Veterans Review and Appeal Board

Representative:	Self-represented
Decision number:	100003215412
Decision type:	Federal Court Order to Rehear Entitlement Appeal
Location of Hearing:	Charlottetown, Prince Edward Island
Hearing Date:	10 January 2018

The Entitlement Appeal Panel decides:

PARKINSON'S DISEASE

No entitlement granted for service in the Regular Force under Section 45 of the *Canadian Forces Members and Veterans Reestablishment and Compensation Act*

Panel Members: J.A. Bouchard
Thomas W. Jarmyn
Michelaine Lahaie

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J.A. Bouchard

INTRODUCTION

By a decision dated July 4, 2017, the Federal Court referred this case back to the Board for rehearing.[1] The case involves an application for a disability award for Parkinson's disease.

The Appellant is 71 years old. He served in the Canadian Forces from 1963 to 1971, and again from 1973 to 1990. His service included a period of time at Canadian Forces Base (CFB) Gagetown, in New Brunswick, in June 1967, when the Canadian Forces were conducting spray tests of a substance called Agent Orange. Agent Orange is a

herbicide and defoliant chemical known for its use by the U.S. Army during the Vietnam War.

The Appellant was diagnosed with Parkinson's disease around 1985. In 2011 he applied for a disability award pursuant to section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, claiming that his Parkinson's disease was due to his exposure to Agent Orange while serving at Gagetown. His application was denied by Veteran Affairs Canada and by a Review Panel of the Board and eventually by an Appeal Panel on 22 May 2013.

Following the denial of his application for reconsideration in October 2016, he filed an application for judicial review before the Federal Court. The Federal Court allowed the application for judicial review and referred the case to a different panel for redetermination.

The Federal Court found that the Board had erred by refusing to reconsider its appeal decision. As Justice Boswell explained, the Board erred in its assessment of the case law and a fact-finding report, commonly referred to as the "Furlong Report", which presented research on Agent Orange for the federal government. The Court's decision states:

> [32] It is important to appreciate the context of the decision under review. The Applicant was requesting the Panel to reconsider whether he was entitled to disability benefits because the Appeal Panel's decision was based upon an error in view of *McAllister (2014)*. The Panel's role pursuant to subsection 32(1) of the VRAB Act was to decide whether the Appeal Panel's decision was based upon an error. The Appeal Panel's decision, which was rendered before the decision in *McAllister (2014)*, made the following comments:
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> > According to these studies, the spraying of Agent Orange herbicides was conducted under strictly controlled conditions in an unused and remote area of the Base, not proximate to any residential areas.
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> > The Panel is satisfied that these studies represent the best evidence available at this time as to what took place at CFB Gagetown.
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> [33] In making these comments, the Appeal Panel referenced the Furlong Report. The Appeal Panel's conclusion that Agent Orange was sprayed in an "unused" area cannot be inferred from the Furlong Report, as the Court found in *McAllister (2014)*. This is a factual error in the Appeal Panel's decision which the Panel either overlooked or ignored. The Furlong Report does say that the sprayed area was remote, but it does not say the area was "unused." Dr. Furlong merely stated in his report that he had been "informed by the Base that the specific areas used by the Americans for testing in 1966 and 1967 have not been used since for formal training by the Base." This does not preclude the possibility,

> as the Applicant argues, that this area was used for training during the spraying activities in June 1967. The Furlong Report cannot stand as conclusive evidence that Agent Orange was sprayed in an "unused" area. In view of this error by the Appeal Panel, it was unreasonable for the Panel to conclude that the Applicant had failed to establish any error.
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> [34] Moreover, the Appeal Panel's determination that the Furlong Report was "the best evidence" as to what took place at the Base can no longer be considered as being valid in view of *McAllister (2014)*. The Appeal Panel relied on this "best evidence" to conclude that "there is no more than a slight possibility that the Veteran experienced direct exposure to Agent Orange." Even if this conclusion may have been reasonable at the time of the Appeal Panel's decision, the findings in *McAllister (2014)* make it open to question and, in my view, it was unreasonable for the Panel not to reconsider it.
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> [35] In short, the Panel unreasonably screened out the Applicant's reconsideration request without proper regard for the evidence before it and in light of *McAllister (2014)*.

As directed by the Federal Court, a hearing was held by a new Panel on 10 January 2018. The Appellant decided to represent himself before the Board and to present his case. The Appellant did not file any new evidence.

This proceeding is a *de novo* hearing. This means that the Panel has considered the Appellant's application afresh, relying on its own independent assessment of all the evidence before it. It was not bound by any of the factual conclusions of previous panels.

ISSUES

In order to be entitled to a disability award, the Appellant has to establish that the requirements set out in subsections 45(1) and 2(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* were met.

Under these requirements, an Appellant may be eligible for a disability award if he or she is suffering from a disability resulting from an injury or disease that arose out of or was directly connected with service in the Canadian Forces.

The case law teaches that, in accordance with these requirements, the Appellant has to present evidence to establish, on a balance of probabilities, that his Parkinson's disease arose out of or was directly connected with his military service; he has to establish a causal link between his disease and his military service.[2]

In turn, section 39 of the *Veterans Review and Appeal Board Act* provides directions on how the evidence should be weighed. Under this section, every reasonable inference

should be drawn and any doubt resolved in the applicant's favour where uncontradicted and credible evidence is presented by the applicant, unless a lack of credibility finding is made.[3]

At issue, therefore, is whether the Appellant submitted credible evidence establishing that his Parkinson's disease was caused or aggravated by his military service.

EVIDENCE AND ARGUMENT

The medical evidence reveals that tremors were detected in the Appellant during a routine medical examination around 1963. According to this report, the Appellant had suffered from tremors since childhood.[4]

In the mid-1980s, the Appellant's tremors and associated problems were given closer medical attention. The doctors and the neurologists who examined the Appellant did not agree; some diagnosed essential tremors whereas others deemed that the Appellant presented with enough characteristic symptoms of Parkinson's disease for this to be diagnosed.[5]

A medical opinion dated 19 October 2011,[6] by Dr. Alas, the Appellant's treating physician, was submitted in support of the application. The material portion of the opinion reads as follows:

> "Medical Science has in recent years considered hereditary and environmental causes for this condition. Mr. […] has no family history of Parkinson's so I would rule out the hereditary as the cause. As for the environmental cause, there is enough evidence to have the United States Institute of Medicine IOM to place Parkinson's Disease on a list of medical conditions related to Agent Orange.
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> Mr. […] was an infantryman at CFB Gagetown when some of the Agent Orange spraying took place. Also the grounds where the troops would be training would remain contaminated for many years after. As an infantryman, Mr. […] would come into contact with these elements on many occasions after the spraying.
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> As Mr. […] has previously been diagnosed with Chloracne, another condition related to Agent Orange, I think it is highly probable his Parkinson's is a result of the use of Agent Orange at CFB Gagetown."

With respect to exposure to Agent Orange, the evidence is twofold. On the one hand, there are the Appellant's statements to the effect that he was exposed to the elements during the training exercises at CFB Gagetown and that he observed a helicopter spraying a mist that drifted onto him. The Appellant also stated that he supplemented his food rations by eating game and berries picked in the bush, and that he drank water drawn from the training area.

On the other hand, there are statements made by the Appellant's former fellow members who served with him in the summer of 1967 to the effect that the Appellant's Black Watch Battalion took part in a large-scale field exercise in the days following the spraying of Agent Orange. According to some statements, Agent Orange was sprayed on CF members.[7]

The Appellant's arguments are simple: he maintains that the Federal Court decision in *McAllister v. Canada (Attorney General)*, 2014 FC 991, establishes the merits of his application. He challenges the Furlong Report and reiterates that this report is not the best evidence on the issue of exposure. He claims to have received compensation for chloracne, a disease known to be linked to Agent Orange, and that this compensation establishes that he was within the areas that were sprayed at CFB Gagetown. He submits that the United States Environmental Protection Agency has indicated that dioxins are very dangerous, even at very low levels.

The Appellant admits that in pursuing his application, he is not entitled to financial compensation, since the extent of disability in his case (100%) has already been paid. He states that he wishes to pursue this application since he believes he is right and because it is the right thing to do.

ANALYSIS/REASONS

The Panel recognizes the obligations that the people and government of Canada have toward the Appellant, who has served his country. In this matter, the Panel interpreted and liberally construed the provisions of its enabling statute and of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* to fulfill the obligation to compensate veterans for disabilities from which they suffer as a result of their military service. For the reasons outlined below, this appeal is dismissed.

Since the mid-1950s, the Canadian Forces and the Department of National Defence have been clearing brush at CFB Gagetown using various means, including chemical herbicides. Some of these products containing manufacturing impurities, such as dioxin, were sprayed at CFB Gagetown. The Agent Orange sprayed in 1967 also contained manufacturing impurities.[8]

The Appellant served at CFB Gagetown from 1965 to 1971. It is thus reasonable to conclude that he was in contact with chemicals, including Agent Orange. Some of these chemicals can cause health conditions in individuals exposed to sufficient quantities. Nevertheless, it is a well-established principle that neither an individual's mere presence in proximity of a hazard nor service or occupation in the vicinity of a hazard constitutes harmful exposure. In this appeal, the issue remains whether the Appellant presented credible evidence establishing that his Parkinson's disease was caused by or

aggravated by this exposure. The Panel finds that the Appellant did not meet his burden of proof.

In order to determine whether an applicant was exposed to a hazard in a manner sufficient to have caused a health condition, the evidence for causality between the hazard and the health condition, the mode and extent of exposure, and the latency must generally be considered. Ensuring fairness in disability award entitlements requires reasonable and credible expert evidence to establish the likelihood that a claimant's disease could reasonably have been caused by the claimed exposure.

A credible medical opinion need not be long or complicated. Previous decisions of the Board and the Federal Courts have established that a credible expert opinion consists of a reasonably complete and accurate medical history, reference to the relevant medical scientific information about the claimed condition and an opinion based on the history and medical information.

The Federal Court has ruled on several applications for judicial review concerning cases of exposure to toxic substances and has provided guidance on this matter.

In the decision in *Jarvis v. Canada (Attorney General)*, 2011 FC 944, the Federal Court found that in the absence of the details of the exposure and a credible medical opinion, the applicant had not met his burden of proof. The decision states as follows:

> …medical opinion was not conclusive with regards to the relation between toxic exposure and the Applicant's medical condition. As the Respondent points out, [the doctor's] medical opinion was based upon what the Applicant told him about his medical history and his time spent in the tool crib. There was no information on the details or nature of the alleged exposure. [The doctor's] opinion was based on a diagnosis of exclusion and is not based on any scientific research. It was not unreasonable for the Appeal Board to find that this opinion did not establish causation.

In the matter of *Dumas v. Canada (Attorney General)*, 2006 FC 1533, a medical report supporting the application had been presented as evidence to establish that various toxins were the cause of the claimed conditions. The report was nevertheless found to be insufficient to establish the merits of the application since it had not been sufficiently researched, did not have enough detail and failed to consider the applicant's medical history. The Court held as follows:

> …Having reviewed the decision of the Panel and the evidence before it, I am satisfied that it did not err in affirming the rejection of the applicant's claim. The findings of fact made by the Panel were properly made based on the evidence before it. The inconclusive medical opinion provided by [the doctor] did not establish the required causal connection between the applicant's disability and his military service.

In the cases of *Tonner v. Canada (Minister of Veterans Affairs)*, (1995), 94 F.T.R. 146, and *Moar v. Canada (Attorney General)*, 2006 FC 610, the Federal Court ruled that the Board did not err when it did not rely on speculative or vague medical opinions.

In this case, the letter from Dr. Alas does not constitute credible evidence for an award because the opinion is based on history provided by the Appellant and not on a reasonably complete and accurate history. Several Federal Court judicial review decisions have pointed out that medical opinion evidence produced years after the claimed injuries are only credible if based on a reasonably complete and accurate history as revealed by all of the evidence, including the service health record.[9]

In this case, there is no evidence that Dr. Alas was provided with the Appellant's service medical records or that he was aware that the Appellant suffered from tremors before being exposed to Agent Orange contaminants during his military service. There is no indication that the doctor was aware that the Appellant had reported problems with tremors in earlier generations of his family.[10] The Board does not know where the diagnosis of chloracne referred to by Dr. Alas comes from. This diagnosis is not on file. The Panel finds that Dr. Alas's opinion is vague and provides too little explanation or details to support his conclusion.

The Panel sought to determine whether the Appellant could benefit from paragraph 50(g) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, which provides that a veteran is presumed, in the absence of evidence to the contrary, to have established that an injury or disease is a service-related injury or disease, or a nonservice-related injury or disease that was aggravated by service, if it is demonstrated that the injury or disease or its aggravation was incurred in the course of "the performance by the member or veteran of any duties that exposed the member or veteran to an environmental hazard that might reasonably have caused the injury or disease or its aggravation."

Nevertheless, even if it were accepted that there were toxic elements where the Appellant was serving at CFB Gagetown between 1965 and 1971 and that he came into contact with these elements by inhalation, ingestion or direct contact, no credible evidence was submitted that this exposure could reasonably have caused his disease.

The scientific evidence on file is to the effect that CF members who took part in chemical testing did not have an increased risk of long-term adverse effects on their health. The same is true for longer exposure times after spraying for members who trained within the areas that were sprayed in 1966 and 1967, where the evidence on file shows that the exposure was so low that an increased risk of dioxin-related diseases was unlikely.[11]

Similarly, Veteran Affairs Canada's policy regarding exposure to Agent Orange does not assist the Appellant.[12] According to this policy, veterans who served in Vietnam benefit

from a presumption according to which a list of diseases, compiled by the Institute of Medicine, are presumed to have been caused by exposure to Agent Orange in Vietnam. For exposure incurred elsewhere, such as CFB Gagetown, as in this case, claimants must submit reasonable evidence of exposure that placed them at an increased risk for long-term, irreversible health effects as well as of having an illness that VAC accepts as being associated with exposure to Agent Orange. Here, there is no credible expert opinion or scientific evidence on file from which it can be inferred that, during his military service, the Appellant suffered from exposure that placed him at an increased risk for long-term, irreversible health effects.

With respect to the Federal Court decision *McAllister v. Canada (Attorney General)*, 2014 FC 991, the Panel finds that it would be incorrect to reach the conclusion that the directions from the Court in that case automatically establish the merits of the Appellant's application in this case. In *McAllister*, the Court found that the Furlong Report did not establish that military personnel were restricted from the spray sites and that claimants did not have to prove direct contact or exposure to obtain pension entitlements. The Board made a reviewable error when it concluded that the Furlong report was the best evidence on spray site restrictions when it was faced with conflicting evidence. It would have been reasonable to rely on the evidence from McAllister and his fellow servicemen.

It is clear that each case must be decided on its own facts. Medical evidence differs from one case to another and each individual's circumstances are different. In this case, the Panel concludes that the Appellant did not prove that exposure to Agent Orange or other toxins during his military service caused or aggravated his Parkinson's disease. There is no evidence on file of harmful exposure and no credible medical opinion to link the Appellant's service to the claimed condition.

The Panel reviewed the Board decisions submitted by the Appellant where compensation was awarded in situations that on their face appear similar to his situation. It is true that consistency is obviously desirable since it promotes equality before the law and reduces the possibility of arbitrary decisions. However, this Panel must render a decision based on the principles of the law that are relevant to this case.

It has long been a guiding principle of veterans' disability pension adjudication that applicants are to be given the benefit of the doubt in the weighing of evidence. That principle is codified in sections 3 and 39 of the *Veterans Review and Appeal Board Act*. Yet, it is also clear that the applicant must produce reliable evidence. The courts, including the Federal Court of Canada, have been very helpful in providing guidance on the benefit of the doubt.

The Court has ruled that this means that in weighing the evidence before it, the Panel will look at it in the best light possible and resolve doubt so that it benefits the applicant.

The benefit of the doubt provision however does not lead the adjudicator to accept automatically whatever submission is made by an applicant. The evidence must be credible and reasonable, and not merely speculative: *Tonner v. Canada* (1995), 94 F.T.R. 314; affirmed (12 June, 1996) A-263-95 (F.C.A.).

Schut v. Canada, 2003 FC 1323, includes the following statement about sections 3 and 39 of the *Veterans Review and Appeal Board Act*:

> The Applicant argues that all he needed to do in this case was to raise a doubt . . . If such a doubt can be raised, he contends, then s. 39 of the *Veterans Review and Appeal Board Act* dictates that a finding must be made in the Applicant's favour.
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> But the jurisprudence suggests that s.s. 3 and 39 of the *Veterans Review and Appeal Board Act* do not relieve the Applicant of the burden of establishing, on a balance of possibilities and with the evidence considered in the best light possible, that the disability is service-related.

The tribunal must determine whether upon reliable evidence a reasonable doubt exists as to whether there is a relevant connection between the disability and service. If so, the applicant is to be given the benefit of that doubt. However, this does not remove the onus from the applicant to produce reliable evidence upon which such a doubt could be raised.[13]

Regretfully, the Panel concludes that the Appellant has not established his case for a disability award. It is not left with a doubt in that regard that it believes could be resolved in the Appellant's favour.

Even if the Panel has erred in its assessment of the evidence and its conclusions regarding the outcome of this application, the legislation does not allow the Panel to grant the Appellant the claimed compensation. Section 54 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* provides that no disability award shall be granted to a veteran in respect of any percentage points exceeding 100%. In this case, the extent of the Appellant's disability exceeds 100%. The issue of this application for a disability award is therefore moot. The Panel believes, however, that it had to rule on the application to comply with the Federal Court order.

DECISION

The Review Decision dated 26 October 2011, denying entitlement for Parkinson's disease is affirmed.

Applicable Statutes:

Canadian Forces Members and Veterans Re-establishment and Compensation Act, [S.C. 2005, c.21.]

Section 45

Veterans Review and Appeal Board Act, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3
Section 25
Section 39

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[1] *Blount v. Canada (Attorney General)*, 2017 FC 647.
[2] *Sanders v. Canada (Attorney General)*, 2015 FC 556 at par. 32, *Chaytor v. Canada (Attorney General)*, 2011 FC 501 at par. 28.
[3] *Canada (Attorney General) v. Wannamaker*, 2007 FCA 126, *Rioux v. Canada (Attorney General)*, 2008 FC 991.
[4] Statement of Case at p. 30.
[5] Statement of Case at pp. 60, 62-63, 68-69, 70, 77-79, 82, 86, 98-100, 101-102.
[6] Statement of Case at p. 152.
[7] Statement of Case at pp. 380-388.
[8] *Task 2A: The History and Science of Herbicide Use at CFB Gagetown from 1952 to Present*, Report Summary at p. 2; *CFB Gagetown Herbicide Spray Programs 1952 – 2004: Fact-Finders' Report*, at p. 14.
[9] See for instance *Woo Estate v. Canada (Attorney General)*, 2002 FCT 1233, *Lunn v. Canada (Attorney General)*, 2017 FC 840.
[10] Statement of Case at p. 70.
[11] *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*, Report Summary at pp. 3-4.
[12] *Exposure to Agent Orange and Other Unregistered US Military Herbicides* (November 28, 2013). This policy must be read in conjunction with two other VAC's policies: *Assessing and Categorizing Health-Related Expert Opinion(s) and Scientific Evidence* (November 28, 2013) and *Hazardous Material and Radiation Exposure* (November 28, 2013).
[13] *Minister of Pensions and National Insurance v. Greer*, (1958) 2 WPAR 957 at pp. 965-967.