Federal Court Cour fédérale

Date: 20231212

Docket: T-1474-23

Citation: 2023 FC 1678

Toronto, Ontario, December 12, 2023

PRESENT: Madam Justice Go

BETWEEN:

ALEXANDRE DMITRIENKO

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Alexandre Dmitrienko, the Applicant, is a 60-year-old officer with the Royal Canadian Mounted Police [RCMP]. In June 2016, the Applicant sustained an on-duty injury to his right knee, which required surgery in August 2016. In September 2016, the Applicant suffered complications of blood clots from his surgery and was hospitalized. The Applicant was diagnosed with Bilateral Pulmonary Embolism [PE] and Deep Vein Thrombosis [DVT].

[2] While the Applicant's PE has resolved (meaning his blood clots were successfully treated), he has been suffering from a whole host of persistent symptoms including shortness of breath, chest pain, dizziness, and fatigue, which the Applicant asserts are related to the PE, and are also part of Post-PE Syndrome.

[3] On October 27, 2016, the Applicant applied to Veteran Affairs Canada [VAC] for disability benefits for the conditions of Internal Derangement of his right knee [ID], as well as PE and DVT. In 2018, VAC granted the Applicant's disability pension for ID and Venous Thromboembolism [VT].

[4] Since then, the Applicant has pursued VAC to recognize his cardiorespiratory impairment as an impairment related to his PE, as well as part of Post-PE Syndrome. The Applicant's efforts led to a seven-year battle which included a request of reassessment to VAC, followed by a request for review of two VAC assessments to the Veterans Review and Appeal Board [VRAB], an appeal, and an application for reconsideration. Finally, in a decision dated June 9, 2023, the VRAB Reconsideration Panel [Reconsideration Panel] denied the Applicant's application for reconsideration [Decision].

[5] The Applicant seeks judicial review of the Decision. I dismiss the application, as I find the Decision was reasonable and there was no breach of procedural fairness.

[6] My decision to dismiss the application does not mean the Court does not recognize or empathize with the Applicant's ongoing struggles with his cardiorespiratory impairment, as well

as the emotional and financial toll that such an impairment has taken on the Applicant. My decision also does not speak to whether or not the Court agrees with the outcome of this case.

II. Background

A. *Procedural History*

[7] At the heart of the Applicant's battle for a greater disability pension, is the Applicant's claim that VAC erred by improperly assessing his PE as an attack on his intravascular system as opposed to an attack on his cardiorespiratory system. In making its assessment, VAC relied on the Table of Disabilities, a statutory instrument used to assess the extent of a disability for the purposes of determining disability benefits. The Applicant asserts VAC erroneously relied on the chapter dealing with hypertension and vascular impairment (Table 13), as opposed to that dealing with cardiorespiratory impairment (Table 12). The Applicant also asserts that VAC failed to interpret and apply the Table of Disabilities in a manner consistent with the legislative requirement to give the Applicant the benefit of the doubt.

[8] Over the years, the Applicant has been assessed and treated by numerous physicians for his cardiorespiratory system. While some physicians opined that the Applicant's cardiorespiratory issues are or could possibly be sequela of his PE, there have been other reports that explicitly rejected such a diagnosis, including one that attributed the Applicant's symptoms to anxiety. The upshot of the latter type of reports is that there is no etiology for what the Applicant is experiencing. The last report with respect to this issue was dated July 9, 2020.

[9] On his own accord, the Applicant has researched and submitted medical journal articles to VAC and the VRAB based on research of patients who had PE and continued to suffer unexplained dyspnea, chest pain and reduced physical abilities. These articles refer to this unexplained impairment as “Post-PE Syndrome.” But as these articles also acknowledge, the term Post-PE Syndrome remains controversial and requires further study.

[10] As noted above, the Applicant’s case has gone through multiple stages through VAC and the VRAB.

[11] VAC’s initial assessment of the Applicant’s claim, on March 1, 2018, modified the Applicant’s claim for DVT and PE to a diagnosis of VT and ID, and assessed the latter at 5%. On May 6, 2018, the Applicant’s entitlement for VT was assessed at 11%. On September 1, 2020, following a departmental review, VAC determined the Applicant had PE because of his knee injury, but combined it with VT to a total assessment of 15%, finding it was not possible to separate the two.

[12] On October 25, 2021, the Review Panel of the VRAB assessed the Applicant’s PE and DVT as separate conditions, but it rejected the Applicant’s claim that his chest pain/dyspnea arose from his PE diagnosis, as well as his submissions on Post-PE Syndrome. The Review Panel thus assessed the PE at “nil.” While the Review Panel also found there was insufficient information to support the Applicant’s assessment of VT at 15%, it drew an inference in the Applicant’s favour and kept the 15% assessment.

[13] On April 21, 2021, the Appeal Panel found there was no objective medical evidence to link the Applicant's cardiorespiratory symptoms to PE or evidence supporting an additional award for Post-PE Syndrome. The Applicant sought a reconsideration of the Appeal Panel decision on May 17, 2022, and argued the Appeal Panel wrongfully framed the issue, reiterating his request for an assessment of his distinct cardiorespiratory impairment arising from PE and Post-PE Syndrome. The Applicant also argued the Appeal Panel failed to appropriately account for the evidence or abide by the legislative framework.

B. *Decision under Review*

[14] The Reconsideration Panel determined that the Applicant did not provide new evidence or demonstrate an error of fact or law that would require it to reopen the Appeal Panel's decision and conduct a reconsideration hearing. This Decision is the subject of this judicial review.

III. Issues and Standard of Review

[15] The Applicant submits five issues:

A. Did the Reconsideration Panel breach the duty of procedural fairness?

B. Was the Decision unreasonable as it failed to respond to the Applicant's allegations of errors in fact and law?

C. Was the Reconsideration Panel unreasonable by refusing to exercise its jurisdiction?

D. Was the Reconsideration Panel unreasonable by failing to take into consideration all the evidence on file?

E. Did the Reconsideration Panel unreasonably refuse to recognize disability in form of disturbance of a body part or a body system without presence of identifiable pathology?

[16] The Respondent submits that the presumptive standard of review for the Decision is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Respondent offers a reminder of the VRAB's expertise in assessing entitlement under VAC's disability pension system and in weighing medical and occupational evidence: *Nisbet v Canada (Attorney General)*, 2004 FC 1106 at para 10.

[17] While the Applicant does not address standard of review, I agree with the Respondent the presumptive standard of review of an administrative decision, including one made by the VRAB, is reasonableness: *Dowe v Canada (Attorney General)*, 2022 FC 245 at para 28 and *Thomson v Canada (Attorney General)*, 2021 FC 606 at para 32.

[18] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. A reasonable 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: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94, 133-135.

[19] For a decision to be unreasonable, the Applicant must establish the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep:" *Vavilov* at para 100.

[20] When a procedural fairness issue is raised, the Court should ask whether, taking into account the particular context and circumstances at issue, the process was fair and offered the applicant the right to be heard and a full, fair opportunity to know and respond to the case before them. No deference is owed to the decision-maker on issues of procedural fairness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56.

IV. Analysis

A. *Relevant Legislative Framework and Guidelines*

[21] The VRAB is an independent administrative tribunal that has full and exclusive jurisdiction to render decisions for reviews, appeals, and reconsiderations of disability claims under the *Pension Act*, RSC, 1985, c P-6 [*Pension Act*]. The *Pension Act* and the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRAB Act*] govern the VRAB's decisions for RCMP members and veterans.

[22] In order to qualify for a pension, section 21 of the *Pension Act* requires an applicant to demonstrate that they suffer a disability resulting from an injury or disease that arose out of, or was directly connected with, their service. A pension may be granted if the initial injury or disease did not result in the disability, but resulted in a condition that led to a disability: *MacDonald v Canada (Attorney General)*, 2008 FC 796 at para 8 [*MacDonald*].

[23] Section 3 of the *VRAB Act* states the provisions of the *Pension Act*, or any other Act of Parliament or regulations conferring jurisdiction on the VRAB, shall be liberally construed in favour of the appellants.

[24] Subsection 32(1) of the *VRAB Act* gives the VRAB power to reconsider an appeal decision where there are findings of new evidence, an error of fact, or an error of law.

[25] This is a two-stage process. The first stage, called the screening stage, requires the Reconsideration Panel to assess the grounds for reconsideration (i.e., new evidence, error of fact, or error of law). If any of these grounds are established, the Reconsideration Panel will move to the second stage where it conducts a reconsideration hearing and reconsiders the decision under appeal.

[26] Section 39 of the *VRAB Act* sets out the rules for the VRAB when weighing evidence. Pursuant to this provision, the VRAB must draw every reasonable inference in favour of the appellant, accept any uncontradicted evidence presented by the appellant that it considers to be

credible in the circumstances, and resolve any doubt in weighing the evidence in favour of the appellant.

[27] However, this Court has confirmed that section 39 does not relieve an applicant of their burden to prove the facts required to establish entitlement to a pension: *Canada (Attorney General) v. Wannamaker*, 2007 FCA 126 [*Wannamaker*] at para 5. The VRAB is entitled to reject contradicted evidence and uncontradicted evidence if it determines that the evidence is not credible: *Wannamaker* at para 5.

[28] The relevant provisions of the *Pension Act* and the *VRAB Act* are set out in Appendix A.

B. *What is the role of a reviewing court when assessing a decision of the VRAB Reconsideration Panel?*

[29] In *McAllister v Canada (Attorney General)*, 2013 FC 689 at paras 43-47, Justice Strickland described the Federal Court's role when reviewing a reconsideration decision of the VRAB as being similar to a Reconsideration Panel's own method of looking backwards to the substance of the earlier decision – i.e., the Appeal Panel decision. However, looking backwards is only limited to assessing whether the Reconsideration Panel committed any errors in coming to its decision, and the Court may not overturn the Appeal Panel decision.

[30] Further, while the threshold for the Reconsideration Panel proceeding to the next stage is fairly low, it is important not to lose sight of the fact that the Reconsideration Panel's decision was a screening decision and not a full, second stage reconsideration decision. The central issue

for the Court is therefore whether the Reconsideration Panel reasonably determined that the Appeal Panel did not make an error in law or in fact: *Blount v Canada (Attorney General)*, 2017 FC 647 at para 26.

[31] It is therefore not appropriate for this Court to engage in an exercise to review the merits of the Applicant's claim for a disability pension, nor is it the Court's role to reweigh the evidence that the Applicant submitted, either to the Appeal Panel, or to the Reconsideration Panel.

C. *Was there a breach of procedural fairness?*

[32] The Applicant makes several submissions to argue that the Reconsideration Panel was biased and engaged in procedural unfairness:

a. The Reconsideration Panel referred only to those parts of findings on previous decisions and medical evidence detrimental to the Applicant's claim;

b. The Reconsideration Panel did not respond to the Applicant's allegation of bias against the Appeal Panel;

c. The Reconsideration Panel produced false or deceptive statements in an attempt to justify its unjust decisions because it:

    i. Falsely stated the Applicant "has not clearly identified the basis for the Panel to reconsider the case;"

    ii. Falsely identified the issue the Applicant was asking the Panel to resolve as "seeking a greater assessment than Nil, for the pensioned condition of Pulmonary Emboli;"

    iii. Deceptively stated that the Applicant did not provide new evidence to show his cardiorespiratory condition was caused by PE;

iv. Deceptively stated that the Applicant has not provided evidence that would demonstrate that the previous Appeal Panel committed an error of fact that was sufficiently relevant and significant to affect the outcome of the decision; and

v. Falsely stated that the Applicant did not identify any errors in law committed by the Appeal Panel.

[33] The Respondent submits there is no breach of procedural fairness.

[34] While not cited by the parties, I begin my analysis with the definition of bias, as affirmed by the Supreme Court of Canada [SCC] in *Wewaykum Indian Band v Canada*, 2003 SCC 45 [*Wewaykum*] at para 58:

> … a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[35] As the SCC further explained in *Wewaykum* at para 76, the standard refers to an apprehension of bias that rests on serious grounds, noting the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience" [citation omitted]

[36] The SCC also reiterated that an inquiry into allegations of bias is highly fact-specific: *Wewaykum* at para 77.

[37] Applying the teaching as laid down by the SCC, I find the Applicant has failed to prove his allegation of bias with respect to the Reconsideration Panel.

[38] The arguments raised by the Applicant with respect to the allegation of bias are directed at the substance of the Decision. They represent the Applicant's deeply held disagreements with the Reconsideration Panel's analysis of previous decisions, and how it and the previous panels weighed the medical evidence. The Applicant's assertion, without more, is insufficient to support an allegation of bias.

[39] I also find that the Applicant's allegation of bias may have been informed by his own interpretation of the reasons of the Reconsideration Panel, without considering these reasons in the context of the Reconsideration Panel's mandate as prescribed under subsection 32(1) of the *VRAB Act*.

[40] For instance, when the Reconsideration Panel found that the Applicant did not raise any errors of fact or error of law, they were not suggesting the Applicant himself did not make any argument of errors of fact and law when seeking an appeal or reconsideration. Rather, the Reconsideration Panel did not find the arguments made by the Applicant support any finding of error of fact or error of law.

[41] Thus, while the Applicant seeks to make a procedural fairness argument, the Respondent rightly points out that the Applicant's arguments do not deal with procedure. Nor can I find any

breach of procedural fairness, having considered the Applicant's submissions and having reviewed the record before me.

D. *Was the Decision unreasonable?*

[42] As noted above, the Applicant raises four arguments to challenge the reasonableness of the Decision. Three of these arguments, namely, the failure to respond to the Applicant's allegations of errors in fact and law, failure to take into consideration all the evidence on file, and refusing to recognize disability in the form of disturbance without the presence of identifiable pathology, pertain to the Applicant's fundamental position that it was unreasonable for the VRAB to deny him disability pension for his cardiorespiratory condition related to his PE and Post-PE Syndrome. I will address these arguments collectively.

[43] I will first address the Applicant's argument that the Reconsideration Panel unreasonably refused to exercise its jurisdiction.

i. Did the Reconsideration Panel failed to exercise its jurisdiction?

[44] The Applicant argues that in refraining from exercising jurisdiction, the Reconsideration Panel disregarded sections 15, 26, and 29 of the *VRAB Act*, which vest in it full and exclusive power to inspect the entire record (section 15), to deal with all matters (section 26), and to make orders on appeal (section 29) as to make sure the matter before it is afforded due attention.

[45] However, I note that sections 26 and 29 relate to the powers of the Appeal Panel, not the Reconsideration Panel, whose power, as I have already noted, is set out under subsection 32(1). Further as the Respondent points out, the Reconsideration Panel can only amend or rescind the Appeal Panel decision (i.e., it cannot make a finding on a different condition).

[46] Thus, I find the Reconsideration Panel made no reviewable error when it exercised its statutorily granted jurisdiction to consider the three grounds of reconsideration as set out under subsection 32(1).

ii. Was the Decision denying the Applicant's application for reconsideration unreasonable?

[47] Before the Reconsideration Panel, the Applicant submitted that the Appeal Panel made several errors of fact:

i. The Appeal Panel identified the wrong issue, which led it to the wrong conclusion, and it failed to assess the Applicant's disability entitlement for the condition of cardiorespiratory impairment.

ii. The Appeal Panel erred in discrediting the Dr. Kapasi's Medical Questionnaire.

iii. The Appeal Panel erroneously concluded that there were several reports indicating there was no sequela from PE. The Applicant argued that multiple medical reports from doctors confirm that his cardiorespiratory impairment was a consequence of PE.

[48] The Applicant further submitted that the Appeal Panel committed the following errors of law:

i. The Appeal Panel erred by refusing to assess the Applicant's cardiorespiratory impairment due to absence of any detectable cardiopulmonary, and in so doing, it contravened section 2 of the *Pension Act* and Chapter 1 of the Table of Disabilities, which direct the VRAB to assess the existence of a disability and degree of medical

impairment, not medical pathology. Instead, the Applicant argued, the Appeal Panel should have viewed his cardiopulmonary pathology as a consequence of his PE condition.

ii. The Appeal Panel misapplied sections 3 and 39, including the "benefit of the doubt" principle of the *VRAB Act*, as it failed to reference the medical reports from doctors which confirmed the Applicant's cardiorespiratory impairment and only selected to assess the Dr. Kapasi's Medical Questionnaire to conclude that there was no cardiorespiratory impairment.

[49] The Applicant submits that the Reconsideration Panel failed to respond to his allegations of errors in fact or law with respect to the Appeal Panel.

[50] I find the Reconsideration Panel did not commit such errors.

[51] With respect to the alleged errors of fact, I note that the Reconsideration Panel explicitly addressed the Applicant's allegations in the Decision: "The Reconsideration Panel considered the claim that an error of fact had been committed and finds no error of fact has been found, meaning that any error of fact must be sufficiently relevant and significant to affect the outcome of the decision and if so, that the error would have an impact on the new decision."

[52] I also note that, when read as the whole, the Decision addressed all three errors of fact the Applicant raised.

[53] With respect to the allegation that the Appeal Panel misidentified the issue, the Reconsideration Panel began its review by noting the Applicant's appeal to the Appeal Panel sought to establish the following:

i. To assess my Cardiorespiratory condition related to my entitled [PE] under Chapter 12 of the Table of Disabilities, with a medical impairment of 71 and a Quality of Life at Level 2.

ii. To make an additional award related to my [Post-PE] Cardiorespiratory condition in the amount equal to two years pension under Subsection 39(2) of the *Pension Act*.

[54] The Reconsideration Panel then went on to review the Appeal Panel's analysis of the Applicant's claim, the Appeal Panel's rejection of both claims made by the Applicant, and the Appeal Panel's treatment of the medical opinion from Dr. Kapasi.

[55] The Reconsideration Panel then conducted its review of the Appeal Panel's analysis, and noted, with respect to Dr. Kapasi's opinion:

> The Medical Questionnaire (SOC 348) submitted by the [Applicant] is the same questionnaire completed by Dr. Kapasi on 29 October 2018. The Appeal Panel had noted that the report had been completed, at least partially, by the [Applicant]. The [Appeal] Panel had found the questionnaire as not credible due to the discrepancy. On review, this Panel notes that the portions that were completed by Dr. Kapasi, are credible. This Panel notes that the diagnosis of [Post-PE] Syndrome has been erased and in its place was noted 'dyspnea/chest pain NYD', which is noted as a provisional diagnosis.
>
> The Panel accepts this portion of the report as credible and finds that the diagnosis of 'Dyspnea and Chest Pain NYD' is noted as a provisional diagnosis by the completing physician, not a permanent diagnosis, and no narrative to indicate that these symptoms were permanent or related to the [PE].

[56] From the above quoted passage, it was clear that not only did the Reconsideration Panel consider the Applicant's allegations of errors of facts with respect to the Appeal Panel, it in fact amended one of the findings of fact made by the Appeal Panel, which rejected Dr. Kapasi's

report, in its entirety, as not credible. Instead, the Reconsideration Panel accepted as credible a portion of Dr. Kapasi's report, including Dr. Kapasi's provisional diagnosis.

[57] The same can be said of the Reconsideration Panel's findings with respect to the errors of law arguments the Applicant raised. It noted the Applicant's submissions and his "multiple references to several statements and findings" of the previous Panel he disagreed with, including the Applicant's argument with respect to section 2 of the *Pension Act* and the Table of Disabilities, as well as his arguments pursuant to section 39 of the *VRAB Act*, Rule of Interpretation, section 3 of the *VRAB Act*, Benefits of Doubt, and section 5(3) of the *Pension Act*.

[58] The Reconsideration Panel then went on to note the Applicant's position with regard to his entitlement based on a cardiorespiratory impairment, but noted that it was "jurisdictionally limited to determine if evidence has been presented that demonstrates whether the current condition of Pulmonary Emboli has been fairly assessed."

[59] Thus, contrary to the Applicant's argument, the Reconsideration Panel did take into account the Applicant's allegations of errors of law, but ultimately concluded that no errors of law had been identified by the Applicant, based on its understanding of its jurisdictional limit and the Applicant's position.

[60] While the Applicant may take issue with the Reconsideration Panel's conclusion, the Decision reveals that his arguments on errors of facts and law were never ignored, but were considered.

[61] The Applicant further argues the Reconsideration Panel did not appropriately apply section 39 of the *VRAB Act*, which he submits requires it to accept any credible evidence that is not contradicted and to base its inferences in his favour. The Applicant also submits that the Reconsideration Panel did not refer to other medical reports prepared by five doctors, which he argues "unequivocally affirmed presence of cardiorespiratory symptoms" and "link of those symptoms to his pulmonary embolism attack." Lastly, the Applicant argues that the Reconsideration Panel failed to confirm whether it reviewed all the medical evidence before it, which he argues show the current medical knowledge related to his Post-PE cardiorespiratory condition.

[62] I find the Reconsideration Panel committed no reviewable errors as submitted by the Applicant.

[63] To start, as the Applicant himself acknowledges, section 39 requires the VRAB to accept any credible evidence that is not contradicted and to base its inferences in his favour. In this case, the Reconsideration Panel, and the Appeal Panel before it, made certain findings about what they consider to be credible evidence that is not contradicted. However, in coming to its determination, both panels determined there was insufficient credible medical evidence to support the link between the Applicant's PE and his cardiorespiratory impairment. In the case of the Reconsideration Panel, while they amended a portion of the Appeal Panel's finding and accepted as credible, the medical questionnaire completed by Dr. Kapasi, the Reconsideration Panel also noted that Dr. Kapasi's report did not provide evidence that the Applicant's symptoms are related to PE. The Reconsideration Panel's finding was reasonable.

[64] As to the Applicant's argument that the Reconsideration Panel ignored five medical reports that the Applicant has previously submitted, it is important to bear in mind that the Reconsideration Panel was conducting a review of the Appeal Panel decision. The role of the Reconsideration Panel is limited to assessing new evidence, errors of fact and errors of law. I find it was not an error for the Reconsideration Panel to not refer to the five medical reports that the Applicant has previously submitted, and relied on, in his claim for disability. As the Reconsideration Panel rightly pointed out, the only new evidence submitted by the Applicant in support of the reconsideration request was two print outs entitled, "Typical Chest Pain vs. Atypical Chest Pain" and a printout from Collins Dictionary "Disturbance." All five medical reports that the Applicant seeks to rely on were available at the time of his appeal.

[65] Further, the Reconsideration Panel made no reviewable error by not referring to all five previous medical reports, as it was not conducting a *de novo* hearing of the Applicant's claim. I pause here to note that, at the hearing before me, the Applicant brought the Court's attention to the case of *Nolan v Canada (Attorney General)*, 2005 FC 1305 [*Nolan*] at para 19 to argue that the hearing before the Reconsideration Panel was *de novo*. The Applicant in my view has misread *Nolan*, as the paragraph in question referred to the review hearing, and not the reconsideration hearing.

[66] Finally, I agree with the Respondent that the Reconsideration Panel did not need to refer to every piece of evidence before it, but is presumed to have considered all the evidence: *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10.

[67] Having said that, while the Reconsideration Panel need not refer to all medical reports cited by the Applicant, its role was to consider whether the Appeal Panel, in arriving at its decision, committed any reviewable factual errors in the latter's assessment of the evidence, which included the five reports. As such, I will briefly address the Appeal Panel's treatment of the five medical reports, as part of my review of the Decision.

[68] The Appeal Panel specifically referred to three of the five reports that the Applicant relies on. Another one was closely echoed in Dr. Kapasi's report, which was referred to by the Appeal Panel. The Appeal Panel also referred to other medical reports that do not support the Applicant's claim linking his cardiorespiratory symptoms to PE. Of the five reports, the only report that appears to be missing from the Appeal Panel's decision is a Medical Examination/Assessment prepared by Dr. Stuart in April, 2018. At the hearing before me, the Applicant cited Dr. Stuart's report as one of the main basis for his disability claim.

[69] Based on my review, Dr. Stuart's report did not, as the Applicant asserts, confirm a linkage between PE to the Applicant's cardiorespiratory symptoms. Dr. Stuart noted the Applicant has "ongoing symptoms" and was diagnosed with "increased pulmonary artery pressure." Dr. Stuart's examination findings noted normal heart rate and respiratory examination, and that the Applicant "had shortness of breath getting on and off examination table combined with dressing and undressing."

[70] Under "Comments," Dr. Stuart added:

> Post knee surgery venous thromboembolism which led to multiple pulmonary embolism. He has severe residual symptoms as

> described at any activity greater than 1-2 METS. All of this is related to his Pensioned Condition. He may see some slow improvement but he is now almost 2 years post incident and any further improvement will likely be minimal at best.

[71] Read as a whole, I agree with the Respondent's submission that Dr. Stuart's report focused on the Applicant's symptoms without providing a diagnosis. I further agree with the Respondent that, even if this report could be interpreted as being favourable to the Applicant, its omission in the Appeal Panel's decision, and subsequently in the Reconsideration Panel's review, is insufficient to render the Decision unreasonable, given the Appeal Panel's holistic review of all the medical evidence before it.

[72] With respect to the medical articles that the Applicant argues support a finding of Post-PE Syndrome, I note that neither the Appeal Panel nor the Reconsideration Panel referred to these articles specifically. The Appeal Panel noted:

> The Veteran has requested an additional award related to his [Post-PE] Cardiorespiratory condition in an amount equal to two years pension, under subsection 39(2) of the *Pension Act*. The Panel has found there is no evidence upon which to pay an additional award.

[73] As noted above, these medical articles acknowledge that the diagnosis of Post-PE Syndrome is controversial. I find no reviewable error for the Reconsideration Panel to not mention these articles when it confirmed the Appeal Panel's conclusion finding no evidence, "specifically medical questionnaires or medical opinions," to support a change in the current rating.

[74] This takes me to the Applicant's final argument, namely, that the Reconsideration Panel unreasonably refused to recognize disability in the form of disturbance of a body part or a body system without the presence of identifiable pathology.

[75] The Applicant submits that according to the *Pension Act*'s own phrasing, his disability constitutes a "disturbance" of an alternation of his health status and that the assessment of his cardiorespiratory impairment should be based on a deviation of his health status from a normal state. The Applicant also argues that there are a lot of medical conditions, such as Post Traumatic Stress Disorder, where one's ability to function normally is significantly disturbed, without objective findings of a pathological or other observable changes in the brain or body to explain the disturbance.

[76] The Applicant submits that his cardiorespiratory system was disturbed significantly following his PE attack, leading to severe dyspnea and chest pain, even when in rest. The Applicant admits that the medical articles on record confirm that "medical knowledge is not able to provide explanation to the mechanism of the cardiorespiratory system disturbance observed on the Applicant and other Pulmonary Embolism survivals." However, the Applicant argues that the Reconsideration Panel's refusal to recognize his Post-PE cardiorespiratory impairment because of the fact that the etiology of his condition is unknown contradicts the spirit of the *Pension Act* and the jurisprudence, as well as the benefit of the doubt that he should be afforded. The Applicant also submits that his medical evidence supports there is a link between his cardiorespiratory symptoms and his past and recognized condition of PE.

[77] The Applicant cites *Cundell v Canada (Attorney General)*, 2000 CanLII 14802 (FC), [2000] FCJ No 38 [*Cundell*] and *Ouellet v Canada (Attorney General)*, 2016 FC 608 [*Ouellet*], both of which he also cited in his reconsideration application submission.

[78] I have no doubt that the Applicant has been greatly affected by his cardiorespiratory symptoms. However, I must reject the Applicant's arguments.

[79] First of all, I note in *Cundell* and *Ouellet*, the Court was dealing with the issue of the causal connection between the applicant's medical condition and their military service. There was no question in these cases that the applicant in question suffered from an entitled medical condition; the question was whether the condition arose during their service. This is not the case here. The VAC accepted that the Applicant suffered an injury while on duty. However, unlike *Cundell* and *Ouellet*, there is contradictory evidence in this case about the condition causing the Applicant's symptoms of impairment.

[80] As noted above, section 21 the *Pension Act* requires the Applicant to demonstrate that he suffers from a disability resulting from an injury or disease that arose out of his service. The Court has interpreted this section broadly to allow entitlement if the disease or injury resulted in a condition that led to a disability: *MacDonald* at para 8. However, that liberal interpretation is still predicated upon a finding of a condition which leads to a disability, and the Applicant carries the burden of demonstrating that his ongoing disability is linked to an entitled condition.

[81] VAC's first decision and the subsequent decisions all concluded that there is insufficient medical evidence linking the Applicant's cardiorespiratory impairment to an entitled condition, namely PE. Their decisions were based on the available medical evidence and opinions before them, including those that are supportive of the Applicant's claim, as well as those that are not. The Reconsideration Panel found no reviewable errors based on its review of the Appeal Panel decision.

[82] However sympathetic I am towards the Applicant's circumstances, it is not my role to second guess the findings of the Reconsideration Panel, or reweigh the evidence that was put before it. The reasons of the Reconsideration Panel meet the hallmarks of intelligibility, transparency and justification. I am unable to conclude that the Reconsideration Panel's findings were unreasonable, in light of all of the evidence before it. As such, I must dismiss the application.

[83] The Applicant faces ongoing challenges due to his cardiorespiratory symptoms. He has not been able to return to work full time, and the seven-year legal battle has no doubt affected the Applicant's physical and mental well being. In light of all the circumstances of this case, while I find in favour of the Respondent, I decline to issue costs.

V. Conclusion

[84] The application for judicial review is dismissed.

[85] There will be no costs.

JUDGMENT in T-1474-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"Avvy Yao-Yao Go"
Judge

APPENDIX A

Pension Act **(R.S.C. 1985, c. P-6)**
Loi sur les pensions **(L.R.C. (1985), ch. P-6)**

Service during war, or special duty service	**Service pendant la guerre ou en service spécial**
21 (1) In respect of service rendered during World War I, service rendered during World War II other than in the non-permanent active militia or the reserve army, service in the Korean War, service as a member of the special force, and special duty service,	**21 (1)** Pour le service accompli pendant la Première Guerre mondiale ou la Seconde Guerre mondiale, sauf dans la milice active non permanente ou dans l'armée de réserve, le service accompli pendant la guerre de Corée, le service accompli à titre de membre du contingent spécial et le service spécial :
(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that was attributable to or was incurred during 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;	**a)** des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — survenue au cours du service militaire ou attribuable à celui-ci;

***Veterans Review and Appeal Board Act* (S.C. 1995, c. 18)**
***Loi sur le Tribunal des anciens combattants (révision et appel)* (L.C. 1995, ch. 18)**

Construction	**Principe général**
3 The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	**3** Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.
[…]	[…]
Reconsideration of decisions	**Nouvel examen**
32 (1) Notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.	**32(1)** Par dérogation à l'article 31, le comité d'appel peut, de son propre chef, réexaminer une décision rendue en vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.
Board may exercise powers	**Cessation de fonctions**
(2) The Board may exercise the powers of an appeal panel under subsection (1) if the members of the appeal panel have ceased to hold office as members.	**(2)** Le Tribunal, dans les cas où les membres du comité ont cessé d'exercer leur charge, peut exercer les fonctions du comité visées au paragraphe (1).
Other sections applicable	**Application d'articles**
(3) Sections 28 and 31 apply, with such modifications as the circumstances require, with respect to an application made under subsection (1).	**(3)** Les articles 28 et 31 régissent, avec les adaptations de circonstance, les demandes adressées au Tribunal dans le cadre du paragraphe (1).
[…]	[…]

Rules of evidence	**Règles régissant la prevue**
39 In all proceedings under this Act, the Board shall	**39** Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(a) draw from all circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant; **(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.	**a)** il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci; **b)** il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence; **c)** il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1474-23
STYLE OF CAUSE:	ALEXANDRE DMITRIENKO v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 27, 2023
JUDGMENT AND REASONS:	GO J.
DATED:	DECEMBER 12, 2023

APPEARANCES:

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Tengteng Gai	FOR THE RESPONDENT

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