Federal Court  Cour fédérale

Date: 20180723

Docket: T-1627-17

Citation: 2018 FC 773

Vancouver, British Columbia, July 23, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

STUART MCCULLOCH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The primordial issue is envisaged by sections 3 and 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 ("VRAB Act"), with respect to whether the reconsideration panel had committed an error or erred in fact and law when new evidence was refused in respect of the medical condition of the Applicant.

[2] The panel did not bring to bear each inference that it could have drawn from the evidence; and, as a result did not resolve all evidentiary doubt in favour of the Applicant as per the requirement of the VRAB Act. As is stated in *Mackay v. Attorney General (of Canada)*, 1997 FCJ No. 495, at page 7 in discussing the purpose of the VRAB Act:

> Section 3 therefore creates certain liberal and purposive guidelines for claims for veterans pensions in light of the Nation's great moral debt to those who have served this country.

The panel therefore rendered an unreasonable decision in that it did not adequately consider both definitive and credible evidence submitted by the Applicant in regard to his medical condition as related to his years of service in the RCMP.

[3] The "new evidence" test within the VRAB Act is well explained in the Federal Court decision in *Mackay* at para. 40:

> (a) The evidence should not be admitted if, by due diligence, it could have been adduced at the original hearing;
>
> (b) The evidence must be relevant, in that it bears upon a decisive or potentially decisive issue;
>
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) If believed, the evidence could reasonably be expected to have affected the result.

II. Background

[4] This is an application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of the Veterans Review and Appeal Board of Canada [VRAB] dated September 28, 2017. The Applicant seeks a *writ of certiorari* to quash the decision of the Reconsideration Panel [Panel], dated August 29, 2017, denying the application for reconsideration of the Entitlement Appeal decision, dated July 10, 2013, which denied a disability pension for the claimed condition of chronic rotator cuff impingement right shoulder (operated). The claim was denied under section 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11 [RCMP Superannuation Act], in accordance with subsection 21(2) of the *Pension Act*, RSC 1985, c P-6 [Pension Act].

[5] The Applicant, aged 61, was employed by the Royal Canadian Mounted Police [RCMP] from July 1979 until his retirement in September 2017. His work history with the RCMP is summarized as follows:

> Mr. McCulloch reportedly worked as a general duty police officer for almost 11 years (~1979 to 1991). […] From 1991 to 2003 Mr. McCulloch worked in forensic identification duties in the field. […] In 2003, Mr. McCulloch began working as a division manager in which he would spend about 25% of his time out in the field and 75% of his time doing deskwork. […] From 2011, he has had less fieldwork in this position and is often involved in meetings and paperwork unless it is an uncommonly severe crime scene or investigation.
>
> (Certified Tribunal Record [CTR], Ergonomic Risk Analysis Report of Matthew Rose & Associates, dated August 19, 2016, p 201.)

[6] The Applicant reportedly started experiencing pain from his right shoulder in 1994. Since his wrestling training injury in 1979 until 1989, the Applicant had continuously reported experiencing intermittent pain in his neck and upper back.

[7] In 2007, the Applicant reported having chronic pain in his right shoulder and back area and, in April of that same year, he was diagnosed with a rotator cuff injury in his right shoulder. Since his diagnosis and the ongoing treatments he has been receiving, the Applicant was experiencing problems with strength and mobility, all of which have impacted his ability to work as a RCMP officer.

[8] On March 21, 2011, the Applicant applied to Veterans Affairs for disability pension for his right shoulder. On January 5, 2012, the Veterans Affairs denied the Applicant's entitlement to a disability pension on the basis that there was no evidence establishing a connection between the Applicant's right shoulder injury and his RCMP service. The Applicant then appealed the Veterans Affairs decision. On September 27, 2012, a VRAB entitlement review panel denied this appeal and concluded that the Applicant did not meet the overuse criteria in the Entitlement Eligibility Guidelines published by Veterans Affairs Canada.

[9] The Applicant appealed the 2012 decision to a VRAB Appeal Panel. On August 27, 2013, the Appeal Panel refused to grant a pension for the Applicant's right shoulder on the grounds that there was no evidence on file demonstrating that the Applicant's RCMP service caused his chronic right shoulder injury to develop nor that his services were attributable to his injury.

[10] On January 6, 2017, the Applicant sought reconsideration of the VRAB's Entitlement Appeal Decision pursuant to subsection 32(1) of the *Veterans Review and Appeal Board Act*, SC 1985, c 18 [VRAB Act] on the basis of new evidence.

III. Decision under Review

[11] On September 28, 2017, the Panel decided not to reopen the Entitlement Appeal decision for reasons as follows. The VRAB first stated that the issue to be determined in any reconsideration request is whether the new evidence meets the criteria in a four part legal test prescribed by the Supreme Court of Canada in *Mackay v Canada (Attorney General)*, (1997), 129 FTR 286, [1997] FCJ 495:

> 1. The evidence should generally not be admitted, if, by due diligence, it could have been adduced at a previous hearing.
>
> 2. The evidence must be relevant in the sense that it bears upon the decisive or potentially decisive issue in the adjudication.
>
> 3. The evidence must be credible in the sense that it is reasonably capable of belief.
>
> 4. It must be such that if believed, it could reasonably, when taken with other evidence adduced earlier, be expected to affect the result.
>
> (CTR, the VRAB Decision, p 242.)

[12] In his reconsideration request, the new evidence that the Applicant sought to submit to the Panel was:

> A report from Matthew Rose & Associates whose letterhead indicates "Medical Legal Consultants".
>
> (CTR, the VRAB Decision, p 240.)

[13] This particular report in the form of R1-M1 (page 16) states that:

> Mr. McCulloch has been exposed to moderate to high levels of ergonomic risk for the shoulder and upper-extremity over the first 20 years of his career. It is of high probability that given the absence of cofounding injuries that the initial wrestling shoulder injury caused a muscular imbalance that when placed in moderate to high injury risk situations, eventually caused the shoulder to fail. After carefully reviewing the medical information there does not appear to be any other reasons for the shoulder symptomatology other than [sic] the work demands he endured over several decades. It is thus highly probable that the shoulder injury is attributable to the demands of the workplace.
>
> (CTR, the VRAB Decision, p 241.)

[14] After reviewing the new evidence and taking into consideration the Applicant's submissions, the VRAB found that the Applicant failed to establish why the report could not have been produced at an earlier stage. The Panel found that the report of Matthew Rose failed to address the onset of chronic right shoulder symptoms from 2006 despite having reviewed the previous reports of this Board.

[15] As for the second criterion, the Panel was however of the view that some elements of the report were relevant to the matter of the Applicant's claimed condition. In fact, the Panel found that the report of Matthew Rose identifies the periods in the Applicant's career where there was greater risk for him. For instance, Matthew Rose identified that the early portions of the Applicant's service from 1980 to 1990 posed the highest risk. Therefore, if the report were to be accepted, the Panel would consider it to be relevant.

[16] The VRAB came to the conclusion that the report lacked credibility. According to the Panel, the new evidence could not be characterized as a "medical opinion" but as an

"occupational therapy opinion" with regard to the relationship of the injury to the job demands. While the Panel did accept that the assessor is an expert in their field, it found that the report nonetheless lacked credibility as it failed to consider the entire information in the Statement of Case. The new evidence did not meet the three requirements of a credible medical report in such a way that:

> The report fails to consider all of the evidence and is premised on a shoulder injury early in the Appellant's career and ongoing right shoulder symptoms from 1994. These facts are not supported by the contemporaneous evidence.
>
> (CTR, the VRAB Decision, p 247.)

[17] Finally, the Panel concluded that the new evidence would not affect the result. The Panel noted that the new evidence submitted by the Applicant attempted to counter the Entitlement Eligibility Guidelines "which indicate that for the condition to be aligned with work activities the symptoms must begin at the time or within 30 days of the activity" (CTR, p 247). After reviewing all of the evidence as a whole, the Panel noted that all of the reports had indicated that the onset of symptoms in the case of the Applicant had occurred much later than the 30 day period. The VRAB acknowledged the fact that the Entitlement Eligibility Guidelines are simply guidelines, however, they do represent medical consensus. The Panel therefore concluded that Mr. Rose's report is completely silent on the onset of symptoms, "which is an ongoing barrier to entitlement in this case" (CTR, p 248).

IV. Relevant Provisions

[18] The following are relevant to the present case:

Subsection 21(2) of the Pension Act:

Service in militia or reserve army and in peace time	**Milice active non permanente ou armée de réserve en temps de paix**
21 (2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,	**21** (2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :
(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;	a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;
(b) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;	b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;
(c) where a member of the forces is in receipt of an additional pension under paragraph (a), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner dies, except where an award is payable under subsection 34(8), the	c) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa a), du paragraphe (5) ou de l'article 36 continue d'être versée pendant l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui

additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in respect of another spouse or common-law partner is awarded to the member commencing during that period, until the date that it so commences; and

il cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

(d) where, in respect of a survivor who was living with the member of the forces at the time of that member's death,

d) d'une part, une pension égale à la somme visée au sous-alinéa (ii) est payée au survivant qui vivait avec le membre des forces au moment du décès au lieu de la pension visée à l'alinéa b) pendant une période d'un an à compter de la date depuis laquelle une pension est payable aux termes de l'article 56 — sauf que pour l'application du présent alinéa, la mention « si elle est postérieure, la date du lendemain du décès » à l'alinéa 56(1)a) doit s'interpréter comme signifiant « s'il est postérieur, le premier jour du mois suivant celui au cours duquel est survenu le décès » — d'autre part, après cette année, la pension payée au survivant l'est conformément aux taux prévus à l'annexe II, lorsque, à l'égard de celui-ci, le premier des montants suivants est inférieur au second :

(i) the pension payable under paragraph (b)

(i) la pension payable en application de l'alinéa b),

is less than

(ii) the aggregate of the

(ii) la somme de la pension

basic pension and the additional pension for a spouse or common-law partner payable to the member under paragraph (a), subsection (5) or section 36 at the time of the member's death,

de base et de la pension supplémentaire pour un époux ou conjoint de fait qui, à son décès, est payable au membre en application de l'alinéa a), du paragraphe (5) ou de l'article 36.

a pension equal to the amount described in subparagraph (ii) shall be paid to the survivor in lieu of the pension payable under paragraph (b) for a period of one year commencing on the effective date of award as provided in section 56 (except that the words "from the day following the date of death" in subparagraph 56(1)(a)(i) shall be read as "from the first day of the month following the month of the member's death"), and thereafter a pension shall be paid to the survivor in accordance with the rates set out in Schedule II.

Section 32 of the RCMP Superannuation Act:

Eligibility for awards under Pension Act

32 Subject to this Part and the regulations, an award in accordance with the Pension Act shall be granted to or in respect of the following persons if the injury or disease — or the aggravation of the injury or disease — resulting in the disability or death in respect of which the application for the award is made arose out of, or was

Admissibilité à une compensation conforme à la Loi sur les pensions

32 Sous réserve des autres dispositions de la présente partie et des règlements, une compensation conforme à la Loi sur les pensions doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au

directly connected with, the person's service in the Force:	service dans la Gendarmerie, à toute personne, ou à l'égard de toute personne :
(a) any person to whom Part VI of the former Act applied at any time before April 1, 1960 who, either before or after that time, has suffered a disability or has died; and	a) visée à la partie VI de l'ancienne loi à tout moment avant le 1er avril 1960, qui, avant ou après cette date, a subi une invalidité ou est décédée;
(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died.	b) ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

Sections 3, subsection 32(1) and section 39 of the VRAB Act:

Construction	**Principe général**
3 The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	**3** Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.
Reconsideration of decisions	**Nouvel examen**
32 (1) Notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind	**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

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.	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.
Rules of evidence	**Règles régissant la preuve**
39 In all proceedings under this Act, the Board shall	**39** Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve :
(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en 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.

V. Analysis

[19] For the following reasons, the application for judicial review is granted.

[20] The sole issue to be determined in the present matter is whether the Reconsideration Panel erred by failing to accept the Ergonomist's Report as new evidence. The applicable standard of review to be applied to a VRAB reconsideration decision is that of reasonableness (*Nicol v Canada (Attorney General)*, 2015 FC 785 at para 22; *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at para 13).

[21] As discussed in *R. v Sekhon*, 2014 SCC 15, a court or tribunal must control the expert evidence sought to be adduced so that the evidence does not overwhelm the adjudicative process.

[22] The ultimate issue in respect of evidence as a whole is left to a tribunal or court to assess. It is not for the experts to determine how to reach ultimate conclusions in respect of an entire evidentiary record.

[23] Dr. Silburt's report (even if using the additional ergonomist's report as an indication of the need to simply ensure that all the evidence is read as a whole), can be summarized in the following manner that the injury with the duration of time and its repetitive or accumulated nature, aggravated itself over the years in respect of the shoulder injury, as acknowledged by the surgical repairs the Applicant had undergone. Dr. Silburt's report does not contradict the evidence, it only indicates that the evidence should be considered in its entirety. The consideration of that report may be assessed in various ways; however, it basically points to the evidence with an indication that it should be brought together, to be considered as a whole.

[24] It is important to recognize that evidence as a result must be examined as a continuum rather than in piecemeal fashion (*R. v Hart*, 2014 SCC 52).

[25] The medical report from Dr. Silburt dated April 15, 2012, specifies that:

> Inspector McCulloch has had a R shoulder arthroplastry and subacromial decompression done due to the chronic pain and dysfunction he had come to experience after 30 odd years of police work. I have no doubt that this is related to his police duties, as he has never been much of a "weekend warrior" never participating in sports like hockey or football which are likely to contribute to shoulder aliments. If you look through your records I am sure his file will contain various limitations of duties and restrictions due to this shoulder problem. It is those very duties which were repeated over and over again (think of a baseball pitcher throwing a ball at 90 miles/h, 100 times a game) that are the duties which contributed to his repetitive strain in the first place. The fact that Inspector McCulloch has been restricted from them confirms the concept that each contributed to the problem in a small but consistent and persistent way. For example, firing a weapon (it's his dominant shoulder that's involved) causes problems because the repeat of the weapon sharply forces the humerus into the glenoid. Reaching up above shoulder level causes impingement (how many times a day does a forensics worker do that-not to mention carting equipment to the scene). Obviously hand to hand "wrestling" and other control techniques needed for arrest situations have contributed. I think that what we may have uncovered is a member who does NOT complain and hence did not report the pain after "this arrest" or "that gun-range session".
>
> I think it entirely possible that the RSI of policing provoked his ultimate need for shoulder surgery.
>
> I trust this will suffice.
>
> Bruce Silburt MD, FCFP
>
> (CTR, Dr. Silburt's medical report, p 137.) (Reference is also made to paragraph 32 of this judgment.)

[26] The VRAB panel (decision-makers) did reproduce the narrative of the Applicant; however, it was reproduced as a series of still pictures rather a cohesive whole (film) in the life of the Applicant. The injury narrative, as in a film or a biography of an event or of a person must have a beginning, a middle and an end. Dr. Silburt's report does demonstrate the history of the file. It was Dr. Silburt who had sent the Applicant to a specialist physician for very specific reasons and not for a history of the file which was not given; it is the second physician to whom Dr. Silburt sent the Applicant that sent the Applicant to a surgeon. This type of evidentiary situation must not be analyzed by hypothesis or supposition. It was due to the history of the evidence as reported by Dr. Silburt that the Applicant was sent to the two additional medical specialists.

[27] When analyzing evidence, it is important to state that specific evidence of life experiences or events therein form a continuous narrative as set before decision-makers; a narrative must be analyzed from beginning to end of all that is heard, read and seen; all has to be taken as a comprehensive whole, not fragmented into pieces, only, then, can it be decided as to what, in fact, is relevant and what is not, as to the understanding of the case at bar; to ensure that evidence has been adequately assessed for the purpose of analysis by which to reach a conclusion or conclusions.

[28] The VRAB panel decision must be determined anew by a differently constituted panel, that, for the evidence to be tied together, to articulate how the panel viewed and thus analyzed the evidence in its entirety. The Panel must articulate or motivate the evidence as a whole in relating the narrative of the Applicant as per the jurisprudence discussed below.

[29] For the decision to be reasonable, the evidence based on the medical case history of all the doctors' reports requires a comprehensive, integral evidence analysis with a culmination of the medical case history of the Applicant. This must be done in respect of the whole medical chart or the entire file of evidence to be examined in a linear fashion with a demonstration of a continuum; that is to be assembled as a whole presentation of a narrative rather than segmented pieces. To do otherwise would need a demonstration to show that Dr. Silburt did not assess the case history properly or did so inadequately. No medical doctor has said that was the case. No medical doctor discounted Dr. Silburt. Dr. Silburt is the only one who assessed the entire medical case history as a whole.

[30] The question was and still is: was the injury one that came about and thus began in the RCMP, recognizing that the Applicant served in the RCMP from 1979 to 2017, with medical problems that had arisen in respect of his present condition before the Court, beginning in 1994 as per the evidence thereon. Was such injury aggravated by the continuous sequence of events as strung together, thus, an aggravated injury with the passage of time from its inception? As a result of life's continuous experience or events, the evidence needs assessment from its origin; the injury could have remained dormant or aggravated with the passage of time and continued use of the limb.

[31] It is not that the narrative of the evidence, as a whole, was not related by the VRAB panel; it is rather that it was reassembled in segmented fashion, rather than assembled.

- Origin of applicant suffering from shoulder pain in 1994

Medical Report of Dr. John T. Smith
CTR at pp 16-17; AR Tab 3(b)

Clinical Report and Account of Dr. Rosemary Baird
CTR at p 18; AR Tab 3(c)

● Reported wrestling injury suffered at the outset of RCMP service while training specified in 1998

Medical Report of Dr. Dermot Adams
CTR at pp 29-30; AR Tab 3(d)

● Chronic pain reported in right shoulder and neck, diagnosed as rotor cuff injury shoulder with pain that is continuous until the present – medical restrictions instructed for operational services

Medical Report of Dr. Yabsley dated February 20, 2007
CTR at p 52; AR Tab 3(e)

Medical Report of Dr. Yabsley dated April 24, 2007
CTR at p 63; AR Tab 3(f)

Periodic Health Assessment dated April 1, 2008
CTR at p 67; AR Tab 3(g)

Periodic Health Assessment dated March 18, 2009
CTR at p 81; AR Tab 3(h)

Medical Report of Dr. Yabsley dated October 27, 2009
CTR at p 85; AR Tab 3(i)

Clinic Letter of Dr. David G. Johnston dated December 15, 2009
CTR at pp 87-88; AR Tab 3(j)

● Surgery on the Applicant's right shoulder in 2010

Consultation Report or Dr. Johnston dated February 25, 2010
CTR at p 91; AR Tab 3(k)

● The Applicant has continually specified injury of his rotor cuff caused by service in the RCMP which relate repetitive physical altercations with combative persons in line of duty in addition to the use of firearms such as a metal stock 12 gauge shotgun and .308 rifle and systematically carrying about 40 lbs. of material equipment for crime scenes which include cameras and lens in respect of distances further than 100 feet in addition to duties to be effected in challenging and constrained spaces in work on investigations

Application for Disability Benefits
CTR at p 7; AR Tab 3(a)

Applicant's Letter to the Bureau of Pension Advocates
CTR at pp 138-139; AR Tab 3(r)

Review Decision
CTR at p 131; AR Tab 3(p)

Appeal of Review Decision
CTR at pp 143-154; AR Tab 3(w)

Application for Reconsideration
CTR at pp 179-232; AR Tab 3(x)

Medical Report of Dr. Silburt dated April 15, 2012
CTR at pp 137-141; AR Tab 3(q)

Ergonomist's Report
CTR at pp 202-206; AR Tab 3(y)

> ● A continuation of sustained continuous pain and significant diminished range of motion in daily tasks due to medically reported shoulder condition historically set down in chronological fashion

Medical Questionnaire of Dr. Roula Eid
CTR at pp 227-232; AR Tab 3(z)

[32] No single event can be set apart without studying evidence as a whole; only then could it be decided whether evidence can be strung together or separated – to ensure that the whole picture is envisaged so that the narrative can be concluded upon. The evidence must be weighed and must be assessed. (Reference is made to page 252 and 253 of the Tribunal Record as seen in Tab AA.)

[33] A differently constituted panel is to determine the matter anew. As this Court determines that there is an error of fact and law as the new evidence was not properly assessed as per the analysis test in *Mackay*. That test would have lead the panel to recognize, acknowledge and understand the need to assess the entirety of the evidence, together, as a whole.

[34] All that is said above echoes this Court's decision in *Stoyek v Canada (Attorney General)*, 2017 FC 47 at para 47, that evidence must be examined as a whole.

> [47] In order to determine whether the VRAB's decisions were reasonable, it is necessary to understand what evidence was before it, and at what time. The following discussion will divide the relevant evidence before the EAP in reaching its 2015 Decision and before the Panel in reaching its 2016 Decision and will consider the reasonableness of each decision in light of the available evidence. [Emphasis added.]

[35] As determined by this Court in *Roach v Canada (Attorney General)*, 2013 FC 852 at para 64 and 65 [*Roach*] and also in *Reed v. Canada (Attorney General)*, 2007 FC 1237 at para 55 and 56, the Court concludes in the present matter that the VRAB's decision lacks justification. In addition, the Court also concludes that the VRAB decision, in addition to lacking justification, lacks transparency and intelligibility (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47) and that the matter should therefore be determined anew by a differently constituted panel:

> [67] Dr. Wiseman and Dr. Silha are the Applicant's treating physicians with a knowledge of his whole file. Their opinions cannot be sidestepped in the ways attempted by the Board. The Board failed to consider what is basically uncontradicted evidence that establishes that the aggravation and deleterious consequences of the Applicant's disease arose out of, or are directly connected with, his service in the RCMP. In particular, the Board has not reasonably applied section 39 of the Act. This matter must be referred back for reconsideration.
>
> (*Roach*, above, at para 67.) Also, in the case at bar, there is the most probable link between employment history and injury.

[36] In proceeding with the determination of this case, the question before decision-makers should be as follows: can the evidence stand as an edifice or is it simply made up of single bricks that cannot be put together for the edifice to stand?

VI. Conclusion

[37] The application is granted with costs.

JUDGMENT in T-1627-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted; the decision of the VRAB is quashed and the matter is to be returned for determination anew by a newly constituted panel in accordance with these reasons.

2. The Respondent will pay the Applicant's costs in this matter.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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