Federal Court  Cour fédérale

Date: 20240527

Docket: T-242-23

Citation: 2024 FC 801

Toronto, Ontario, May 27, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

MASTER CORPORAL (RETIRED) KELLY CARTER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Master Corporal (Retired) Kelly Carter [the Applicant], is a veteran with over 30 years of service in the Canadian Air Force. He sustained injuries during his service which qualified him for rehabilitation and vocational services [the Rehabilitation Program or the Program] as well as related financial benefits [the Income Replacement Benefit or the IRB] under the *Veterans Well-being Act*¸ SC 2005, c 21 [the *Act*]. He qualified for the Rehabilitation Program on July 29, 2020 after which date, members of Veterans Affairs Canada [VAC] tried to

work with him to develop a rehabilitation plan [the Rehabilitation Plan] and a job search plan [the Vocational Plan] [collectively, the Plans].

[2] On January 4, 2022, VAC made the decision to cancel the Applicant's Plans and to cease paying him the associated IRB. This decision stemmed from VAC's conclusion that the Applicant did not participate in the way he needed to in order to meet the goals of his Plans, which he was required to do under paragraph 14(1)(a) of the *Veterans Well-being Regulations*, SOR/2006-50 [the *Regulations*]. A review of that decision was upheld through two levels of review. The Applicant now seeks judicial review of the final decision by the National Second Level Appeals Unit [the N2LA Decision].

[3] While I am sympathetic to the Applicant's position, he has not discharged his burden of showing the N2LA Decision is unreasonable nor has he identified any instance in which he was denied procedural fairness before the N2LA. Accordingly, this application for judicial review is dismissed.

II. The Legal Framework

[4] Under sections 8 and 18(1) of the *Act*, eligible veterans may obtain physical rehabilitation, psycho-social rehabilitation and vocational rehabilitation services which then entitles them to receive the IRB for the duration of their participation in the Rehabilitation Program.

A. *The Rehabilitation and Vocational Assistance Plans*

[5] According to subsection 8(1) of the *Act*, and section 3a of the Policy: *Rehabilitation Services and Vocational Assistance Plan: Assessments, Development and Implementation* [the ADI Policy], the goal of the Rehabilitation Plan is to help eligible participants cope with and improve any barriers to function, social adjustment or employability due to mental or physical health problems.

[6] Two steps follow the determination that a veteran is eligible for the Rehabilitation Program. First, VAC will assess the participant in accordance with their eligibility status to determine their medical, psycho-social, vocational rehabilitation or vocational assistance needs (s. 10(1) of the *Act*). Second, VAC may develop and implement a Rehabilitation Plan to address the rehabilitation needs identified in the assessment (s. 10(2) of the *Act*, s. 4 of ADI Policy).

[7] The success of any Rehabilitation Plan depends on the participant's active participation in each aspect of the plan. This is made clear in section 7 of the ADI Policy, subsection 18(2) of the *Act*, and paragraph 14(1)(a) of the *Regulations*.

B. *The Income Replacement Benefit*

[8] The IRB is a taxable, monthly benefit intended to provide income support to veterans while they participate in the Rehabilitation Program. Pursuant to subsection 18(2) of the *Act*, a veteran who is informed of their entitlement to the IRB is required to participate in the assessment of their needs and in the development and implementation of any plan that has been developed. Failure to participate in the components of a plan may result in cancellation of the

Rehabilitation Program and suspension of a veteran's IRB (s. 18(2), (6) of the *Act*; s. 7 of ADI Policy).

C. *Review of VAC Decisions*

[9] The Director General, Policy and Research has issued the Policy: *Review of Part 1, Part 1.1, Part 2 and Part 3.1 Decisions under the Veterans Well-being Act* to provide guidance on the review of decisions concerning benefits and services provided under the *Act* [Review Policy].

[10] According to the Review Policy, a person who is dissatisfied with a VAC decision may apply for a: (i) first level review of that decision by the National First Level Appeals Unit [N1LA]; and (iii) a second level review by the N2LA who may confirm, amend or rescind the decision. Both the N1LA and N2LA reviews are conducted on the basis of written submissions.

III. Facts

A. *The Applicant's Enrolment in the Rehabilitation Program*

[11] On July 29, 2020, the Applicant was found eligible for the Rehabilitation Program and the IRB under the *Act*. While the Applicant sustained a number of injuries, the Applicant's approval was ultimately based on injuries he sustained to his knee, hip and shoulder. These injuries were viewed as creating barriers to the Applicant's re-establishment in his post-service life.

[12] In communicating the Applicant's eligibility by letter dated July 29, 2020, VAC also informed the Applicant of the requirement that he participate in the Rehabilitation Program and that failure to do so may result in cancellation of both the Rehabilitation Program and the IRB.

B. *The Applicant's Rehabilitation Program*

[13] On March 17, 2021, the Applicant attended the Canadian Back Institute Health Group [the First Clinic] for the physical assessments necessary to develop his Rehabilitation Plan.

[14] An Interdisciplinary Assessment Report was eventually received from the First Clinic which included a summary of assessment findings and treatment recommendations. The Rehabilitation Plan proposed treatment involving active-based physiotherapy once per week for 12 weeks. The Applicant was advised on May 26, 2021 of the Rehabilitation Plan and the fact that he could implement his treatment at a physiotherapy clinic of his choice so long as it was registered with VAC.

[15] On June 9, 2021, the Applicant and his Case Manager spoke again on the phone. The Case Manager let the Applicant know that another clinic had called and indicated that they had availability. The Case Manager also asked the Applicant to sign consent forms. The Applicant reported that he did not want to go to a place requiring him to mask. The Case Notes included in the Certified Record indicate that the Applicant said that he would call the clinic and agreed that if he did not like them, he would find his own.

[16] The Case Manager sent the Applicant an additional message using the "My Veterans Affairs" messaging system [MVA message] on July 28, 2021 regarding the need to find a physiotherapy clinic. The Case Manager followed up again on September 3, 2021, and left the Applicant a voicemail message requesting an update and completed consent forms by September 27, 2021. Since the Applicant had also not been responding to calls by his Vocational Rehabilitation Specialist [VRS] regarding his job search, the Case Manager also requested that the Applicant return his VRS's calls.

[17] Ultimately, over the course of 10 months the Applicant never did find a clinic and he never signed the requisite consent forms.

C. *Developing a Vocational Plan for the Applicant*

[18] The Applicant was referred in April 2021 for vocational assessment with Canadian Veterans Vocational Rehabilitation Services [CVVRS]. The Applicant had a vocational assessment conducted by his VRS between April 14 and 20, 2021. According to the Case Plan Notes, the Applicant refused to answer questions or participate further in the assessment. Regarding the physical examination that he conducted with a member of CVVRS in his home, the Applicant argues that he was asked to do tests not sanctioned by VAC and which he found inappropriate.

[19] The VRS appeared to have accepted the Applicant's non-compliance with the assessment and continued with its efforts to develop the Vocational Plan. On July 13, 2021, the VRS spoke

with the Applicant about the Applicant's need to review a draft cover letter and resume and sign a job search agreement. The VRS mailed these documents to the Applicant on July 21, 2021.

[20] The Applicant's VRS made three further attempts in August 2021 to contact the Applicant by phone, leaving voice mail messages for him requesting that they speak to go over his resume and cover letter. The Applicant did not respond. According to the Applicant, he stopped communicating with his VRS after their initial conversation because she laughed at him when he asked her for a list of companies that were looking to hire veterans. According to the Applicant, he felt disrespected.

[21] The last communication with the Applicant in respect of his Vocational Plan occurred on September 10, 2021 when a job developer at CVVRS called the Applicant in connection with his job search. The Case Notes indicate that the Applicant said he was not working with CVVRS because there was an investigation into the organization including over how he was treated by them.

[22] The Applicant took no further steps with respect to the development of his Vocational Plan.

D. *The Applicant's Last Contact with VAC*

[23] On October 6, 2021 and again on October 7, 2021, the Case Manager attempted to contact the Applicant to discuss his non-participation with the Program. The Applicant was given one week to find a physiotherapy clinic for him to complete the recommended exercise

program with the Case Manager offering to help the Applicant find a physiotherapy clinic if necessary. The Applicant was also given a deadline of October 12, 2021 to call his VRS, or his vocational rehabilitation file would be closed.

[24] On October 19, 2021, the Applicant sent the Case Manager a MVA message informing the Case Manager that he had been doing his own rehabilitation program at a recreation centre since early September 2021. He shared that he believed the job search staff were lying to the Case Manager. Finally, he advised that he had been experiencing technical and internet issues at home.

[25] This was the last direct communication between the VAC team and the Applicant before their decision to cancel the Applicant's Program on November 16, 2021.

E. *The Decision to cancel the Applicant's Program*

[26] On November 2, 2021, the Case Manager spoke with the Applicant's VRS regarding his non-participation in a job search. It was decided that his file would be closed with re-referral as an option in the future depending on the Applicant's willingness to participate and complete all of the assessments. This decision was based on the fact that the Applicant had: (i) not spoken to the VRS since July 13, 2021; (ii) never signed the vocational agreement package that his VRS sent him; and (iii) not participated in any part of the verbally agreed to job search.

[27] On this same day, the Case Manager sent the Applicant a letter advising him that his Rehabilitation Program and IRB may be suspended as his participation in the development and implementation of his Rehabilitation Plan was a requirement for continued eligibility.

[28] On November 16, 2021, the Applicant's Vocational Plan was closed at VAC's request. A follow-up letter was sent to the Applicant on December 1, 2021, and the Case Manager sent a MVA message advising that the Applicant's IRB had been suspended effective December 1, 2021. The Applicant was afforded another opportunity to contact his Case Manager to complete the requisite steps and reinstate his IRB.

[29] On January 4, 2022, the Case Manager sent a decision letter [Initial Decision] informing the Applicant that further to the letters dated November 2, 2021 and December 1, 2021, his Program was cancelled and that his IRB was no longer payable.

[30] The Applicant submits that he did not receive the three letters from VAC dated November 2, 2021, December 1, 2021, and January 4, 2022 until July 8, 2022 due to Canada Post delays in forwarding his mail after he moved residences.

F. *Review of the Decision to Cancel the Applicant's Rehabilitation Program*

[31] On April 19, 2022, the N1LA wrote the Applicant to advise that the Case Manager had made a request on the Applicant's behalf for a review of the Initial Decision. On April 27, 2022, the Applicant responded to the N1LA confirming the request for a review.

[32] In the Applicant's letter he made the following submissions: (i) he received no prior notice or reasons for the cancellation of his IRB; (ii) the treatment plan he was receiving while living in Calgary was working very well for him; (iii) he relied on the BC Provincial Health mask exemption for all persons exercising indoors; (iv) he had three phone calls with his Case Manager; (v) he was laughed at by his VRS for asking for a list of employers that hire veterans; (vi) he was offline for about six weeks and does not have a cellphone; and (vii) his Case Manager was aware of his internet problems.

[33] On July 29, 2022, the N1LA upheld the Initial Decision [N1LA Decision]. The N1LA held that the Rehabilitation Program was properly cancelled, as the Applicant had not participated to the extent required to meet the goals of the Plans nor advised of any reason he could not do so. The N1LA found that VAC made every reasonable effort to reach the Applicant in order to understand whether there was a reasonable cause for the Applicant's non-participation.

G. *The Decision under Review*

[34] On August 10, 2022, the Applicant wrote to the N2LA requesting a review. This request reiterated that the Applicant did not receive letters from his Case Manager, along with discussions surrounding COVID protocols and the Applicant's perspective on wearing masks.

[35] On January 11, 2023, the N2LA issued its Decision, confirming the N1LA Decision. It stated in part:

> In reviewing your National First Level Appeals decision of 29 July 2022, I have referred to the *Veterans Well-being Regulations* and

> policy provisions concerning the Rehabilitation Services and Vocational Assistance Program. [...] The Regulations and policy further state, it is appropriate to cancel a rehabilitation plan if a Veteran does not participate to the extent required to meet the goals of the plan. In other words, failure to participate may result in the cancellation of your plan.
>
> […]
>
> The information on your file has been thoroughly reviewed, including a prescription from Dr. Hardy dated 25 august 2022. […] The available information, indicates that in working with your Case Manager, you had agreed to the goals of your plan. However, Evidence demonstrates that you did not fully participate in your assessment with CBI Health, nor updated your Case Manager as per the requirements of your rehabilitation plan. Additionally, following the referral to the Canadian Veterans Vocational Rehabilitation Services for your Vocational Rehabilitation, you did not fully participate during the initial assessment, did not continue to participate in the process and did not return numerous phone calls (24 August, 26 August, 30 August and 16 September 2021) from your assigned vocational rehabilitation specialist.
>
> Your file demonstrates your Case Manager had made every reasonable effort to determine the cause for your non-participation, and to explain the necessity of re-engaging in your rehabilitation plan through phone calls, messages and letters. […] Further, your file demonstrates that the following letters were sent to you on multiple occasions: Intent to suspend your IRB letter dated 2 November 2021, IRB suspension letter dated 1 December 2021, and, Rehabilitation Program and IRB Cancellation letter dated 4 January 2022.
>
> As you did not or could not engage in this process, you were not participating to the extent required to meet the goals of your plan. Therefore, based on the information available at the time of the original decision and the first level review, I am confirming the 29 July 2022 National First Level Appeals Unit decision.

IV. Issues and Standard of Review

[36] The Applicant's arguments on the merits of the N2LA Decision appear to be that: (i) he continued to do physiotherapy on his own and should not have been required to find a

physiotherapy clinic given their unsafe masking requirements; and (ii) he did not receive any prior notice or explanation regarding the cancellation of his IRB.

[37] The appropriate standard of review on the merits of a N2LA decision rendered under the *Act* is reasonableness (*Chartrand v Canada (Attorney General)*, 2022 FC 1352 at para 14 citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*]). Notably, this includes whether the N2LA reasonably considered whether the Applicant received notice of the cancellation of his Program.

[38] In reviewing the N2LA Decision for reasonableness, this Court is tasked with reviewing the written reasons holistically through a lens of judicial restraint that considers the legal context and the evidentiary record which constrained the decision maker (*Vavilov* at paras 75, 84, 89, 97, and 99). Due sensitivity must be given to the administrative regime and the specialized knowledge of its decision makers (*Vavilov* at para 93). This Court must determine whether the N2LA Decision is justified, intelligible and transparent and must refrain from re-deciding the case or reweighing the evidence (*Vavilov* at paras 15 and 125).

[39] The burden rests on the party challenging the administrative decision to show that it is unreasonable (*Vavilov* at para 100).

V. Preliminary Issues

[40] The Respondent raises two preliminary matters in its submissions. First, the Respondent argues that in accordance with Rule 303(2) of the *Federal Courts Rules* SOR/98-106, the correct

Respondent to this application is the Attorney General of Canada and not Veterans Affairs Canada and Minister Lawrence Macaulay. I agree and the style of cause shall be amended to reflect the correct respondent, the Attorney General of Canada.

[41] Second, the Respondent argues that the Applicant's Record contains improper evidence, as it contains material that was not before the N2LA. The following exhibits (as identified by the Applicant in the Table of Contents) are therefore in dispute:

A. Supporting Documentation for Client Based Physiotherapy
B. Supporting Client Offline of my VAC Account
C. Supporting Documents of CVVRS Negative Relationships
D. Supporting Mail never sent to my Home
E. Source Documents to support Reverse of Cessation Attempts

[collectively, the New Exhibits]

[42] It is well established that judicial review is to proceed based on the evidence that was before the original decision maker. There are, however, recognized exceptions to this rule: (1) general evidence of a background nature that is of assistance to the Court (and which does not go to the merits of the decision under review); (2) evidence that is relevant to an alleged denial of procedural fairness by the decision maker that is not evident in the record before the decision maker; or (3) evidence that demonstrates the complete lack of evidence before a decision maker for an impugned finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20; and *Henri v Canada (Attorney General)*, 2016 FCA 38 at paras 39-40).

[43] The Applicant has not argued, and I have not found, that the New Exhibits relate to any of the recognized exceptions. Accordingly, I have not considered the New Exhibits.

VI. Analysis

A. *The Applicant has not shown the NL2A Decision is unreasonable*

[44] I agree with the Respondent that the N2LA Decision was reasonable. In my view, the N2LA Decision is intelligible, transparent and justified in light of the legal and factual constraints that bear on the Decision. The N2LA considered the evidence, and provided cogent reasons relating to the Applicant's failure to participate in the Plans.

[45] In his written submissions, the Applicant says he was cut-off from his IRB without any prior notice whether by Canada Post correspondence or even "the professional courtesy of a phone call." However, the materials that were before the N2LA demonstrate that the Case Manager and VRS tried to contact the Applicant prior to cancelling his Program and warned him that lack of participation could result in the cancellation of his IRB. These instances were highlighted in the N2LA Decision, leading to the conclusion that every reasonable effort was made on the part of Case Manager to provide the Applicant with notice of the consequences of his non-participation. In light of the evidentiary record, it was open to the N2LA to reach this conclusion.

[46] The N2LA's conclusions regarding the Applicant's lack of participation in the necessary assessments and the Program are also well supported by the evidence. The only communication by the Applicant to the Case Manager between June 9, 2021 and the Initial Decision on January

4, 2022 was a MVA message on October 19, 2021, in which the Applicant did not respond to the Case Manager's requests for updates regarding his physiotherapy nor address his non-participation.

B. *The Applicant has not shown the NL2A Decision to be procedurally unfair*

[47] While the Applicant was invited at the oral hearing to identify any matters going to whether or not he was afforded procedural fairness in addressing the N2LA Decision, he focused instead on matters going to the general unfair treatment he believes he and other veterans have been subjected to by individual VAC workers, VAC more generally, and the Government. Regrettably, this judicial review application is not the proper forum for such complaints.

[48] The ultimate question when considering questions of procedural fairness is whether the Applicant knew the case he had to meet and had an opportunity to respond to it before a fair and impartial decision maker (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 41). I find that was indeed the case: the Applicant was provided with the reasons for the cancellation of his Program and the IRB, and he was afforded an opportunity to request a review and provide submissions to both the N1LA and N2LA decision makers in accordance with the Review Policy, which he did.

VII. Conclusion

[49] As the Applicant is a self-represented litigant, I have given due regard to the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons* (2006). Nevertheless, the Applicant has not identified any error in the N2LA Decision. The

Decision is justified, transparent, and intelligible, and it cannot be said that it falls outside the scope of reasonable outcomes that are defensible in respect of the applicable law or the particular facts of this case. Accordingly, this application for judicial review is dismissed.

JUDGMENT in T-242-23

THIS COURT'S JUDGMENT is that:

1. The style of cause shall be amended to name the Attorney General of Canada as the sole Respondent to this proceeding.
2. The application for judicial review is dismissed; and
3. There is no order as to costs.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-242-23
STYLE OF CAUSE:	MASTER CORPORAL (RETIRED) KELLY CARTER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	MAY 16, 2024
JUDGMENT AND REASONS:	WHYTE NOWAK J.
DATED:	MAY 27, 2024

APPEARANCES:

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Duncan McManus	FOR THE RESPONDENT

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