Federal Court  Cour fédérale

Date: 20150717

Docket: T-2125-14

Citation: 2015 FC 881

Ottawa, Ontario, July 17, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

IDRIS BEN-TAHIR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Veterans Review and Appeal Board (VRAB) Entitlement Appeal Panel (the Board) dated September 10, 2014, which affirmed the decision of the VRAB Entitlement Review Panel dated March 1, 2013, which affirmed the February 17, 2012 decision of Veteran Affairs Canada (VAC) to deny the applicant's request for a disability award under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [*Compensation Act*]. The Board found that

the applicant had not established that his hearing loss and benign paroxysmal positional vertigo (BPPV or vertigo) was caused by or aggravated by his military service.

[2] Mr Ben-Tahir, the applicant, provided a significant amount of information regarding his role in the Canadian Forces and his medical diagnoses.

[3] The issue in this judicial review is not whether Mr Ben-Tahir suffers from hearing loss and BPPV, as the medical evidence confirms that he does indeed have these conditions. He described the serious impact of these conditions on his day-to day-life.

[4] Similarly, the issue on this judicial review is not Mr Ben-Tahir's contribution or commitment to the Canadian Forces as a member of the Reserve Force and Supplementary Reserve and as a public servant or civilian.

[5] This judicial review focuses on the decision made by the Board with respect to Mr Ben-Tahir's particular claims for a disability award.

[6] For the reasons that follow, the application for judicial review is dismissed. The decision of the Board is reasonable and was reached in a procedurally fair manner.

Background

[7] The pertinent background can be summarised as follows.

[8] Mr Ben-Tahir served in the Reserve Force of the Canadian Forces (Reserve Force) from December 5, 1963 to February 14, 1967.

[9] He recounts that in August 1965, while in the Reserve Force, he was subjected to a bullying or hazing incident which was sanctioned by his commanding officer. He describes that he was stripped of his clothing, shoes and glasses; his feet were tied; Coca-Cola was poured on his head; and, he was thrown into a swimming pool. He instituted a grievance, but was encouraged to withdraw it. He also recounts other adverse consequences which led to his transfer to the Supplementary Reserve in February 1967.

[10] He indicates that the bullying incident, along with the associated stress of the consequences following the incident, resulted in or contributed to his BPPV and hearing loss.

[11] He also recounts that while working for the Canadian Forces in a civilian capacity at CFB Trenton beginning in 1967 and at CFB Cold Lake in 1977, he suffered significant noise exposure which also contributed to his hearing loss. In oral submissions, the applicant indicated that the noise exposure began earlier, while he was located at CFB Uplands.

[12] Mr Ben-Tahir submits that his hearing loss and vertigo did not exist prior to the bullying incident and were exacerbated over the years since the incident.

[13] He also notes that he applied to be a member of the VRAB in 2010 and was not accepted. He submits that he met all the educational requirements and there was no valid reason provided to him for his non-acceptance.

The Decision Under Review

[14] As noted in the respondent's record, the applicant made a separate disability claim for another condition which was decided by a different Entitlement Review Panel on June 18, 2014. That decision has not yet been appealed to the Entitlement Appeal Panel.

[15] There are several review and appeal mechanisms from decisions of VAC regarding entitlement to various disability awards and pensions. In the present case, Mr Ben-Tahir has pursued all levels of review with respect to his claim related to BPPV and hearing loss and now seeks judicial review of the decision of the Board dated September 10, 2014. It is only this decision that is the subject of judicial review.

[16] The Board found that the applicant's claimed conditions of hearing loss and BPPV did not arise out of and were not directly connected to the applicant's service in the Reserve Force.

[17] The Board noted that most of the evidence the applicant had filed in support of his claim was not relevant to his claimed conditions.

[18] With respect to the applicant's hearing loss, the Board noted that the medical documents did not reveal any medical examinations or audiograms at the time of his release from the

Reserve Force. The Board also found that the report of the applicant's medical examination for enrolment in 1974 did not indicate that he suffered from any hearing problems at that time.

[19] The Board noted that the applicant's first available audiogram was dated May 1986 and the results did not indicate sufficient decibel loss to be considered the cause of any category of hearing loss disability as defined by the Entitlement Eligibility Guidelines (EEGs) for hearing loss.

[20] The Board considered the opinion of Dr Murphy, an otolaryngologist, dated August 25, 2013 that indicated that noise exposure may provide an accumulative effect which may not become evident for several years.

[21] The Board also noted that the evidence did not reveal the activities the applicant participated in during his time in the Reserve Force and what level of noise exposure he experienced in the Reserve Force (from 1964-1967). The Board added that the applicant's testimony indicated that he was exposed to noise predominately from 1969-1974 while at CFB Trenton. The Board concluded that the applicant had not demonstrated that he was exposed to noise during his time in the Reserve Force.

[22] The Board acknowledged that the applicant was exposed to significant noise while working at CFB Trenton from 1969-1974 and later at CFB Cold Lake, but found that, at those times, he was working as a civilian and, as a result, he would not be entitled to benefits from VAC.

[23] The Board concluded that the applicant is not entitled to a disability award for the condition of hearing loss.

[24] Regarding the applicant's BPPV, the Board referred to the Mayo Clinic website for information regarding the causes and risk factors for BPPV, which indicates that doctors cannot identify a specific cause in about half of all cases. Where a cause can be determined, the website indicates that it is often associated with a minor or severe blow to the head or other disorders that can damage the inner ear. No definite risk factors are identified other than age.

[25] The Board considered the opinion of Dr Murphy, dated August 25, 2013, that stated that the act of being thrown into water would not cause Meniere's disease, which is a precursor to vertigo. Dr Murphy's opinion indicated that the psychological stress resulting from the bullying incident may have aggravated the applicant's perception of any vertigo that he may have had prior to the incident.

[26] The Board noted that the EEGs do not indicate that stress is a cause of or can aggravate vertigo.

[27] The Board added that the October 8, 2012 opinion of Dr Murphy indicated prior diagnoses of cochlear hydrops, labyrinthitis and viral infection as causes of the applicant's vertigo. Dr Murphy indicated that the diagnoses of cochlear hydrops or labyrinthitis could have been a first episode of BPPV.

[28] The Board also commented that the bullying incident recounted to Dr Murphy had not been proven.

[29] In addition, the Board considered the opinion of Dr Smith, a psychiatrist, dated October 17, 2002 which stated that the applicant's 1969 episode of vertigo was attributed to a viral infection. Dr Smith added that "this does not detract from psychosocial factors as a significant contributor in regard to the exacerbation of his benign positional vertigo."

[30] The Board concluded that the medical evidence was insufficient to relate the applicant's BPPV to his Reserve Force service.

Relevant Legislation

[31] *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 20015, c. 21*:*

43. In making a decision under this Part or under section 84, the Minister and any person designated under section 67 shall	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) 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;	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) accept any uncontradicted evidence presented to the Minister or the person, by the applicant, that the Minister or	b) accepte tout élément de preuve non contredit que le demandeur lui présente et qui lui semble vraisemblable en l'occurrence;

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.

…

45. (1) The Minister may, on application, pay a disability award 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.

(2) A disability award 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.

c) tranche en faveur du demandeur toute incertitude quant au bien-fondé de la demande.

…

45. (1) Le ministre peut, sur demande, verser une indemnité d'invalidité 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.

(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une indemnité d'invalidité.

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

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

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

circumstances; and	l'occurrence;
(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.	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

The Issues

[33] The applicant raised several issues and provided a significant amount of information in his record, including information relating to his career in Canada and his community involvement. Based on his written memorandum and his oral submissions, the applicant's key submissions pertaining to this judicial review are that the Board erred in assessing his entitlement to a pension. Specifically, the applicant argues that the incident that occurred in 1965 was a cause of both his BPPV and hearing loss and that his exposure to noise while working at CFB Trenton and CFB Cold Lake was a cause or an exacerbation of his hearing loss. In addition, the applicant raised the issue of bias by the VRAB.

[34] The applicant also seeks relief which goes beyond the authority of the Court on judicial review. For example, the Court cannot address issues that relate to the admissibility or acceptance of evidence in other proceedings.

[35] The issues that will be considered in this judicial review are:

(1) Whether the decision of the Board is reasonable; and
(2) Whether the decision of the Board is procedurally fair, based on allegations that the VRAB showed a reasonable apprehension of bias.

The Supplementary Affidavit

[36] As a preliminary issue, the applicant seeks to admit his supplementary affidavit, dated June 15, 2015, with exhibits. The respondent objects to the majority of the affidavit noting that it includes legal argument, statements which are not relevant to the issue on this judicial review, statements which are repetitive of information on the record and/or included in the applicant's December 2, 2014 affidavit, and, more generally, that the affidavit will not assist the Court.

[37] I agree that the applicant has not met the onus upon him to establish that the evidence in the supplementary affidavit will serve the interests of justice, assist the Court and not prejudice the respondent (*Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5, [2002] FCJ No 1112. Prejudice to the respondent is not an issue in the present circumstances; however, the other two branches of the test are not met.

[38] Although the applicant has not established that the supplementary affidavit should be admitted, I have given the applicant, who is self-represented, some latitude in his submissions and in his reference to material included as exhibits to his supplementary affidavit. Some of the information repeats that which is on the record or in his memorandum of law. Other information describes his contribution to the community, which is commendable, but not relevant to the issue before this Court, which is the reasonableness of the Board's decision. The affidavit refers to new information, a letter from Dr Murphy dated May 2015. This letter was not available earlier and was not provided to the Board. It provides a possible explanation for an anomalous audiogram result in 1986 (or 1984, both dates are referred to at different points in the record). I

have considered this letter; however, as explained below, this new evidence does not change the Court's assessment of the decision.

Standard of Review

[39] The standard of review of discretionary decisions and findings of fact of the VRAB Entitlement Appeal Panel is reasonableness (*Robertson v Canada (Minister of Veterans Affairs)*, 2010 FC 233 at para 32, [2010] FCJ No 263 [*Robertson*]; *Phelan v Canada (Attorney General)*, 2014 FC 56 at para 25; *Jarvis v Canada (Attorney General)*, 2011 FC 944 at para 4 [*Jarvis*]). The Board's determination of the applicant's entitlement to a disability pension involves the interpretation and assessment of medical evidence, which is also reviewable on a standard of reasonableness (*Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21, 375 FTR 13).

[40] The standard of reasonableness is not necessarily what a person may think or argue is reasonable based on their perspective of the impact of the decision. Rather, the standard of reasonableness that is applied to the review of decisions is based on well-established legal principles. I appreciate that this concept may not be readily understood, particularly where the result is not what is hoped for. However, the Court is obliged to apply the relevant legal principles.

[41] The role of the Court on judicial review where the standard of reasonableness applies, as in the present case, is to determine whether the Board's decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process

and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339 [*Khosa*]).

[42] The Court does not re-weigh the evidence or remake the decision.

[43] A reasonable decision can also be described as one that can stand up to a somewhat probing examination (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 63, [1999] SCJ No 39).

[44] Questions of procedural fairness are reviewable on a correctness standard (*Khosa* at para 43; *Jarvis* at para 5). A breach of procedural fairness would require that the decision be reconsidered; there is no deference to the decision maker where there is such a breach. This standard applies to the allegations of bias raised by the applicant.

Material Not Before the Board

[45] As explained at the oral hearing, on judicial review, the Court may only consider the evidence which was before the board, commission or other tribunal whose decision is being reviewed, unless certain narrow exceptions apply, which are not present in this case (*Via Rail Canada Inc v Canada (Canadian Human Rights Commission)*, [1998] 1 FC 376 at paras 14-24, 135 FTR 214; Robertson at paras 29-31). Therefore, the reasonableness of the Board's decision

is assessed based on the evidence that the Board had before it, which the Board acknowledged was extensive, but not all of which was relevant.

Is the Board's Decision Reasonable?

The Applicant's Submissions

[46] The applicant submits that he was subjected to a hazing incident in 1965, while in the Reserve Force, which was ordered or approved of by the Commanding Officer and this led to several conditions, particularly, vertigo and hearing loss.

[47] The applicant also submits that much of the relevant information regarding the incident in 1965 has been destroyed.

[48] He explains that he suffered severe vertigo while at CFB Trenton from 1969-1974 and that his hearing loss worsened due to noise exposure.

[49] He also explains that while he may have been a civilian while working at CFB Trenton, he was called upon to participate in various missions and this required him to wear his uniform. He submits that these missions or assignments were analogous to being called out for service from the Supplementary Reserve.

[50] The applicant now submits that he was exposed to noise much earlier while at CFB Uplands in 1963-1967 and while still in the Reserve Force.

[51] The applicant argues that the May 2015 letter of Dr Murphy provides an explanation for an anomalous audiogram in 1984 or 1986 which indicated his hearing had not deteriorated from the previous test. The applicant submits that Dr Murphy now indicates that there was a malfunction in the equipment or a mix-up of the test results.

[52] The applicant also argues that the Board did not take the evidence of Dr Smith, who had treated him for many years prior to 2006, into account. The applicant submits that Dr Smith's evidence shows that stress is a cause of vertigo. Dr Smith stated:

> On a balance of probability and given the distressing events Mr. Ben-Tahir was experiencing at the time I would state that there is a relationship between the symptoms of vertigo and the heightened levels of anxiety he was experiencing. On a balance of medical probability the emotional distress he did experience was a significant contributor to the symptoms he experienced and which were associated with benign positional vertigo.

The Respondent's Submissions

[53] The respondent notes that an applicant bears the burden of proving that his or her condition is sufficiently proximate to his or her military service (*Acreman v Canada (Attorney General)*, 2010 FC 1331 at para 26, 381 FTR 139) with sufficiently credible and reasonable evidence (*Weare v Canada (Attorney General)* (1998), 153 FTR 75 at para 19, [1998] FCJ No 1145 (FCTD)). The respondent submits that the Board reasonably found that the applicant had not met this burden.

[54] The respondent submits that the Board's decision clearly explains why it was not satisfied that a causal connection was established between the applicant's conditions and his military service.

[55] The respondent points out that the determinative factor for the Board was the lack of evidence of causation during the applicant's military service. The respondent notes that although the Board acknowledged that the applicant was exposed to noise while working as a civilian at military bases following his discharge from the Reserve Force, his membership in the Supplementary Reserve or his civilian status while working at a military base does not create a basis for a disability award and is not relevant for the *Compensation Act*, as the harm suffered is not a "service-related injury or disease" (*Compensation Act*, s 45).

[56] The respondent notes that a "service-related injury or disease" is an injury or disease attributable to "special duty service" or which "arose out of or was directly connected to service in the Canadian Forces" (*Compensation Act*, s 2).

[57] The respondent submits that the evidence does not suggest that the applicant was involved in "special duty service."

[58] With respect to the applicant's BPPV, the respondent submits that the Board reasonably found that there was insufficient evidence to relate this condition to his service in the Reserve Force. This finding was reasonably based on the evidence that stress is not an identified cause of

BPPV and that the applicant had been diagnosed with three other possible causes of BPPV, all of which were unrelated to his military service.

[59] In response to the applicant's submission that it was unreasonable for the Board to disbelieve his bullying allegations, the respondent notes that the Board stated only that the incident had not been proven. Moreover, the incident was not the cause of the applicant's condition. If the Board had made a finding that the incident occurred, it would still have found that the effect of the incident was stress and stress is not identified by the EEGs as a cause of BPPV.

[60] The respondent adds that, based on the three other possible diagnoses that could have caused the applicant's BPPV, the Board reasonably concluded that the applicant had not established the causal link between his disability and his service in the Armed Forces.

The Board's Decision is Reasonable

[61] As the respondent notes, the case law has established that sections 43 and 45 of the Compensation Act and sections 3 and 39 of the VRAB Act mean that "an applicant must submit sufficient credible evidence to show a causal link between his or her injury or disease and his or her time of military service" (*Grant v Canada (Veterans Review and Appeal Board)*, 2006 FC 1456 at para 29).

[62] The injury must be sufficiently proximate to justify an award of disability benefits. This means that the injury must arise out of service in the Canadian Forces or be directly connected

with service in the Canadian Forces (*Hall v Canada (Attorney General)*, 2011 FC 1431 at para 35, [2011] FCJ No 1806).

[63] It is not necessary to decide whether membership in the Supplementary Reserve constitutes membership in the Reserve Force, which would then constitute membership in the Canadian Forces and provide for possible eligibility for disability awards for service-related injuries. In the present case, the Board reasonably found that the medical evidence was insufficient to establish that the applicant's BPPV was caused by his service in the Reserve Force and that, to the extent that noise exposure resulted in or aggravated the applicant's hearing loss, this noise exposure occurred while the applicant was a civilian employee.

[64] As noted above, the reasonableness standard of review considers whether the decision is justified, transparent and intelligible. The decision of the Board meets this standard; the Board considered all the evidence, did not misunderstand or misconstrue the evidence, provided an explanation for relying on the evidence of Dr Murphy and the EEGs rather than the somewhat different opinion of Dr Smith, a psychiatrist, and reached a decision on both claims that falls within the range of acceptable outcomes and is justified by the facts and the law.

[65] With respect to the applicant's hearing loss, the Board reasonably found that the applicant was working as a civilian at CFB Trenton and CFB Cold Lake (i.e., he not working in his capacity as a member of the Supplementary Reserve). Any injuries suffered by the applicant while working as a civilian do not engage section 45 of the *Compensation Act* because he was

not working as a member of the Canadian Forces. As the respondent helpfully pointed out, there may be other avenues of recourse for the applicant to pursue as a civilian employee.

[66] The new evidence, the letter from Dr Murphy dated May 15, 2015, which the applicant submits establishes an explanation for an audiogram conducted in 1984 or 1986 and which showed some improvement from a previous audiogram, does not, in my view, provide a specific explanation for the anomalous result. Rather, Dr Murphy indicates that the earlier audiogram was not conducted in his office but elsewhere and that it is difficult for him to provide a specific reason for the result. Dr Murphy indicates that *possible* explanations could be faulty equipment or a mix-up of medical records. Dr Murphy does not say that this is what in fact occurred, because, as he notes, he did not perform the audiogram.

[67] The applicant also appears to rely on this letter to support his submission that his hearing loss deteriorated over the years and, as explained in Dr Murphy's August 25, 2013 opinion, the accumulative effect of noise exposure may become evident later. However, the applicant's hearing loss is not in dispute, only its cause. Dr Murphy's full opinion indicates hearing loss in the left ear and Meniere's disease in the right ear, regardless of the different results in 1984 or 1986.

[68] The October 8, 2012 opinion of Dr Murphy notes that the first available audiogram is dated April 2, 1981, with follow-up tests done on April 22 and in July 1981, and describes the results. Dr Murphy also notes the results of a hearing test conducted in September 1984.

[69] Dr Murphy indicates that the hearing loss noted in the 1981for the left ear is consistent with noise exposure, but that "with respect to the right ear an etiology regarding the hearing loss cannot be gleaned strictly by a review of the hearing test itself" (I note that etiology means a cause or origin).

[70] Dr Murphy also indicates that "[v]ertigo per se does not cause hearing loss but can be an additional manifestation of inner ear upset or derangements affecting the vestibular apparatus."

[71] With respect to the applicant's submission that although he was working in a civilian capacity at CFB Trenton and later at CFB Cold Lake, he was engaged in several missions where he was in effect on special assignment analogous to service in the Reserve Force, the evidence relied on by the applicant does not support this submission.

[72] The letter from Major-General (retired) RG Husch describes the Major-General's familiarity and working relationship with the applicant, which dates back to 1969, and some of the positions that the applicant and the Major-General occupied during the relevant periods.

[73] Major-General Husch notes that the Air Transport Command's motto was "Versatile and Ready" and that Mr Ben-Tahir "supported the organization's efforts enthusiastically and served on many missions although he was a public servant at the time." He notes as examples, a three-week tour to replenish troops in Vietnam and Kashmir, and other UN peacekeeping missions.

[74] The Board did not misunderstand or ignore any evidence that could have supported the applicant's argument that he was exposed to noise which was a cause of his hearing loss while in the Canadian Forces. Major General Husch is clear in stating that the applicant was a public servant at that time.

[75] With respect to the applicant's oral submissions which raised the possibility that his exposure to noise began earlier while he was located at CFB Uplands, the evidence he relies on does not establish that there was such noise exposure nor does it describe the nature of his duties at CFB Uplands at the relevant time. The copy of a memo from a former colleague, Mr Barker, that the applicant submits indicates that he was stationed at CFB Uplands in 1963-1967 is simply an acknowledgment by Mr Barker that the applicant contacted him about his interest in taking certain courses. The memo does not confirm the time period or the duties performed by the applicant or that he was exposed to any noise at CFB Uplands in 1963-1967.

[76] Regarding the applicant's BPPV, the Board considered all the evidence, did not misconstrue it in any way and reasonably found that it was insufficient to establish that the BPPV was caused by an injury or disease while in the Reserve Force.

[77] Dr Murphy's October 8, 2012 opinion also responds to questions about the applicant's vertigo.

[78] With respect to whether there is a relationship between vertigo and stress, Dr Murphy states that "[s]evere vertigo can induce anxiety in individuals who experience it. The anxiety is

usually short lived and dissipates as the vertiginous episode recedes. Stress, however, does not cause vertigo."

[79] Dr Murphy also provides the opinion that the applicant's symptoms are consistent with Meniere's disease of the right ear. He adds that a diagnosis of labyrinthitis in the 1960s could have been the first episode of Meniere's disease, as the two are indistinguishable.

[80] Dr Smith provided an opinion dated October 17, 2012, based on a review of documents provided to him. Dr Smith noted that he had not re-examined Mr Ben-Tahir since 1996 because Dr Smith has been practicing in Australia since that time.

[81] Dr Smith stated:

> I would of course defer the significance of benign positional vertigo to a specialist ear, nose and throat surgeon. I can however state [sic] that from a psychiatric point of view, benign positional vertigo may be worsened by a number of modifiers including stressful conditions. Anxiety, depression and other emotional factors contributing to a disturbance of sleep may also exacerbate and significantly contribute to the symptoms of benign positional vertigo."

[82] Dr Smith adds:

> On a balance of probability and given the distressing events Mr Ben-Tahir was experiencing at the time I would state that there is a relationship between the symptoms of vertigo and the heightened levels of anxiety he was experiencing. On a balance of medical probability the emotional distress he did experience was a significant contributor to the symptoms he experienced and which were associated with benign positional vertigo.

[83] I note that Dr Smith clearly defers to the expertise of an ear, nose and throat surgeon. His opinion is from a psychiatric point of view and does not indicate that stress is a cause of vertigo, rather that there is a relationship between symptoms of vertigo and anxiety, and whether the vertigo aggravates anxiety or *vice versa* is not clear. Regardless, Dr Smith speaks of symptoms and not causes.

[84] The Board considered this opinion, but reasonably deferred to the opinion of Dr Murphy, the ear, nose and throat specialist, which indicates that stress is not a cause of vertigo.

[85] I also note the applicant's evidence that he did not experience any vertigo prior to the bullying incident in 1965. Therefore, Dr Murphy's opinion dated August 25, 2013, which states that "[t]he psychological stress he may have had to endure prior, during and after this incident may have aggravated his perception of any vertigo that he may have had prior to this episode," must be considered in this context. If the applicant did not experience vertigo prior to the bullying incident, then the resulting stress would not have aggravated his perception of vertigo at that time, as he indicates that he had no vertigo at that time.

[86] The Board reasonably found, based on the medical evidence and the EEGs, that stress was not a cause of vertigo.

Was There a Reasonable Apprehension of Bias?

[87] The applicant submits that there was some bias demonstrated and refers to three factors demonstrating bias: his application to become a member of the VRAB was refused without a

satisfactory explanation; the members of the Entitlement Review Panel acted in an amused and mocking manner in response to his account of the bullying incident; and, the same member sat on the Entitlement Review Panel for two of his claims, although the publicly available information regarding the VRAB indicates that some members sit in Charlottetown and other members sit on hearings across the country.

[88] The respondent submits that simply because the same member heard two claims involving the applicant does not establish a reasonable apprehension of bias (*Khodeir v Canada (Governor-in-Council)*, 2010 FCA 308 at para 2). The respondent clarifies that the member in question sat on a two person Entitlement Review Panel with respect to a separate claim and on a three person Entitlement Appeal Panel of the VRAB which made the decision which is now under review.

[89] The respondent also submits that the only statutory restriction on the ability of a VRAB member to hear an Entitlement Appeal is where he or she was also a member of the Entitlement Review Panel being appealed (*VRAB Act*, subs 27(2)). In other words, the member cannot sit on the appeal of a decision they have taken part in. This is not the situation in the present case.

[90] In response to the allegations that the decision rendered by the Entitlement Review Panel was not fair because the members acted inappropriately, the respondent does not concede that this occurred, but points out that this allegation is not about the conduct of the Board, but about the members of the panel below. There is no evidence that any such conduct by the panel below

influenced that decision. Moreover, it is the decision of the Entitlement Appeal Panel that is subject to this judicial review, which has a different membership.

[91] The respondent also submits that there is no evidence that the Board was aware that the applicant had applied to be a member of the VRAB or that the applicant made efforts to obtain further information about the VRAB as a result of the refusal.

There is No Reasonable Apprehension of Bias

[92] The test for reasonable apprehension of bias is "what would the informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or sub-consciously, would not decide fairly". (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716).

[93] None of the applicant's submissions meet this standard of reasonable apprehension of bias.

[94] While it may be a better practice for a member to not be involved in several different claims regarding the same claimant, this may not always be possible given the volume of decisions to be reviewed and appealed across the country, the composition of the VRAB and other factors.

[95] In this case, the member in question considered an entirely different claim of the applicant as one member of the Entitlement Review Panel. No reasonable apprehension of bias arises in these circumstances.

[96] There are no allegations of improper conduct by members of the Entitlement Appeal Panel, and it is the decision of this Board which is the subject of this judicial review.

[97] Finally, the applicant's unsuccessful application to become a member of the VRAB does not provide any basis for his view that the Board could not decide his claim fairly. There are many criteria in addition to the educational qualifications considered for appointment to the VRAB, as indicated on the screening form which is on the record. The record also indicates that the applicant was given information about the outcome of his application, which was not based on lack of educational qualifications. Moreover, the Board that decided the applicant's claims would not have been aware that he had applied to become a member.

[98] The applicant raised other issues, including about the conduct of the solicitor assigned to assist him and that he should have been able to access information regarding his application to be a member of the VRAB.

[99] Even if the counsel assigned to assist the applicant acted in the manner he alleged, there is no reasonable probability that, but for the counsel's action or inaction, the result of the initial hearing would have been different.

[100] The applicant's inability to access information about his VRAB application is not an issue for this judicial review, apart from the considerations noted above, which as found, do not raise any suggestion of bias.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No costs are awarded.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2125-14
STYLE OF CAUSE:	IDRIS BEN-TAHIR v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 6, 2015
JUDGMENT AND REASONS:	KANE J.
DATED:	JULY 17, 2015

APPEARANCES:

Idris Ben-Tahir	FOR THE APPLICANT (ON HIS OWN BEHALF)
Mathew Johnson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT