**Date: 20030612**

**Docket: T-549-02**

**Citation: 2003 FCT 731**

**Ottawa, Ontario, June 12, 2003**

**PRESENT: The Honourable Mr. Justice Blanchard**

**BETWEEN:**

**CARL FURLONG,**

**Applicant,**

**- and -**

**ATTORNEY GENERAL OF CANADA,**

**Respondent,**

**REASONS FOR ORDER AND ORDER**

***Introduction***

[1] This is an application for judicial review of a decision dated January 15, 2002, by an appeal panel of the Veterans Review and Appeal Board (appeal panel) dismissing a second application to reconsider a decision by the appeal panel dated May 31, 1999.

***Facts***

[2] The applicant, Mr. Furlong, born in 1957, served in the Regular Forces of the Canadian Army from May 8, 1975 to November 6, 1979. During his service, the applicant was posted to Egypt from October 11, 1978 to April 12, 1979, as part of a peacekeeping mission.

[3] During this period in Egypt, while he was at the barber's, the applicant claims that the barber threatened him by holding a razor against his throat and that he was traumatized by this incident. However, it appears from the Board's decisions that he said nothing about this incident until 1997.

[4] On April 21, 1986, the applicant applied for a disability pension based on chronic anxiety, depression and alcoholism, all of which he attributed to his service in Egypt. On September 11, 1986, the former Canadian Pension Commission denied the pension claim. On May 27, 1987, a review panel of the former Canadian Pension Commission allowed the pension claim in part and awarded a 1/5 pension entitlement for chronic anxiety and depression and 1/5 pension entitlement for the alcohol dependence resulting from the chronic anxiety.

[5] The applicant appealed the decision of the review panel to the Veterans Review and Appeal Board (the Board). On June 14, 1988, the Board modified the review panel's decision and determined that he was entitled to a 2/5 pension for chronic anxiety and a full pension for alcohol dependence.

[6] On April 1, 1997, the applicant filed a new application for a disability pension for post-traumatic stress syndrome, which he attributed to his posting in a special duty area in Egypt, in particular, to the above-described incident.

[7] On October 10, 1997, the Department of Veterans Affairs concluded that there was insufficient evidence to establish that the applicant suffered from this condition.

[8] Under section 84 of the *Pension Act*, R.S.C. 1985, c. P-6, the applicant filed an application for review before a review panel of the Board. On November 24, 1998, the Board denied the review application on the ground that the post-traumatic anxiety, as described in Dr. Duguay's medical report, was a type of chronic anxiety for which the applicant was already receiving a pension.

[9] Under section 25 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the VRAB Act), the applicant brought that decision before an appeal panel of the Board, and on May 31, 1999, the appeal panel upheld the decision of the review panel.

[10] The applicant filed an application for judicial review of that decision, then had the proceeding stayed _TRANSLATION_ "until judgment is delivered and has become *res judicata* in the Veterans Review and Appeal Board file - reconsideration section ...." since he had, in the meantime, submitted a request to an appeal panel to reconsider the May 31, 1999, decision.

[11] On March 29, 2000, the appeal panel dismissed the application to reconsider, and on October 6, 2000, the applicant withdrew his application for judicial review.

[12] On June 5, 2001, the applicant presented the same appeal panel with a second application to reconsider its decision of May 31, 1999, and submitted four pieces of evidence to support his application. Last, on January 15, 2002, the appeal panel again dismissed his application to reconsider on the ground that the supplementary evidence added nothing new to the file. That decision is the subject of this application for judicial review.

***Issues***

[13] The respondent submits that the applicant cannot attack the decisions of May 31, 1999, and March 29, 2000, on this application. In order to fully understand this application, it is preferable to deal with the following question first:

1. Which decision(s) is or are the subject of this application for judicial review ?

The Court will then be able to consider the following questions:

2. Did the appeal panel make a patently unreasonable error in fact or in law warranting the intervention of this Court

(a) in determining that the applicant was not severely traumatized psychologically in Egypt;

(b) in assessing the “fresh evidence” in the case.

3. Is there an apprehension of bias when the members sit on an appeal and reconsideration of their own decision?

***Standard of review***

[14] This Court must show considerable deference to decisions rendered by an appeal panel that refuses to reconsider one of its own decisions.

[15] The jurisprudence of this Court has established that the Court can only intervene to the extent that the impugned decision is patently unreasonable, based on an erroneous finding of fact, made in a perverse or capricious manner or without regard to the material that was before the Appeal Board [*MacDonald v. Canada (Attorney General)*, [1999] F.C.J. 346 (F.C.); *Tousignant v. Canada (Minister of Veterans Affairs)*, [2001] F.C.J. No. 1083 (F.C.); *Hull v. Canada (Attorney General)*, [1998] F.C.J. No. 890 (F.C.) affirmed by [1999] F.C.J. 1800 (F.C.A.)].

***Analysis***

***1. Which decision is the subject of this application for judicial review?***

[16] The appeal panel rendered two decisions prior to its decision of January 15, 2002. First, on May 31, 1999, it ruled on the appeal of the review panel's decision; then, on March 29, 2000, it refused to reconsider its decision of May 31, 1999. The applicant submits that the appeal panel erred in fact and in law in the two earlier decisions and that this Court must consider those errors on the judicial review. The respondent submits that the applicant cannot attack the decisions of May 31, 1999, and March 29, 2000, on this application because they are not the subject of this judicial review.

[17] The line of demarcation between the January 15, 2002, decision and the earlier decisions is unclear because a reconsideration, by its very nature, requires some hearkening back to the substance of the earlier decision. In *Mackay v. Canada (Attorney General)* (1996), 129 F.T.R. 186, Mr. Justice Teitelbaum explained how a decision based on a reconsideration of earlier decisions must to some extent look backwards to those decisions:

> Because of the VRAB's jurisdictional and procedural errors already discussed above, I need not determine for the purposes of the current proceeding what the VRAB should have determined if it had properly applied the relevant considerations in Section 111 to Mr. Mackay's case. Suffice it to say that for the VRAB, to properly exercise its statutory mandate under Section 111, _*sic*_ must look to potential errors of fact or law in the earlier decision under reconsideration and examine its merits. Effectively in a reconsideration, the VRAB is required to look backwards to the substance of the earlier decision. In a similar vein, in a judicial review application concerning the VRAB's failure to reconsider an earlier decision, the Court must equally look backwards to the earlier decision. Thus, the Court in the case at bar cannot decide in a vacuum if the VRAB on June 21, 1996 properly exercised its discretion. The Court must also pay some attention to the earlier decision of the VAB dated January 19, 1994 because it was at issue in the VRAB reconsideration proceeding.
>
> However, I wish to emphasize that it is not for the Court in the current proceeding to conduct a full-fledged judicial review of the January 19, 1994 decision of the VAB. The validity of the earlier decision of January 19, 1994 cannot properly be challenged in a judicial review of the VRAB's June 21, 1996 reconsideration decision. The Court does not have jurisdiction to overturn the

> earlier decision. By its very nature, a reconsideration under the auspices of the Veterans Review and Appeal Board Act is backward-looking but there cannot be a point of infinite regression. The applicant can only argue that the VRAB in its June 21, 1996 decision did not properly exercise its discretion under Section 111 because it did not reconsider on its own motion the earlier decision of the VAB despite the existence of errors of fact and law in the VAB decision. [My emphasis.]

[18] I accept Mr. Justice Teitelbaum's analysis. Accordingly, the Court cannot disregard the decisions made prior to the appeal panel's last decision of January 15, 2002. Although the Court does not have jurisdiction to set aside those earlier decisions because they are not the subject of this judicial review, the Court must nonetheless consider them retrospectively to better understand the basis of the decision that is under judicial review.

***Decision of January 15, 2002***

[19] It was under subsection 32(1) of the VRAB Act that the appeal panel rendered its decision on the applicant's application to reconsider dated June 5, 2001. Subsection 32(1) reads as follows:

| | |
|---|---|
| 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. [My emphasis] | 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. [Je souligne] |

The main thrust of the decision is as follows:

> _TRANSLATION_
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> . . .
>
> On June 5, 2001, the representative filed an application to reconsider supported by new evidence, including an expert report by Dr. Jacques Voyer dated March 13, 2000, as well as supplementary affidavits and an excerpt from Veterans Affairs Canada's guidelines on post-traumatic stress.
>
> In her application to reconsider, the representative concluded:
>
> > We contend that the enclosed new evidence as well as a review under the Pensions Act and supplementary evidence submitted on November 12, 1999, should lead the Board to find that the post-traumatic stress suffered by Mr. Furlong entitles him to a pension under subsection 21(1) of the Pension Act.
>
> After reviewing the various pieces of evidence that were submitted, in particular, Dr. Voyer's expert report, the panel determined that the problem of legally identifying the post-traumatic stress was made more difficult by the comorbidity of the applicant's conditions, as described by the doctor. This expert report did not establish that a trauma, in fact, existed.
>
> Furthermore, the said expert report does not state at all to what extent the traumatizing event "may or may not have contributed to the post-traumatic condition." Although it is meticulous, this expert report has no significant probative value for purposes of section 39 of the Pension Act.
>
> . . . There is still no prima facie evidence that the applicant experienced a real trauma.
>
> For these reasons, the panel concludes that the application to reconsider is not accepted since the panel did not err in fact or in law. For all practical purposes, the new evidence adds nothing new to the applicant's case . . .

***2. Did the appeal panel make a patently unreasonable error in fact or in law warranting the intervention of this Court***

(a) ***in determining that the applicant was not severely traumatized psychologically in Egypt;***
(b) ***in assessing the "fresh evidence" in the case.***

[20] The applicant submits that the appeal panel erred in its three decisions by not recognizing the event or the trauma that he experienced and that triggered his post-traumatic stress

symptoms. He claims that in the review panel's decision dated November 24, 1988, the members had recognized the facts recounted by the applicant and had dismissed the claim for a supplementary pension because his entitlement to the pension he was receiving for chronic anxiety included the post-traumatic stress condition.

[21] The applicant maintains that the appeal panel did not have to address the factual question as to whether the incident in Egypt took place because, the applicant says, this incident had already been accepted by the Board in an earlier decision.

[22] The applicant contends that the incident and the resulting post-traumatic stress had been recognized by the review panel following the hearing on November 24, 1998. According to the applicant, the following excerpt from the transcript of the November 24, 1998, hearing, supports his position:

> _TRANSLATION_
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> YVES CARON, PRESIDING MEMBER
> That is not it, that is not it. We are not denying the facts. We believe the facts as he has related them. That's it. All I'm saying is that chronic anxiety, the name, as a name, includes . . .

Accordingly, the applicant submits that the appeal panel erred in fact and in law in its May 31, 1999, decision by reconsidering the issue of the incident _TRANSLATION_ "at a hearing *de novo*" in the absence of the applicant and without hearing new testimony.

[23] In its decision of May 31, 1999, the appeal panel had indicated the following:

> _TRANSLATION_
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> . . . the appellant's military service record does not contain an investigative report or any other report confirming that the incident in question occurred when he was serving in a special duty area in Egypt, . . . or again, that the appellant experienced a severely traumatizing psychological event beyond common human experience . . .

On this point, the applicant presented an application to reconsider where he made the same argument. In its decision of March 29, 2000, the appeal panel wrote:

> _TRANSLATION_
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> As appears from [the] decision [of May 31, 1999], the review panel did not comment on the event or the appellant's affidavit in support of his claim. . . .
>
> Section 26 and following of the Veterans Review and Appeal Board Act sets out the powers of an appeal panel. The Board notes that the appellant who exercises his or her right of appeal is not required to rely on any grounds whatsoever to bring the claim from the review level to the appeal level.
>
> Parliament did not set out any grounds, and therefore the case can be throughly reviewed, and the appellant can put forward new grounds for a claim . . .
>
> The Board believes that its appeal jurisdiction is *de novo*, and that therefore it can revisit any question of fact or law raised by the Minister's decision, any question that is, for all practical purposes, the source of the "dispute."

[24] The appeal panel's comments in its January 15, 2002, decision are indicated above, but the substance of them is:

> _TRANSLATION_
>
> . . . There is still no *prima facie* evidence that the applicant experienced a real trauma.

Other than the passage from the transcript of the hearing before the Board held November 24, 1998, cited above in paragraph [22], there is no finding regarding the incident in

Egypt in the review panel's decision of November 24, 1998. After reviewing all the evidence, I am of the view that the appeal panel did not err in its decision of May 31, 1999, by determining that the applicant was not severely traumatized psychologically in Egypt.

[25] In its decision of March 29, 2000, the appeal panel also reconsidered in detail all the medical evidence in the file as well as the fresh evidence filed in support of the application to reconsider, including the affidavits of Stan Chambers, Alfred Brideau and Denis Soucy. The appeal panel found that _TRANSLATION_" although there may have been an altercation between the appellant and a barber during his stay in Egypt in 1978, there is simply no evidence in the file attesting to the history of the trauma."

[26] In my view, based on the evidence in the record, it was reasonable for the appeal panel to make this finding.

[27] In support of his second application to reconsider, i.e., the one that is the subject of this judicial review, the applicant adduced four new pieces of evidence: a psychiatric consultation report by Dr. Voyer; a supplementary affidavit of Mr. Soucy; a supplementary affidavit of Mr. Chambers; and a brochure entitled "*Post Traumatic Stress Disorder and War-Related Stress, Information for Veterans and their Families*."

[28] In its decision of January 15, 2002, the appeal panel maintained that it had reviewed all this evidence and explained, *inter alia*, that Dr. Voyer's expert report did not establish that there

had, in fact, been a trauma and did not state to what extent the traumatic event _TRANSLATION_ "may or may not have contributed to the post-traumatic stress condition." The review panel gave no significant probative value to this expert report.

[29] The appeal panel stated several times that the applicant's service record did not contain an investigate report or any other report confirming that the incident in question had occurred during his service in a special duty area in Egypt from October 11, 1978 to April 12, 1979, or that the applicant had been severely psychologically traumatized by an incident that was beyond common human experience during the same period of service. Moreover, the appeal panel noted that, following his service in Egypt, there was no report of him sustaining an injury or contracting an illness while he was in the special duty area; nor was there a medical report indicating that there had been a problem in Egypt during that time.

[30] Essentially, the appeal panel relied on the fact that the applicant had never reported the traumatic incident in Egypt prior to his new pension claim for his post-traumatic stress symptoms in 1997, and that there was no evidence in the record about this incident other than the testimony of the applicant and two other witnesses, testimony that the appeal panel considered of no probative value.

[31] The fundamental problem of credibility regarding whether the triggering event occurred prevented the appeal panel from responding favourably to the applicant's pension application. Nonetheless, the appeal panel assessed the supplementary evidence that was submitted at each

application for review, appeal and reconsideration. Even if the medical reports were not contradictory, as the applicant argues, the appeal panel could reasonably determine that they had no significant probative value since they were based essentially on the applicant's testimony as to the event that took place in Egypt, an event that he did not report for more than eight years.

[32] Considering all the evidence in the record, I am satisfied that this determination by the appeal panel, i.e., that Dr. Voyer's report did not constitute fresh evidence, was not a patently unreasonable finding. As for the supplementary affidavits, the appeal panel noted that a non-expert witness, such as Mr. Soucy, is not authorized to give an opinion and that these deponents recounted facts that could have been stated in their first affidavits that were before the appeal panel on the first reconsideration. In my view, the appeal panel did not err in giving little weight to these statements.

[33] After reviewing all the evidence that was before the Board and considering the parties' written representations and oral arguments, I am of the view that the appeal panel did not err in determining that _TRANSLATION_ "for all practical purposes, the new evidence adds nothing new to the applicant's case." The appeal panel was entitled to make the findings it did and to deny the application to reconsider.

### *3. Is there an apprehension of bias when the members are sitting on an appeal and reconsideration of their own decision?*

[34] The applicant also alleges bias on the part of the members of the appeal panel who reconsidered their own decision. Since I agree with the respondent, I adopt most of his

arguments. First, the applicant should have raised this argument at the earliest opportunity, i.e., at the hearing of the first application to reconsider (March 29, 2000) or at the hearing of the second application (January 15, 2002). He cannot rely on it for the first time in his application for judicial review. Not raising it is tantamount to waiving this argument [*Hudon v. Canada (Attorney General),* [2001] F.C.J. No. 1836 (F.C.)].

[35] Moreover, subsection 32(1) of the VRAB Act expressly provides that the appeal panel may reconsider its own decisions unless the members of the appeal panel have ceased to hold office as members.

***Conclusion***

[36] For all these reasons, this application for judicial review should be dismissed.

## ORDER

**THE COURT ORDERS:**

1. The application for judicial review of the decision dated January 15, 2002, by the Veterans Review and Appeal Board is dismissed.

"Edmond P. Blanchard"
Judge

Certified true translation
Mary Jo Egan, LLB

**FEDERAL COURT OF CANADA**
**TRIAL DIVISION**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-549-02 |
| **STYLE OF CAUSE:** | Furlong v. Attorney General of Canada |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | April 22, 2003 |
| **REASONS [FOR ORDER OR JUDGMENT]:** | Mr. Justice Blanchard |
| **DATED:** | June 12, 2003 |

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