of the Veterans Review and Appeal Board [VRAB] dated May 29, 2021. The VRAB declined to reconsider the December 6, 1978 decision of the Pension Review Board which found that Mr. Robert Nicol, a veteran, was not eligible for a disability pension pursuant to the *Pension Act*, RSC 1985, c P-6. This application is brought by his surviving spouse, Ms. Carol Nicol Dowe.

Background

[2] The background facts are not complicated, nor have they been the subject of dispute. Despite that, this claim for pension benefits has been the subject of more than 10 prior proceedings from 1957 to date.

[3] Mr. Nicol served with the Royal Canadian Air Force [RCAF] as a fighter pilot from 1952 until 1957. On July 1, 1954, Mr. Nicol was stationed at Zweibrucken, Germany, with the 3 Fighter Wing of the RCAF. On that day, he attended a unit picnic to celebrate Dominion Day (now Canada Day). Officers were instructed or expected to arrange their own travel in privately owned vehicles. On the way to the picnic Mr. Nicol was a passenger in a group of five or more persons in a vehicle owned and driven by another officer, Mr. Alexander. A group of officers departed the picnic in Mr. Alexander's vehicle at around 7:00 or 8:00 p.m. They stopped at a "Gasthouse" for a meal and then drove to a casino to see a floor show. The group left the casino at approximately 11:30 p.m. to return to the base. A few minutes after midnight, in the very early moments of July 2, 1954, the car left the road. Mr. Nicol suffered a fractured left humerus, a fractured right femur, a fractured pelvis and laceration of the perineum.

[4] A Board of Inquiry was convened on July 5, 1954 to investigate the accident. It received sworn statements from Mr. Alexander, Mr. Nicol and another passenger. When asked if they were on RCAF duty at the time of the accident, they each stated that they were not.

Canadian Pension Commission – October 21, 1958

[5] In October 1958, Mr. Nicol applied to the Canadian Pension Commission [CPC] for a disability pension based on the injuries he suffered in the car accident. In a decision dated October 21, 1958, the CPC found that the injuries were not pensionable under s 13(2) of the *Pension Act* (as then in force) as the evidence did not indicate that the injuries arose out of or were otherwise directly connected to peacetime service, noting the finding of the Board of Inquiry that Mr. Nicol was not on duty at the time of the accident.

Canadian Pension Commission – November 13, 1959

[6] At a second hearing Mr. Nicol asserted, by way of letter, that at the time of the accident he was returning from an RCAF Air Force organized picnic that he was required to attend and, since Germany was still being occupied, as far as he knew, he was considered on duty at all times. He also stated that when he answered the questions put forward by the Board of Inquiry he was still quite ill, in hospital and not fully aware of what he was saying. On November 13, 1959, the CPC ruled that it could not find any new evidence warranting a change in its former decision. It found that Mr. Nicol was not on duty at the time of the accident and that the evidence was insufficient to establish that the injuries arose out of, or were otherwise directly connected with peace-time service within the meaning of s 13(2) if the *Pension Act*.

Canadian Pension Commission, Appeal Board – March 7, 1960

[7] Mr. Nicol appealed the CPC's second hearing decision to the CPC Appeal Board. On March 7, 1960, the Appeal Board dismissed the appeal as it was unable to find the evidence established that the accident occurred in circumstances which would bring it within s 13(2) of the *Pension Act*.

Canadian Pension Commission, Entitlement Board – October 6, 1975

[8] In 1974, following changes to the *Pension Act*, R.S.C. 1970, c. P-7, as amended by *An Act to Amend the Pension Act* RSC 1970, c 22 (2nd Supp), s 7, and on the basis of s 12(2) and 12(3) of the revised *Pension Act*, Mr. Nicol again requested reconsideration of the prior pension decisions. By decision dated October 6, 1975, the CPC noted that the application was being made on the basis of s 12(2) of the *Pension Act*, pursuant to which there must be evidence to show that injury arose out of or was directly connected with service in peacetime, and s 12(3), whereby disability is deemed to have arisen out of or to have been directly connected with military service if incurred in specified circumstances. The CPC found that the evidence did not establish that the accident, which resulted in the claimed disabilities, arose under circumstances which would bring them within s 12(2). Mr. Nicol's condition neither arose out of nor was it directly connected to service in peacetime and, therefore, the claim was not pensionable.

Canadian Pension Commission, Entitlement Board – May 25, 1977

[9] In 1976, Mr. Nicol applied to the CPC Entitlement Board for a review of the October 6, 1975 CPC decision. Mr. Nicol gave oral evidence in which he again reiterated his belief that attendance at the picnic was compulsory and that he was on duty at the time of the accident. The Entitlement Board found that Mr. Nicol was not on duty at the time of the accident. The picnic ended around 6:00 or 7:00 p.m. and Mr. Nicol, accompanied by other officers, drove to a casino for food and refreshments in a private motor vehicle. They left the casino at around midnight, and were involved in an accident in the course of their travels. The Entitlement Board was unable to find evidence that Mr. Nicol's attendance at the picnic was compulsory. It was satisfied, given the evidence, that Mr. Nicol was not on duty at the time of the accident and concluded that the injuries were not pensionable within the meaning of s 12(2) and s 12(3) of the *Pension Act*, R.S.C. 1970, c. P-7, as amended.

Pension Review Board – December 6, 1978

[10] Mr. Nicol appealed to the Pension Review Board, and on December 6, 1978, the Pension Review Board confirmed the May 25, 1977 decision of the CPC Entitlement Board. There Mr. Nicol argued that s 12(3) of the *Pension Act* applied on the basis that it was to be presumed that the picnic was properly authorized because transportation of the ranks had been provided and officers were expected to attend. Thus, the injuries sustained by Mr. Nicol in the car accident should be deemed as arising out of or directly connected with regular force service. The Pension Review Board noted that after the picnic, "there were no restrictions placed on the appellant or his companions, and they were free to act on their own and chose to proceed on another

adventure entirely of their own". It concluded that injuries suffered by Mr. Nicol occurred "in an auto accident at a time and under circumstances when he was not engaged in any military function and the resultant disabilities did not arise out of nor were they directly connected with Regular Force service". It confirmed the Entitlement Board decision.

Veterans Review and Appeal Board Reconsideration Decision – September 3, 2014

[11] Mr. Nicol died on December 23, 2003. In 2013, his spouse, the Applicant, made an application to the VRAB to reconsider the December 6, 1978 decision of the Pension Review Board which was made some 34 years before. The Applicant submitted new evidence and alleged errors of fact and law. On September 3, 2014, the VRAB denied the application for reconsideration. The VRAB found no error of fact or error of law occurred and that the new evidence, although relevant and credible, would not change the outcome of its decision. The VRAB found the injury did not arise out of service as Mr. Nicol was not under any directions or orders to attend the picnic.

Federal Court of Canada, Judicial Review – June 24, 2015

[12] The Applicant sought judicial review of the VRAB's September 3, 2014 decision, which application was denied by Justice de Montigny in a decision dated June 24, 2015 (*Nicol v Canada (Attorney General)*, 2015 FC 785 [*Nicol 2015*]).

Federal Court of Appeal

[13] The Applicant appealed the June 14, 2015 decision of the Federal Court and also brought a motion to admit new evidence. The motion to admit new evidence was denied by Justice Gleason by Order dated January 6, 2016. The hearing of the appeal before the Federal Court of Appeal was adjourned *sine die* on September 3, 2020.

Veterans Review and Appeal Board, Reconsideration Panel – July 25, 2018

[14] The Applicant again applied the VRAB for reconsideration of the December 6, 1978 decision of the Pension Review Board. The Applicant filed new evidence and alleged that the Pension Review Board made an error of fact by failing to make the connection of the matter arising out of or directly connected with service, namely attending a squadron picnic. By decision dated July 25, 2018, the VRAB denied the application for reconsideration. It conducted an analysis of the new evidence and ultimately found that it would not establish a military service connection to the accident and, therefore, it would not change the decision of the reconsideration panel. It also found that there was no error of fact, the Applicant's allegations actually described an error of law. As to the error of law allegation, being that the Appeal Board failed to properly apply the facts to the legislation and failed to make the connection of the matter out of or directly connected with service, namely attending the squadron picnic, the Reconsideration Panel found there was no error of law. Mr. Nicol attended the squadron picnic, he then proceeded to enjoy non-military refreshments and entertainment and then, after midnight, the accident occurred. When applying the legislation to those facts, a military service connection

could not be found. The Reconsideration Panel declined to reopen the Applicant's claim for disability pension entitlement.

Veterans Review and Appeal Board, Reconsideration Panel – May 29, 2021

[15] In 2020, the Applicant applied for a third time to the VRAB for a reconsideration of the December 6, 1978 decision of the Pension Review Board. That decision is the subject of this application for judicial review.

Relevant Legislation

Pension Act, RSC 1985, c P-6

> **21(2)** In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,
>
> > **(a)** where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;
> >
> > **…**
>
> **21(3)** For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of
>
> > **…**
> >
> > **(f)** any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof

would have resulted in disciplinary action against the member;

Veterans Review and Appeal Board Act, SC 1995, c 18 [*VRAB Act*]

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.

…

39 In all proceedings under this Act, the Board shall

(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.

…

111 The Veterans Review and Appeal Board may, on its own motion, reconsider any decision of the Veterans Appeal Board, the Pension Review Board, the War Veterans Allowance Board, or an Assessment Board or an Entitlement Board as defined in section 79 of the *Pension Act*, 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, in the case of any decision of the Veterans Appeal Board, the Pension Review Board or the War Veterans Allowance Board, do so on application if new evidence is presented to it.

[16] I note here in passing that s 21(3)(f) of the *Pension Act*, 1985, c P-6, considered by the VRAB in the decision under review is substantially the same provision as s 12(3)(f) of the *Pension Act*, RSC 1970, c P-7, as amended, as considered in prior decisions described above.

Decision Under Review

[17] The VRAB notes that it may consider any decision of its predecessor bodies, including the Pension Review Board, under s 111 of the VRAB Act where grounds exist based on new evidence, error of fact, or error of law. Further, that reconsiderations are a two-stage process. The first is a screening stage to determine whether there are grounds for a reconsideration. If none of the permissible grounds are met, then the request for a reconsideration is denied. If any of the grounds are met, then the VRAB moves to the second stage, a reconsideration hearing.

[18] The VRAB notes the Applicant elected to have the hearing proceed on the basis of written submissions pursuant to s 28(1) of the VRAB Act. Further, that the facts were not in dispute and no new evidence was sought to be submitted. The VRAB set out the Applicant's position which was, in essence, that somehow, in all of the prior hearings, the legal presumption set out in s 21(3) of the *Pension Act* had never been addressed.

[19] The VRAB analyzed the Applicant's submission as an error of law. It found that although the Applicant submitted that the prior decisions had not considered the current version of s 21(3)(f) of the *Pension Act*, in fact, the December 6, 1978 decision of the Pension Review Board had considered the earlier version of s 21(3), then s 12(3).

[20] Regardless, the VRAB went on to consider s 21(3)(f) to determine if it would provide a connection to military service, that is, whether Mr. Nicol was engaged in an "established military custom or practice" when he sustained his injuries. The VRAB found that while the Dominion Day picnic may have been an "established military custom or practice" and that there may have been an expectation by the military that Mr. Nicol attend the picnic, there was clearly no military connection to the activities conducted after Mr. Nicol and the other officers left the picnic. Accordingly, s. 21(3)(f) did not apply to the circumstances of the case.

[21] The VRAB notes that as Mr. Nicol was serving in Germany during peacetime when the accident occurred, the test is whether the injury arose out of or was directly connected to military service. Referencing *Fournier v Canada (Attorney General)*, 2005 FC 453 [*Fournier*] and *Canada (Attorney General) v Frye*, 2005 FCA 264 [*Frye*] the VRAB stated that it must consider:

> all of the circumstances of the particular case, including the location, the nature of the activity, the degree of control exercised by the military, whether he was on duty at the time, and any other relevant factors, to determine whether the Veteran's accident arose out of military service.

[22] The VRAB found that, in the case before it, Mr. Nicol was returning from a casino late in the evening, he was free to do as he pleased at that time and was not on duty. The VRAB agreed with Justice de Montigny's findings in *Nicol 2015*, where it was determined that:

> … The Armed Forces played no role in Mr. Nicol's choice to come to the picnic as a passenger in another officer's car or in his decision to go with the particular officers he was with as opposed to any others. The officers were expected to make their own travel arrangements, and no directions were given in that respect.

[23] The VRAB found that in its December 6, 1978 decision the Pension Review Board had not erred in law in finding that the accident occurred at a time and under circumstances when Mr. Nicol was not engaged in any military function, and the resultant disabilities did not arise out of nor were they directly connected with Regular Force service during peacetime.

[24] As a result of that finding, the VRAB declined to re-open the December 6, 1978 decision for reconsideration.

Issue

[25] The Applicant does not explicitly identify an issue. The Respondent submits, and I agree, that the question is whether the VRAB's decision was reasonable.

Standard of review

[26] The Applicant submits that the standard of review is reasonableness. However, while deference is normally owed to a specialist tribunal such as the VRAB, this matter turns on interpretation of military custom. Since none of the VRAB panel members have any military experience, the level of deference owed to the VRAB should be low.

[27] The Respondent submits that the standard of review is reasonableness. Further, that the level of deference owed to an administrative tribunal is not dependent on the qualifications or experience of any particular tribunal member, but rather expertise is something that inheres in a tribunal itself as an institution (citing *Edmonton (City) v Edmonton East (Capilano) Shopping*

Centres Ltd, 2016 SCC 47 [*Edmonton City*] at para 33; *Shahzad v Canada (Citizenship and Immigration)*, 2017 FC 999 at para 26 [*Shahzad*])).

[28] It is well settled that in assessing the merits of an administrative decision, such as the decision made by the VRAB, the standard of review of reasonableness will presumptively apply (*Canada (MCI) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25, 31 48-49; see also *Thomson v Attorney General*, 2021 FC 606 at para 32). When applying the standard of reasonableness, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

[29] I agree with the Respondent that the expertise or experience of individual tribunal members does not influence the level of deference owed to the tribunal.

[30] First, in discussing the standard of reasonableness in *Edmonton City*, the Supreme Court states that the presumption that the reasonableness standard will apply is "grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing". Such expertise "arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer", not on the expertise of the individual decision maker: "…as with judges, expertise is not a matter of qualifications or expertise of any particular tribunal member. Rather expertise is something that inheres in a tribunal itself as an institution" (*Edmonton City* at para 33; see also *Shahzad* at paraas 25-26).

[31] Second, in *Vavilov* the Supreme Court adopted a presumption that the standard of reasonableness will apply to the review of administrative decisions. Thus, one of the prior rationales for applying the reasonableness standard – the relative expertise of administrative decision makers with respect to the question before them – no longer plays a role in determining the standard of review as it did in the previously required contextual analysis. However, the role of expertise in administrative decisions continues to be a relevant consideration in conducting a reasonableness review (*Vavilov* at paras 27-28, 31, 58), the performance of which is described in *Vavilov* (paras 73-142). That review is primarily concerned with an assessment of whether the decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision" (*Vavilov* at para 85).

[32] As to the role of the expertise of administrative decision makers within that reasonableness analysis, the Supreme Court noted that an administrative decision maker may demonstrate through its reasons that a given decision was made while bringing institutional expertise and experience to bear and that "Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach" (*Vavilov* at para 93).

[33] Thus, the Applicant's submission, that since none of the VRAB panel members have any military experience the level of deference owed to the VRAB should be low, is without merit.

Preliminary matter – admissibility of new evidence

[34] In her application record, the Applicant has included the affidavit of Nicole Bélanger-Drapeau, an employee of Michel Drapeau Law Office, sworn on August 6, 2021. This affidavit, without any explanation, attaches five exhibits.

[35] The Respondent submits that the affidavit and its exhibits are inadmissible. The Respondent points out that, as a general rule, only material that was before the administrative decision maker is admissible on judicial review (citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* [*Access Copyright*], 2012 FCA 22 at para 17). The Respondent submits that all five exhibits are new evidence that was not before the VRAB. Exhibits 1-3 and 5 are new evidence going to the merits of the issue decided by the VRAB, and Exhibit 4 (in addition to being new evidence) is irrelevant to the issues to be adjudicated by this Court.

[36] The jurisprudence clearly establishes that, as a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision maker. Evidence that was not before the decision maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible. This is because Parliament gave administrative decision makers and the courts different roles. Administrative decision makers, and not the courts, have jurisdiction to determine certain matters on their merits. A court cannot allow itself to become a forum for fact finding on the merits of the matter.

[37] The recognized exceptions to this general rule are an affidavit that: provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision maker; 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; or, highlights the complete absence of evidence before the administrative decision maker when it made a particular finding (*Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 [*Namgis*] at paras 4, 7-10; *Access Copyright* at para 20; also see *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25 [*Bernard*]; and *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 [*Delios*]).

[38] The exhibits attached to the Bélanger-Drapeau affidavit are:

Exhibit 1: an excerpt from a Canadian Forces Leave Policy issued in January 2009;

Exhibit 2: a page from Black's Law Dictionary including the definition of the word "custom";

Exhibit 3: a document said to be an example of a Canadian Armed Forces leave pass from November 5, 1945;

Exhibit 4: the biographies of each of the VRAB members who made the decision under review;

Exhibit 5: email correspondence advising that there is no leave pass in the file of Mr. Nicol for July 1, 1954.

[39] The issue raised by the Applicant before the VRAB was whether *by attending the picnic* the Applicant was participating in an established military practices or custom, within the

meaning of s 21(3)(f) of the *Pension Act*. The Applicant did not submit any new evidence, nor were any arguments made regarding a leave pass.

[40] The Applicant raises, for the first time on judicial review, the argument that there existed an established military custom *of the issuance of leave passes* which passes expire at midnight. According to the Applicant, the reason the officers left the casino at 11:30 p.m. was the requirement to report back to base by midnight, a military custom, and that the VRAB failed to consider this. Exhibits 1, 3, and 5 of the impugned affidavit all serve to support the Applicant's arguments on that new issue.

[41] When appearing before me the Applicant submitted that the Bélanger-Drapeau affidavit is admissible as it falls within the general background exception. This position was premised on the submission that military custom has always been a central issue in the case. The Applicant acknowledged that the submissions she made before the VRAB did not address leave passes in any way, including whether the issuance of leave passes was military custom which thereby compelled Mr. Nicol to leave the casino to be back at base before midnight, connecting that transit and the accident to military service. However, she submitted that this issue should have been "intuitive" to the VRAB or "inherently known to them" and would have been known to anyone with military experience. The Applicant submits that the issue was implicitly on the table and should have been addressed by the VRAB, of its own volition, because in a Statement of Case dated October 26, 1976, there is a reference to an Exhibit 3, a Report on Accidental or Self-Inflicted Injuries or Immediate Death, a summary of which indicates that Mr. Nicol was not on duty at the time of the accident and was on leave with pay. As I understood the argument, the

Applicant asserts that the Bélanger-Drapeau affidavit is admissible as it establishes a custom that exists but which was not previously considered.

[42] This submission cannot succeed.

[43] First, the Bélanger-Drapeau affidavit does not fall within the background information exception. In *Bernard*, Justice Statas revisited the general rule, referencing the Federal Court of Appeal's prior decisions in *Assess Copyright*, *Connolly v Canada (Attorney General)*, 2014 FCA 294 and *Delios*, and elaborated on the three recognized exceptions. With respect to the background information exception he stated:

> [23] The background information exception exists because it is entirely consistent with the rationale behind the general rule and administrative law values more generally. The background information exception respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers. The background information placed in the affidavit is not new information going to the merits. **Rather, it is just a summary of the evidence relevant to the merits that was before the merits-decider, the administrative decision-maker.** In no way is the reviewing court encouraged to invade the administrative decision-maker's role as merits-decider, a role given to it by Parliament. Further, the background information exception assists this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task.
>
> (emphasis added)

[44] In *Delios*, Justice Stratas stated:

> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before

> the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy - that is the role of the memorandum of fact and law - it is admissible as an exception to the general rule.
>
> [46] But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).

[45] The issue of the filing of new affidavit evidence was also addressed by the Federal Court of Appeal in *Nicol v Attorney General* A-405-15 (appeal of the September 3, 2014 VRAB reconsiderations decision). There the Court found that:

> Subject to narrow exceptions that are not applicable in this case, evidence that was not before the tribunal of first instance [here the VRAB] is not admissible in a judicial review application or in appeal from a decision of the trial court rendered in a judicial review application [citing *Access Copyright*]… **New evidence is not admissible in these circumstances because an appeal or judicial review does not involve a reconsideration of the merits of the parties' claims but, rather, involves assessment of whether the tribunal committed a reviewable error.** As the affidavits the appellant seeks to include were not before the VRAB, they are irrelevant to the issue of whether the VRAB's decision should be set aside. The appellant's motions must therefore be dismissed.
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> (emphasis added)

[46] The Bélanger-Drapeau affidavit itself offers no explanation of its purpose or the purpose of the five attached exhibits. In my view, Exhibits 1- 3 and 5 are new evidence that goes to the

merits of the broader issue that was before the VRAB – whether a reconsideration was warranted because there had been an error in the December 6, 1978 decision in failing to consider if the Applicant fell within s 21(3)(f) of the *Pension Act*. The VRAB then considered for itself whether the Applicant fell within s 21(3)(f) and, based on the evidence before it, found that he did not.

[47] In sum, Exhibits 1- 3 and 5 are new evidence that goes to the merits of the VRAB's decision, this evidence was not before the VRAB, it does not provide general background information nor does it fall within any of the limited exceptions to the general rule. The affidavit and these exhibits are not admissible on this basis.

[48] As to Exhibit 4, the biographies of the VRAB panel members, this is advanced in support of the Applicant's argument that the VRAB panel who decided the Applicant's case does not have military expertise, and the decision should therefore be afforded a lower level of deference. As discussed above with respect to the standard of review, this submission is of no merit. The evidence is therefore not relevant to this judicial review.

[49] Further, as is apparent from the Applicant's submissions in this application for judicial review, the Exhibits 1-3 and 5 are intended and are utilized to support the Applicant's argument that the VRAB "gave no consideration to the actual terms of a military leave pass, as it existed in 1954, and what the custom would have required of a military member serving abroad". Yet this issue and the exhibits to the Bélanger-Drapeau affidavit were not before the VRAB.

[50] On that point, in *Namgis* the Federal Court of Appeal stated:

> [12] Sometimes parties in the first-instance reviewing court try to add issues that should have been raised first before the administrative decision-maker and then try to adduce evidence in support of the new issues. For good reason, reviewing courts are very reluctant to entertain new issues: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; and for new constitutional issues, see *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 and *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 at paras. 43-47. In part, this is due to the normal rule, explained above, that the reviewing court normally cannot receive evidence other than what was before the administrative decision-maker. This also respects the law the legislature has set out: it has assigned the responsibility of deciding the issues to the administrative decision-maker, not us.

[51] In my view, as will be discussed below, this is such a circumstance. Exhibits 1-3 and 5 are therefore also inadmissible as they are tendered to support a new argument that was not before the VRAB. Moreover, as such, the new evidence is not relevant to the determination of this application for judicial review.

[52] I conclude that the Bélanger-Drapeau affidavit, with its exhibits, is inadmissible.

Is the VRAB's decision reasonable?

[53] Relying on the Exhibits 1-3 and 5 of the Bélanger-Drapeau affidavit, the Applicant submits that the VRAB did not consider the actual terms of military leave passes as they existed in 1954, and what custom would have required of a military member serving abroad during that time. The Applicant submits it is normal military custom that Mr. Nicol and the other officers

were on authorized leave passes, that such leave passes customarily expired at midnight, and that the reason Mr. Nicol and the other officers left the casino at 11:30 p.m. was to return to base by midnight. Thus, on this reasoning, the car accident that caused Mr. Nicol's injuries is sufficiently connected to service to warrant compensation under s 21 of the *Pension Act* as it is directly connected to an established military custom. The Applicant submits that this case is similar to the cases of *Fawcett v Canada (Attorney General)*, 2012 FC 750 [*Fawcett 2012*], and *Canada (Attorney General) v Frye*, 2005 FCA 264 [*Frye*], where the applicants were engaged in activities that were connected to a military purpose through orders or policies.

[54] The Respondent submits that the VRAB's decision is reasonable. Further, while the Applicant argues that the VRAB erred in its application of s 21(3)(f) of the *Pension Act* by failing to consider the terms of military leave passes, no evidence or submissions to that effect were before the VRAB. Accordingly, that argument is not relevant to the reasonableness of the VRAB's decision and should not be considered by this Court on judicial review. The Respondent also submits that *Fawcett 2012* and *Frye* are both distinguishable on their facts, and that this case is more analogous to *Greene-Kelly v Canada (Attorney General)*, 2018 FC 1188 [*Greene-Kelly*].

Analysis

[55] As the VRAB notes in its decision, pursuant to s 111 of the VRAB Act, the VRAB was required to determine whether the December 6, 1978, decision contained an error of law, an error of fact, or whether new evidence warranted reconsidering the decision. Those are the only grounds which, if any one of them is established, would warrant reconsidering the decision.

[56] The VRAB notes that the Applicant submitted no new evidence in support of the request for reconsideration. And, although "error of fact" was checked off in the application, no specific arguments were made on that ground. As to the remaining ground, error of law, the VRAB stated that the Applicant alleged that pursuant to s 21(3)(f) of the *Pension Act*, Mr. Nicol should have been found to be on duty at the time of the accident.

[57] Section 21(3)(f) states:

> **21(3)** For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of
>
> > **(f)** any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member;

[58] The VRAB first found that, contrary to the Applicant' submission that s 21(3)(f) was not considered by any of the prior decision makers, the Pension Review Board (referred to as the Appeal Panel by the VRAB) did consider the earlier version of the provision, which was s 12(3) of the *Pension Act* at the time. The VRAB noted the Pension Review Board's finding (in their December 6, 1978 decision) that:

> This Board, on the basis of the evidence, finds that there were no restrictions placed on the appellant or his companions to return directly to their base and that after the picnic they were free to act on their own and chose to proceed on another adventure entirely of their own.

[59] As the Respondent points out, s 12(3) was also considered in the October 6, 1975 and May 25, 1977 decisions.

[60] Regardless, the VRAB went on to consider whether s 21(3)(f) would provide a connection to military service. In addressing the Applicant's argument that the injuries were sustained in the course of an established custom, attendance at the picnic, the VRAB found:

> While the Panel acknowledges that the Dominion Day picnic may have been an established military custom or practice and that there may have been an expectation by the military that the Veteran attend the picnic, there was clearly no military connection to the activities conducted after the Veteran and others left the picnic. Accordingly, paragraph 21(3)(f) would not apply to the circumstances of this case.

[61] The VRAB noted that there was a critical difference between whether a veteran is serving in peacetime or during wartime/special duty service. When serving in peacetime, the compensation principle provides that a member is eligible for a disability pension for a disability resulting from an injury that arose out of or was directly connected to military service. As to wartime or special service duty, there the insurance principle would apply, which provides that a member is eligible for a disability pension for a disability arising from injury which was incurred during, attributable to, or aggravated during wartime service or special duty service. In that circumstance, individuals are covered 24 hours a day, seven days a week, and need only demonstrate that their disability had its onset during the qualifying period of service. Unlike the compensation principle, no causal link needs to be established between the disability and military service (per s 21(1)(a) and (b) of the *Pension Act* and s 2(1) and 45(1) of the *Veterans Well-being Act*).

[62] Given that at the time of the accident Mr. Nicol was serving in Germany during peacetime, the VRAB found that the applicable test is whether the injury arose out of or was directly connected to military service.

[63] Referring to *Fournier* and *Frye*, the VRAB stated that it considered all of the circumstances of the case before it, including the location, the nature of the activity, the degree of control exercised by the military, whether Mr. Nicol was on duty at the time, and any other relevant factors, to determine whether the accident arose out of military service. The VRAB found that the circumstances before it were that Mr. Nicol was returning from a casino late in the evening, he was free to do as he pleased at the time and he was not on duty.

[64] As to the submission by the Applicant that Mr. Nicol had no control over his transportation arrangement, the VRAB stated that it agreed with the findings of this Court in *Nicol 2015* and quoted paragraph 35 of that decision.

[65] I note that in *Nicol 2015* of Justice de Montigny held that:

> [32] I accept, moreover, that military service goes beyond the mere giving and obeying of orders, and that officers were at least implicitly encouraged to attend social events such as a picnic on Canada Day, especially during such a stressful period of time as the Cold War where officers were under significant pressure. Indeed, the Pension Review Board went so far as to suggest that the decision might well have been different had the injuries suffered by the Applicant's husband occurred during the picnic or on his return trip, had he returned directly to his base.
>
> [33] The Pension Review Board found, however, that any potential connection with military service was severed when the Applicant's husband and his fellow comrades stopped on the way back for a snack at the Gasthouse and a show at the casino. **In my view, the VRAB could reasonably confirm that decision and**

> **find that these intervening events disrupted any causal link that may have existed between Mr. Nicol's military service and his injuries**.
>
> [34] The Applicant counters that her husband was carpooling with other officers, including his commanding officer, and had no other available means of transportation to convey him back to the base. As a passenger, it was not up to him to decide whether the car would stop at the Gasthouse or the casino. Unfortunately, there is very little evidence in that respect beyond the fact that officers were expected to make their own travel arrangements to attend the picnic; we do not even know whether Mr. Nicol made the return trip with the same officers with whom he had travelled on his way to the picnic.
>
> [35] Had Mr. Nicol driven his own car to go to the picnic and stopped on the way back to eat, drink and go to the casino, there is no doubt in my mind that the required connection between his injuries and his military service would have been lacking. In my view, the fact that he had the misfortune to hitch a ride with fellow officers in a car whose driver dozed off and had an accident does not make up for this lack of connection. The Armed Forces played no role in Mr. Nicol's choice to come to the picnic as a passenger in another officer's car or in his decision to go with the particular officers he was with as opposed to any others. The officers were expected to make their own travel arrangements, and no directions were given in that respect.
>
> (emphasis added)

[66] The VRAB concluded, having considered all of the circumstances, that the injuries Mr. Nicol suffered in the car accident did not arise out of military service nor were they directly connected with military service. Having considered s 21(3)(f) of the *Pension Act* as well as jurisprudence in respect of s 21(2), the VRAB found that the Pension Review Board (Appeal Panel) did not make an error in law in finding that the accident occurred at a time and under circumstances where Mr. Nicol was not engaged in any military functions and the resultant disabilities did not arise out of nor were they directly connected with regular force service.

[67] In the absence of an error of fact or law, the VRAB declined to re-open the decision.

[68] In her written submissions, the Applicant does not take issue with any of these findings. She does not assert that they are unreasonable.

[69] Rather, the Applicant raises an entirely new argument – that the VRAB erred in its application of s 21(3)(f) by failing to consider that there existed an established military custom of leave passes expiring at midnight. According to the Applicant, the reason the officers left the casino at 11:30 p.m. was the requirement to report back to base by midnight, a military custom, and that the VRAB failed to consider this. However, as noted above, she did make that submission before the VRAB and did not submit any evidence in that regard when she requested the reconsideration. She now attempts to support this new argument based on new evidence that was not before VRAB and, based on this, assert that the decision not to reconsider was unreasonable. This cannot succeed.

[70] First, the VRAB cannot be found to have erred for failing to address an argument or evidence that was not before it (*Leblanc v Canada (Attorney General)*, 2019 FC 959, at para 28; *Nowoselsky v Canada (Attorney General)*, 2007 FC 1065 at para 108; *Odunsi v Canada (Citizenship and Immigration)*, 2016 FC 208 at paras 18, 24).

[71] Second, as the Respondent points out, while the rules of evidence as set out in s 39 of the VRAB Act must be applied by the VRAB, they do not operate in a vacuum (*Whitty v Veterans Review and Appeal Board*, 2019 FC 1125 at para 55). The onus remains on the Applicant to

prove, on a balance of probabilities, the facts required to establish entitlement to a pension (*Canada (Attorney General) v Wannamaker,* 2007 FCA 126 at para 5). Here, the facts that were before the VRBA were not in issue. The facts that the Applicant now seeks to establish and to rely on in support of her new argument were not before the VRAB when it made its decision. Even the most liberal application or interpretation of s 39 cannot assist the Applicant in this circumstance.

[72] Third, when appearing before me the Applicant submitted that the VRAB erred in finding that when Mr. Nicol was returning late at night from a casino he was, at that time, free to do as he pleased and that he was not on duty at the time of the accident. That is, that any connection to military service was severed when he left the picnic. According to the Applicant, this was in error because the (inadmissible) new evidence supports that Mr. Nicol was on a leave pass that time and the VRAB failed to consider this. Ultimately, the Applicant conceded that if the Bélanger-Drapeau affidavit was inadmissible then her arguments in whole are without foundation.

[73] Fourth, the new argument amounts to a request to re-litigate rather than having this Court conduct a judicial review of the decision of the VRAB. It is not the role of this Court to conduct a *de novo* assessment of the Applicant's claim (*Vavilov* at paras 83, 116, 125). Given this, the new argument is also not relevant to an assessment of the reasonableness of the VRAB's decision.

[74] Accordingly, I agree with the Respondent that the new argument should not be considered in the determination of this application for judicial review of the VRAB's decision (*Namgis* at para 12; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 23-26).

[75] Finally, given my findings above, I need not address the Applicant's submission that this matter factually closely resembles *Fawcett v Attorney General*, 2012 FC 750 [*Fawcett 2012*] and *Frye*. Moreover, the Applicant did not make submissions to the VRAB based on those cases when seeking a reconsideration. Rather, the Applicant's submissions appear to allege errors by this Court in *Nicol 2015* (which allegations could only be addressed by the Federal Court of Appeal, not the VRAB).

[76] In any event, as the Respondent points out, the *Fawcett 2012* decision relied on by the Applicant resulted in a redetermination (on procedural fairness grounds), which redetermination found that the applicant was *not* on duty and that her injuries did not arise out of her military service. That decision was challenged on judicial review, but both the Federal Court (*Fawcett v Canada (Attorney General)*, 2017 FC 1071) and the Federal Court of Appeal (*Fawcett v Canada (Attorney General)*, 2019 FCA 87) upheld the reasonableness of the decision, and leave to appeal was denied by the Supreme Court of Canada (*Kimberly Y. Fawcett v. Attorney General of Canada*, 2019 CanLII 101524 (SCC).

[77] As to *Frye*, I agree with the Respondent that it is factually distinguishable. There the applicant's superior had authorized the establishment of a recreation and relaxation policy to

ensure soldiers did not become overly fatigued. Further, the applicant was on duty 24 hours a day, seven days a week in an elevated area of risk. The activity in question was causally connected to active service through the recreation policy. While the Applicant attempts to equate the existence of an established policy to "the issuance of a leave pass to observe Canada's national holiday" and thereby being sufficiently connected to military service, that argument was not made before the VRAB.

[78] I also point out that the VRAB considered the factors outlined in *Frye* and in *Fournier*, and explained why the circumstances of Mr. Nicol's injuries did not demonstrate a sufficient connection to military service. Finally, I agree with the Respondent that this matter is factually more similar to *Greene-Kelly v Canada (Attorney General)*, 2018 FC 1188.

Conclusion

[79] The Applicant's new argument asserting that the VRAB erred by failing to consider whether the issuance of leave passes is military custom will not be considered in the determination of this application for judicial review of the VRAB's decision.

[80] I agree with the Respondent that the VRAB reasonably denied the Applicant's request for a reconsideration, finding that Pension Review Board, in its December 6, 1978 decision, did not err in law. The VRAB's decision was transparent, intelligible and justified in relation to the facts and the law that constrained it (*Vavilov* at para 99).

[81] The Respondent does not seek costs and, accordingly, none will be ordered.

JUDGMENT IN T-1088-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1088-21
STYLE OF CAUSE:	CAROL NICOL DOWE v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
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APPEARANCES:

Joshua M. Juneau	FOR THE APPLICANT
Emma Gozdzik	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michel Drapeau Law Office Ottawa, Ontario	FOR THE APPLICANT
Department of Justice Ottawa, Ontario	FOR THE RESPONDENT