Federal Court Cour fédérale

Date: 20240529

Docket: T-2309-23

Citation: 2024 FC 812

Ottawa, Ontario, May 29, 2024

PRESENT: Madam Justice McDonald

BETWEEN:

MICHAEL ANDREW TAYLOR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Michael Andrew Taylor's claim for compensation under section 45 of the *Veterans Well-being Act,* SC 2005, c 21 [*VWA*] was refused by the Veterans Review and Appeal Board Reconsideration Panel. Mr. Taylor is self-represented and seeks judicial review of the Reconsideration Panel decision. He claims the conditions he suffers from – idiopathic hypersomnia, bipolar disorder, and generalized anxiety disorder – are a result of his military

service in the Reserves. The Panel found there was insufficient evidence to establish that these conditions arose out of, or are directly connected with, his service in the Reserves.

[2] While I am sympathetic to Mr. Taylor's circumstances, I am dismissing his judicial review because he has not established that the Panel failed to consider his evidence or that he had an unfair consideration of his application. In other words, he has not demonstrated that the decision is unreasonable or was reached in a manner that was procedurally unfair.

I. Background

[3] Mr. Taylor resides in Conception Harbour, Newfoundland and Labrador. He says he is completely disabled from work and has been unemployed since September 2002. Relevant to this judicial review is his service in the Reserves between March 2001 and September 2002 when he served with the Royal Newfoundland Regiment and the Nova Scotia Highlanders.

[4] In December 2014, Mr. Taylor applied to Veterans Affairs Canada for benefits, claiming that his psychological conditions were caused by traumatic events during training exercises. He points to live-fire exercises, sleep depravation, and verbal abuse as the events that led him to develop symptoms of hypersomnia, bipolar disorder, and general anxiety disorder.

[5] Veterans Affairs Canada denied his August 2015 request for benefits because there was insufficient medical information to provide a specific cause for his medical conditions. His appeals to the Veterans Review and Appeal Board [VRAB] Entitlement Review Panel and the

VRAB Entitlement Appeal Panel were also denied due to a lack of evidence to establish that his medical conditions arose out of or were worsened by his service in the Reserves.

II. Relevant legislation

[6] The relevant provisions of the *Veterans Well-being Act,* SC 2005, c 21 [*VWA*], the *Veterans Well-being Regulations,* SOR/2006-50 and the *Veterans Review Appeal Board Act,* SC 1995, c 18 [*VRABA*] are included in the attached Annex.

III. Reconsideration Panel decision

[7] In a decision of September 26, 2023, the Panel denied pain and suffering compensation to Mr. Taylor (who the Panel refers to as the Appellant) for idiopathic hypersomnia, bipolar disorder, and generalized anxiety disorder under section 45 of the *VWA*. The Panel noted that it reviewed all the evidence, considered Mr. Taylor's submissions, and applied the requirements of section 39 of the *VRABA*. The Panel noted:

> The diagnoses of the Appellant's conditions and their classification as disabilities are not in dispute. The only remaining question for the Panel to consider is whether the claimed conditions arose out of, were directly connected with, or aggravated by the Appellant's Reserve Force service.

[8] The Panel accepted new evidence in the form of a letter from Dr. H. Russell Lake dated June 27, 2018. It also noted that the Appeal decision failed to consider if the Entitlement Eligibility Guidelines (EEGs) for Generalized Anxiety Disorder (GAD) might apply to Mr. Taylor as follows:

> … The Panel acknowledges that the EEGs for GAD consider causal or aggravating factors, including experiencing stressful life events within one year before the clinical onset or aggravation of GAD. These events encompass various situations, such as social isolation, problems in relationships, work or school-related concerns, legal issues, financial hardship, health issues in close family members or friends, and being a caregiver.
>
> More specifically, point C indicates:
>
> > c. having concerns in the work or school environment including: on-going disharmony with fellow work or school colleagues, perceived lack of social support within the work or school environment, perceived lack of control over tasks performed and stressful workloads, or experiencing bullying in the workplace or school environment

[9] In reference to the EEG, Mr. Taylor claimed that the live-fire exercise caused him to experience a "perceived lack of control over tasks performed and stressful workloads." Further, he argues that when he was belittled and yelled at, this was "experiencing bullying in the workplace or school environment."

[10] Despite considering the new report from Dr. Lake and the EEG guidelines, the Panel found there was insufficient evidence to reasonably conclude that the described experiences meet the criteria outlined in the EEGs for GAD. Dr. Lake's letter provided clarity on Mr. Taylor's medications, but it did not offer an opinion on how the claimed conditions were connected to his service. The Panel further noted on a 2018 medical report that mentioned a GAD diagnosis in 2001 and medication in early 2002, but the Panel also noted the absence of any medical evidence from that time (2001-2002) to support the diagnosis.

[11] The Panel inferred that the GAD diagnosis was prior to his release from service but found that diagnoses for idiopathic hypersomnia and bipolar disorder were post-release from service. On Dr. Lake's report, the Panel says:

> While Dr. Lake's letter provides insight into the medications the Appellant was taking, it does not offer additional evidence regarding a connection between the claimed conditions and his military service… Dr. Lake's evidence supports the presence of medication use during service, implying a GAD diagnosis at that time. However, Dr. Lake's letter does not address how military service could have caused or aggravated the claimed conditions.

[12] On the treatment of the evidence, the Panel noted that it applied the direction from *McTague v Canada (Attorney General)* (TD), [2000] 1 FC 647 [*McTague*] to differentiate between a "contributing cause" and a "setting". The Reconsideration Panel concluded that Mr. Taylor's "…GAD can reasonably be found to have been diagnosed in service; however, there is insufficient supporting evidence to argue that the condition arose out of, was directly connected with, or was aggravated by Reserve Force service."

[13] Finally, the Panel considered the report from psychiatrist, Dr. David Aldridge dated December 3, 2002, addressing Mr. Taylor's substance abuse and the family history of anxiety. The Panel found that Dr. Aldridge's report contradicted Mr. Taylor's claim that he did not abuse marijuana until after his discharge from service.

IV. Issue and standard of review

[14] The issue on this judicial review is the reasonableness of the Reconsideration Panel's findings that there was insufficient evidence to establish a causal connection between

Mr. Taylor's medical conditions and his military service. Both parties acknowledge that reasonableness is the appropriate standard of review.

[15] In assessing the Panel's decision, the Court considers if the decision is reasonable, the Court must ask "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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

[16] Reasonableness review looks at the whole decision and any errors in the decision must be "sufficiently central and significant to render the decision unreasonable" (*Vavilov* at para 100).

V. Analysis

A. *Preliminary issue – admissibility of Mr. Taylor's Affidavit*

[17] The Respondent objects to the Court considering the Affidavit sworn by Mr. Taylor on November 14, 2023. The Respondent says the Affidavit contains information that was not before the Reconsideration Panel and is, therefore, inappropriate to be considered on this judicial review.

[18] Generally, on judicial review, the Court cannot consider any new evidence that was not before the decision maker. On judicial review, the Court does not make factual findings on the merits of the matter. One exception is if the evidence offered on the judicial review provides

general background information (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20). Mr. Taylor argues that his Affidavit does provide additional background information that is not otherwise available on the record because he cannot access his medical records from 2001.

[19] In assessing if Mr. Taylor's Affidavit provides background information and, therefore, meets the exception, I have compared the contents of his Affidavit against the evidence before the Panel. His Affidavit provides additional details and narrative on the live-fire training, the use of vulgarity, and the intentional sleep deprivation events. However, these events were covered in Mr. Taylor's submissions to the Reconsideration Panel and are addressed by the Panel in the decision. Therefore, the additional information contained in his Affidavit cannot be characterized as background information. Further, the information in the Affidavit goes into the merits of the matters considered by the Panel. Because of this, I cannot consider the contents of the Affidavit as it does not meet the exception to the rule that would allow me to consider evidence that was not before the Reconsideration Panel.

[20] Mr. Taylor's Affidavit of November 14, 2023, is inadmissible on this judicial review and will not be considered.

B. *Did the Reconsideration Panel reasonably consider Mr. Taylor's case?*

[21] In his submissions, Mr. Taylor argues that the Reconsideration Panel reached an unreasonable decision on the following issues (1) the treatment of his new medical evidence (2)

the allegations of substance abuse (3) the evidence on sleep deprivation and (4) the bullying conduct. Before I turn to consider these specific issues, it is helpful to outline who has the burden of proof and how evidence is to be assessed by the Panel.

[22] Before the Panel, Mr. Taylor had the burden to submit sufficient credible evidence to establish a cause and effect link between his medical conditions and his military service. The 'benefit of the doubt' provision at section 39 of *VRABA* does not require the Panel to accept all evidence and even uncontradicted evidence must still be credible. Credible evidence is described as evidence that is "plausible, reliable and logically capable of proving the fact it is intended to prove" (C*anada (Attorney General) v Wannamaker,* 2007 FCA 126 para 6).

(1) <u>New medical evidence</u>

[23] The new medical evidence was a report from Dr. Lake dated June 27, 2018. The Panel noted that while this report provided evidence of Mr. Taylor's GAD diagnosis at the time of his service, the report did not provide an opinion on the cause of the GAD.

[24] Mr. Taylor argues that Dr. Lake's report is evidence of a GAD diagnosis during his military service and should be accepted as sufficient evidence of a service-related injury. He argues that the report draws a causal connection between his GAD diagnosis and his service. In support he relies upon paragraph 97 of *Cole v Canada,* 2015 FCA 119 [*Cole*] which states:

> Recognizing that there is no determinative authority on this issue and being mindful of the admonishments in section 2 of the *Pension Act* and section 3 of the *VRAB Act* that the provisions of the *Pension Act* are to be liberally construed and interpreted, I

> conclude that, for the purposes of establishing entitlement to a disability pension under paragraph 21(2)(*a*) of the *Pension Act* on the basis that the claimed condition was "directly connected with" the applicant's military service, the applicant must establish only a significant causal connection between the applicant's claimed condition and his or her military service. In other words, a causal connection that is significant but less than primary will be sufficient. Thus, an applicant's military service will provide a sufficient causal connection with his or her claimed condition, such that the claimed condition is "directly connected with" such military service, where he or she establishes that his or her military service was a significant factor in bringing about that claimed condition.

[25] The *Cole* case outlines the approach to be taken by decision makers in applying the statutory language "directly connected with." However, the *Cole* case involved different legislation, the *Pension Act*, and involved different facts, namely someone with a 21-year military career who was medically discharged. Finally, *Cole* does not stand for the proposition that causation must be "presumed" when someone is diagnosed with a condition while in military service.

[26] Returning to the Panel's consideration of Dr. Lake's report, the Panel notes the report provided insight into the medications taken by Mr. Taylor but the report did not offer additional evidence on a connection between Mr. Taylor's miliary service and his medical conditions. As there was no medical evidence that provided a causal connection between his GAD and his miliary service, the Panel could not find that the GAD was a "service-related injury or disease."

[27] While I acknowledge that Mr. Taylor disagrees with this finding, he has not satisfied me that the Panel was unreasonable in the consideration of Dr. Lake's report.

(2) Allegations of substance abuse

[28] Mr. Taylor argues that the Reconsideration Panel made an error by implying that his GAD was triggered by substance abuse. He says the Panel misread the report of Dr. Aldridge dated December 2, 2002 where it states:

> Michael had a problem with drinking until 8 months ago when he stopped except for social drinking at parties. He uses marijuana 2-3 times every day. He has occasionally used other drugs and has depended on benzodiazepines and taken more than he should.

[29] On Dr. Aldridge's report, the Panel states:

> The Panel also considers contemporaneous evidence from Dr. Aldridge, a psychiatrist, dated 3 December 2002 (SOC 38) who indicated that the Appellant had issues with substance use (alcohol and marijuana), occasionally used other drugs, and had relied on benzodiazepines until December 2002, which had stopped around eight months prior to his report (circa April 2002)....
>
> The Appellant argues that he did not abuse marijuana while in service, claiming that it became a problem after his honorable discharge. However, the Panel finds that this statement is contradicted by Dr. Aldridge's contemporaneous medical report. The Panel prefers the contemporaneous medical evidence over the Appellant's recollections.

[30] Mr. Taylor says that the use of the word "contemporaneous" by the Panel led them into error and they wrongly implied that substance abuse was a factor during his service. He explains his position on this issue in his written and oral submissions as:

> The VRAB *Reconsideration Panel* considered this report contemporaneous with Mr. Taylor's time of service even though the medical report was written over two months after his discharge in addition they concluded that Mr. Taylor was smoking marijuana

> in April 2002 but in fact this report report [*sic*] only referred to marijuana use in December of 2002 and not April of 2002 as the VRAB concluded.

[31] I agree with Mr. Taylor that the Panel appears to have misstated the information in Dr. Aldridge's report in reference to his use of marijuana while in service. The 8-months reference in the Aldridge report relates to Mr. Taylor's use of alcohol and not to his use of marijuana. The Aldridge report does not indicate that Mr. Taylor used marijuana while he was in service. But because the Panel did not find that Mr. Taylor's medical conditions were caused by substance abuse, this misstatement is of no consequence to the Panel's overall findings. In other words, the finding of the Panel on marijuana use is not sufficiently central or significant to render the entire decision unreasonable. That is because Mr. Taylor's claim was denied based on the lack of evidence to support a connection between his medical conditions and his military service, and not because of his use of marijuana.

(3) <u>Sleep deprivation</u>

[32] Mr. Taylor argues that the Reconsideration Panel ignored the three medical journal articles he submitted to demonstrate the link between sleep deprivation and bipolar disorder and anxiety. I agree with Mr. Taylor that the medical journal articles are not specifically referenced by the Panel in their decision. However, it is not always necessary for a decision maker to refer to every piece of evidence in their decision. The impact of the failure of the Panel to specifically refer to the articles is assessed by considering the importance and relevance of the evidence to

Mr. Taylor's case (*Akram v Canada (Minister of Citizenship and Immigration)*, 2004 FC 629 at para 15).

[33] In considering the importance and relevance of the medical journal articles, I would first note that the articles provide general information only. The journal articles do not contain personal evidence or information about Mr. Taylor that would allow for the connection between his medical conditions and his service in the Reserves. While Mr. Taylor argues that the articles are uncontradicted, that alone is not sufficient to make the information they contain relevant to his own circumstances. Mr. Taylor relies upon the journal articles to make a connection between his medical conditions and sleep deprivation. But he did not offer any of his own medical evidence to support that connection in his circumstances. The Panel's failure to refer to the medical journal articles in its decision does not establish that the decision is unreasonable or that the Panel disregarded the evidence.

(4) The bullying conduct

[34] Mr. Taylor argues that the Panel failed to consider the adverse impact of the bullying and harassment. He argues that his personal uncontradicted evidence should have been sufficient for the Panel and he challenges the Panel's reference to *McTague* as he says that case concerned an injury suffered after work, whereas he experienced verbal abuse during training.

[35] The Court in *McTague* upheld a decision that the injury at issue there, did not directly arise from or "was directly connected" to military service. I do not understand the Panel to point

to *McTague* because the facts are like Mr. Taylor's case. Rather, the Panel noted the case because it addresses the concept of a "contributing cause" within a "setting" (paras 66 and 67 *McTague*). The relevance to Mr. Taylor's case is that it is not sufficient for Mr. Taylor to have been in the Reserves "setting" when he was diagnosed with GAD. Rather, Mr. Taylor must establish that his service in the Reserves was a "contributing cause" to his GAD diagnosis to be entitled to compensation.

[36] The Reconsideration Panel acknowledged Mr. Taylor's military service experiences and accepted that Mr. Taylor was diagnosed with GAD while he was in military service. However, Mr. Taylor's experiences during service were not sufficient evidence to support his claim that his medical conditions arose out of, were directly connected with, or were aggravated by his service in the Reserves. The Panel's finding of a lack of medical evidence to link Mr. Taylor's medical conditions to his military service experiences is reasonable.

VI. Conclusion

[37] The decision of the Reconsideration Panel to deny Mr. Taylor's claim on the grounds of insufficient evidence is reasonable. The Panel applied the 'benefit of the doubt' legislative provisions; however, those provisions cannot fill an evidentiary void. The decision is justifiable, transparent, and intelligible and grounded on the evidence before the Reconsideration Panel.

[38] This judicial review is dismissed. The Respondent did not seek costs and none are awarded.

JUDGMENT IN T-2309-23

THIS COURT'S JUDGMENT is that:

1. This judicial review is dismissed.

2. No costs are awarded.

"Ann Marie McDonald"
Judge

ANNEX

Veterans Well-being Act, SC 2005, c 21 [VWA]

Subsection 2(1) of the *VWA*:

service-related injury or disease means an injury or a disease that (a) was attributable to or was incurred during special duty service; or (b) arose out of or was directly connected with service in the Canadian Forces. (*liée au service*)	**liée au service** Se dit de la blessure ou maladie : a) soit survenue au cours du service spécial ou attribuable à celui-ci; b) soit consécutive ou rattachée directement au service dans les Forces canadiennes. (service-related injury or disease)

Section 43 of *VWA* has additional rules for evidence:

43 In making a decision under this Part or under section 84, the Minister and any person designated under section 67 shall (a) draw from the circumstances of the case, and any evidence presented to the Minister or person, every reasonable inference in favour of an applicant under this Part or under section 84; (b) accept any uncontradicted evidence presented to the Minister or the person, by the applicant, that the Minister or person considers to be credible in the circumstances; and (c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case.	43 Lors de la prise d'une décision au titre de la présente partie ou de l'article 84, le ministre ou quiconque est désigné au titre de l'article 67 : a) tire des circonstances portées à sa connaissance et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible au demandeur; b) accepte tout élément de preuve non contredit que le demandeur lui présente et qui lui semble vraisemblable en l'occurrence; c) tranche en faveur du demandeur toute incertitude quant au bien-fondé de la demande.

Subsection 45(1) of the *VWA*:

Eligibility 45 (1) The Minister may, on application, pay pain and suffering compensation to a member or a veteran who establishes that they are suffering from a disability resulting from (a) a service-related injury or disease; or (b) a non-service-related injury or disease that was aggravated by service. Compensable fraction (2) Pain and suffering compensation may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.	Admissibilité 45 (1) Le ministre peut, sur demande, verser une indemnité pour douleur et souffrance au militaire ou vétéran qui démontre qu’il souffre d’une invalidité causée : a) soit par une blessure ou maladie liée au service; b) soit par une blessure ou maladie non liée au service dont l’aggravation est due au service. Note marginale : Fraction (2) Pour l’application de l’alinéa (1)b), seule la fraction — calculée en cinquièmes — de l’invalidité qui représente l’aggravation due au service donne droit à une indemnité pour douleur et souffrance.

Section 50 of the *Veterans Well-being Regulations*, SOR/2006-50:

50 For the purposes of subsection 45(1) of the Act, a member or veteran is presumed, in the absence of evidence to the contrary, to have established that an injury or disease is a service-related injury or disease, or a non-service-related injury or disease that was aggravated by service, if it is demonstrated that the injury or disease or its aggravation was incurred in the course of … (f) any military operation, training or administration, as a result of either a specific order or an established military custom or practice, whether or not a failure to perform the act that resulted in the injury or disease or its aggravation would have resulted in	50 Pour l’application du paragraphe 45(1) de la Loi, le militaire ou le vétéran est présumé démontrer, en l’absence de preuve contraire, qu’il souffre d’une invalidité causée soit par une blessure ou une maladie liée au service, soit par une blessure ou maladie non liée au service dont l’aggravation est due au service, s’il est établi que la blessure ou la maladie, ou leur aggravation, est survenue au cours : … f) d’une opération, d’un entraînement ou d’une activité administrative militaire, soit par suite d’un ordre précis, soit par suite d’usages ou de pratiques militaires établis, que l’omission d’accomplir l’acte qui a entraîné la blessure ou la maladie, ou leur aggravation, eût entraîné ou non des mesures

disciplinary action against the member or veteran; or	disciplinaires contre le militaire ou le vétéran;

Section 3 of the *Veterans Review Appeal Board Act*, SC 1995, c 18 [*VRABA*]:

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.

Section 39 of [*VRABA*] outlines the same evidentiary rules as section 45 of *VWA*:

Rules of evidence 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.	Règles régissant la preuve 39 Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve : 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-2309-23
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DATE OF HEARING:	MAY 6, 2024
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	MAY 29, 2024

APPEARANCES:

Michael Andrew Taylor	(ON HIS OWN BEHALF)
Jessica Harris	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT