

Federal Court



Cour fédérale

**Date: 20160531**

**Docket: T-2153-15**

**Citation: 2016 FC 608**

**Ottawa, Ontario, May 31, 2016**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**HENRICK OUELLET**

**Applicant**

**and**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of the November 16, 2015 decision of an appeal panel (“Appeal Panel”) of the Veterans Review and Appeal Board (“VRAB”) denying Lieutenant Commander Henrick Ouellet’s (“Applicant”) entitlement to disability benefits which he seeks pursuant to s 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 (“*CF Compensation Act*”).

## **Background**

[2] The Applicant's Report of Physical Examination for Enrolment dated October 18, 1988, indicated no health problems, including lung disease or shortness of breath, prior to his enlistment in the Canadian Forces. The Applicant commenced his Regular Force service on August 30, 1989. A March 12, 2003 medical consultation report indicates the Applicant, who was then 30 years old, complained of shortness of breath over the prior eight to ten months and that his x-rays showed extensive interstitial lung reaction, most likely sarcoid. On April 4, 2003, the results of a CT scan were described as consistent with advanced sarcoidosis. Subsequent medical reports reached the same finding. A report dated October 15, 2009 contains a diagnosis of Stage 4 sarcoidosis. The considerable medical evidence in the record is consistent in the sarcoidosis diagnosis.

[3] The Applicant applied for disability benefits on August 16, 2007 and stated in his application that from 1997 to 2000 he served on the HMCS Halifax, acting as Above Water Warfare Officer and Deck Officer. He submitted that sarcoidosis was thought, by most scientists, to be a disorder of the immune system. Although its cause is not yet known, most evidence suggests it is a reaction of the body to an as yet unidentified environmental agent or agents, and that bacteria, viruses or chemicals might trigger the disease. While there was no clear evidence as to what triggered sarcoidosis in his case, while serving on the HMCS Halifax his exposure to shipboard agents such as viruses, dust, mold and other airborne particles in an environment where the air quality was often questionable, could not be discounted.

[4] By decision dated October 19, 2007, the Department of Veterans Affairs (“DVA”) refused to grant the Applicant’s application for disability. It ruled there was no documented evidence to establish that factors associated with his service in the Canadian Armed Forces caused or contributed to his claimed condition. It also noted that the underlying cause for sarcoidosis remains unknown. Therefore, it concluded that the Applicant’s sarcoidosis did not arise out of, is not directly connected with, and has not been aggravated by his Regular Force service.

[5] The Applicant was dissatisfied with the DVA’s decision and appealed to a Veterans Affairs Entitlement Review Panel (“Review Panel”) of the VRAB. In support of his appeal, he submitted various documents including a February 28, 2011 letter from Dr. Mark A. Smith and medical articles and reports concerning sarcoidosis. The Applicant referred to a study conducted by Dr. J. Jajosky which suggested a possible relationship of sarcoidosis with exposure to dust from removal of non-skid deck coatings. The Applicant submitted that during his service on the HMCS Halifax the ship underwent numerous work periods which often involved the removal of non-skid surfaces, as well as internal and external deck grinding, burning and welding, and other types of work that produced dust, smoke and smell. The Applicant also stated he had participated in hands-on tasks including grinding and painting, and in the removal of non-skid coating from the ship’s flight deck. During this time the ship’s air quality was poor, the use of respiratory protective equipment was sporadic and such equipment was often not available to those not directly involved with the work even though the impacted areas were often well beyond the immediate work area.

[6] Based on his good health prior to his enlistment and a lack of evidence of a genetic predisposition to the disease, the Applicant submitted that it was fair to state his sarcoidosis was service related, being attributable to exposure to airborne particles (e.g. crystalline silica) during the subject work periods on the HMCS Halifax (e.g. he classified the HMCS Halifax as a “dirty ship” per a U.S. study framework). He also submitted that he believed his disease was aggravated by a subsequent posting to the HMCS Ville de Quebec from 2002 to 2005 during which that ship underwent similar repair work periods. Further, it was unrealistic to require him to pinpoint the etiology of his sarcoidosis.

[7] On October 21, 2011, the Review Panel confirmed the DVA’s decision and denied the Applicant a disability award entitlement on grounds of insufficient evidence to establish a relationship between sarcoidosis and his Regular Force service, pursuant to s 45 of the *CF Compensation Act*. The Review Panel noted that the medical literature clearly indicated the cause of sarcoidosis is unknown, that there was speculative information regarding environmental pollutants as factors in the development of the condition, but also that there was no credible medical evidence indicating a conclusive relationship between the condition and the military service. The Review Panel acknowledged the February 28, 2011 opinion of Dr. Mark A. Smith but observed that Dr. Smith was not able to conclusively support a relationship between the development of sarcoidosis and military service factors. Rather, he speculated on the possible increase of risk due to service factors while indicating there was insufficient supporting evidence to establish such a relationship. Accordingly, the Review Panel afforded extremely limited weight to Dr. Smith’s report in this regard.

[8] On October 17, 2015 the Applicant appealed the Review Panel's decision to an entitlement appeal panel of the VRAB. The hearing before the Appeal Panel proceeded by way of written submissions only, pursuant to the Applicant's request and s 28(1) of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 ("VRAB Act").

[9] The Applicant submitted that the Review Panel erred in law by requiring a much higher standard of proof than a balance of probabilities to rule in favour of the etiological relationship between the Applicant's claimed disability, sarcoidosis, and his uncontradicted exposure to pollutant chemicals, including crystalline silica. The Applicant also submitted that the Review Panel failed to properly acknowledge the evidence supportive of his claim, namely the epidemiological research literature and the medical opinion of Dr. Smith. In the result, the Review Panel effectively breached the provisions of s 39 of the *VRAB Act*. The Applicant provided documents in support of his appeal including a decision of this Court, medical and other reports concerning sarcoidosis, the Applicant's statement, prior appeal panel decisions, and medical reports pertaining to other claimants.

[10] In its decision dated November 16, 2015, the Appeal Panel confirmed the Review Panel's decision and denied a disability award entitlement pursuant to s 45 of the *CF Compensation Act* on the basis of insufficient evidence to establish a relationship between sarcoidosis and service factors. That decision is the subject of the application for judicial review herein.

## Decision Under Review

[11] The Appeal Panel found the issue before it to be whether the Applicant's sarcoidosis arose out of or was directly connected with his Regular Force service. It then reviewed the procedural history of the benefits claim, including a description of the Applicant's supporting evidence.

[12] The Appeal Panel stated it had reviewed all of the evidence and taken into consideration the Applicant's submissions. In doing so, it applied the requirements of s 39 of the *VRAB Act* which required it to:

- |  |  |
|--|--|
| (a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;     | a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci; |
| (b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and              | b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;          |
| (c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case. | c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.  |

[13] The Appeal Panel interpreted this to require it, when weighing the evidence, to look at the evidence in the "best light possible and resolve doubt so that it benefits the Appellant".

However, it also stated that this did not relieve the Applicant from the burden of proving his

claim by linking his condition to his service. Further, the Appeal Panel was not required to accept all evidence submitted by the Applicant if it was not credible, even when the evidence was uncontradicted (*MacDonald v Canada (Attorney General)*, [1999] FCJ No 346 at paras 22 and 29; *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at paras 5 and 6; *Rioux v Canada (Attorney General)*, 2008 FC 991 at para 32).

[14] In coming to its decision, the Appeal Panel asked itself the following three questions:

1. Is there a valid, existing, diagnosis of the claimed condition?
2. Does the claimed condition constitute a permanent disability? and,
3. Was the claimed condition caused, aggravated or contributed to by military service?

[15] With respect to the first question, the Appeal Panel accepted that a valid diagnosis of sarcoidosis existed. With respect to the second question, it accepted that the Applicant's condition met the definition of a permanent disability.

[16] As for the third question, the Appeal Panel noted that the Applicant's pre-enrolment medical was free of history or diagnosis of sarcoidosis and that the claimed condition was diagnosed while the Applicant was serving with the Canadian Armed Forces. Further, the periods in time the Applicant described as being on board the HMCS Halifax, when refit work was being conducted, were not in dispute nor was the type of service undertaken.

[17] As to his exposure, the Appeal Panel noted that the Applicant likened the onboard conditions to being on a "dirty ship", as per the definition provided in Dr. Smith's research, but found, as a Canadian Patrol Frigate, it actually fell into the "clean ship" category, excepting for

short periods of time. The Appeal Panel accepted that, while the Canadian Navy takes precautions to protect its sailors from potentially harmful airborne particles, quantities of those particles could potentially get beyond those safeguards. The Appeal Panel found the Applicant's testimony regarding the timeframe and his perception as to shipboard air quality to be credible.

[18] However, the Appeal Panel stated that while the Applicant could speak to issues of fact within his knowledge, he was not qualified to speak to the causation of medical conditions and it was the Appeal Panel's duty to determine if the medical evidence was credible and sufficient. In that regard, while a significant quantity of literature had been presented regarding the potential causations of sarcoidosis, some of which included research into potential linkages to environmental and occupational factors, the common conclusion was that the etiological relationship of the condition remains unknown. Therefore, the Appeal Panel agreed with the Review Panel that the available information was speculative.

[19] The Appeal Panel acknowledged the research provided by Dr. Smith, but concluded his opinion was subjective and "did not sufficiently influence the balance of probabilities necessary to link the claimed condition to the Applicant's service" noting Dr. Smith's concluding paragraph where he stated that "[u]nfortunately, because the cause of sarcoidosis is unknown it is difficult to say to what extent it is related to his service".

[20] On the grounds of insufficient evidence to establish a relationship between sarcoidosis and service factors, the Appeal Panel affirmed the decision of the Review Panel and denied entitlement for a disability award for sarcoidosis pursuant to s 45 of the *CF Compensation Act*.



## Relevant Legislation

### *CF Compensation Act*

2(1) *service-related injury or disease* means an injury or a disease that

(a) was attributable to or was incurred during special duty service; or

(b) arose out of or was directly connected with service in the Canadian Forces.

...

2.1 The purpose of this Act is to recognize and fulfil the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada. This obligation includes providing services, assistance and compensation to members and veterans who have been injured or have died as a result of military service and extends to their spouses or common-law partners or survivors and orphans. This Act shall be liberally interpreted so that the recognized obligation may be fulfilled.

...

43 In making a decision under this Part or under section 84,

2(1) *liée au service* Se dit de la blessure ou maladie :

a) soit survenue au cours du service spécial ou attribuable à celui-ci;

b) soit consécutive ou rattachée directement au service dans les Forces canadiennes.

...

2.1 La présente loi a pour objet de reconnaître et d'honorer l'obligation du peuple canadien et du gouvernement du Canada de rendre un hommage grandement mérité aux militaires et vétérans pour leur dévouement envers le Canada, obligation qui vise notamment la fourniture de services, d'assistance et de mesures d'indemnisation à ceux qui ont été blessés par suite de leur service militaire et à leur époux ou conjoint de fait ainsi qu'au survivant et aux orphelins de ceux qui sont décédés par suite de leur service militaire. Elle s'interprète de façon libérale afin de donner effet à cette obligation reconnue.

...

43 Lors de la prise d'une décision au titre de la présente

the Minister and any person designated under section 67 shall

(a) draw from the circumstances of the case, and any evidence presented to the Minister or person, every reasonable inference in favour of an applicant under this Part or under section 84;

(b) accept any uncontradicted evidence presented to the Minister or the person, by the applicant, that the Minister or person considers to be credible in the circumstances; and

(c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case.

...

45 (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from

(a) a service-related injury or disease; or

(b) a non-service-related injury or disease that was aggravated by service.

(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease

partie ou de l'article 84, le ministre ou quiconque est désigné au titre de l'article 67 :

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;

b) accepte tout élément de preuve non contredit que le demandeur lui présente et qui lui semble vraisemblable en l'occurrence;

c) tranche en faveur du demandeur toute incertitude quant au bien-fondé de la demande.

...

45 (1) Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée:

a) soit par une blessure ou maladie liée au service;

b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.

(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une

was aggravated by service.

indemnité d'invalidité.

...

...

46 (1) For the purposes of subsection 45(1), an injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of

46 (1) Pour l'application du paragraphe 45(1), est réputée être une blessure ou maladie liée au service la blessure ou maladie qui, en tout ou en partie, est la conséquence :

(a) a service-related injury or disease;

a) d'une blessure ou maladie liée au service;

(b) a non-service-related injury or disease that was aggravated by service;

b) d'une blessure ou maladie non liée au service dont l'aggravation est due au service;

(c) an injury or a disease that is itself a consequence of an injury or a disease described in paragraph (a) or (b); or

c) d'une blessure ou maladie qui est elle-même la conséquence d'une blessure ou maladie visée par les alinéas a) ou b);

(d) an injury or a disease that is a consequence of an injury or a disease described in paragraph (c).

d) d'une blessure ou maladie qui est la conséquence d'une blessure ou maladie visée par l'alinéa c).

(2) If a disability results from an injury or a disease that is deemed to be a service-related injury or disease, a disability award may be paid under subsection 45(1) only in respect of that fraction of the disability, measured in fifths, that represents the extent to which that injury or disease is a consequence of another injury or disease that is, or is deemed to be, a service-related injury or disease.

(2) Pour l'application du paragraphe 45(1), si l'invalidité est causée par une blessure ou maladie réputée liée au service au titre du paragraphe (1), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente la proportion de cette blessure ou maladie qui est la conséquence d'une autre blessure ou maladie liée au service ou réputée l'être donne droit à une indemnité d'invalidité.

*VRAB Act*

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.

...

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.

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.

...

39 Le Tribunal applique, à l'égard du demandeur ou de l'appellant, 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.

### **Issue and Standard of Review**

[21] The Applicant initially asserted in his written submissions that the issue before the Court was whether it was correct for the Appeal Panel to determine that there is no connection between the Applicant's sarcoidosis and his military service and that the correctness standard of review was applicable (*Cole v Canada (Attorney General)*, 2015 FCA 119 at paras 58-59 [*Cole*]).

[22] However, when appearing before me, counsel for the Applicant advised that his submission on the standard of review had been in error. He now accepted that the issue before the Court is as described by the Respondent, and, that the applicable standard of review in this matter is reasonableness.

[23] The Respondent submits that the issue before the Court is whether the Appeal Panel's decision that there was insufficient evidence to establish a relationship between his sarcoidosis and his military service was reasonable. Further, the Appeal Panel's decision was based on factual findings and questions of mixed fact and law which attract the reasonableness standard of review as demonstrated by *Newman v Canada (Attorney General)*, 2014 FCA 218 at para 11; *Ben-Tahir v Canada (Attorney General)*, 2015 FC 881 at para 39 [*Ben-Tahir*]; *Werring v Canada (Attorney General)*, 2013 FC 240 at para 11; *Jarvis v Canada (Attorney General)*, 2011 FC 944 at para 4 [*Jarvis*]; *Hall v Canada (Attorney General)*, 2011 FC 1431 at para 11. These decisions are also consistent with the presumption that reasonableness is the applicable standard of review for decisions of administrative tribunals.

[24] In my view, the issue in this matter is whether the Appeal Panel committed a reviewable error when it determined there was insufficient evidence to establish a relationship between the Applicant's disability and his military service. More specifically, did the Appeal Panel commit a reviewable error in its assessment of whether the medical evidence presented by the Applicant was sufficient to establish a link or causal connection between the Applicant's condition, sarcoidosis, and his military service. As this is a question of mixed fact and law, I agree that the standard of review is reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51 [*Dunsmuir*]; *Alemari v Canada (Citizenship and Immigration)*, 2016 FC 368 at para 13).

[25] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also determining whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

**Did the Appeal Panel commit a reviewable error when it determined there was insufficient evidence to establish a relationship between the Applicant's disability and his military service?**

#### *Applicant's Position*

[26] The Applicant submits that the Appeal Panel, in finding on the balance of probabilities that there was no connection to military service, applied a primary cause analysis. However, this is no longer the accepted method of determining whether or not injuries arose out of or were directly connected with military service. According to the Applicant, in *Cole*, the Federal Court of Appeal held that an applicant must show a causal connection between a condition and military

service which is defined as somewhere between a mere possibility (1%) and primary cause (51%). To be successful, the Applicant must only establish a significant causal connection. A causal connection which is significant, but less than primary, will suffice (*Cole* at para 97). By reaching a conclusion on the balance of probabilities, and thus applying a primary cause analysis, the Appeal Panel committed a reviewable error.

[27] The Applicant further submits that in assessing whether an injury has been caused by or aggravated by military service a purposeful approach is required (*Cole* at paras 87-92) and that prior to making a decision the evidence is to be weighed in accordance with s 39 of the *VRAB Act*. He submits his sarcoidosis was connected to his military service and the connection was clear, unambiguous and supported by the record: he was in good health when he joined the military; he was diagnosed with sarcoidosis after serving on several naval ships which were undergoing repairs; scientific papers that have researched sarcoidosis since the 1940's have consistently determined that it is caused by a reaction of the body to bacteria, viruses, dust, mold, mildew, silica or other chemicals; he was exposed to such risk factors during the ship repairs including silica from sandblasting of non-skid surfaces; and, the Appeal Panel has previously granted awards for sarcoidosis based on likely exposure to fiberglass, dust fumes, gases, paints, chemicals and/or other sand and that he is being treated in adverse differential manner, without reason. The Applicant submits that there was either a direct connection with his military service or a direct connection with multiple causes entitling him to compensation.

[28] The Applicant also submits that the Appeal Panel improperly applied s 39(b) of the *VRAB Act* when it found Dr. Smith's medical opinion to be subjective and rejected it in its totality. As

no adverse credibility finding was made against Dr. Smith and his evidence is not contradicted, it is not in keeping with the spirit of s 39 to reject this evidence. Further, it was unreasonable for the Appeal Panel to interpret Dr. Smith's statement "it is difficult to say to what extent [LCdr. Ouellet's sarcoidosis] is attributed to his service" as a statement that there is no connection between his service and his condition. This statement confirms a connection, although not the extent thereof.

[29] The Applicant also submits that he presented the Appeal Panel with a vast amount of medical literature which demonstrates exposure to inhalational risks on board naval vessels causes sarcoidosis. The Appeal Panel, focusing on one report, unreasonably determined the HMCS Halifax was not a "dirty ship" and also dismissed all of the other medical literature without reason. The Appeal Panel cavalierly dismissed all of his evidence and gave no indication as to what additional or alternative information they required. This was unreasonable and sets an unachievable standard.

[30] The Applicant submits the above breaches amount to bad faith on the part of the Appeal Panel. Further, a pension has been ordered to be granted in a similar fact situation. In *Cundell v Canada (Attorney General)*, [2000] FCJ No 38 [*Cundell*], the applicant had a clear x-ray prior to deployment to the Persian Gulf where he was exposed to oil well fires. Chest x-rays taken one month after his return showed abnormalities, but a diagnosis of sarcoidosis was not obtained for several years. The Applicant submits the reviewable error in *Cundell*, as in this matter, was the rejection by the VRAB of uncontradicted medical evidence without making a credibility finding. Further, because the conduct of the VRAB was considered so egregious in *Cundell*, this Court



granted the application and substituted its own judgment ordering that the applicant was entitled to receive his pension. The Applicant submits that the fact pattern in both cases is the same, the VRAB was aware of the *Cundell* decision and, therefore, a similar order should be issued and solicitor-client costs awarded against the Respondent.

*Respondent's Position*

[31] The Respondent submits there is an onus on the Applicant to meet a burden of proof in order to establish his claim (*Cundell* at para 54; *Ben-Tahir* at para 61; *Jarvis* at para 26).

Notwithstanding the liberal approach mandated by the *VRAB Act*, the Applicant still must prove on the balance of probabilities the requisite connection between his condition and his service.

Further, contrary to the Applicant's submissions, the Appeal Board did not apply a primary cause analysis in this matter. Rather, it found insufficient evidence, on a balance of probabilities, of any connection between the Applicant's condition and his service.

[32] The Respondent submits that it was reasonable for the Appeal Panel to conclude there was insufficient evidence to establish a relationship between the Applicant's sarcoidosis and his military service.

[33] The Appeal Panel assessed the evidence, including Dr. Smith's letter, however found that it gave no positive opinion regarding a connection as it spoke only to the possibility of a connection but that the causes of sarcoidosis are unknown. Further, a study cited by Dr. Smith did not identify service on naval ships as a risk although, as he noted, the study was not large enough to have the statistical power to make such a connection. Dr. Smith's letter was, at best,

neutral and inconclusive. While his statement “because the cause of sarcoidosis is unknown it is difficult to say to what extent it is related to his service” could be interpreted as an opinion that sarcoidosis was caused to some degree by the Applicant’s military service, it was also open to the Appeal Panel to find, as it did, that Dr. Smith’s conclusions “did not sufficiently influence the balance of probabilities necessary to link the claimed conditions to the Appellant’s service”.

[34] The Respondent further submits that the medical literature was insufficient to establish a relationship between the Applicant’s condition and his service and listed examples of its purported frailties. Given the weak or tentative conclusions in the medical literature, the Appeal Panel’s finding that the evidence of a connection is speculative was accurate and reasonable. The Appeal Panel’s fact finding role attracts deference.

[35] The Appeal Panel found there was insufficient evidence, on a balance of probabilities, of any connection between the Applicant’s condition and his service. Accordingly, he did not meet his onus of proof to establish his claim.

[36] The Respondent submits that *Cundell* is distinguishable as, in that case, the Court appeared to place weight on the close timing of the factual circumstances to draw a causal link (*Cundell* at para 58) which is not the circumstance in this matter. Nor do the references to other appeal board decisions where sarcoidosis has been considered assist the Applicant as each case turns on its own facts and evidence, nor are those decisions binding (*Jarvis* at para 20). Further, the Applicant’s bald assertion of bad faith is without foundation.

*Analysis*

[37] As a starting point I note, as was clearly described in *Newman*, s 45 of the *CF Compensation Act* requires the Minister to determine the cause of the disability for which an award is sought. If the Minister's determination is appealed under the *VRAB Act*, the responsibility for determining the cause of the disability falls to the Review Panel or the Appeal Panel, as the case may be. The determination of the cause of disability must be made in a manner which respects the statutory presumptions set out in s 43 of the *CF Compensation Act*, which are substantially the same as found in s 39 of the *VRAB Act*.

[38] The statutory presumptions are, in my view, reflective of the stated purpose of the *CF Compensation Act* which is to recognize and fulfil the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada. This obligation includes providing compensation to members or veterans who have been injured as a result of military service. The *CF Compensation Act* is to be liberally interpreted so that the recognized obligation may be fulfilled. It is through this prism that the Appeal Panel was required to make its determination (*Cole* at para 97).

[39] Although the Applicant devoted much of his submissions to establishing the background facts of his claim, the Appeal Panel accepted the fact that his physical examination on joining the navy contained no medical history or diagnosis of sarcoidosis. It also accepted the diagnosis of advanced sarcoidosis in April 2003 as continued and contained in the many subsequent medical reports in the record and that this amounted to a disability. The Appeal Panel further accepted

the Applicant's evidence as to his service on the HMCS Halifax and potential exposure to harmful airborne particles during refit periods. In other words, it found the Applicant to be credible and accepted the facts submitted. The only matter at issue was whether the medical evidence was credible and sufficient to establish a causal nexus between the Applicant's condition and his military service.

[40] The Appeal Panel dealt with this in two paragraphs, the first addressing the medical literature and the second with Dr. Smith's letter.

[41] As to the medical literature, the Appeal Panel set out Dr. Smith's description of two of the submitted studies, but added no analysis or reasoning of its own with respect to those or any of the studies.

[42] The first study referenced in Dr. Smith's letter is entitled *Sarcoidosis Diagnosis Among US Military Personnel: Trends and Ship Assignment Associations* (Philip Jajosky, (1998) 14:3 Am J Prev Med 176) ("Jajosky Study"). Only a brief abstract of the article is contained in the record. It states that after the diagnosis of a deck grinder was changed from sarcoidosis to dust induced lung disease, the U.S. Navy asked the National Institute for Occupational Safety and Health to determine if navy work environments had been associated with lung disease, some of which may have been reported as sarcoidosis. The study found that when reported sarcoidosis ratios from 1943 to 1993 were examined, there was an unexplained peak of military sarcoidosis rates in the 1960s and 1970s with a decline in the black/white ratio of those rates. The case control analysis revealed a decreased risk for sarcoidosis diagnosis among men who worked only

on “clean ships”. The abstract concluded that those findings suggested sarcoidosis-like diseases in the military may be associated with environmental factors. To implement effective primary prevention, early detection, and treatment programs for sarcoidosis-like disease, those trends and work environment patterns needed to be explained.

[43] The Appeal Panel found the HMCS Halifax, as a Canadian Patrol Frigate, actually fell into the category of a “clean ship”. It is difficult, based on the abstract, to determine how this conclusion was reached as it contains no definitions of either a clean or dirty ship. However, another article, entitled *Trends and Occupational Associations in Incidence of Hospitalized Pulmonary Sarcoidosis and Other Lung Diseases in Navy Personnel, a 27-year Historical Prospective Study, 1975-2001* (E.D. Gorham et al. (2004) 126:5 Chest 1431) (“Gorham Study”) appears to reference the Jajosky Study describing it as suggesting a possible relationship between sarcoidosis and assignment aboard aircraft carriers, and with possible exposure to dust from removal of non-skid deck coating material in particular. A specific reference is later made to the Jajosky Study, noting that it did not provide evaluation of risk for specific occupations, but based risk on whether the ship was considered “clean” or “dirty” from an inhalational point of view. Most personnel aboard ships considered to be dirty were assigned aboard aircraft carriers, with a few aboard repair ships or other industrial-type ships. Clean ships included hospital ships, research ships, cargo carriers and escort ships. In his letter when referring to the Jajosky Study, Dr. Smith referenced a similar definition of clean ships as well as a definition of dirty ships. He stated that service on aboard a dirty ship increased the risk of being diagnosed with sarcoidosis, but could not say whether the ship the Applicant served on would have been classed as clean or

dirty. The Applicant suggested that during the work periods when he was exposed to airborne particles, the HMCS Halifax would be considered a “dirty ship”.

[44] Although the Applicant submitted that the Appeal Panel rejected his evidence on the basis of its ungrounded finding that the HMCS Halifax does not fall into the dirty ship category, I do not read the Appeal Panel’s decision in that light. Rather, in my view, little turns on the classification of the HMCS Halifax as a clean or dirty ship by the Appeal Panel as it appears to acknowledge that, during repair periods, the clean ship classification may not apply. It was during those periods that the Applicant claims to have been exposed to harmful airborne particles. The Appeal Board accepted his factual evidence and also explicitly accepted that quantities of such particles could potentially get beyond any implemented safeguards. Therefore, in my view, the salient point of the Jajosky Study abstract is the conclusion that its findings suggest sarcoidosis-like diseases in the military may be associated with environmental factors. Further, and tied to this, is Dr. Smith’s statement that service on board dirty ships increases the risk of being diagnosed with sarcoidosis.

[45] Also included with the four articles submitted with Dr. Smith’s letter of February 28, 2011 was *A Case Control Etiologic Study of Sarcoidosis Environmental and Occupational Risk Factors* (Lee S Newman et al. (2004) 170:12 Am J Respir Crit Care Med 1324) (“ACCESS Study”). Dr. Smith described this as the largest of the studies and stated that it did identify several associations which increase the risk of sarcoidosis and others which decrease the risk. Dr. Smith noted that the study did not identify naval service as a risk, however, it did specifically state it was not a large enough sample to have the statistical power to

have found this connection. Dr. Smith then stated, nevertheless, it was clear that certain occupations and exposures do increase the risk of sarcoidosis, therefore, the chance that the Applicant's service is linked to his disease "is not far fetched". He also noted that another included study, *Relationship of Environmental Exposures to the Clinical Phenotype of Sarcoidosis* (M.E. Kreider et al (2005) 128:1 Chest 207), based on the same data set as the ACCESS Study, found certain exposures, primarily inhalational, would be more likely to result in pulmonary sarcoid. Dr. Smith stated that it is possible fumes or dust on the ship may have been associated with the Applicant's sarcoidosis.

[46] I note that the ACCESS Study found that the etiology of sarcoidosis remains obscure but the prevailing view suggested it occurs as a consequence of exposure to one or more environmental agents interacting with genetic factors. It observed positive associations between sarcoidosis and specific occupations such as agricultural employment with exposure to pesticides and work environments with mold or mildew exposure. As noted by Dr. Smith, the study indicates that while being employed in the U.S. Navy had been reported as a risk factor for sarcoidosis, the authors of the ACCESS Study stated they did not have adequate statistical power to test that hypothesis. However, the study went on to state:

ACCESS did not identify a single predominant environmental or occupational "cause" of sarcoidosis. Indeed, this large case-control data study ...leads us to suspect that multiple environmental sources of exposure initiate granulomatous response in sarcoidosis. Alternatively, there may be a single cause that we did not recognize as a commonality across occupations and environments. Although it is conceivable that sarcoidosis has no environmental etiology, we consider it more likely that host factors such as genetics and personal habits may modify the individual's response to exposures.

[47] Another study provided by Dr. Smith, *Association Between Exposure to Crystalline Silica and Risk of Sarcoidosis* (V. Rafinsson et al. (1998) 55:10 Occup Environ Med 657) (“Rafinsson Study”), concerns a study of the inhabitants of a community in which a diatomaceous earth plant was located. It was understood to be the first study to indicate a relationship between sarcoidosis and exposure to crystalline silica. It too confirmed the etiology of sarcoidosis remains unknown. It concluded that “...we have found an increased risk of sarcoidosis among those workers exposed to diatomaceous earth and cristobalite. There is a biological plausibility for such an association...”.

[48] As noted by the Respondent, the findings of a later study, *Occupational Silica Exposure and risk of Various Diseases: an Analysis Using Death Certificates from 27 States of the United States*, G.M. Calvert and others (“Calvert Study”) did not support those of the Rafinsson Study.

[49] The Gorham Study, mentioned above, stated that its objective was to examine long term trends in incidence rates of hospitalized pulmonary sarcoidosis in a large cohort of U.S. Navy personnel and evaluate the possible relationship of sarcoidosis with occupation. It noted that U.S. Navy service includes a potential for exposure to a variety of substances, including non-skid coatings used on ship decks which may be aerosolized during removal. The article, again, confirms the etiology of sarcoidosis is unknown but notes several infectious and environmental factors have been associated with it. It states its findings were consistent with a prior study which reported high odds ratios for black navy members and those who entered the navy before



1985 as well as an increased risk to those assigned to aircraft carriers as well as ship's servicemen, mess management specialists and aviation structural mechanics.

[50] The Appeal Panel found the studies submitted by the Applicant presented research into potential linkages to environmental factors and occupational factors but that the common conclusion of the research was that the etiological relationship of sarcoidosis remains unknown. It was for this reason that the Review Panel found the information to be speculative and the Appeal Panel agreed.

[51] It is true that all of the articles confirm that the cause of sarcoidosis is unknown. However, the articles also demonstrate an increased risk of sarcoidosis when persons are exposed to certain environmental factors, including particulate from non-skid coating removal.

[52] In my view, the Appeal Board failed to consider the studies in the context of s 39 of the *VRAB Act*. Given the Applicant's factual evidence, which was uncontradicted and which the Appeal Panel accepted and found to be credible, the circumstances of the case and all of the submitted evidence – specifically the findings of the above studies which confirmed an increased risk of sarcoidosis in certain circumstances, including those to which the Applicant was exposed – the Appeal Panel should have considered whether this permitted it to draw a reasonable inference that the Applicant's condition was the result of his military service. Further, the Appeal Panel should have weighed all of this evidence in making its finding. Instead, it simply dismissed the appeal on the basis that because the cause of sarcoidosis was unknown, the information contained in the articles was speculative. In my view, the Appeal

Panel was required to take a wholistic view of the evidence in the context of s 39 and failed to do so, thereby rendering its decision unreasonable.

[53] The treatment of the letter from Dr. Smith is similarly flawed. The Appeal Panel found Dr. Smith's conclusions were subjective and insufficient to influence the balance of probabilities necessary to link the claimed condition to the Applicant's military service. It then quoted Dr. Smith's statement that "[u]nfortunately, because the cause of sarcoidosis is unknown it is difficult to say to what extent it is related to his service".

[54] The Respondent submits it was open to the Appeal Panel not to interpret this as confirming that the Applicant's condition *was*, to some extent, related to his service. Rather it could interpret it, as it did, as insufficient to influence the balance of probabilities necessary to link the claimed condition to the Applicant's military service. However, in my view such reasoning does not seem to be in keeping with the approach required by s 39. Particularly as the Respondent also submits that the evidence was insufficient to establish *any* connection between the Applicant's service and his condition.

[55] Dr. Smith's letter is candid and fairly describes the studies he provided. He concludes that the research does suggest environmental or occupational factors which may increase the risk of developing sarcoidosis, including certain naval environments. Neither his evidence or the studies are contradicted, nor does the Appeal Panel find either to lack credibility. There is also no evidence of any other cause for the Applicant's condition.

[56] A liberal and generous interpretation of the evidence required the Appeal Panel to consider the entirety of the circumstances (*Canada (Attorney General) v Frye*, 2005 FCA 264 at para 33), with a view to determining if the Applicant's condition was sufficiently causally connected to his military service to establish his eligibility for a disability benefit. As noted by the Federal Court of Appeal in *Cole*, some kind of connection other than a direct or immediate one may be sufficient (*Cole* at paras 72 and 74). Instead, the Appeal Panel rejected the evidence in whole as speculative on the basis that the cause of sarcoidosis is unknown, and without any further analysis.

[57] The Applicant also asserts that, because the Appeal Panel in this matter found on the balance of probabilities that there was no connection to his military service, it was applying the primary cause analysis, which was discredited by the Federal Court of Appeal in *Cole* and thereby committed a reviewable error.

[58] I do not agree that the Appeal Panel applied a primary cause analysis.

[59] In *Cole* the applicant was medically discharged after a twenty one year military career because of four conditions. One of these was depression, which could be traced to factors related to her military service as well as to factors related to her personal life. The Federal Court of Appeal held that the words "arose out of or was directly connected with such military service" in s 21(2)(a) of the *Pension Act*, RSC 1985, c P-6 ("*Pension Act*") required the applicant to establish a causal connection between the claimed condition and her military service. As her condition was directly related to *both* military and personal factors, the issue was the degree or

extent of the causal connection required to establish a direct connection with her military service.

The Federal Court of Appeal held this would be satisfied if the military factors were established to have been a significant cause of her claimed condition, a lesser degree of causation than a primary cause.

[60] Unlike *Cole*, this matter is not a situation where one accepted, directly attributable cause was being considered with another. Here, a single cause was submitted by the Applicant, his exposure to harmful airborne particles while serving on naval vessels, there was no question of its primacy over another cause. Causation pertained solely to the sufficiency of the medical evidence. I would also note that *Cole* was decided by the Federal Court of Appeal on May 5, 2015 while the decision of the Appeal Panel was decided on November 16, 2015. *Cole* is not mentioned and there is no evidence that it was brought to the attention of the Appeal Panel by the parties.

[61] In any event, in this matter, the Appeal Board stated in its decision that it applied the requirements of s 39 of the *VRAB Act* and, therefore, in weighing the evidence, would look at it in the best light possible and resolve doubt in favour of the Applicant, although the Applicant must still prove facts needed to link his claimed condition to his military service. The Appeal Panel concluded there was insufficient evidence to establish a relationship between sarcoidosis and service factors. Thus, it was the insufficiency of the evidence to establish the existence of such a link, and not the strength or extent of the link, which the Appeal Panel found to be the deciding factor in this case. Accordingly, the degree of the casual connection was not at issue as the Appeal Panel found no link.

[62] The sole issue was whether the sarcoidosis was service related, that is, was military service causative, rather than the degree to which it was causative. This question required the application of the presumptions found in s 43 of the *CF Compensation Act* and s 39 of the *VRAB Act* when assessing the medical evidence submitted by the Applicant and, as I have found above, the Appeal Panel failed to consider the evidence in that context.

[63] With respect to *Cundell*, there are certain factual similarities to this matter. There, the applicant had a normal chest x-ray prior to his departure to serve in the Persian Gulf where he served from February 18 to March 21, 1991. During that time he was exposed to pollutants from oil well fires. Upon his return, he claimed he coughed up black sputum for a period of three days. On April 25, 1991 a chest x-ray showed abnormalities. An x-ray report in 1997 suggested sarcoidosis. He sought a pension entitlement pursuant to s 21(1) of the *Pension Act* which was denied on the basis that there was no definitive medical opinion of the effect of oil on the applicant.

[64] In that case, the applicant's respirologist stated that since the etiology of sarcoidosis is not clear, it was not possible to say whether the applicant's exposure to smoke and toxic fumes precipitated the lung parenchymal changes or contributed to them. Further, the applicant's lungs were clear prior to his departure to the Gulf and he displayed the first signs of sarcoidosis upon his return. The respirologist's evidence was not contradicted nor was she found not to be credible.

[65] The Court concluded that the appeal panel misapplied s 3 and s 39 of the *VRAB Act* and misinterpreted the jurisprudence of this Court. It appears to have accepted that, in the absence of any adverse credibility finding or contradictory evidence, the appeal panel was obliged to accept the opinion of the applicant's doctor. Further, that the appeal panel erred when it denied the pension because the applicant's doctor had stated that the etiology of sarcoidosis was unclear, given that it was not unclear that his x-rays showed no lung problems before he went to the Persian Gulf and upon his return, or soon thereafter, showed sarcoidosis. The Court held that if the benefit of the doubt was to be resolved in the applicant's favour, and if the applicant must provide proof on a balance of probabilities, then the decision was patently unreasonable. Further, the appeal panel had also erred in law by requiring proof on a much greater standard than the balance of probabilities. The Court quashed the appeal panel's decision and found that the applicant was entitled to receive his pension.

[66] In this matter the Appeal Panel did not state that it rejected the Applicant's claim because of a lack of a definitive medical opinion of the effect of his exposure to ship board air particles. However, it also did not find the medical studies or the evidence of Dr. Smith lacked credibility, and this evidence was uncontradicted. As noted above, the Appeal Panel unreasonably discounted all of the evidence solely on the basis that the etiological relationship of sarcoidosis remain unknown. While I agree with the Respondent that prior decisions of the appeal board are fact based and do not bind it or this Court (*Jarvis*), difficulty arises from the fact that in this matter the Appeal Panel's underlying reason for denying the claim was that the etiological relationship of sarcoidosis remains unknown, yet this same circumstance exists in every decision granting a pension where sarcoidosis is claimed to arise from military service. That is, this

reason alone did not serve as a basis to reject those claims, although I acknowledge that other and differing facts may have supported those positive findings, including statements by the physicians involved as to the extent that military factors may have played a role in the condition.

[67] That said, in my view while the decision is unreasonable, the Applicant has not established bad faith nor am I prepared to order that he is entitled to a disability pension. The Appeal Panel's decision will be quashed and the matter referred back for redetermination by a different appeal panel taking into consideration the reasons contained in this decision.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is granted;
2. The decision of the Appeal Panel is quashed and the matter is remitted back to a differently constituted panel for redetermination taking into consideration the reasons contained in this decision; and
3. The Applicant shall have his costs.

“Cecily Y. Strickland”

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2153-15

**STYLE OF CAUSE:** HENRICK OUELLET v CANADA (ATTORNEY GENERAL)

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 19, 2016

**JUDGMENT AND REASONS:** STRICKLAND J.

**DATED:** MAY 31, 2016

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