Federal Court Cour fédérale

Date: 20191101

Docket: T-222-19

Citation: 2019 FC 1374

Ottawa, Ontario, November 1, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

DARRYL MORRIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Entitlement Appeal Panel [Appeal Panel] of the Veterans Review and Appeal Board [VRAB], dated September 26, 2018, in which the Appeal Panel affirmed the decision of the Entitlement Review Panel [Review Panel] of the VRAB, dated January 12, 2017, and denied the Applicant pension entitlement for myocardial infarction for Regular Force service, under s 21(2) of the *Pension Act*, RSC 1985, c P-6 [*Pension Act*], and Special Duty Area service under s 21(1) of the *Pension Act*.

Background

[2] The Applicant, Mr. Darryl Morris, was born on December 30, 1968. He served in the Regular Force of the Canadian Forces from March 1988 to December 2004, and he served in a Special Duty Area (Afghanistan and surrounding area) from November 2001 to April 2002. Mr. Morris suffered two myocardial infarctions (or heart attacks), in June-July 2002, when he was 33-years old and while on leave, camping with his children.

[3] On January 19, 2004, the Applicant applied for a disability pension. By a decision dated June 16, 2004, the Department of Veterans Affairs [Department] denied his application. It found that while the Applicant had been diagnosed with myocardial infarction during his service, there was no evidence to indicate that his condition developed or was aggravated secondary to any service related injuries or factors, including stress. The Department therefore concluded that the claimed condition was not attributable to or incurred during the Applicant's Special Duty Area tour of service, nor was it directly connected to his Regular Force service.

[4] The Applicant appealed the Department's decision. At a hearing before the Review Panel, the Applicant testified and also provided documentation in support of his claim, including his statement dated stamped September 21, 2016, and a letter from Dr. Joyce Coles dated September 15, 2016, which concluded that stress, shift work, smoking "culture", dyslipidemia related to provided food choices, truncal obesity, and sedentary lifestyle were all factors related to the Applicant's military service and which contributed to and aggravated his condition, on a three-fifths basis. Upon review of the evidence, including the Applicant's military service medical and related records, the Review Panel accepted that the Applicant had a valid diagnosis of myocardial infarction and that the condition constitutes a disability. However, it found that the

Applicant had not provided sufficient evidence to establish that his condition arose out of, or is directly connected with, his military service.

[5] The Review Panel found Dr. Coles' medical opinion not to be credible for establishing a service relationship to his condition. Further, that a review of the Applicant's health service records did not demonstrate any episodes of acute service related stress, service related stress complaints, or a history of service related stress. The Review Panel was not satisfied that the evidence demonstrated that the Applicant was experiencing significant service related stress that led to the development of his claimed condition. Further, that the evidence also showed that the Applicant had a long history of smoking, a family history of early heart disease, and that he was experiencing a difficult divorce – a significant personal stressor – at the time of his heart attacks. The Review Panel also found that there was insufficient evidence to demonstrate that the Applicant's diet or lack of exercise facilities while aboard Navy ships caused or contributed to the development of his claimed condition, in particular when compared to his other risk factors. It affirmed the decision of the Department and denied pension entitlement. The Applicant appealed the Review Panel's decision to the Appeal Panel. It is the decision of the Appeal Panel that is the subject of this application for judicial review.

Decision under review

[6] The Appeal Panel noted that the Applicant elected, pursuant to s 28(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRAB Act*] to have his hearing before the Appeal Panel proceed by way of written submissions.

[7] The Appeal Panel began by reviewing the Applicant's written statement contained in his January 19, 2004 application for a disability pension, his September 21, 2016 written statement, and it inserted the Review Panel's summary of the Applicant's testimony given before that Panel. The Appeal Panel then summarized information contained in the Applicant's medical records and identified new evidence filed in support of the Applicant's appeal, being a medical report from Dr. Nicholas Giacomantonio, Cardiovascular Prevention and Rehabilitation and Cardiologist at the QEII Health Sciences Centre in Halifax, dated May 17, 2017.

[8] The Appeal Panel stated that the hearing was *de novo* and acknowledged its obligations under s 39 of the *VRAB Act* to make every reasonable inference in the Applicant's favour, to accept uncontradicted evidence that it considers credible, and to resolve any doubt in weighing the evidence in favour of the Applicant. However, it noted jurisprudence which supports that the Applicant still had the burden of proving the necessary facts underlying his claim and that the Appeal Panel was not required to accept all evidence presented by the Applicant if the Appeal Panel found that it is not credible, even if not contradicted (*Macdonald v Canada (Attorney General)*, 164 FTR 42, 1999 CanLII 7645 at paras 22, 29 (FCTR); *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at paras 5-6 [*Wannamaker*]; *Rioux v Canada (Attorney General)*, 2008 FC 991 at para 32).

[9] The Appeal Panel listed the following criteria that it stated it would look for to find medical reports credible:

- The physician is an expert in the claimed condition;
- The physician provides unbiased evidence to the Appeal Panel;

- The physician provides all aspects relating to the condition, including information that is helpful and not helpful to the appellant's claim;
- The physician states when something is outside their area of expertise;
- The physician provides a detailed history of treatment of the condition;
- The physician has reviewed and commented on the contemporaneous medical reports;
- The physician provides a full analysis explaining how the conclusion was reached; and
- The physician provides a reference to any resources used in preparing the medical report.

[10] The Appeal Panel then assessed the medical opinion letters submitted by Dr. Coles and Dr. Giacomantonio.

[11] It concluded that Dr. Coles' letter was not credible in relating the Applicant's myocardial infarction to his military service noting that Dr. Coles is the Applicant's family doctor and not an expert in cardiology. Additionally, that her report was based on information provided by the Applicant, including as to the quality of the food served on board by the Navy and what food choices were available to the Applicant, rather than independent information. Further, Dr. Coles did not refer to contemporaneous medical information, as her report did not refer to a significant non-military-related stressor, the Applicant's bitter divorce. Nor did she provide a full analysis for her conclusion that the Applicant's military service contributed three-fifths to his heart condition.

[12] The Appeal Panel also concluded that Dr. Giacomantonio's letter was not credible in relating the Applicant's condition to his military service. The Appeal Panel recognized that Dr. Giacomantonio was an expert in the field of cardiology but found that his report was brief and stated that it was not clear that Dr. Giacomantonio was aware of the full circumstances of the

Applicant's case, noting that he had failed to mention that the Applicant was going through a bitter divorce at the time of his heart attack. The Appeal Panel found that Dr. Giacomantonio's report was unclear based on his statement that he agreed that diet, stress, "that is least in part alleviated by smoking…", and other factors all contributed to the Applicant's coronary artery disease. Nor had Dr. Giacomantonio reviewed and commented on contemporaneous medical evidence or provided a full analysis for his conclusion that the Applicant's military service contributed to the condition, but was not its cause. He had also not explained his reference to the "rigorous military service" which he concluded contributed to the Applicant's claimed medical condition.

[13] The Appeal Panel stated that in order to grant entitlement, it must first satisfy itself that the following exist for each condition:

1. Diagnosis of a presently existing claimed condition;
2. The claimed condition has been found to be a disability; and
3. There must be a finding that service either caused, contributed to, or aggravated the claimed condition.

[14] As to a diagnosis of a presently existing claimed condition, the Appeal Panel stated that there was no question that the Applicant had suffered a documented myocardial infarction but that that there was no evidence of a diagnosis of a presently existing condition. The Appeal Panel also concluded that the Applicant only provided information in 2004 as to how his condition affected him and did not provide evidence that his condition was presently disabling.

[15] As to whether the Applicant's service caused, contributed to, or aggravated his claimed condition, the Appeal Panel noted that the Applicant had his heart attack while camping with his

children and found that the onset of the condition was not work related. Further, his various medical records did not indicate issues with service related stress, or with his heart, but identified smoking, high blood pressure, and a family history of heart disease as listed contributing factors. There was also no independent evidence of the unavailability of fitness equipment, or that the food on the Navy ships was unhealthy during the Applicant's time at sea. The Appeal Panel recognized that military service can at times be quite stressful, but noted that the Applicant had rated his experience during Operation Apollo a "7 or 8/10. Enjoyed it".

[16] The Appeal Panel reiterated that the Applicant had not provided a credible medical opinion which related his heart condition to his military service, noted that he was a long time smoker with a family history of heart disease, and he had the onset of his condition while on leave. The Appeal Panel concluded that it was unable to find that the Applicant's condition was caused, contributed to, or aggravated by military service, and the Appeal Panel denied his pension entitlement.

Issues and Standard of Review

[17] The Applicant submits that the Appeal Panel erred by finding the medical evidence of Dr. Coles and Dr. Giacomantonio not to be credible, by incorrectly applying the definition of disability from s 3 of the *Pension Act*, and that the Appeal Panel breached procedural fairness by reversing the Review Panel's finding that he is disabled without notice to the Applicant or an opportunity to address the issue.

[18] The Respondent submits that the issue is whether the Appeal Panel's decision to deny the Applicant a pension under ss 21(1) and 21(2) of the *Pension Act* was reasonable. Specifically,

whether it was reasonable for the Appeal Panel to find that the medical evidence submitted by the Applicant was not credible, to complete a *de novo* assessment of the evidence, and to find that there was no causal link between the claimed condition and the Applicant's military service.

[19] In my view, the issues are:

1. Was the decision reasonable?
2. Was there a breach of procedural fairness?

[20] The parties submit, and I agree, that the applicable standard of review for the first issue is reasonableness. This Court has previously found an Appeal Panel's assessment of evidence is reviewed on a reasonableness standard (*Leroux v Canada (Attorney General)*, 2012 FC 869 at para 32; *Thompson v Canada (Attorney General)*, 2019 FC 662 at para 17; *Crummey v Canada (Attorney General)*, 2019 FC 73 at paras 15-16 [*Crummey*]; *Everett v Canada (Attorney General)*, 2019 FC 627 at para 14). Further, the application of the disability definition in the *Pension Act* to the facts of the case raises a question of mixed fact and law which also attracts the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*]; *Chaytor v Canada (Attorney General)*, 2011 FC 501 at para 18 [*Chaytor*]; *Beauchene v Canada (Attorney General)*, 2010 FC 980 at para 21; *Jansen v Canada (Attorney General)*, 2017 FC 8 at para 20 [*Jansen*]). Reasonableness is concerned with the existence of justification, transparency, and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

[21] As to the second issue, the Applicant submits that the standard of review for issues of procedural fairness is correctness. The Respondent is of the view that assessing all of the

evidence was within the scope of the Appeal Panel's mandate when conducting a *de novo* hearing and that assessing whether the Applicant has a presently existing condition was not a new issue. Accordingly, that there was no breach of procedural fairness and the issue of the Appeal Panel's assessment of the evidence falls within the reasonableness standard. I find that, to the extent that there was a breach of procedural fairness, that issue would attract the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Chaytor* at para 18). On a review of a decision for correctness, a reviewing court will not show deference to the decision maker's reasoning process and, instead, will undertake its own analysis of the question (*Dunsmuir* at para 50).

Legislative Framework

***Pension Act,* RSC 1985, c P-6**

3(1) In this Act,	**3(1)** Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
disability means the loss or lessening of the power to will and to do any normal mental or physical act; (*invalidité*)	***invalidité*** La perte ou l'amoindrissement de la faculté de vouloir et de faire normalement des actes d'ordre physique ou mental. (*disability*)
…	[…]
21(1) In respect of service rendered during World War I, service rendered during World War II other than in the non-permanent active militia or the reserve army, service in the Korean War, service as a member of the special force, and special duty service,	**21(1)** Pour le service accompli pendant la Première Guerre mondiale ou la Seconde Guerre mondiale, sauf dans la milice active non permanente ou dans l'armée de réserve, le service accompli pendant la guerre de Corée, le service accompli à titre de membre du contingent spécial et le service spécial :

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that was attributable to or was incurred during 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;

…

(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,

(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;

…

(2.1) Where a pension is awarded in respect of a disability resulting from the aggravation of an injury or disease, only that fraction of the total disability, measured in fifths, that represents the extent to which the injury or disease was aggravated is pensionable.

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 — survenue au cours du service militaire ou attribuable à celui-ci;

[…]

(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) 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;

[…]

(2.1) En cas d'invalidité résultant de l'aggravation d'une blessure ou maladie, seule la fraction — calculée en cinquièmes — du degré total d'invalidité qui représente l'aggravation peut donner droit à une pension.

***Veterans Review and Appeal Board Act*, SC 1995, c 18**

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.
…	[…]
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.

Analysis

ISSUE 1: Was the Appeal Panel's decision reasonable?

[22] As stated by the Federal Court of Appeal in *Wannamaker*:

> [5] Section 39 ensures that the evidence in support of a pension application is considered in the best light possible. However, section 39 does not relieve the pension applicant of the burden of proving on a balance of probabilities the facts required to establish entitlement to a pension: *Wood v. Canada (Attorney General)* (2001), 199 F.T.R. 133 (F.C.T.D.), *Cundell v. Canada (Attorney General)* (2000), 180 F.T.R. 193 (F.C.T.D).
>
> [6] Nor does section 39 require the Board to accept all evidence presented by the applicant. The Board is not obliged to accept evidence presented by the applicant if the Board finds that evidence not to be credible, even if the evidence is not contradicted, although the Board may be obliged to explain why it finds evidence not to be credible: *MacDonald v. Canada (Attorney General)* (1999), 164 F.T.R. 42 at paragraphs 22 and 29. Evidence is credible if it is plausible, reliable and logically capable of proving the fact it is intended to prove.

i. Medical evidence

[23] The Applicant submits that the Appeal Panel unreasonably found that his medical evidence was not credible, that the Appeal Panel gave unclear or incorrect reasons, and failed to intelligibly demonstrate why it found the evidence of the Applicant's physicians not credible (*Crummey* at para 25). There was a doctor-patient relationship between the Applicant and his physicians and each of the opinions was plausible, reliable, and logically capable of proving the facts they were intended to prove. That is, they were credible as defined in *Wannamaker* (at para 6). The Applicant sets out why, in his view, the medical evidence was credible and how the Appeal Panel erred in its assessment.

[24] The Respondent submits that the Appeal Panel was alive to its obligation under s 39 of the *VRAB Act* to look at evidence in the best light possible. The Appeal Panel acknowledged that obligation but also correctly found that it did not have to accept evidence that was not credible, even if uncontradicted. Further, the Appeal Panel considered the medical evidence and used a clear and explicit framework to assess the credibility of the letters from Dr. Coles and Dr. Giacomantonio. It was entitled to assign little weight to evidence that it found to be non-credible, as long as it provided reasons for its conclusion. Its analysis of the credibility of the medical evidence was reasonable.

(a) *Dr. Coles' letter*

[25] Dr. Coles' letter stated that coronary artery disease has multi-factorial causes. And, while the military could not have contributed to the Applicant's family history of premature heart disease, his employment as a weapons tech – which is a Navy hard sea trade – would have several risks that could have contributed to his disease progression/myocardial infarction. She noted that the Applicant had reported that he was required to works shifts and that the stress of shift work, night shifts in particular, and being away from his family could have contributed to the progression of his heart disease. Further, that Navy "culture" at that time bred smokers. While it was the Applicant's decision to smoke, easy access to cigarettes when around other smokers would make it very difficult to give it up. The Applicant had also reported that the food served by the Navy at that time included a lot of deep fried meals and leftovers, which could have elevated the Applicant's LDL cholesterol and triglycerides and unquestionably would contribute to cholesterol deposits in his arteries. Such food also has a direct link to obesity, itself an independent risk factor of coronary artery disease. His shift work and this food together set

him up for the development of truncal obesity because of a sedentary lifestyle (fatigue after shift completion), which studies have shown to be a risk factor for coronary disease. She concluded that these factors, which she then set out in list form, are interweaving and synergistic. As such, they would contribute a three-fifths major aggravation.

[26] In considering Dr. Coles' report, the Appeal Panel first stated that Dr. Coles is a family doctor, not an expert in cardiology. While the Applicant asserts that the Appeal Panel assigned no weight to her report because of this, I do not accept this view as the Appeal Panel went on to make other findings when assessing the credibility of Dr. Coles' medical opinion. The Applicant also submits that the reason why – because Dr. Coles is not a cardiologist – the Appeal Panel may have discounted this evidence cannot be discerned from its reasons. I note that it is undisputed that Dr. Coles is a family doctor and not a cardiologist. It is, therefore, self-evident that she does not hold a specialist's level of expertise. That said, I agree with the Applicant that Dr. Coles, as a family doctor, does have a level of expertise. If the Appeal Panel was of the view that she lacked the necessary qualifications to identify, as she did, factors that can contribute to coronary artery disease and how this relates to the Applicant, this is not apparent from the Appeal Panel's reasons. To the extent that the Appeal Panel based its finding that Dr. Coles' medical opinion lacks credibility based on her qualification as a family doctor, in my view, without explaining how a lack of specialist status specifically negatively impacted the credibility of her opinion, it is unreasonable.

[27] The Appeal Panel then stated that Dr. Coles had indicated in several points in her letter that her information was based on what the Applicant had told her, citing as an example that he had reported that the Navy had served a lot of deep fried meals, which she found could elevate

his LDL cholesterol and triglycerides. The Appeal Panel stated that Dr. Coles did not have independent information about the quality of the food served and the food choices available to the Applicant and based her opinion on the information the Applicant had provided to her. In my view, it is not reasonable to expect a physician to research and provide independent information as to the food quality provided by the Navy. Dr. Coles was entitled to refer to what her patient, the Applicant, told her in that regard. She was not offering an opinion on whether or not that food was served, rather, she was giving her medical opinion that, if it was, it could have contributed to the Applicant's coronary artery disease. It is also of note that the Appeal Panel does not take issue with her medical opinion that deep fried foods could have elevated the Applicant's LDL cholesterol and triglycerides.

[28] In *Lebrasseur v Canada (Attorney General)*, 2010 FC 98 [*Lebrasseur*], Justice Tremblay-Lamer held that it was unreasonable to reject medical reports submitted by the applicant on the basis that he was the source of the information upon which they were based:

> 27 While the Respondent is right that the Board is entitled to make credibility findings and need not accept all of the evidence tendered to it, its calling in question of the medical reports submitted by the Applicant on the basis that he was the source of the health professionals' conclusions is unjustified. It is not enough to say that the reports in question are based on a story told by the Applicant because that does not make them any less credible if that story is true. The Board did not make any findings as to the Applicant's credibility; yet it disregarded the favourable credibility finding made by the Panel. Thus, it failed to justify its decision to discount the medical reports.

[29] Here the Applicant states that his credibility has never been challenged but that the Appeal Panel has, indirectly, found him not to be credible by taking issue with Dr. Coles' reliance on information he imparted to her. While I agree that the Appeal Panel did not make an

adverse credibility finding pertaining to the Applicant, the Appeal Panel was entitled to look at all of the evidence before it. The Appeal Panel, in its evidence review, did reference the Applicant's January 19, 2004 statement, which described the stresses the Applicant claims contributed to his heart condition, including standing 1 and 2 watch rotations for 6.5 months, disruption of his sleeping, poor eating and exercise habits, a limited ability to eat healthily, and being forced to eat what was on offer. The Appeal Panel also extracted and reproduced the summary of the Applicant's testimony given before the Review Panel, which is found in the Review Panel's decision. His testimony spoke, in part, to the stress of shift work resulting in the disruption of sleeping and eating habits, causing him to eat outside meal hours, eat leftovers, or skip meals. His September 21, 2016 statement speaks to his Operation Apollo deployment, during which the normal high readiness watch keeping shifts were applied. This resulted in 12-hour days with broken sleep patterns leaving little time to work out, de-stress, or relax, and that even eating habits were "out of whack".

[30] In short, the Applicant's evidence as to the food served by the Navy was very limited. The Applicant provided no evidence as to how frequently deep fried foods were served, whether there were any available alternatives or why eating leftovers would be detrimental to his coronary health.

[31] In my view, this is not a circumstance such as *Jansen*, which concerned a claimant's evidence as to the actual occurrence of service related injuries, and where the Appeal Panel's reasoning could only be based on a negative credibility finding – a finding that the Panel did not make. Rather, here it was open to the Appeal Panel to have found that the Applicant's evidence as to the food served on board during his service did not provide a sufficient basis to support

what he imparted to Dr. Coles and upon which she relied in reaching her opinion (*Wannamaker* at para 5). That is, he failed to meet his burden of proving the necessary facts to establish pension entitlement on a balance of probabilities. Accordingly, the reliability of Dr. Coles' finding that dyslipidemia (related to food choices) contributed to the Applicant's coronary artery disease and was related to his military service was open to question in the absence of underlying evidence from the Applicant.

[32] The difficulty, however, is that the Appeal Panel did not make any finding that the Applicant had provided insufficient evidence of food quality and availability on the Navy ships on which he served. Rather, the Appeal Panel acknowledged that the Applicant claimed that during his deployment he had a sedentary lifestyle and had unhealthy food but stated that it had not been provided with any independent evidence that fitness equipment was not available on board or that the food on board was unhealthy during the Applicant's time at sea. The Appeal Panel does not explain why, in the absence of a negative credibility finding, independent evidence was required. Further, s 39(b) of the *VRAB Act* required the Appeal Panel to accept any uncontradicted evidence presented by the Applicant that it considered to be credible. If the Appeal Panel considered the Applicant's evidence as to the quality of food served by the Navy, which was not contradicted, not to be credible, then should have made that finding, explained why it did so, and rejected the evidence on that basis (*Jansen* at paras 55-58).

[33] The Appeal Panel also states that Dr. Coles did not refer "to contemporaneous medical information". Specifically, while she referred to his family history of premature heart disease and his smoking, she did not refer to a significant non-military stressor, the fact that the Applicant was going through a "bitter divorce proceeding". I note that the record contains four references

to the Applicant's divorce. The first is a Medical Questionnaire dated October 11, 2001. Under the portion concerning "stress" the questionnaire asks whether at that time the Applicant is preoccupied or worried about the listed matters; personal/family relationships, work/professional relationships, or financial problems, to all of which he indicated "no". As to "other issues", neither "yes" or "no" are indicated, but there is a notation that divorce proceedings are in progress. A Formation Health Services Unit Halifax Consultation Report dated July 10, 2002, is also found in the record. This describes the Applicant's health prior to his heart attacks and includes the statement that "[h]is father and grandmother had infarcts. He has a sister in good health. He is presently undergoing divorce. He has three children ages 9, 6 and 4. He is a weapons tech. He has been on the Iroquois for several years and has had no previous surgery". In the Interview Guide (Aug 2002), which appears to be a post deployment interview intended to identify any problems arising as a result of the deployment (for example, problems with sleeping, eating, and changes in personality, drinking, working and family relationships), he noted, amongst other things, a new girlfriend, that his children were positively adjusting to his return and, under "other", that his ex-wife's behaviour was unpredictable and they were in court as he was seeking shared custody, but that he was managing her behaviour and not letting it get to him. A Medical Examination Record dated October 3, 2012, under psychiatric exam, states "mood/sleep good. Min stress @ present despite health issues/recovery & court battle for kids…". The extracted summary by the Review Panel of the Applicant's testimony is found in the Appeal Panel's decision, including that "[h]e separated from his wife in 2000. At the time he was going through a bitter divorce." The record before me does not contain a transcript of the Applicant's testimony.

[34] It is true that Dr. Coles does not mention the divorce. However, she does state that coronary artery disease has multifactorial causes. She acknowledges that the Applicant's military service was unrelated to his family history of premature heart disease. She lists those factors which, in her view, were contributors to his coronary artery disease and were related in some way to his military service, which factors she described as interweaving and synergistic and suggested that these contributed three-fifths: major aggravation. While the failure to mention the divorce is a concern, in my view, the Appeal Panel's focus on this omission as a basis for finding the whole of the medical report not to be credible fails to recognize and address the other factors identified by Dr. Coles, which she viewed as service related. Further, the role of the personal stress of the divorce could have been weighed by the Appeal Panel against the stresses that were attributed by Dr. Coles to the Applicant's military service as well as against medical evidence that did not support the existence of such stressors prior to his heart attacks, and other risk factors such as his smoking and family history.

[35] The Appeal Panel also found that Dr. Coles did not provide a full analysis for her conclusion that the Applicant's military service contributed three-fifths to his heart condition but does not identify what is missing from the analysis. That said, as to the Applicant's submission that Dr. Coles has been his family physician for 10 years and is very familiar with his medical history, at the hearing before me the Applicant could not point to evidence in the record as to the length of that doctor-patient relationship, nor are Dr. Coles' medical records concerning the Applicant contained in the record.

[36] In sum, in my view, while it may have been open to the Appeal Panel to have ultimately afforded Dr. Coles' opinion little weight when considered in the context of other evidence in the

record, its reasons do not establish that the report was not credible on the basis that it was implausible, unreliable, and not logically capable of proving the facts that it was proffered to prove.

(b) *Dr. Giacomantonio's letter*

[37] As for Dr. Giacomantonio's letter, the Appeal Panel noted that he is an expert in the field of cardiology. It also accurately stated that his letter was very brief. In total, the letter is less than half of one page. Dr. Giacomantonio stated:

> I do agree that diet, stress, that is least in part alleviated by smoking but also very common particularly at your time of service in the military, along with poor sleep patterns due to stress and the very nature of the vocation, all do contribute to your coronary artery disease and subsequent myocardial infarction.

[38] Dr. Giacomantonio went on to state that the related issues regarding the Applicant's military service contributed, at most, between two to three-fifths of his condition. Further, that all of the issues the Applicant outlined undoubtedly contributed to, but not all military personnel develop, cardiovascular disease. Nor did Dr. Giacomantonio know cardiovascular disease to be in excess as compared to non-military groups or populations. Further, that there are underlying contributing biological and genetic factors, including family history of risk and disease, which appears in the Applicant's family at least in part due to dyslipidemia (high cholesterol). He concludes that overall, "it is without question that rigorous military service contributes to your cardiovascular disease but is not the cause of it in and of itself".

[39] The Appeal Panel stated that it was not clear whether Dr. Giacomantonio was aware of the full circumstances of the Applicant's case. For example, he did not mention that the

Applicant was going through a bitter divorce in the time period prior to his heart attack, but did indicate the Applicant's underlying biological and genetic risk factors. The Appeal Panel also found Dr. Giacomantonio's statement, quoted above, to be unclear and confusing. Further, that Dr. Giacomantonio had not commented on contemporaneous medical evidence or provided a full analysis for his conclusion that the Applicant's military service contributed to the condition but is not the cause of it. Nor did he specify what rigorous military service was and the Applicant based his claim on stress that caused his condition, not rigorous military service. For these reasons, the Appeal Panel found Dr. Giacomantonio's medical opinion not to be credible in relating the Applicant's condition to his military service.

[40] It is clear from the record that Dr. Giacomantonio was the Applicant's attending cardiologist when he suffered his heart attacks. The Capital Health Discharge Summary Report was prepared on his behalf and Dr. Giacomantonio also provided a report to Dr. Zwicker, the military physician who had conduct of the Applicant's case, reporting that he had seen the Applicant in November 2002. He noted that the Applicant's risk factors were dyslipidemia and smoking, at which he persisted, as well as a significant family history, his father having had a heart attack when in his early forties and his sister being investigated for a heart murmur. Dr. Giacomantonio stated:

> Overall, Mr. Morris is quite stable from a cardiovascular standpoint and appears to have a functioning stent with no hemodynamically significant remaining coronary artery disease. There is recent evidence of post-myocardial infarction that Plavix plus Aspirin in the face of stent is beneficial at least out to a year, and so I have not stopped this therapy. With respect to his lipids, his LDL is still not to target and so I have increased his Zocor to 40 mg p.o. daily. Unfortunately his triglycerides and HDL are disproportionate and if this persists in three to six months at repeat, I would consider combination therapy such as with Lipidil Supra

> 160 mg daily and appropriate follow up of LFTs and CK with education to the patient side effect.
>
> …
>
> Finally, with respect to his categorization at his job, I believe that Mr. Morris can return to regular duties given his present normal cardiovascular state.

[41] The Navy apparently did not agree with Dr. Giacomantonio's view that the Applicant could return to his regular duties. In a Formation Health Services Employment Limitation Worksheet dated September 11, 2003, Dr. Zwicker found that the Applicant requires physician follow up every six months and specialist follow up every year; that he was at risk of experiencing a crisis for which physician services would be required within two hours; and, during such a crisis he would not be able to perform his full duties. He requires daily medications without which for three to five days he may suffer a crisis related to his chronic medical problem. Further, he was unable to tolerate a military operational environment (*i.e.* unfit sea, UN, isolation, deployment) and that sudden sustained physical effort could precipitate a crisis related to his chronic medical problem. He would be fit for sea if access to physician and hospital services in less than two hours could be maintained.

[42] The final Canadian Forces Heath Service Center (Atlantic) Forum report in the record is dated July 27, 2004, and states that the Applicant presented for follow up on his cardiac status, lists his medications, and states that he is apparently going to be discharged on medical grounds. It concludes that clinically he remains stable, that he should have a repeat exercise ECG, which would be arranged, and that he should continue with his present medications.

[43] In my view, the Appeal Panel's finding that it is unclear that Dr. Giacomantonio was aware of the full circumstances of the Applicant's case – on the basis of his failure to mention the divorce – is somewhat contradicted by the record in that Dr. Giacomantonio was the Applicant's attending physician after his heart attacks, he reported to the military physician as to the Applicant's post-heart attack health and by the fact that he did make reference to the Applicant's underlying biological and genetic contributing factors. In my view, the Appeal Panel was again placing undue focus on the divorce to the exclusion of a consideration of the other service related factors identified by Dr. Giacomantonio as contributing to the Applicant's coronary artery disease and subsequent myocardial infarctions.

[44] I also do not agree that the above quoted sentence is unintelligible. While the sentence structure may be questionable, it is clear that Dr. Giacomantonio agreed that diet, stress (even if that stress was alleviated in part by smoking), poor sleep patterns due to stress, and the nature of the Applicant's vocation all contributed to his coronary artery disease and subsequent myocardial infarction.

[45] The Appeal Panel also states that Dr. Giacomantonio did not review and comment on the contemporaneous medical evidence. Presumably, the Appeal Panel is referring to the medical evidence contemporaneous to the Applicant's heart attacks. However, Dr. Giacomantonio was the Applicant's attending cardiologist as seen from the record. Indeed, later in its reasons the Appeal Panel states that there is no question that the Applicant suffered a myocardial infarction as documented in the reports prepared by Dr. Giacomantonio. And, while it is often a concern in pension denial cases that there is no medical evidence that is contemporaneous to the injury or event complained of as causing or contributing to claimed condition, this is not such a case. In

short, it is unclear from the Appeal Panel reasons what contemporaneous medical records should have been commented upon or why the failure to do so impacted the credibility of Dr. Giacomantonio's opinion.

[46] As to an absence of a full analysis for Dr. Giacomantonio's conclusion that the Applicant's military service contributed to his condition but did not cause it, it is true that the medical opinion is very brief. However, it is also apparent that Dr. Giacomantonio was of the view that diet and work related stress contributed to the Applicant's coronary artery disease and, that there were also underlying biological and genetic factors in play. It was in that context that he stated that it was without question that rigorous military service contributed to the Applicant's cardiovascular disease but was not, in and of itself, its cause.

[47] I note that the Appeal Panel does not suggest that the medical opinions are contradicted by other medical evidence. In my view, the Appeal Panel's reasons provided for finding both Dr. Coles' and Dr. Giacomantonio's medical reports to not be credible are, viewed in whole, unreasonable.

ii. Disability

[48] The Appeal Panel stated that, to grant entitlement it must be satisfied of the existence of: a diagnosis of a presently existing claimed condition; that the claimed condition has been found to be a disability; and, a finding that service either caused, contributed to or aggravated the claimed condition. As to whether the claimed condition has been found to be a disability, the Appeal Panel referenced the s 3 definition of "disability" as found in the *Pension Act* and noted that in his statement of claim, the Applicant detailed how his condition affected him.

Specifically, he was categorized and no longer able to sail, he was unable to do his job a Naval Weapons Technician, he no longer holds universality of service, he could not be promoted or progressed in his trade, and, as a result, he was released from the military. The Appeal Panel stated that this information was provided in 2004 and that it had not been provided with evidence of whether the Applicant's condition is "presently disabling" and, therefore, it was unable to find that the condition is disabling to the Applicant.

[49] The Applicant submits that the Appeal Panel erred by not applying the appropriate definition of disability. The test requires only that the veteran show there has been a "loss or lessening of the power or will and to do any normal or physical act". According to the Applicant, the medical opinions of Dr. Coles and Dr. Giacomantonio were evidence of his presently disabling condition and the Appeal Panel also did not justify its failure to address the Applicant's testimony or to explicitly address the medical article that he submitted in support of his disability.

[50] The Respondent submits that it was reasonable for the Appeal Panel to question whether the claimed condition continued to disable the Applicant.

[51] Leaving aside the discussion of the temporal aspect of the interpretation of s 3 of and ss 21(1)(a) and s 21(2)(a) of the *Pension Act* that arose during the hearing before me, and that the wording of the requirements stated in the Appeal Panel's reasons differs from that set out in the reasons of the Review Panel, and making no findings in that regard, the Appeal Panel did not refer to the Applicant's September 2016 statement in which he stated that since 2004 he has worked various positions and must always be checked and regularly meet with his family doctor and that his disease was aggravated and contributed to by his Navy career and has limited him in

his life and has changed his lifestyle. Nor did it address the one medical report that he filed "Braunwalds's Heart Disease: A Textbook of Cardiovascular Medicine", 8th edition, taken from the website of "Doctors Nova Scotia", Chapter 86, Psychiatric and Behaviour Aspects of Cardiovascular Disease, a short section entitled Life Stress and Job Strain. Unlike the Review Panel, the Appeal Panel made no reference to this article; however, I fail to see how it relates to the Applicant's position as to a currently disabling condition. Nor do the Applicant's medical reports speak directly to this question.

[52] In any event, it cannot be ascertained from the Appeal Panel's decision whether it overlooked the above evidence or if it found it to be unpersuasive or insufficient. Its conclusion is, therefore, unreasonable. This is not to say that the Applicant's evidence was sufficient, rather that the Appeal Panel had an obligation to consider all the evidence and it appears that it failed to do so.

Issue 2: Was there a breach of procedural fairness?

[53] In considering whether there existed a diagnosis of a presently existing claimed condition, the Appeal Panel stated that there was no question that the Applicant suffered a myocardial infarction but that it had not been provided with evidence of a diagnosis of a presently existing condition. The Applicant asserts that this is a new issue. The Department and the Review Panel accepted the diagnosis of his condition, myocardial infarction, and that it constitutes a disability. They only questioned whether the condition was related to his military service. The Applicant asserts that the Appeal Panel breached procedural fairness by raising a new issue and not affording him notice and the opportunity to address it.

[54] While the Applicant references much case law in support of his position, none of it concerns a circumstance such as this where a *de novo* hearing is being conducted. This Court has previously confirmed that hearings before review and appeal panels are conducted on a *de novo* basis (*Nolan v Canada (Attorney General)*, 2005 FC 1305 at para 19). In a *de novo* hearing the decision maker is not bound by the decision below, but must make its own determination based on its review of all of the evidence. The Applicant's argument has also been previously addressed in *Comeau v Canada (Attorney General)*, 2007 FCA 68 where the Federal Court of Appeal held that:

> [12] Mr. Comeau also argued that, as a matter of law, it was not open to the Board to find that his condition did not arise during his period of military service, because that point had been determined in his favour on the previous Entitlement Appeal. Mr. Comeau argues that the only question before the Board on the rehearing was whether his condition had been aggravated by his military service, a point on which he says the report of Dr. Douglas is conclusive. Dawson J. found, and I agree, that the Board was required to consider Mr. Comeau's claim afresh, based on its own independent assessment of the entire body of evidence before it. It was not bound by any of the factual conclusions of the previous Board.

[55] Accordingly, the Appeal Panel did not breach the duty of procedural fairness.

[56] I would observe, however, that the Appeal Panel's finding that there is no evidence of a diagnosis of a presently existing claimed condition is unintelligible in the sense that the claimed condition as assessed by the Appeal Panel is myocardial infarction. That diagnosis is not disputed. The Applicant's underlying condition appears to remain and to be stabilized by the stent and medications. However, unless the Applicant has another heart attack, there can be no diagnosis of a presently existing claimed condition. Perhaps the relevant considerations were better stated by the Review Panel by asking if the Applicant "established that he has the claimed

condition (an injury or disease or aggravations thereof) and whether the claimed condition constitutes a permanent disability".

[57] Viewed in whole, the Applicant's evidence was likely wanting. Regardless, for the reasons set out above, the Appeal Panel's reasons for finding that the medical opinions were not credible were unreasonable and the Appeal Panel also erred in failing to address all of the Applicant's evidence.

JUDGMENT in T-222-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. The Appeal Panel's decision is set aside and the matter is referred back to a differently constituted panel for redetermination, taking into consideration the reasons contained in this decision; and

3. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-222-19
STYLE OF CAUSE:	DARRYL MORRIS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	OCTOBER 16, 2019
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	NOVEMBER 1, 2019

APPEARANCES:

Jillian Kean	FOR THE APPLICANT
Mary Anne MacDonald	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McInnes Cooper Barristers and Solicitor Halifax, Nova Scotia	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT