Federal Court  Cour fédérale

Date: 20130619

Docket: T-1421-12

Citation: 2013 FC 689

Ottawa, Ontario, June 19, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

BASIL MCALLISTER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Veteran's Review and Appeal Board (VRAB) dated July 9, 2012. The VRAB refused to reconsider, pursuant to subsection 32(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 (VRAB Act), an earlier entitlement appeal decision which denied the Applicant's entitlement to a pension on the basis that the Applicant's new evidence was neither new nor credible.

Background

[2] The Applicant, Mr. Basil McAllister, served in the Canadian Armed Forces from December 30, 1954 to January 1, 1975. Much of that time was spent working and training at Canadian Forces Base (CFB) Gagetown, New Brunswick.

[3] Agent Orange was sprayed at CFB Gagetown in 1966 and 1967. The Applicant's service records confirm that he performed field training at CFB Gagetown during the summer of 1967.

[4] In 1994, at the age of 62, the Applicant was diagnosed with adenocarinoma of the prostrate (prostate cancer). On May 19, 2005, the Applicant applied to the Department of Veterans Affairs (VAC) for disability benefits on the basis that his prostrate cancer was related to his military service, specifically, that it resulted from his exposure to Agent Orange.

[5] On March 21, 2006, the Applicant's request for a disability pension pursuant to subsection 21(2) of the *Pension Act*, RSC, 1985, c P-6 (*Pension Act*) was denied. The Department of Veterans Affaires (DVA) acknowledged that the Applicant served at CFB Gagetown in one of the known time frames when spraying of Agent Orange occurred and that current medical research supported an association between exposure to Agent Orange and adenocarcinoma of the prostate. However, it found that there was no evidence that the Applicant had been exposed to that substance. The Applicant was advised that the decision could be reviewed on the basis of any new information or evidence that he might provide, and, that he had the option of appealing the decision to the VRAB. The Applicant exercised that option.

[6] On September 25, 2008 an entitlement review panel of the VRAB upheld the DVA decision (Entitlement Review Decision). The review panel listed the evidence that it considered in making its decision. It was satisfied that studies which arose from a comprehensive review of the Agent Orange test spraying rebutted a presumption of exposure, as the evidence did no more than establish that the Applicant was serving at CFB Gagetown during the relevant time period. Therefore, the Applicant failed to establish that his prostate cancer arose out of or was directly related to his military service.

[7] The review panel stated that the Agent Orange test spraying occurred in an unused and remote area of the base; flagmen were posted to indicate the designated spray area to helicopters; officers were assigned to ensure the flagmen were in the correct positions; and, according to the research, the two sprayed plots of land were not used again. The Task 3A-1 Tier 1 Report indicated that even for those directly involved with the tests (loaders, pilots, applicators and flagmen) there was no suggestion of an increased risk of long term irreversible health risks. For those who trained near the two sites, the exposure was found to be sufficiently low to indicate no increased risk of dioxin-related illness.

[8] Accordingly, the panel found that there was no more than a possibility that the Applicant was actually exposed to Agent Orange during his service and that a possibility was insufficient to establish entitlement under the *Pension Act*. Further, even if some exposure occurred, the level of risk attributable to the exposure was insufficient to establish a case for a pension award.

[9] The Applicant was advised that, pursuant to section 25 of the VRAB Act, if he was dissatisfied with that decision he could appeal to a VRAB board, which he did.

[10] On August 11, 2009, an entitlement appeal panel of the VRAB upheld the above described VAC decision and the Entitlement Review Decision (Entitlement Appeal Decision). At the entitlement appeal, the Applicant presented additional evidence from Captain James W. Bloomfield (retired) and a report from Dr. Liam Hickey. The appeal panel noted that a pension benefit entitlement had been denied on the basis that there was no evidence that the Applicant had been exposed to Agent Orange and found that the new evidence did not answer the objections raised in the previous decision. That is, the Applicant failed to adduce evidence of direct exposure Agent Orange.

[11] The appeal panel made particular note of the fact that the entitlement review panel had referred to the Task 3A – Tier 3 Report (in fact, it referenced the Task 3A-Tier 1 report). In addition, the appeal panel noted that the Applicant was diagnosed with prostate cancer when he was 73, while the median age of the diagnosis in the general population is 72 years of age. Further, that the only scientific study on which it could assess the risk of contamination is one sponsored by the Canadian government and that there was no documented evidence to lead the appeal panel to consider that study as not being credible. The appeal panel found that it could not rely on Dr. Hickey's opinion to relate the Applicant's condition to his military service because the opinion was not of probative value. In addition, the statistics in Captain James W. Bloomfield's letter were not in keeping with the conclusion of the study sponsored by the Canadian government. The appeal

panel upheld the previous decisions and affirmed that there was no evidence that the Applicant's prostate cancer is related to his military service.

[12] The Applicant sought a reconsideration of the Entitlement Appeal Decision pursuant to subsection 32(1) of the VRAB Act on the basis of errors of fact and law. On March 29, 2010 a VRAB reconsideration panel affirmed the Entitlement Appeal Decision (First Reconsideration Decision).

[13] The reconsideration panel acknowledged an error of fact made in the Entitlement Appeal Decision which stated that the Applicant was diagnosed with prostate cancer at the age of 73 when, in fact, he was diagnosed at the age of 62. The reconsideration panel further acknowledged that it could not trace the source of the entitlement appeal panel's statement that the median age for prostate cancer diagnosis in the general population was 72 years old.

[14] The reconsideration panel did not accept the Applicant's submission that a second error of fact arose because, although he had corroborated his prior evidence with the statements of two witnesses confirming that he had spent a lot of time in the training areas in 1967 immediately after they were sprayed and possibly even during spraying, it understood, according to the "Furlong Report", that the sprayed areas were not accessible for regular training and that only those who were directly exposed may have been at higher risk.

[15] As to the Applicant's submissions that these two alleged errors of fact constituted an error of law by erroneously rebutting a presumption arising from subsection 21(3)(g) of the Pension Act that

the Applicant's prostate cancer was connected with his military service, the reconsideration panel stated that it could find no support for that contention.

[16] The reconsideration panel also disagreed with and dismissed the opinion of Dr. Liam Hickey. His opinion was that there was a medical connection between the Applicant's condition and Agent Orange exposure which was consistent with the Department of National Defence (DND) studies. The reconsideration panel stated that there are very specific circumstances where a link can be established and, according to the available evidence, the panel could not find that such a link exists in this case.

[17] The Applicant also submitted a report from an oncologist, Dr. Michael Sia, that had been prepared for another applicant; a copy of the Chamie Study as well as three similar fact VRAB decisions which awarded pensions to individuals who served with the Applicant at Gagetown and suffered disabilities related to Agent Orange exposure. The reconsideration panel stated that it could not rely on that evidence as circumstances vary from case to case and each case must be decided on its own merits. It concluded that it could find no evidence to indicate that the Applicant was directly exposed to Agent Orange. It upheld the Entitlement Appeal Decision that the Applicant was not entitled to pension benefits.

[18] Pursuant to subsection 32(1) of the VRAB Act, the Applicant then sought a second reconsideration on the basis of new evidence in the form of two new witness statements. On July 9, 2012 a second reconsideration panel denied the Applicant's request (Second Reconsideration Decision).

[19] On July 23, 2012 the Applicant filed a Notice of Application seeking judicial review of the Second Reconsideration Decision. It is that decision which is under review by this Court.

Decision Under Review

[20] In the Second Reconsideration Decision, the VRAB stated that when determining an application for a reconsideration based on new evidence, a four part test prescribed by the Supreme Court of Canada in *R v Palmer*, 106 DLR (3d) 212 (SCC) and adopted in *Mackay v Canada* (1997), 129 FTR 286, [1997] FCJ No 495 [*Mackay*] and *Canada (Chief Pensions Advocate) v Canada (Attorney General)*, 2006 FC 1317, [2006] FCJ No 1646 [*Chief Pensions Advocate*], aff'd in 2007 FCA 298 is to be applied in determining if the evidence should be accepted:

i) the evidence should generally not be admitted if, by due diligence, it could have been adduced at a previous hearing ;

ii) the evidence must be relevant in the sense that it bears upon the decisive or potentially decisive issue in the adjudication;

iii) the evidence must be credible in the sense that it is reasonably capable of belief, and

iv) the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[21] The new evidence that the Applicant sought to submit by way of his request for the second reconsideration was:

a) Statement of Gordon A. Gravelle Sgt (R) (Gravelle statement) which stated:

> I was Platoon Sgt. of 7 Platoon "C" Company and Sgt. McAllister Basil J. was 12 Platoon "D" Company which was on our right flank when Agent Orange was sprayed on us.

> We were ordered before that to put on respirators and ponchos for the attack. This occurred when 2nd Battalion the Black Watch (RHR) of Canada were Enemy Force of 1st Battalion The Black Watch (RHR) of Canada in the summer of 1967.

b) Statement of H. J. Harkes, MC, CD, Lieutenant – Colonel (R) (Harkes statement) that the Applicant was a member of Mr. Harkes' battalion, The Black Watch (Royal Highland Regiment), at CFB Gagetown, which was assigned to design and conduct a training program to prepare the 1st battalion of The Black Watch for a six month deployment to Cyprus and that:

> The practical phase of the training included a series of field training exercises conducted throughout Gagetown's manoeuvre area… The training culminated with a major field exercise involving almost every soldier from both battalions in the middle of June 1967 – just days after parts of the training area had been sprayed with 'Agent Orange'. Mr. McAllister, a rifle platoon sergeant at the time, participated in the exercise. Moreover, as an element of the exercise control staff, he would have been in the training area in the weeks prior to the final exercise conduction reconnaissance and making the preparations necessary to ensure that the exercise provided for realistic training.
>
> Although I cannot state that I personally witnessed Mr. McAllister being sprayed or otherwise in contact with 'Agent Orange', I am certain that he would have been in or around the affected area at, and in the days immediately after, the spraying took place.

[22] The VRAB reasoned that the Applicant had submitted similar evidence in the past. This included a letter of support submitted to the entitlement appeal panel and corroborating letters from two witnesses that were before the first reconsideration panel. The latter letters attested that the Applicant had spent a lot of time in the training area immediately after, and possibly during, the spraying of Agent Orange. The VRAB quoted the statement of the panel in the First Reconsideration Decision that it understood the Furlong Report to contradict this evidence as that

report found that the sprayed areas were not accessible for regular training and only those who were directly exposed to Agent Orange were at a higher risk. The VRAB adopted that reasoning.

[23] The VRAB found that the new evidence which the Applicant sought to submit in the Second Reconsideration was not "new" because the new statements reiterated the same contention. The VRAB stated that with respect to the second part of the test for new evidence, relevance, the statements did not address in a credible manner the decisive point that the Applicant was not directly exposed to Agent Orange. Accordingly, that criterion was not met.

[24] The VRAB also found that the new evidence was not credible and, therefore, did not meet the third criterion. While the Gravelle statement stated that the Applicant's platoon was on his "right flank when Agent Orange was prayed on us", the VRAB stated that, based on the Furlong Report, it understood that Agent Orange was never sprayed in training areas, but only in remote areas where no training was held. Further, the Harkes statement did not provide any evidence of direct exposure to Agent Orange and his recollection was also not in keeping with the Furlong Report.

[25] The VRAB concluded that the tendered evidence was not new or credible and would not, when taken with the earlier adduced evidence, be expected to affect the result. As the Applicant did not meet the criteria in *Mackay*, above, the VRAB declined to reopen the otherwise final and binding Entitlement Appeal Decision for reconsideration.

Issues

[26] The Applicant is a self-represented litigant. While he does not explicitly identify issues, his Notice of Appeal, Memorandum of Fact and Law and oral submissions suggest that to him the issues are whether the Board erred: in denying his entitlement to a pension, particularly as others who served with him at CFB Gagetown are receiving that benefit; in the discounting of all other evidence in favour of the Furlong Report; and, in the assessment of the credibility of his proposed new evidence.

[27] In its written submissions, the Respondent identifies the issue as being whether the VRAB's decision that the Applicant is not entitled to a pension under subsection 21(2)(a) of the *Pension Act* is reasonable. However, when appearing before me, the Respondent submitted that the issue was limited to the reasonableness of the Second Reconsideration Decision.

[28] In my view, the issues are as follows:

a) What is the standard of review for a reconsideration decision of a VRAB appeal panel?

b) Did the VRAB err by refusing to admit the new evidence and, as a result, in declining to reconsider the Entitlement Appeal Decision?

Submissions and Analysis

Standard of Review

[29] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [*Dunsmuir*] at para 57 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by

past jurisprudence, the reviewing court may adopt that standard of review. (*Dunsmuir*, above; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 [*Kisana*] at para 18).

[30] Prior jurisprudence has held that the standard of review for a reconsideration decision of a VRAB panel is reasonableness (*Bullock v Canada (Attorney General)*, 2008 FC 1117 [*Bullock*] at paras 11-13; *Rioux v Canada (Attorney General)*, 2008 FC 991 [*Rioux*] at para 15 and 17; *Dugré v Canada (Attorney General)*, 2008 FC 682 [*Dugré*]; *Lenzen v Canada (Attorney General)*, 2008 FC 520). The question of whether an appeal panel gave proper effect to section 39 of the VRAB Act also attracts a standard of reasonableness: *Wannamaker v Canada (Attorney General)*, 2007 FCA 126 [*Wannamaker*] at para 13. Thus, the standard of review in this case is reasonableness.

[31] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility of the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above, at para 47; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 59). Put otherwise, the Court should only intervene if the decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, at para 47).

[32] On a judicial review the Court must show considerable deference to decisions rendered by a VRAB appeal panel that refuses to reconsider its own decision (*Furlong v Canada (Attorney General)*, 2003 FCT 731 [*Furlong*] at para 14).

Did the VRAB err in refusing to admit the new evidence and, as a result, in declining to reconsider the Entitlement Appeal Decision?

Applicant's Position

[33] The Applicant submits that the VRAB has granted disability pensions for prostate cancer, and other medical conditions attributable to exposure to Agent Orange, to comrades with whom he served side by side at CFB Gagetown during the relevant time frame.

[34] He submits that the common theme of the VRAB refusals is an alleged lack of evidence that he was directly exposed to Agent Orange during his military service. Yet, in nine other decisions of the VRAB where claimants were found to be entitled to pension benefits, only one, a flagman, was directly sprayed with "Agent Orange".

[35] The Applicant submits that the VRAB inappropriately denied his admission of new evidence by giving undue weight to some evidence at the expense of other evidence that was favourable to his claim. He states that the VRAB continues to deny his application solely on the basis of the "Furlong Report", which contains errors and which the VRAB has interpreted incorrectly. Specifically, according to the VRAB, based on the "Furlong Report", Agent Orange was never sprayed in training areas, but only in remote areas where training was not conducted. This is incorrect and is also not in keeping with what the Furlong Report actually states.

[36] The evidence of those who were actually in service at CFB Gagetown is not only credible, but is better evidence and should be preferred. The Applicant submits that any and all evidence he produces as to his exposure to Agent Orange is rejected by the VRAB because it has interpreted the Furlong Report to contradict the Applicant's contention. Section 3 and 39 of the Act requires the VRAB to draw from all of the evidence every reasonable inference in favour of the Applicant and to resolve any doubt in his favour when weighing his evidence.

[37] The Applicant states that the new evidence should change the result because it further corroborates his exposure to Agent Orange at Gagetown during the summer of 1967. The Gravelle statement confirms that his battalion, flanked by Mr. McAllister's, was sprayed with Agent Orange. The Harkes statement confirms that their training culminated with a major field exercise just days after part of the training area had been sprayed with Agent Orange. As such, the evidence raises a doubt, as contemplated by Sections 3 and 39 of the Act, that the Applicant's disability was related to his service that should be resolved in his favour. The Applicant states that he is therefore, entitled to a pension pursuant subsection 21(2) of the Pension Act.

Respondent's Position

[38] The Respondent acknowledges that the Applicant served in the 1st Battalion, The Black Watch (RHR) and that he participated in the field training program at CFB Gagetown's manoeuvre area in preparation for a peacekeeping deployment to Cyprus. The Respondent also acknowledges that during the summers of 1966 and 1967 the Applicant performed field training exposing him to long transits on foot, rolling, crawling and digging on and in the ground, and, accepts that he

performed field duties at CFB Gagetown between June 14-16, 1966 and June 21-24, 1967 when Agent Orange was sprayed.

[39] The Respondent submits that it was reasonable for the VRAB to conclude that the new evidence was not new or credible. It was not new as the Applicant presented similar evidence making the same contention before the panel in the First Reconsideration Decision. It was not credible as the VRAB found, based on the Furlong Report, that the training areas which had been sprayed with Agent Orange were not in areas in which training was held after the spraying. The VRAB therefore could not accept that the new evidence which contended that Agent Orange had been sprayed at the same time as (and in very close proximity to the area in which) the Applicant was engaging in field exercises.

[40] The medical evidence did not establish that the Applicant's condition arose out of exposure to Agent Orange sprayed at CFB Gagetown. An individual's mere presence in Gagetown during the testing of Agent Orange does not constitute exposure that would place an individual at an increased risk for long-term, irreversible health effects.

[41] Section 39 of the Act "does not relieve the pension applicant of the burden of providing on a balance of probabilities the facts required to establish the entitlement to a pension" (*Wannamaker*, above, at para 5). Nor does it imply that such evidence must be automatically accepted as an Applicant's claim must be supported by evidence that is credible and reasonable (*Tonner v Canada (Minister of Veterans Affairs*), [1995] FCJ No 550 [*Tonner*]).

[42] The Respondent submits that while the VRAB is required to draw every reasonable inference in favour of the Applicant, the facts inferred must be grounded on "more than a mere possibility" *(Elliot v Canada (Attorney General)*, 2003 FCA 298 at para 46). The Applicant failed to prove on a balance of probabilities that he suffers from a disability resulting from his military service.

Analysis

[43] This judicial review is of the VRAB's Second Reconsideration Decision refusing to reconsider, on the basis of new evidence, the August 11, 2009 Entitlement Appeal Decision. The Second Reconsideration Decision is the last in a chain of five decisions concerning the pension benefit entitlement sought by the Applicant. Therefore, as a preliminary matter, it is necessary for the Court to determine to what extent it can look to the previous decisions in assessing the decision under review.

[44] In *Furlong*, above, at para 17, Justice Blanchard stated that the line of demarcation between a decision refusing to reconsider and an earlier decision is unclear because "a reconsideration, by its very nature, requires some hearkening back to the substance of the earlier decision". He quotes Justice Teitelbaum in *Mackay*, above, who explained this as follows:

> [17] […]
>
> […] Effectively in a reconsideration, the VRAB is required to look backwards to the substance of the earlier decision. In a similar vein, in a judicial review application concerning the VRAB's failure to reconsider an earlier decision, the Court must equally look backwards to the earlier decision. Thus, the Court in the case at bar cannot decide in a vacuum if the VRAB on June 21, 1996 properly exercised its

> discretion. The Court must also pay some attention to the earlier decision of the VAB dated January 19, 1994 because it was at issue in the VRAB reconsideration proceeding.
>
> However, I wish to emphasise that it is not for the Court in the current proceeding to conduct a full-fledged judicial review of the January 19, 1994 decision of the VAB. The validity of the earlier decision of January 19, 1994 cannot properly be challenged in a judicial review of the VRAB's June 21, 1996 reconsideration decision. The Court does not have jurisdiction to overturn the earlier decision. By its very nature, a reconsideration under the auspices of the Veterans Review and Appeal Board Act is backward looking but there cannot be a point of infinite regression. […]
>
> [Emphasis in original]

[45] Justice Blanchard in *Furlong*, above accepted this analysis and concluded, that the Court could not disregard the decisions made prior to the appeal panel's last decision. Although the Court did not have jurisdiction to set aside these earlier decisions because they were not the subject of the judicial review before it, the Court must nevertheless consider them retrospectively to better understand the basis of the decision that is under judicial review.

[46] *Mackay*, above, was also followed in *Caswell v Canada (Attorney General)*, [2004] FCJ No 1655 [*Caswell*] at para 20 which concluded:

> [20] Therefore in order for me to assess whether the Board properly exercised its jurisdiction pursuant to s. 111 of the *Act*, I must also look to the earlier decision of the Panel to determine whether any errors of law or fact were made in its assessment of whether the evidence submitted by Mr. Caswell in support of his request for reconsideration was in fact new evidence. In order to determine whether the Board properly assessed the Panel's reasons, the Board has to look at the Panel's reasons. It appears to me that the Court, as the reviewing body of the Board's decision, has to be in the

> same position as was the Board when it reviewed the Panel's decision, and it cannot do so without also looking at the Panel's reasons. By not doing so, the Court would not have the full understanding of the situation and would not be in a position to make a determination on the merits of the Board's decision.

[47] Therefore, in this case, the Court must look to the First Reconsideration Decision and Entitlement Appeal Decision to understand the basis of the Second Reconsideration Decision and to determine whether the VRAB made any errors of law or fact in assessing whether the evidence submitted by the Applicant in support of his request for a second reconsideration was, in fact, new evidence.

[48] On a second preliminary point, it is trite law that in a judicial review application, the Court can only consider the material that was before the panel with respect to the decision under review (*Ochapowace First Nation v Canada (Attorney General)*, 2007 FC 920 at para 9; *Ray v Canada*, 2003 FCA 317 at paras 5 to 7). Therefore, and as I advised the Applicant at the hearing, the Court cannot consider the additional documents that he filed but which were not before the VRAB, being his own affidavit dated August 8, 2012 and the affidavit of Mr. David Tucker, CD SGT. (R) dated October 12, 2012.

[49] As for the merits of this application, pursuant to section 31 of the VRAB Act, the Entitlement Appeal Decision is final and binding. However, the VRAB may reconsider its decision on its own motion if it determines that there was an error of fact and/or law, or, 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.

[50] In his Application for Reconsideration pertaining to the second reconsideration, the Applicant indicated that the basis for his application was that there was new evidence. He did not allege an error of fact or law. The Applicant submitted that the VRAB had continued to deny a pension entitlement on the basis that it had not been presented with evidence of his direct exposure to Agent Orange and that the new evidence, the Gravelle and Harkes statement, would substantiate his position.

[51] Given the basis for the request for reconsideration, the VRAB was correct to apply the four part test for new evidence as described in *Mackay*, above. This Court must review the VRAB's application of that test.

[52] As noted above, the third prong of the test for admissibility of new evidence requires the proposed new evidence to be credible in the sense that it is reasonably capable of belief. The VRAB determined that the proposed new evidence, the Gravelle and Harkes statements, both described above, were not credible. In my view, based on the record before me and keeping in mind the context provided by sections 3 and 39 of the VRAB Act, the VRAB erred in finding that the proposed new evidence was not credible because of an apparent contradiction with the "Furlong Report".

[53] Essentially, the position of the VRAB has been, throughout the Applicant's pension entitlement review and appeal process, that the "Furlong Report" contradicts any evidence of the Applicant's exposure to Agent Orange. According to the VRAB, the Furlong Report stated that the

sprayed areas were not accessible for regular training and only those who were directly exposed to Agent Orange may have been at a higher risk. On this basis, the VRAB continued to reject any evidence the Applicant submitted to indicate that he was exposed to Agent Orange.

[54] However, I am unable to locate a document entitled the "Furlong Report" in the record before me which was, presumably, also the record before the VRAB. The record did contain a web page print out of National Defence and the Canadian Forces entitled "Project Summary Task 2A: The History and Science of Herbicide Use at CFB Gagetown from 1952 to Present"; a "Project Summary Environmental Site Assessment of CFB Gagetown, NB: Task 2B"; a "Plain Language Summary, Fact Finding, Task 3A-1, Tier 1: Human Health Risk Assessment for Historical Exposures to Contaminants Associated with 1966-67 U.S. Defoliant Testing and CFB Gagetown"; a "Plain Language Summary, Fact Finding Task 3A-1, Tier 2: Toxicological Risk Assessment Pertaining to Potential Occupational and Related Exposures Associated with Herbicide Spraying Operations at CFB Gagetown – Tier 2 – Manufacturing Impurities (Contaminants)" (collectively ER – M2 of the Entitlement Review Decision); a "Plain Language Summary Fact Finding Task 3A-2: Human Health Risk Assessment for Current Exposures to Dioxins at CFB Gagetown"; and, a "Report Summary, Fact Finding Task 3A-1, Tier 3" (collectively ER-M3 of the Entitlement Review Decision).

[55] I am unable to find any specific reference in those documents, or elsewhere in the record, for the proposition relied on by the VRAB that the "Furlong Report" found that the areas sprayed with Agent Orange were not accessible for regular training.

[56] The Task 3A-1, Tier 1 report referenced in the Entitlement Review Decision states that it focuses on the contaminants in the products tested by the US military in 1966 and 1967. Further, that the US Department of the Army tested military defoliant chemicals on two densely forested areas of land at CFB Gagetown described in detail in Fact Finding Task 2A. As found in the record before me, Task 2A states only that in addition to the yearly herbicide control program in place at CFB Gagetown, "in 1966, 1967 and 1990, small tracts of land within the ranges and training areas were used for herbicide trials" (emphasis added). In 1966 and 1967, the Forestry Branch of the Canadian Forest Service conducted trials of certain products and in the same years but in different areas, the US Department of the Army conducted separate trials including testing of Agent Orange, Agent Purple and Agent White.

[57] The focus of Task 3A-1, Tier 1, as stated in that document, was on the contaminants in the products tested by the US military in 1966 and 1967, dioxins and hexachlorobenzene. Risks were assessed for mixers/loaders, applicators, flaggers, post-application scouts and on-site military trainees. The latter defined as "the military personnel who may have trained close to the sprayed areas, during, and after and at the time of spraying" (emphasis added). Despite this definition, section 5.0, titled "Evaluation of Exposure" states that "Military trainees who trained in the area after the spraying were assumed to have longer term exposures" (emphasis added). This would also appear to suggest, contrary to the VRAB's finding, that sprayed areas were in fact accessible by military personnel for training.

[58] With respect to dioxins, in the context of risks from exposures due to "normal activities" the Task 3A-1, Tier 1 report states:

> - The short-term exposures estimated for the people who were directly involved with the chemical testing (mixer/loaders, pilots, applicators, scouts) do not suggest they would have been at increased risk for long-term, irreversible health affects…
>
> - The longer-term exposures estimated for military trainees who trained in or near either the 1966 or 1967 spray areas following the spray applications were low enough that no increased risk of dioxin related illness is predicted.
>
> (Emphasis added)

[59] As to risks from exposure due to "accidents":

> - Accidents, such as spills or other incidents, may have resulted in higher exposure for some people. These individuals could have had elevated dioxin body burdens following the accident event.
>
> - Although the occurrence of accidents during the 1966 and 1967 spray periods remains uncertain, and elevated body burdens do not necessarily mean that individuals would have experienced adverse health effects, further investigation such as body burdens testing or an epidemiology study may be warranted.

[60] Again, this would at least seem to suggest that military personnel could have trained in or near the 1966 and 1967 Agent Orange spray areas and, therefore, been exposed to the contaminants.

[61] Because, Fact Finding Task 3A-1, Tier 2 focuses on the contaminants in all herbicides sprayed at CFB Gagetown between 1952 and 2004 (manufacturing impurities) and Task 3A-1, Tier 3 focuses on the active ingredients in all herbicides sprayed at CFB Gagetown between 1952 and the present, it is presumably Fact Finding Task 3A-1, Tier 1, referenced above, that was relevant to the VRAB decisions pertaining to the Applicant.

[62] Counsel for the Respondent was unable to refer me to a reference within the record stating that sprayed areas were not accessible for regular training. Counsel did refer me to the Task 3A-Tier 1 report definition of "military trainees", referenced above, and suggested that it may be inferred from this that military trainees did not have access to sprayed sites, I do not agree.

[63] Based on the record before me, the evidence does not support the VRAB assertion that the "Furlong Report" determined that Agent Orange was never sprayed in training areas, but only in remote areas where no training was held. Accordingly, the VRAB's finding that the new evidence was not credible, and therefore not admissible, because as it was contradicted by the Furlong Report, is unreasonable. Further, the excluded evidence is relevant and is such that, if believed, it could reasonably, when taken with the other evidence adduced by the Applicant, be expected to have affected the result.

[64] Accordingly, the VRAB erred in refusing to admit the new evidence and in declining to reconsider the Entitlement Appeal Decision.

[65] The application is granted, the Second Reconsideration Decision is set aside and the matter is remitted back to a differently constituted panel of the VRAB for redetermination. The Applicant shall have his costs (*Yu v Canada (Attorney General)*, 2011 FCA 42) in the amount of $500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted. The decision of the VRAB dated July 9, 2012 is set aside and the matter is remitted to a differently constituted panel of the VRAB for re-determination. The Applicant shall have his costs in the amount of $500.00.

"Cecily Y. Strickland"
Judge

ANNEX A

(A) *Legislative Background*

[1] Section 2, 21(2)(a) and 21(3)(g) of the *Pension Act*, RSC, 1985, c P16, and sections 3, 31, 32(1) and 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [the VRAB Act] are applicable to this application and are included in this Annex.

(i) The *Pension Act*

Construction	Règle d'interprétation
2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.	**2.** Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effèt à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.
[…]	[…]
21. […]	**21.** […]
Service in militia or reserve army and in peace time	Milice active non permanente ou armée de réserve en temps de paix
(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,	(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;

[…]

[…]

Presumption

(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of

Présomption

(3) Pour l'application du paragraphe (2), une blessure ou maladie — ou son aggravation — est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce paragraphe si elle est survenue au cours :

[…]

[…]

(*g*) the performance by the member of any duties that exposed the member to an environmental hazard that might reasonably have caused the disease or injury or the aggravation thereof.

g) de l'exercice, par le membre des forces, de fonctions qui ont exposé celui-ci à des risques découlant de l'environnement qui auraient raisonnablement pu causer la maladie ou la blessure ou son aggravation.

The VRAB Act:

Construction	Principe general
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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1421-12
STYLE OF CAUSE:	BASIL MCALLISTER v AGC
PLACE OF HEARING:	Fredericton
DATE OF HEARING:	April 9, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	STRICKLAND J.
DATED:	June 19, 2013

APPEARANCES:

Basil McAllister	SELF-REPRESENTED
Nicole Arsenault	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT