

CANADA / JUDGMENT

Schut v. Canada (Attorney General)

2003 FC 1323

COURT

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Decision Content

Date: 20031110

Docket: T-2083-01

Citation: 2003 FC 1323

OTTAWA, ONTARIO, this 10th day of November, 2003

PRESENT: The Honourable Mr. Justice James Russell

BETWEEN:

DANNY GARY SCHUT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

I. NATURE OF APPLICATION

[1] This is an application for judicial review of Decision No. 6156-33-47-559 ("Decision") rendered by the Veterans Review and Appeal Board Canada ("Appeal Board") at Charlottetown, Prince Edward Island communicated to the Applicant on October 30, 2001.

[2] The Decision denied the Applicant a pension because:

A. The Appeal Board was not satisfied that the Applicant's condition of Acute Stress Disorder had arisen out of, or was directly connected to, military service in peacetime, pursuant to s. 21(2) of the Pension Act, R.S.C. 1985, c. P-6; and

B. The following conditions were not pensionable because the requirements of paragraph 21(5) (a) of the Pension Act were not met:

- a. Head injury with multiple fractures of skull resulting in encephalocele (operated);
- b. Loss of vision due to optic nerve damage and optic chiasm injury;
- c. Fractured mandible resulting in osteomyelitis of jaw;
- d. Diabetes insipidus;
- e. Meningitis;
- f. C-6 nerve root injury;
- g. Loss of teeth; and
- h. Hearing loss.

[3] The Applicant seeks the following relief:

A. An order quashing the Decision of the Appeal Board; and

B. An order referring the matter back to the Board, differently constituted, to reconsider and decide the matter pursuant to directions to be given by the Court; and

C. Such further and other relief that this Honourable Court may deem just.

II. BACKGROUND

[4] The Applicant began his career as a search and rescue technician in January, 1977. He was stationed at CFB Comox as a member of 442 Transport and Rescue Squadron. While on Christmas leave in 1979, he learned that the Panamanian vessel, Lee Wang Zin, had capsized off the coast in 12 metre waves with some of her crew still inside the hull. The Applicant twice telephoned Warrant Officer Copeland, his leader, on December 26, 1979, and

volunteered his services. The warrant officer accepted his offer and the Applicant returned to the base on December 27, 1979.

- [5] The purpose of the Applicant's trip to the base was to ensure that his personal operations gear was in order, fully functional and ready for the following morning's mission. On his way home, after inspecting and preparing his gear, the Applicant spent approximately three and one half hours at the Westerley Hotel discussing the upcoming mission with a colleague. He states that he consumed two beers during this time period. Both men left the hotel in the Applicant's car at approximately 11:30 p.m. on December 27, 1979.
- [6] Constable Lapp of the RCMP began to follow the Applicant, eventually turning on his flashing lights because the Applicant was speeding down the centre of a city street at speeds which reached 130 km/h, as estimated by Const. Lapp. The Applicant states that he does not remember anything after the flashing lights were turned on. He eventually lost control of his car and hit a tree and a power pole before coming to a stop. The Applicant suffered serious injuries and was charged with three counts of dangerous driving. The Applicant's only passenger on that occasion, Private Neil Fredheim, who had been with him at the Westerley Hotel, also suffered serious injuries.
- [7] Due in part to his disabilities, the Applicant was discharged from the regular forces in February, 1981, and subsequently applied for pension benefits from Veterans Affairs Canada. He initially based his application to the Canada Pension Commission on the claims that he was on duty at the time of the accident and that the crash was caused, not by his attempt to flee the police, but because he was terribly anxious about the rescue mission due to take place the following day. There was no evidence put before the Commission, however, to support this last contention.
- [8] The Applicant's application was turned down on April 6, 1992. He appealed this decision to a review panel of the Veterans Review and Appeal Board pursuant to s.s. 19(1) of the Veterans Review and Appeal Board Act, S.C. 1995, c. 18.
- [9] In his appeal, the Applicant argued that the accident was related to duty or, in the alternative, arose out of or was directly connected with his military service. At the beginning of the hearing, on September 23, 1997, counsel for the Applicant also began to introduce evidence that the cause of the accident was the Applicant's acute stress disorder ("ASD"). The panel suggested to counsel, however, that evidence of anxiety would be better dealt with through another application to Veterans Affairs Canada and, after some consultation with the Applicant, counsel discontinued the ASD submissions.

- [10] Based solely on the duty and military service issues, the Applicant's appeal was rejected in an undated decision. The Applicant appealed this decision to an appeal panel of the Veterans Review and Appeal Board ("Appeal Board"). In the meantime, a second application to the Canada Pension Commission, based on evidence of ASD suggested by Dr. Fraser and Dr. Nozick, was rejected after a hearing on February 27, 1998. The Applicant's appeal of this second decision was heard in 1998 and 1999.
- [11] In respect of his appeal to the Appeal Board on the first application, a hearing was held in Charlottetown and in Ottawa with the help of videoconferencing equipment on February 11, 1999. In an undated decision, which both parties agree was made on March 15, 1999, the Appeal Panel rejected the appeal of the first decision.
- [12] The Applicant describes the administrative process thus far as follows:
5. The Applicant did not, as the decision under review states, have two (2) separate claims or applications (Decision, Statement of case pp. 5-6). The Applicant filed one application in December 1990, containing claims that (a) the pensionable condition were (sic) the physical injuries caused in the car accident on 27 December 1979 and (b) that the accident occurred when the Applicant "had broken under stress, that being anxiety or acute stress disorder" on 27 December 1979. At the hearing before the Review Panel on 23 September 1997, the Panel interpreted the claim before it not to include the claim for acute anxiety or acute stress disorder and that the Panel had no intention hearing that claim. For the acute anxiety or acute disorder claim, the Panel believes that a separate claim be filed (sic). Accordingly, only the physical injury claim was heard and the Panel decided that the physical injuries did not arise or were not connected to military service. This decision and the Appeal Panel decision dated February 11, 1999 confirming the decision was the subject matter of a judicial review before Mr. Justice Muldoon, Court File No. T-672-99.
 6. As a result of the Review Panel's decision to carve out the claim for anxiety or acute stress disorder on 23 September 1997, the Applicant filed the ASD application with the Department on October 3, 1997. (This is the application involved in this judicial review application.) Following denial of the application by the Department on 15 January 1998, the Board's Review Panel heard the matter on three (3) separate sittings: 27 January 1998 (before Mr. J. Galipeau and Mr. R. Robichaud), 18 June 1998 (before Mr. J. Galipeau and Mr. R. Robichaud) and 8 February 1999 (before Mr. R. Robichaud). The Review Panel, consisting only of Mr. Robichaud, released its decision on March 9, 2000, denying pension benefits on the ground that the claimed disability of acute stress disorder was not established by the evidence.
 7. The Review Panel decision was appealed to the Appeal Panel. Pending hearing before the Appeal Panel, Mr. Justice Muldoon's judgement in the judicial review application of the first claim was rendered. The judgement of Mr. Justice Muldoon was before the Appeal Panel when it heard the appeal and rendered its decision in the issue.

[13] As a result of a hearing held February 28, 2001, the Appeal Board confirmed the decision to deny the Applicant disability benefits and concluded as follows:

The evidence does not establish a credible basis on which the Panel could conclude that the Appellant suffered from the disease of Acute Stress Disorder and Dissociation at the time of his accident on 27 December 1979 and as a result of his military service pursuant to subsection 21(2) of the Pension Act.

The Panel is unable to find a consequential relationship between the Appellant's military service as a SAR Tech, and his car accident and disabilities which resulted from the accident

[14] On November 23, 2001, the Applicant commenced the present application for judicial review of the Decision of the Appeal Board regarding his second application for pension benefits.

III. ISSUES

[15] The Applicant raises various issues that can be summarized as follows:

Did the Appeal Board fail to observe a principle of natural justice by imposing an inappropriate burden of proof on the Applicant?

Did the Appeal Board make erroneous findings of fact in a perverse manner or without regard to the material before it relating to:

- a. the events and facts on the basis of which an inference may be drawn that the Applicant was suffering from ASD at the time of the accident on the evening of December 27, 1979;
- b. the credibility of the Applicant and Dr. Fraser; and
- c. the inference, on the basis of the relevant and admissible medical opinion, that the Applicant was not suffering from ASD at the time of the accident?

Did the Appeal Board err in law by making findings of fact contrary to sections 3 and 39 of the Veterans Review and Appeal Board Act, sections 2 and 5 of the Pension Act and Article 5(3) of the Department's Interpretation Policy:

- a. when it failed to give preference to testimonial or written evidence given under oath compared to the various unsworn statements secured by the Department in this case;
- b. when it made determinations concerning the credibility of witnesses even though it had no opportunity to observe the witnesses when they gave evidence;
- c. in refusing to take into account the finding of the Criminal Court and the Federal Court that the accident on December 27, 1979, occurred without the fault of the Applicant?

IV. RELEVANT LEGISLATION

[16] The relevant statutory provisions of the Pension Act, R.S.C. 1985, c. P-6 are as follows:

Construction

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.

...

Powers of the Minister

5. (1) Subject to this Act and any other Act of Parliament and to the regulations made under this or any other Act of Parliament, the Minister has full power to decide on all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension or other payment under this Act and to the recovery of any overpayment that may have been made.

Additional duties

- (2) The Governor in Council may, by order, confer on the Minister duties like those under subsection (1) in respect of pensions or other payments authorized by any other Act of Parliament or by the Governor in Council.

5(3) Benefit of doubt

- (3) In making a decision under this Act, the Minister shall
 - (a) draw from all the circumstances of the case and all the evidence presented to the Minister every reasonable inference in favour of the applicant or pensioner;
 - (b) accept any uncontradicted evidence presented to the Minister by the applicant or pensioner that the Minister considers to be credible in the circumstances; and
 - (c) resolve in favour of the applicant or pensioner any doubt, in the weighing of evidence, as to whether the applicant or pensioner has established a case.
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 as a member of the special force, service in the Korean War, and service in a special duty area as a member of the Canadian Forces,
 - (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;

...

- (d) an applicant shall not be denied a pension in respect of disability resulting from injury or disease or aggravation thereof incurred during military service or in respect of the death of a member of the forces resulting from that injury or disease or the aggravation thereof solely on the grounds that no substantial disability or disabling condition is considered to have existed at the time of discharge of that member;

...

- (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;

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
 - (a) any physical training or any sports activity in which the member was participating that was authorized or organized by a military authority, or performed in the interests of the service although not authorized or organized by a military authority;
 - (b) any activity incidental to or directly connected with an activity described in paragraph (a), including the transportation of the member by any means between the place the member normally performed duties and the place of that activity;
 - (c) the transportation of the member, in the course of duties, in a military vessel, vehicle or aircraft or by any means of transportation authorized by a military authority, or any act done or action taken by the member or any other person that was incidental to or directly connected with that transportation;
 - (d) the transportation of the member while on authorized leave by any means authorized by a military authority, other than public transportation, between the place the member normally performed duties and the place at which the member was to take leave or a place at which public transportation was available;
 - (e) service in an area in which the prevalence of the disease contracted by the member, or that aggravated an existing disease or injury of the member, constituted a health hazard to persons in that area;

- (f) any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member; and
- (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.

...

Règle d'interprétation

- 2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet 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.

...

Ministre

- 5. (1) Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale ou de leurs règlements, le ministre a tout pouvoir de décision en ce qui touche l'attribution, l'augmentation, la diminution, la suspension ou l'annulation de toute pension ou autre paiement prévu par la présente loi ainsi que le recouvrement de tout versement excédentaire.

Pouvoir équivalent

- (2) Le gouverneur en conseil peut, par décret, conférer au ministre un pouvoir équivalent au sujet des pensions ou autres paiements autorisés au titre de toute autre loi ou par lui-même.

5(3) Décisions

- (3) Lorsqu'il prend une décision, le ministre_
 - a) tire des circonstances portées à sa connaissance et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible au demandeur ou au pensionné;
 - b) accepte tout élément de preuve non contredit que celui-ci lui présente et qui lui semble vraisemblable en l'occurrence;
 - c) tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

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) 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;
- ...
- d) un demandeur ne peut être privé d'une pension à l'égard d'une invalidité qui résulte d'une blessure ou maladie ou de son aggravation contractée au cours du service militaire, ou à l'égard du décès d'un membre des forces causé par cette blessure ou maladie ou son aggravation, uniquement du fait que nulle invalidité importante ou affection entraînant une importante incapacité n'est réputée avoir existé au moment de la libération de ce membre des forces;
- ...
- (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;

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_:
- a) d'exercices d'éducation physique ou d'une activité sportive auxquels le membre des forces participait, lorsqu'ils étaient autorisés ou organisés par une autorité militaire, ou exécutés dans l'intérêt du service quoique non autorisés ni organisés par une autorité militaire;
- b) d'une activité accessoire ou se rattachant directement à une activité visée à l'alinéa a), y compris le transport du membre des forces par quelque moyen que ce soit entre le lieu où il exerçait normalement ses fonctions et le lieu de cette activité;

- c) soit du transport du membre des forces, à l'occasion de ses fonctions, dans un bâtiment, véhicule ou aéronef militaire ou par quelque autre moyen de transport autorisé par une autorité militaire, soit d'un acte fait ou d'une mesure prise par le membre des forces ou une autre personne lorsque cet acte ou cette mesure était accessoire ou se rattachait directement à ce transport;
- d) du transport du membre des forces au cours d'une permission par quelque moyen autorisé par une autorité militaire, autre qu'un moyen de transport public, entre le lieu où il exerçait normalement ses fonctions et soit le lieu où il devait passer son congé, soit un lieu où un moyen de transport public était disponible;
- e) du service dans une zone où la fréquence des cas de la maladie contractée par le membre des forces ou qui a aggravé une maladie ou blessure don't souffrait déjà le membre des forces, constituait un risque pour la santé des personnes se trouvant dans cette zone;
- f) d'une opération, d'un entraînement ou d'une activité administrative militaires, soit par suite d'un ordre précis, soit par suite d'usages ou pratiques militaires établis, que l'omission d'accomplir l'acte qui a entraîné la maladie ou la blessure ou son aggravation eût entraîné ou non des mesures disciplinaires contre le membre des forces;
- 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.

...

[17] The relevant statutory provisions of the Veterans Review and Appeal Board Act, 1995, c. 18 are as follows:

Definitions

2. In this Act,

"Board" « Tribunal » "Board" means the Veterans Review and Appeal Board established by section 4;

"Bureau" means the Bureau of Pensions Advocates continued by section 6.1 of the Department of Veterans Affairs Act;

"member" Version anglaise seulement

"member" means a permanent or temporary member of the Board;

"Minister" « ministre »

"Minister" means the Minister of Veterans Affairs or such other member of the Queen's Privy Council for Canada as may be designated by the Governor in Council as the Minister for the purposes of this Act;

"prescribed" Version anglaise seulement

"prescribed" means prescribed by the regulations.

1995, c. 18, s. 2; 2000, c. 34, ss. 94(F), 95(F).

Construction

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.

...

Appeal

25. An applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.

APPEALS

Exclusive jurisdiction

26. The Board has full and exclusive jurisdiction to hear, determine and deal with all appeals that may be made to the Board under section 25 or under the War Veterans Allowance Act or any other Act of Parliament, and all matters related to those appeals.

...

Disposition of appeals

29. (1) An appeal panel may
 - (a) affirm, vary or reverse the decision being appealed;
 - (b) refer any matter back to the person or review panel that made the decision being appealed for reconsideration, re-hearing or further investigation; or
 - (c) refer any matter not dealt with in the decision back to that person or review panel for a decision.

...

Rules of evidence

39. In all proceedings under this Act, the Board shall
 - (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;

- (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
- (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.

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

« *_Bureau_* » "Bureau"

« *_Bureau_* » *Le Bureau de services juridiques des pensions prorogé par l'article 6.1 de la Loi sur le ministère des Anciens Combattants.*

« *_ministre_* » "Minister"

« *_ministre_* » *Le ministre des Anciens Combattants ou le membre du Conseil privé de la Reine pour le Canada chargé par le gouverneur en conseil de l'application de la présente loi.*

« *_Tribunal_* » "Board"

« *_Tribunal_* » *Le Tribunal des anciens combattants (révision et appel) constitué par l'article 4.*

1995, ch. 18, art. 2; 2000, ch. 34, art. 94(F) et 95(F).

Principe général

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.

...

Appel

25. Le demandeur qui n'est pas satisfait de la décision rendue en vertu des articles 21 ou 23 peut en appeler au Tribunal.

APPEL

Compétence exclusive

26. Le Tribunal a compétence exclusive pour statuer sur tout appel interjeté en vertu de l'article 25, ou sous le régime de la Loi sur les allocations aux anciens combattants ou de toute autre loi fédérale, ainsi que sur toute question connexe.

...

Pouvoirs

29. (1) Le comité d'appel peut soit confirmer, modifier ou infirmer la décision portée en appel, soit la renvoyer pour réexamen, complément d'enquête ou nouvelle audition à la personne ou au comité de révision qui l'a rendue, soit encore déférer à cette personne ou à ce comité toute question non examinée par eux.

...

Règles régissant la preuve

39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes en matière de preuve_:
- a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
 - b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
 - c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

[18] The relevant provisions of the Veterans Review and Appeal Board, Interpretation Policy are as follows:

A. LEGISLATION

Subsection 5(3) of the Pension Act reads as follows:

5(3) In making a decision under this Act, the Minister shall

- (a) draw from all the circumstances of the case and all the evidence presented to the Minister every reasonable inference in favour of the applicant or pensioner;
- (b) accept any uncontradicted evidence presented to the Minister by the applicant or pensioner that the Minister considers to be credible in the circumstances; and
- (c) resolve in favour of the applicant or pensioner any doubt, in the weighing of evidence, as to whether the applicant or pensioner has established a case.

B. POLICY

The function of the adjudicator is to perform an active inquiry into the basis of a claim for an award. This involves gathering relevant information, weighing evidence and making decisions on claims. In performing this duty the adjudicator must adhere to the principles set out under subsection 5(3). These principles, as with all other provisions of the Act, must be afforded a liberal interpretation.

This policy attempts to interpret paragraphs (b), (a) and (c) separately and in that order. For a given case, the adjudicator will be faced with the tasks of, first, deciding what information to accept as evidence; second, drawing inferences in favour of the applicant or pensioner from that evidence and from all the circumstances of the case; and third, resolving any doubt as to whether the applicant or pensioner has established a case.

It must be remembered, however, that in practice it may be difficult to adhere to a strict orderly application of these provisions. Adjudicators must keep in mind and incorporate into decisions the underlying purpose behind including this provision in the Pension Act namely, the notion of giving the applicant or pensioner the benefit of the doubt with respect to all matters of a case.

This policy is not to be used as a substitute for evidence. It is to be applied when the facts of a case are so evenly balanced that a clear decision is impossible (cannot decide, 50/50). An applicant does not have to prove a claim but must provide enough evidence to give rise to a reasonable doubt that it is true.

The evidence will not be equal in weight if the adjudicator, after hearing the evidence for and against the applicant, is left with a concrete opinion that one answer is more probable than the other. In such a case, the adjudicator must accept the more probable answer as fact.

In most decisions it is incumbent upon the adjudicator to not only apply subsection 5(3) but also to state in the decision the fact that s/he is applying subsection 5(3).

1. 5(3)(b) - Accepting credible, uncontradicted evidence from the applicant

Paragraph (b) compels the adjudicator to accept evidence that, in addition to being relevant, is both credible and uncontradicted. This paragraph is aimed at alleviating technical concerns with evidence.

Credible

The word "credible" literally means "believable". Evidence is not believable where other already proven facts do not support the accuracy of the evidence or where a reasonable person using common sense would conclude that the information provided by that evidence is impossible or untrue.

The question of the credibility of a piece of evidence usually arises with respect to information provided by an applicant or pensioner that requires the personal knowledge of the circumstances surrounding the claim of the applicant or pensioner but not the expertise of a specialist. For example, an applicant may assert that she broke her leg while on duty in Somalia. If other documented evidence were to show that she was never actually in Somalia, the applicant's assertion would normally not be accepted as credible.

It is the evidence that must be credible. The credibility of the person submitting the evidence is not a factor with respect to this provision. Even a generally non-credible person can produce or submit evidence that is credible just as a generally credible person can submit evidence that is not credible.

Uncontradicted

When an applicant has uncontradicted evidence, there is no other evidence refuting it. For example, there will be claims presented where the only evidence presented is the applicant's statement. The fact that there is no other evidence found on the service documents and nothing reported post discharge does not contradict the applicant's statement. This lack of evidence can, however, bring into question the credibility of the claim.

On the other hand, evidence that may otherwise be deemed credible may nonetheless be rejected as evidence if contradictory opinion reaches the consensus level. For example, opinion, by definition, will often not point toward an absolute conclusion in relation to a medical matter. Hence, a medical opinion is not generally accepted if it is contrary to the medical consensus of the recognized specialists of that field. Although such evidence may be credible, (not proven to be untrue) it could not be said to be uncontradicted. This statement would not apply to all cases especially in those areas of medicine where a sizeable minority does not concur with the consensus or where the medical knowledge is not definitive.

On the other hand, medical opinion, expressed by a recognised specialist in a field, who has treated or examined the applicant, should be accepted unless it is obviously or admittedly based solely on the history obtained from the applicant (not based on personal examination of the applicant), or is entirely speculative.

A personal examination of an applicant is not relevant where a case turns on a purely medical issue (could X cause Y). The personal examination becomes relevant when the medical question becomes more subjective in nature (could X have caused Y in the veteran) or, on the state of the veteran (how disabled is the veteran, or could X have caused the veteran's condition).

2. 5(3)(a) - Drawing inferences in favour of the applicant

This paragraph is about proving a fact. The applicant is not quite able to prove a fact but has brought evidence from which that fact may be inferred.

The adjudicator must draw inferences in favour of the applicant from the materials that have been accepted into evidence and from the overall circumstances of the case. To draw an inference means to come to a conclusion based on premises or materials that have been placed before you.

With respect to pension adjudications, drawing a favourable inference in most cases will mean that if there is an effect, and a factual circumstance that could be a cause of that effect and nothing that would lead to another conclusion, then it is incumbent upon the adjudicator to conclude or infer that the factual circumstance was the cause of that effect. For example, if a

veteran is claiming osteoarthritis of the knee and records show that the veteran fell off a truck and injured a knee in 1945, a medical opinion is provided which supports the claim and there are no other facts in existence that prove otherwise, then an inference should be drawn in favour of the veteran that the veteran's present condition was at least partially caused by the fall in 1945.

The drawing of favourable inferences is often necessary where it is established that documentation has been lost or destroyed, or was not created due to wartime conditions such as the absence of documentation covering the period of incarceration of prisoners of war.

V. STANDARD OF REVIEW

- [19] The Applicant argues that the Appeal Board made erroneous findings of fact relating to whether the Applicant suffered from ASD at the time of the accident on the evening of December 27, 1979, the credibility of the Applicant and Dr. Fraser, and in drawing the inference on the basis of relevant and admissible medical opinion that the Applicant was not suffering from ASD at the time of the accident. The Applicant also argues that the Appeal Board erred in law by making findings of fact contrary to the deferential provisions of the Pension Act and the Veterans Review and Appeal Board Act.
- [20] The following summary by Evans J. in *McTague v. Canada (Attorney General)*, [2000] 1 F.C. 647 (Fed. T.D.) is worth quoting at length because of the range of issues to be considered in the case at bar:
16. Counsel for the applicant argued that, since there were no primary facts in dispute in this case, the dispute centred on questions of law. By virtue of paragraph 18.1(4)c) [as enacted by S.C. 1990, c. 8, s. 5] of the Federal Court Act, R.S.C., 1985, c. F-7, the Court has jurisdiction to set aside a decision of a federal tribunal, such as the Board, if it erred in law in making its decision. Consequently, it was for the Court to determine for itself whether the applicant's injury "arose from" or was "directly connected with" military service, and if it found that it was, it should set aside the Board's decision as erroneous in law.
 17. Counsel for the Attorney General, on the other hand, submitted that the Board was entitled to a degree of deference from the Court in its interpretation and application of the Pension Act, especially in view of the statutory provision that the Board's decisions are "final and binding" (Veterans Review and Appeal Board Act, section 31), and that the Board had full and exclusive jurisdiction to determine all matters relating to appeals (section 26). Accordingly, he submitted, the Board's decision was only erroneous in law if patently unreasonable: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.
 18. Counsel for the applicant appeared to argue that the Court's jurisdiction to set aside a decision of a federal administrative tribunal for error of law mandates the Court to review any question of law decided by the tribunal under review by asking whether it was [page 660] correct. This, with respect, is not the law. Indeed, it is quite contrary to the elaboration by the Supreme Court of Canada since the mid-1980s of a pragmatic or functional analysis

for determining the standard of review that legislatures should be regarded as implicitly prescribing when a specialist tribunal's interpretation or application of its constitutive statute is challenged in judicial review proceedings.

19. The search for legislative intent in this context is at bottom about determining a rational allocation of decision-making responsibility between specialist tribunal and reviewing court. An important element of this quest is an assessment of whether the tribunal or the reviewing court is better equipped to decide the issues in dispute: *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

...

44. In my opinion, the questions in dispute in this case are at the "application" end of the spectrum. The applicant's complaint in essence is that the Board did not give sufficient weight to the fact that, in the course of a long day at work, MWO McTague was compelled to go out for dinner by the absence of eating facilities on the base, something that the army recognized when it agreed to reimburse him the cost of his dinner. Allocating an appropriate weight to the relevant facts is an exercise of judgment for which the Board is at least as well equipped as a reviewing court. A deferential standard of review is thus indicated by the nature of the issues in dispute in this case.
45. The applicant's allegation that the Board erred in law by failing to give him the benefit of the doubt and to interpret the legislation in a broad and liberal fashion should be taken into consideration at the stage of deciding if the Board's decision falls short of the standard of reasonableness.
46. Finally, I should note that it is well established in this Court that the less demanding standard of patent unreasonableness is applicable when the issue in dispute is the Board's weighing or interpretation of often conflicting or inconclusive medical evidence and determining from it whether the claimant's disability was in fact caused or aggravated by military service: *MacDonald v. Canada (Attorney General)*, [1999] F.C.J. No. 346 (T.D.) (QL); *Weare v. Canada (Attorney General)* (1998), 153 F.T.R. 75 (F.C.T.D.) [page667]; *Hall v. Canada (Attorney General)* (1998), 152 F.T.R. 58 (F.C.T.D.); *Henderson v. Canada (Attorney General)* (1998), 144 F.T.R. 71 (F.C.T.D.).
47. Factual determinations of this nature are at the very heart of the specialized jurisdiction of the Board. Considerations of cost effectiveness and relative institutional competence call for maximum curial deference to findings of fact.
48. The weight of the factors considered above in the pragmatic or functional analysis suggests that Parliament should be regarded as prescribing a deferential standard of review in this case. However, they do not indicate that the most deferential standard should be applied. "Patent unreasonableness" seems increasingly to be reserved as the standard of review applied to the decisions of administrative agencies that are protected by strong preclusive clauses and have a wider range of regulatory responsibilities than the merely adjudicative

functions performed by the Board. It is also the appropriate standard, as I have indicated above, where the issue in dispute involves findings of primary fact, including the drawing of inferences from the evidence.

I accept this analysis by Evans J. as a guide to the standards of review that should be applied to the various issues raised in the case at bar.

VI. ANALYSIS

Did the Appeal Board fail to observe a principle of natural justice by imposing an inappropriate burden of proof on the Applicant?

- [21] The Applicant argues that the burden of proof on the Applicant to establish a claim before the Minister is the same for a claim before the Review Panel and the Appeal Board. Accordingly, any policy, rule, regulation or statute that applies to the Minister at any stage of the application applies to the Review Panel and the Appeal Board. Further, the proceedings of review and appeal are part - or a continuation - of the claim application process initiated before the Minister, although the Appeal Board is an independent body. For this reason, the Applicant argues he has no onus to show, at the review and appeal stages, that the decision of the Minister is wrong in any general or particular respect. His burden is to show that, in the context of the initial evidence he placed before the Minister, and the additional evidence he has introduced at the review and appeal stages, he has established his entitlement to a pension pursuant to the Pension Act. The construction rules, s. 2 of the Pension Act and s. 3 of Veterans Review and Appeal Board Act, and the evaluation rules as to evidence, s. 5(3) of the Pension Act, and s. 39 of the Veterans Review and Appeal Board Act, are identical for this reason. It is also for this reason that Appeal Board proceedings are not adversarial.
- [22] The Applicant submits that both the Pension Act and the Veterans Review and Appeal Board Act establish a unique statutory scheme in relation to pensions. It differs substantially from the procedure and burden of establishing a claim before the general type of administrative tribunal.
- [23] Under the Pension Act, the claimant is not seeking a privilege or a licence; he is seeking the recognition of the "obligation of the people and Government of Canada to provide compensation to the member of the armed forces who has suffered a disability." This is the reason for the direction in s. 2 of the Pension Act that the provisions of the Act be "liberally construed and interpreted."
- [24] The Applicant submits that, in relation to the processing of a claim by the Minister and by the Appeal Board, the issue is not a determination in relation to a privilege, it is in relation to "entitlement."

- [25] The Applicant argues that, under the Pension Act, the rule is that it shall not be necessary for the applicant to adduce conclusive proof of his right to the compensation. For this reason, where the evidence adduced may not meet the burden of proof but is sufficient to create a reasonable inference that the injury occurred while he was engaged in activities that were incidents of employment, then the Board is also mandated to draw the reasonable inference in favour of the applicant.
- [26] The Respondent contends that, in this case, the Appeal Board correctly applied the relevant legislative provisions. Sections 3 and 39 of the Veterans Review and Appeal Board Act create liberal and purposive guidelines for claims for veteran's pensions. Section 39 requires that, where credible evidence is presented, the Board has a duty to weigh and consider that evidence in the best interests of the applicant.

Wood v. Canada (Attorney General), [2001] F.C.J. No. 52 (Fed. T.D.) at paras. 22-23

- [27] The presumptions created by the Veterans Review and Appeal Board Act, however, do not relieve the Applicant of the burden of proving that his illness arose out of, or in connection with, military service. The Applicant must prove, on a balance of probabilities, with the evidence considered in the best light possible, that his disability is service-related.

Wood, *supra*, at para. 24

- [28] Further, s. 39 does not mean that the Appeal Board must automatically accept whatever submissions are made by an applicant. Rather, the evidence must be accepted if it is credible and reasonable, and uncontradicted.

MacDonald v. Canada, (Attorney General), [1999] F.C.J. No. 346 (Fed. T.D.), at para. 22

- [29] In the present case, the Appeal Board explicitly stated that it carefully considered all of the evidence and medical opinions before it and made all of its findings in accordance with its obligations under s. 39 of the Veterans Review and Appeal Board Act. Hence, the Respondent alleges that the Applicant has not presented any cogent evidence that the Appeal Board failed to properly consider the evidence in light of the statutory presumption in favour of the Applicant.
- [30] The finding that the Applicant did not suffer from ASD is fully supported by the evidentiary record that was before the Appeal Board. As such, the Applicant failed to discharge his burden of proving that he suffered from a disability that was service-related.
- [31] Cullen J. in MacDonald, *supra*, addressed this issue as follows:
22. It is settled law that a tribunal does not have to make an explicit written finding on each element which leads to its ultimate conclusion; indeed, there is a presumption that the tribunal has dealt with all of the documents which were placed before it: *Henderson v. Canada (Attorney General)* (1998), 144 F.T.R. 71 (T.D.). However, this is tempered, or qualified, by section 39 of the Veterans Review and Appeal Board Act, which requires that

when new and credible evidence is presented during a reconsideration proceeding, the Board has a duty to consider and weigh the evidence, drawing every reasonable inference in the applicant's favour. This does not mean that the Board must automatically accept whatever submission is made by a veteran; rather, the evidence must be accepted if it is credible and reasonable, and uncontradicted.

[32] MacKay J. made a similar finding in Wood, supra:

24. Sections 3 and 39 of the Act do not, however, relieve the applicant of the burden of proving that his low back pain arose out of or in connection with military service (Cundell v. Canada (Attorney General), [2000] F.C.J. No. 38 (F.C.T.D.)). The applicant must still establish on a balance of probabilities, with the evidence considered in the best light possible, that his disability is service-related. This civil standard must be read in concert with the entitling provision of paragraph 21(2)(a) of the Pension Act, R.S.C. 1985, Chap. P-7, which reads as follows:

21(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(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;

[33] The decision of Teitelbaum J. dealing with s.s. 3 and 10(5) of the Veterans Appeal Board Act, in Tonner v. Canada (Minister of Veterans Affairs), [1995] F.C.J. No. 550 (Fed. T.D.) further supports the Respondent's argument:

29. It is clear from a reading of section 3 and subsection 10(5) that the Board, in reviewing the evidence before it, shall make all of its decisions, where a doubt exists, in favour of the Applicant because of the "recognized obligation of the people and Government of Canada to those who have served their country so well". The Board, in reviewing the evidence, draws every reasonable inference in favour of the Applicant, accepts any uncontradicted evidence that it considers credible and resolves any doubt in favour of the Applicant.

30. I am satisfied, from a reading of the Board's decision, that the Board did exactly what the VAB Act stipulates it must do.

31. My reading of section 3 and subsection 10(5) does not lead me to interpret the sections so as to read that whatever submission is made by a veteran, that submission must automatically be accepted by the members of the VAB. The evidence must be credible and must be reasonable.

...

35. It is not for me, on a judicial review to substitute my decision for that of the Board but only to review the evidence to see if the Board applied the proper test, that it interpreted and evaluated all of the evidence and to conclude, if a doubt exists, in favour of the veteran, the Applicant in this case.

[34] In its Decision in the case at bar, the Appeal Board indicates its awareness of the appropriate burden of proof and the jurisprudence that discusses s. 39 of the Veterans Review and Appeal Board Act at page 20:

The Board has made every effort to ensure that it has weighed the evidence fairly and has made all of its findings in accordance with section 39 of the Veterans Review and Appeal Board Act. The Panel has considered the arguments with respect to the burden of proof under section 39 of the Veterans Review and Appeal Board Act and notes that that provision requires that the Board draw every favourable inference which may reasonably be drawn from the evidence and the circumstances of the case, to accept uncontradicted evidence which it considers credible and to resolve in the Appellant's favour any doubt in weighing the evidence and determining whether the Appellant has established a case.

Section 39 of the Act does not mean that whatever submission is made by an Appellant, that submission must automatically be accepted by the Panel. It does not relieve the Appellant of the burden of providing evidence necessary to support the claim. The Federal Court has stated in a number of decisions that the Appellant's evidence must be credible and must be reasonably capable of supporting the claim.

[35] When it came to applying the law to the facts before it, the Appeal Board's Decision at page 20 shows an acute awareness of the essential nature of the task it faced:

As the main issue in this case turns on the reliability of and weight to be given to the various medical opinions on file, this Panel has weighed the medical opinions before it in light of all the evidence on file and the Board's obligation under section 39 of the Veterans Review and Appeal Board Act.

[36] The Appeal Board then launches into a detailed and principled analysis and weighing of the various medical opinions in the context of the other available evidence and concludes (at page 30) that "[g]iven the facts and circumstances of the case . . . the evidence is not reasonably capable of supporting an affirmative answer" to the Applicant's allegations that he was suffering from ASD that arose out of, or was directly connected to, his military service.

[37] It is possible, of course, to disagree with the Appeal Board's conclusions, and with the relative weight given to the evidence before it, but the Appeal Board committed no reviewable error as regards applying an inappropriate burden of proof to the Applicant's case. The Applicant argues that all he needed to do in this case was to raise a doubt that his behaviour leading to the injuries could be attributable to ASD connected to his military service. 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.

[38] 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.

[39] In the present case, the Applicant was unable to convince the Appeal Board that he had a credible, reasonable and uncontradicted case. Even looked at in the light of s.s. 3 and 39, the Appeal Board felt the Applicant did not have a cogent claim to a pension.

[40] In this regard, the Appeal Board committed no reviewable error.

Did the Appeal Board make erroneous findings of fact in a perverse manner or without regard to the material before it relating to:

a. the events and facts on the basis of which an inference may be drawn that the Applicant was suffering from ASD at the time of the accident in the evening of December 27, 1979?

[41] In MacDonald, supra, Cullen J. held that the Board erred when it failed to reject evidence with reasons bearing on its credibility and reasonableness, stating at paras. 29 and 30 as follows:

The jurisprudence indicates that the Board must accept uncontradicted medical evidence that it considers credible in the circumstances; however, it may reject such evidence if it has before it contradictory evidence, or if it states reasons, which would bear on credibility and reasonableness: *Re Hornby* (1993), 63 F.T.R. 188 (T.D.); *King v. Canada (Veterans Review and Appeal Board)* (1997), 138 F.T.R. 15 (T.D.)...

The Board erred in failing to either accept the new evidence presented to it, or reject it with reasons bearing on its credibility and reasonableness.

[42] In the case at bar, the Applicant raises numerous "facts and evidence before the Appeal Panel from which ASD could be inferred." Upon review of these "facts", I find that many of them are not entirely relevant, and none of them are determinative enough to justify a finding of reviewable error on the part of the Appeal Board. The Appeal Board is quite clear on why it rejects the facts and evidence relied upon by the Applicant.

b. the credibility of the Applicant and Dr. Fraser?

[43] The Applicant relied heavily on the evidence of Dr. Fraser in support of his claim that he was suffering from ASD and Dissociation prior to his car accident. Dr. Fraser's evidence was that the Applicant suffered from ASD and Dissociation in response to the traumatic stressor of the anticipated rescue mission. According to Dr. Fraser, it was the fear of death experienced by the Applicant in anticipation of the upcoming mission that resulted in the car accident of December 27, 1979. The Board refers to the transcript of Dr. Fraser's testimony at page 21 of the Decision:

My opinion is that we had a very, if I could use the American term, gung-ho rescue person who was on vacation and probably wanted to be with his buddies to go on this mission. When he saw them failing he realized that he had to do this. And I believe the recognition of the dangers of this situation, which he knew because his friends didn't make the jump, and he knew that. I think that he felt he could do this. And I think at this stage, his behaviour, from that moment that he made that decision, changed, and that all his behaviour between that moment and the time of the accident was done in a state of changed mental state and which I would call an Acute Stress Disorder

... ..

... I have no way of verifying what he's told me, but based on what he has told me, I am basing my remarks. And I certainly felt that he felt that his life was in danger. He felt that in attempts to rescue these people in this overturned freighter that there was a high likelihood that he would die, but he felt very much committed to the fact that this was his job. This is what he was expected to do. So certainly he fulfills, for instance, the first criteria which we call Criteria A in which the possibility of death, his own death and the death of others, was a very real possibility...

(As transcribed with emphasis)

[44] The Appeal Board rejected Dr. Fraser's medical opinion on the basis of the following weaknesses:

- a. Dr. Fraser had "no opportunity for an objective and independent analysis of facts." He took his facts from the Applicant and the reliability and accuracy of these facts are questionable because the Applicant had difficulty in recalling events "given his lack of consciousness or "black-out," and his post-accident confusion and amnesia."
- b. The Applicant's "firmly held views regarding his own belief that he was suffering from PTSD at that time had influenced the ultimate conclusion reached by Dr. Fraser." "Dr. Fraser ... confirms the Appellant's theories on his car accident," and the "opinion adopts the diagnoses which was conceived before Dr. Fraser was given the opportunity to review the Case." (Emphasis added)

Appeal Panel Decision, Statement of case p. 24

- c. Dr. Fraser's opinion "does not indicate that the diagnostic approach recommended in the DSM-IV Criteria was observed."
- d. Dr. Fraser had "only a cursory appreciation of certain key facts relating to the mission."

Appeal Panel Decision, Statement of case p. 25

- e. The Panel is not satisfied "that the opinion ... addressed the key issue of the traumatic stressor 'involving direct personal experience of an event.'"

Appeal Panel Decision, Statement of case p. 26

[45] In addition, the Appeal Board did not feel that Dr. Fraser's opinion could be reconciled with the remainder of the evidence:

Although all of the evidence concerning the actions and words of the Appellant on 27 December 1979, when taken together, suggest some nervousness or anxiety, it would appear to be inconsistent with the level of anxiousness, mental disturbance and the distraction attributed to the Appellant by Dr. Fraser almost eighteen years later. The mental state attributed to the Appellant by Dr. Fraser just prior to the accident was one of the main foundations for Dr. Fraser's theory that from the time the Appellant volunteered for the mission, he was in a "changed mental state". However, the Panel finds that the remainder of the evidence does not support the views of Dr. Fraser on this issue. As well, although the Panel may reasonably accept that the Appellant was anxious or nervously anticipating the possibility of a difficult rescue mission on the following day, this does not automatically lead to the conclusion that the Appellant was suffering from ASD. There is no medical evidence to suggest that fear, anxiety or nervousness arises only in the context of ASD or PTSD.

Even in accepting the recollections relating to the Appellant's anxious state of mind, the Panel finds that this fails to reasonably establish that the Appellant was suffering from ASD, which is a psychiatric disease of specific etiology.

[46] The Applicant raises several objections to the Appeal Board's treatment and ultimate rejection of Dr. Fraser's opinion. I find none of them compelling on grounds for finding that the Appeal Board committed a reviewable error. Once again, of course, it is always possible to take issue with findings of this nature, but disagreement per se is not grounds for judicial review.

[47] The Decision indicates that a reasoned and balanced consideration was given to Dr. Fraser's evidence. The Appeal Board was aptly concerned with the retrospective nature of the diagnosis, and noted inconsistencies in Dr. Fraser's evidence vis-a-vis known facts, such as the status of the rescue mission.

c. in drawing the inference, on the basis of the relevant and admissible medical opinion, that the Applicant was not suffering from ASD at the time of the accident?

[48] The Applicant argues that the Appeal Board made unsupported inferences about the Applicant's medical condition. In particular, the Applicant argues in his written submissions as follows:

85. Although the Appeal Panel (unlike the Review Panel) found that the Applicant was experiencing nervousness and anxiety on the basis of the evidence (Appeal Panel Decision, Statement of Case, pp. 23-24), it concluded that "feelings of nervousness and anxiety would appear to be well within normal or expected range of human emotion for any person who would have been mentally preparing to face a dangerous situation the following day."

Appeal Panel Decision, Statement of Case, p. 24

86. This inference was drawn without any support from the medical opinions before the Board, including those of Dr. Lange and Dr. Deziel. In effect, the Board was acting as its own expert on what is "normal or expected range" of nervousness and anxiety, on the one hand, and "abnormal" on the other. The conclusion was drawn from the "unremarkable" activities and conversation of the Applicant prior to the accident, yet no medical opinion was put before the Board to show what activities and conversation would be considered "unremarkable" or "remarkable". It is on this background that the Appeal Panel considered Dr. Fraser's evidence.

[49] But these phrases by the Appeal Board have to be placed in the context of the Decision as a whole. Even if the Appeal Board is drawing medical inferences that are not specifically addressed in the medical opinions themselves, its main point is that Dr. Fraser's opinion cannot be reconciled with all of the other evidence before the Board and does not provide the Applicant with a cogent claim:

Although the Panel finds it reasonable to accept that the Appellant may have been in a nervous or anxious state of mind, the earlier evidence of Pte. Fredheim as to his activities and conversation with the Appellant before and after the accident are also credible and were made when the memories were still fresh, and so are entitled to weight equal to the later 1992 statement. The Panel notes that the earlier statement provided by Mr. Fredheim is also consistent with the statement provided by the only other witness to the accident itself, Constable B. Lapp. The Panel finds that this would indicate that the recollections of Mr. Fredheim in January of 1980 in relation to the events of 27 December 1979 are reliable.

The Panel finds that the earlier evidence indicates that the Appellant's activities and conversation prior to the accident were unremarkable and showed that the Appellant had his mind on his work as well as on his other interests and problems. The evidence also demonstrates a complete presence of mind given that the Appellant had shortly after returning to his home from Prince George, found himself able to meet with his friend, and then drive his car to the Base with this same friend, check his gear and indicate to his friend that he was satisfied by his check, and then proceed to a few places of leisure. The Appellant's conversation with Pte. Fredheim, which centred around his preparation for the mission, a skiing trip and his hopes that the intended trip would improve his relationship with his wife, and his satisfaction with the way his sports car was running, are unremarkable as well.

[50] The Appeal Board had a duty to assess all of the evidence before it. It did so and found that Dr. Fraser's opinion, when looked at in the light of the other available evidence, did not establish a claim. There was no reviewable error in this regard.

3. Did the Appeal Board err in law by making findings of fact contrary to sections 3 and 39 of the Veterans Review and Appeal Board Act, sections 2 and 5 of the Pension Act and Article 5(3) of the Department's Interpretation Policy:

- a. when it failed to give preference to testimonial or written evidence given under oath compared to various unsworn statements secured by the Department in this case?
- [51] The Applicant submits that oral evidence given before the Appeal Board should be given greater weight than any unsworn testimony. The Applicant contends that, on many occasions in the case at bar, the Appeal Board preferred unsworn evidence and failed to ask questions of witnesses who were explaining or expanding upon previous unsworn statements in the course of sworn testimony. The Respondent provides a cogent argument demonstrating that the Applicant's assertions in this specific instance are, at the very least, overstated.
- [52] Rothstein J. in *Canada (Attorney General) v. Lambie*, [1995] 1 F.C. 680 (Fed. T.D.) considered a similar issue. *Lambie*, supra, was an application for judicial review of a Human Rights Review Tribunal decision to allow the respondent, Lambie, to call two new witnesses upon an appeal following the dismissal of his complaint that the Canadian Armed Forces had discriminated against him by denying him a promotion and appointment as Base Commander because of his marital status. Lambie was in a common law relationship while awaiting divorce.
- [53] Rothstein J. referred to the Supreme Court of Canada decision in *R. v. Palmer*, [1980] 1 S.C.R. 759 and held that nothing in *Palmer*, supra, indicates that a tribunal must base its decision on credibility, only on sworn affidavits or on statements under oath. Human rights tribunals may receive information other than by affidavit or under oath. A review tribunal does not err if it decides to hear new evidence on the basis of unsworn information or "will-say" statements, as long as it concludes that the information is credible, in the sense that it is reasonably capable of that belief. Evidence which is vague and highly summarized may be insufficient to enable a review tribunal to determine whether it is credible.
- [54] The Appeal Board made no reviewable error in this regard. It carefully weighed all of the evidence before it and considered its strengths and weaknesses.
- b. when it made determinations of credibility of witnesses even though it had no opportunity to observe the witnesses when they gave evidence?
- [55] The Applicant submits that the Appeal Board cannot determine the credibility of witnesses and makes the following statement in his written submissions:
105. The Applicant submits that the finding against the Applicant and, particularly, Dr. Fraser is a finding that goes towards credibility of a witness. The Appeal Panel, not having had the benefit of being present at the hearing when the Applicant and Dr. Fraser testified, cannot make credibility determinations. The Review Panel, being present at the time when the testimonial evidence was given, was in the better position to determine credibility and no negative finding was made by it as against the Applicant and Dr. Fraser. The Appeal Panel is accordingly bound by the Review Panel's silence on credibility.

- [56] The Applicant cites the Supreme Court of Canada decision in *Stein v. Kathy K (The)*, [1976] 2 S.C.R. 802 in support of his argument. Unfortunately, in my opinion *Stein, supra*, does not support the Applicant's argument. *Stein, supra*, indicates that although findings of fact made at trial are not immutable, they are not to be reversed by an Appellate Court unless it can be established that the trial judge made some palpable and overriding error which affected her / his assessment of the facts. *Stein, supra*, further indicates that, while the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not a part of its function to substitute its assessment of the balance of probabilities for the findings of the judge who presided at trial. Clearly, *Stein, supra*, addressed issues relating to findings of fact, not credibility findings, and is not necessarily applicable to administrative tribunal settings. McLachlin C.J. commented on the *Stein, supra*, line of cases in the Supreme Court of Canada decision in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18 at para. 33: "the conceptual foundation of review of administrative decisions is fundamentally different than that of appeals from judicial decisions." As well, *Stein, supra*, is distinguishable because it deals with the reversal of previous findings, not the replacement of silence with new findings.
- [57] The Applicant has chosen to describe the Review Board's consideration of Dr. Fraser's evidence as a credibility determination. But the Appeal Board necessarily had to weigh competing pieces of evidence and consider relative weight. This is part of its inherent function. The Appeal Board did not err in this regard.
- c. in refusing to recognize the finding of the Criminal Court and the Federal Court that the accident on December 27, 1979 occurred without the fault of the Applicant?
- [58] On this issue, the Applicant's argument can be summarized by the following paragraph taken from his written submissions:
106. ... the acquittal of the Applicant before the Criminal Court and the judgement of Mr. Justice Muldoon dated April 4, 2000 bind the Review Panel and the Appeal Panel in relation to the findings of fact in this case. Accordingly, both Panels may not make any finding that the Applicant was normal at the time of the accident and that he was to blame or was responsible for his injuries. The doctrine of *res judicata* applies.
- [59] The Respondent replies to this position as follows:
55. In response, it is specifically denied that the decision of Muldoon J. can be interpreted as finding that the Applicant did, in fact, suffer from ASD on the date in question. Mr. Justice Muldoon specifically stated that the Applicant needed to obtain a panel decision on the ASD issue. As such, any argument that the issue of whether the Applicant suffers from ASD is *res judicata* is untenable. As stated by Muldoon J.:

Another reason for not entertaining submissions on a.s.d. is that the appeal panel was not asked by counsel to consider the issue of a.s.d. or the evidence of Dr. Fraser and Dr. Nozick. The last which was heard of either doctor or a.s.d., in fact, was at the first review panel hearing of September 23, 1997. The issue of a.s.d. was abandoned at this hearing, however, as is evident from reading page 6 of the review panel's reasons

To entertain submissions on a.s.d. at this time would turn this judicial review into an appeal of the appeal panel's decision, something which this Court has stated it is not prepared to do; (Naredo and Arduengo v. Canada (Minister of Citizenship and Immigration), [1997] 3 F.C. 468 (F.C.T.D.)). In addition, it must be noted that the issue of a.s.d. is currently before a second review panel. It would be presumptuous, therefore, for this Court to make a finding now in respect of it.

Schut v. Canada (Attorney General), [2000] F.C.T. No. 424 (Fed. T.D.)

[60] It is true that, in his decision, Muldoon J. does express clear opinions to the effect that the Applicant's conduct during the accident was "entirely involuntary" and that he was "powerless to exert any willful control over it" at para. 29:

It was a condition of strong panic and terror in which he was mindlessly fixated on the extreme, almost certain to be deadly, danger of the duty on which he knew he was to embark the next morning, indeed, in following the norm of inspecting his equipment, he had already embarked on his duty because that inspection was directly connected with his military service.

[61] But it is equally true that Muldoon J. makes no findings as regards ASD in the decision because, as he says at para. 33, "it must be noted that the issue of ASD is currently before a second review panel. It would be presumptuous, therefore, for this court to make a finding now in respect of it."

[62] It is not possible to read into a mere acquittal in criminal proceedings a finding that the Applicant was suffering from ASD at the time of the accident. There is no reviewable error in the Decision on this issue.

ORDER

THIS COURT ORDERS THAT:

1. The Application for Judicial Review is dismissed; and
2. Costs are awarded to the Respondent

"James Russell"

J.F.C.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2083-01

STYLE OF CAUSE: DANNY GARY SCHUT

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: May 26, 2003

REASONS FOR ORDER : THE HONOURABLE MR. JUSTICE RUSSELL

DATED: MONDAY, NOVEMBER 10, 2003

APPEARANCES:

Mr. Emilio S. Binavince FOR APPLICANT

Mr. Michael Roach FOR RESPONDENT

SOLICITORS OF RECORD:

Mr. Emilio S. Binavince FOR APPLICANT

Morris Rosenberg FOR RESPONDENT

Deputy Attorney General of Canada

Ottawa, Ontario

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