Federal Court  Cour fédérale

Date: 20220707

Docket: T-1039-21

Citation: 2022 FC 1002

Ottawa, Ontario, July 7, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

JONATHAN PELLETIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On June 28, 2016, Jonathan Pelletier was playing soccer-baseball as part of a mandatory sports activity with the Canadian Armed Forces when he jumped, landed awkwardly, and broke his left femur at the hip. An appeal panel of the Veterans Review and Appeal Board [VRAB] found the injury did not qualify for a critical injury benefit under section 44.1 of the *Veterans Well-being Act*, SC 2005, c 21, since it was not "the result of a sudden and single incident."

Rather, the VRAB found the injury was the culmination of a chain of events that included Mr. Pelletier's osteoarthritis of the hip and his resulting hip resurfacing surgery.

[2] Mr. Pelletier seeks judicial review of the VRAB's refusal of his critical injury benefit claim. For the reasons that follow, I agree with Mr. Pelletier that the VRAB drew factual inferences regarding the role of his prior hip condition in causing his injury that had no support in the evidence. As this was the central reason for the VRAB's decision, I conclude the decision was unreasonable and must be set aside.

[3] The application for judicial review is therefore allowed and Mr. Pelletier's appeal is remitted to a differently constituted appeal panel of the VRAB for redetermination.

II. Issues and Standard of Review

[4] Mr. Pelletier identifies the following issues on this application:

A. Did the VRAB err by inferring causes of the injury that were not supported by the evidence?

B. Did the VRAB err by interpreting the meaning of "periprosthetic" without sufficient evidence?

C. Did the VRAB err in failing to assess the evidence presented by Mr. Pelletier in the manner required by the applicable statutory framework?

D. Did the VRAB err in finding that Mr. Pelletier's injury was not the result of a sudden and single incident?

[5] Although Mr. Pelletier sets these issues out separately, they are tightly interwoven. In essence, the VRAB found Mr. Pelletier's injury was not the result of a sudden and single incident because, on its assessment of the evidence, including medical evidence that used the term "periprosthetic," the injury was caused not only by the fall at the soccer-baseball game but also by Mr. Pelletier's osteoarthritis and earlier hip surgery. I will therefore consider all of the issues cumulatively rather than as distinct issues.

[6] As the parties agree, judicial review of the merits of the VRAB's decisions is presumptively undertaken on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Abdulle v Canada (Attorney General)*, 2021 FC 708 at para 9. This includes the issue of causation, which is a question of fact: *Primeau v Canada (Attorney General)*, 2021 FC 829 at paras 42–45, 65, 72, citing *Benhaim v St-Germain*, 2016 SCC 48 at para 36.

[7] However, Mr. Pelletier argues the correctness standard should apply to one aspect of the VRAB's analysis, namely the *standard* of causation for determining whether an injury is "the result of" a sudden and single incident. Citing the Federal Court of Appeal's decision in *Cole*, he argues that discerning the standard of causation is not a question of fact but one of statutory interpretation, and one that is of central importance to the legal system: *Cole v Canada (Attorney General)*, 2015 FCA 119 at paras 46–59. I cannot agree. *Cole* must be read in light of the Supreme Court of Canada's subsequent decision in *Vavilov*, which in my view dictates that the reasonableness standard applies to all of the issues raised, including the standard of causation.

[8] The Court of Appeal in *Cole* gave two main reasons for concluding the correctness standard applied. First, it relied on earlier jurisprudence applying the correctness standard: *Cole* at paras 47–51, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 and *Canada (Attorney General) v Frye*, 2005 FCA 264. Second, it found that questions of causation arise in other areas of law and that statutory interpretation on such questions did not fall within the VRAB's expertise: *Cole* at paras 52–53.

[9] With respect to the first of these reasons, the "recalibration" of the standard of review analysis in *Vavilov* means that a court seeking to determine the appropriate standard should look to *Vavilov* first rather than simply apply prior jurisprudence: *Vavilov* at para 143. Indeed, as the Attorney General points out, even prior to *Vavilov*, the Federal Court of Appeal questioned whether *Cole* accorded with developments in administrative law: *Fawcett v Canada (Attorney General)*, 2019 FCA 87 at paras 18–19. With respect to the second reason in *Cole*, *Vavilov* instructs that the expertise of a tribunal is no longer relevant to the selection of the standard of review: *Vavilov* at paras 27–31, 58. Further, the fact that a dispute touches on an important issue "when framed in a general or abstract sense" is not sufficient to attract correctness review: *Vavilov* at paras 59–61. In my view, the standard of causation applicable in deciding whether an injury was "the result of" a sudden and single incident for purposes of paragraph 44.1(1)(*b*) of the *Veterans Well-being Act* is not an issue that requires a "single determinative answer" and does not fall within the category of questions of law of central importance to the legal system as a whole: *Vavilov* at para 62.

[10] I therefore conclude the reasonableness standard applies to all of the issues on this application. On this standard, the Court is concerned with the existence of justification, transparency, and intelligibility in the decision-making process. The Court does not seek to substitute its own decision for that of the administrative decision maker. Rather, it reviews the reasons of the decision maker with "respectful attention" seeking to understand the reasoning process. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in light of the "legal and factual constraints" that bear on the decision: *Vavilov* at paras 83–87, 99–107.

III. Analysis

A. *Critical injury benefits under section 44.1 of the* Veterans Well-being Act

[11] The *Veterans Well-being Act*, known at the time of Mr. Pelletier's injury as the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, is designed 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": *Veterans Well-being Act*, s 2.1. It seeks to fulfil this purpose by providing for a variety of services, assistance, benefits, and compensation to Canadian Forces members and veterans.

[12] The benefit at issue in this matter is the "critical injury benefit," provided for in sections 44.1 and 44.2 of the *Veterans Well-being Act*. Section 44.1 sets out the eligibility requirements for the benefit, and provides for regulation-making powers related to two of those requirements:

Critical Injury Benefit

Eligibility

44.1 (1) The Minister may, on application, pay a critical injury benefit to a member or veteran who establishes that they sustained one or more severe and traumatic injuries, or developed an acute disease, and that the injury or disease

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

(b) was the result of a sudden and single incident that occurred after March 31, 2006; and

(c) immediately caused a severe impairment and severe interference in their quality of life.

Factors to be considered

(2) In deciding whether the impairment and the interference in the quality of life referred to in paragraph (1)(c) were severe, the Minister shall consider any prescribed factors.

Regulations

(3) The Governor in Council may, for the purpose of subsection 44.1(1), make regulations respecting the determination of what constitutes a sudden and single incident.

[Emphasis added.]

Indemnité pour blessure grave

Admissibilité

44.1 (1) Le ministre peut, sur demande, verser une indemnité pour blessure grave au militaire ou vétéran si celui-ci démontre qu'il a subi une ou plusieurs blessures graves et traumatiques ou a souffert d'une maladie aiguë et que les blessures ou la maladie, à la fois :

a) sont liées au service;

b) ont été causées par un seul événement soudain postérieur au 31 mars 2006;

c) ont entraîné immédiatement une déficience grave et une détérioration importante de sa qualité de vie.

Facteurs à considérer

(2) Pour établir si la déficience est grave et la détérioration de la qualité de vie importante, le ministre tient compte des facteurs prévus par règlement.

Règlements

(3) Le gouverneur en conseil peut prendre des règlements concernant ce qui constitue, pour l'application du paragraphe 44.1(1), un seul événement soudain.

[Je souligne.]

[13] As permitted under subsections 44.1(2) and (3), the Governor in Council has promulgated regulations regarding factors relevant to whether the impairment and interference in the quality of life are "severe," and respecting the determination of what constitutes a "sudden and single incident": *Veterans Well-being Regulations*, SOR/2006-50, ss 48.3, 48.4. Of particular relevance is section 48.4 of the *Veterans Well-being Regulations*, which defines a "sudden and single incident":

48.4 For the purpose of subsection 44.1(1) of the Act, a sudden and single incident is a one-time event — including motor vehicle accidents, falls, explosions, gunshot wounds, electrocution, and exposure to chemical agents — in which the member is abruptly exposed to external factors.	**48.4** Pour l'application du paragraphe 44.1(1) de la Loi, ***un seul événement soudain*** s'entend de l'événement unique — tel qu'un accident automobile, une chute, une explosion, une blessure par balle, une électrocution et une exposition à un agent chimique — au cours duquel le militaire est brusquement exposé à des facteurs externes.
[Emphasis added.]	[Je souligne.]

[14] In addition to these "legal constraints" that define when a member or veteran is eligible for a critical injury benefit, the VRAB's decision was constrained by provisions in both the *Veterans Well-being Act* and the VRAB's constating statute, the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [*VRAB Act*] that give broad instructions regarding the application of the *Veterans Well-being Act* and the consideration of evidence.

[15] The "purpose" section of the *Veterans Well-being Act* provides that the statute "shall be liberally interpreted" to fulfill the recognized obligation to members and veterans: *Veterans Well-being Act*, s 2.1. Section 3 of the *VRAB Act* contains similar language. While this injunction

echoes the approach to the interpretation of all statutes, set out in section 12 of the *Interpretation Act*, RSC 1985, c I-21, its appearance in section 2.1 of the *Veterans Well-being Act* and section 3 of the *VRAB Act* underscores the importance of a liberal interpretation of the statutory provisions pertaining to compensation and benefits for members and veterans.

[16] This approach is reinforced by section 43 of the *Veterans Well-being Act*, which calls on the Minister and their delegates to give applicants the "benefit of the doubt" in making decisions on compensation and benefits in three ways:

Benefit of doubt	**Décisions**
43 In making a decision under this Part or under section 84, the Minister and any person designated under section 67 shall	**43** Lors de la prise d'une décision au titre de la présente partie ou de l'article 84, le ministre ou quiconque est désigné au titre de l'article 67 :
(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;	**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) 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	**b)** accepte tout élément de preuve non contredit que le demandeur lui présente et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant any doubt, in the weighing of the evidence, as to whether the applicant has established a case.	**c)** tranche en faveur du demandeur toute incertitude quant au bien-fondé de la demande.

[17] Nearly identical language is found in the *VRAB Act*, under the heading "Rules of evidence," requiring the VRAB to apply the three principles above in "all proceedings under this Act": *VRAB Act*, s 39.

B. *The medical evidence*

[18] There is no dispute that Mr. Pelletier broke his femur at a game of soccer-baseball on the morning of June 28, 2016. He jumped to field a ball, twisted in the air, landed awkwardly on his left leg, and fell to the ground. Mr. Pelletier was taken to the Montfort Hospital in Ottawa, where he underwent surgery. Hospital records that were part of the record before the VRAB include an initial physical assessment report by a Dr. Hobden, the results of several X-rays, and an operative report prepared by the treating orthopaedic surgeon, Dr. Rancourt. Dr. Rancourt's report gives a diagnosis of "Left hip femoral neck fracture in patient with previous hip resurfacing" and describes the surgery in detail. Dr. Rancourt also provided a letter addressed to Veterans Affairs Canada dated August 19, 2016, filed in support of Mr. Pelletier's claim for a critical injury benefit, and another dated October 4, 2018, filed in support of his appeal to the appeal panel of the VRAB.

[19] In addition to the Montfort Hospital records, the VRAB had before it a medical opinion prepared by Dr. Toms, a medical advisor to the Minister. Dr. Toms' opinion, dated January 31, 2017, was prepared in the context of Mr. Pelletier's claim for a critical injury benefit and in response to a consultation request by a pension adjudicator. Both Dr. Toms' opinion and Dr. Rancourt's operative report refer to Mr. Pelletier having undergone hip resurfacing, a

procedure involving the insertion of a prosthetic, in 2014 as a result of osteoarthritis. Dr. Toms' opinion refers to the fracture as being "periprosthetic," as do each of Dr. Rancourt's letters.

[20] Dr. Toms' opinion concluded that while Mr. Pelletier had undergone complex surgery, it did not fall within the criteria of section 48.3 of the *Veterans Well-being Regulations*, which relate to whether the injury caused a severe impairment and severe interference in the member or veteran's quality of life: *Veterans Well-being Regulations*, ss 48.3(*e*), (*h*); *Veterans Well-being Act*, s 44.1(*c*).

C. *The VRAB's decision*

[21] The VRAB accepted that Mr. Pelletier's injury was severe and traumatic, that it was service-related, and that it caused a severe impairment and severe interference with Mr. Pelletier's quality of life, thereby meeting the requirements of subsection 44.1(1) and paragraphs 44.1(1)(*a*) and (*c*). However, it concluded the injury was not "the result of a sudden and single incident" within the meaning of paragraph 44.1(1)(*b*) of the *Veterans Well-being Act* since it was not caused by a "one-time event" as required by section 48.4 of the *Veterans Well-being Regulations*.

[22] The VRAB noted Mr. Pelletier had suffered from osteoarthritis in his left hip for a number of years and had received a benefit in 2015 for this condition. It referred to Dr. Toms' opinion which identified the osteoarthritis as the reason the hip resurfacing prosthetics were needed, and highlighted Dr. Toms' reference to the injury being a "periprosthetic fracture of the left hip" ("*fracture periprothétique de la hanche gauche*"). The VRAB noted that Dr. Rancourt

had similarly mentioned the hip resurfacing and referred to the fracture as a periprosthetic in her letters, while Dr. Hobden's initial assessment referred to the possibility of a "dislocation or fracture around hardware."

[23] The VRAB found this evidence showed the injury was a fracture near the prosthetic implant ("*une fracture en périphérie de l'implant prothétique autour ou à proximité de cet implant*"). It then reached the following conclusions:

> The Act states that the injury, to be eligible, must be caused by a sudden and single incident.
>
> The appeal committee concludes that the fracture was not caused by a one-time event, but rather by a chain of events: the osteoarthritis of the hip; the evolution of osteoarthritis probably over a period of several years; the placement of a prosthetic implant (i.e. "resurfacing" of the hip); the fall at the soccer-baseball game; and unfortunately the fracture associated with the prosthetic implant. Therefore, the fall at the soccer-baseball game on June 28, 2016, was not the sole cause as required by subsection 44.1(1) of the Act.
>
> The appeal panel concludes that the injury the veteran sustained on June 28, 2016 was unfortunately the culmination of an interrelated chain of events that began several years ago. Even after reviewing the evidence in the best possible light, the appeal panel finds that the available evidence depicts an evolving situation and not a sudden incident, as required by subsection 44.1(1) of the Act.
>
> The panel cannot accept counsel's submission that "it is clear that in the appellant's case, a fall is what caused the injury." Rather, the panel finds that the fall is one of the causal factors, but it is far from being the only one.
>
> [Emphasis added; my translation.]

[24] It is clear from this reasoning that the VRAB concluded that Mr. Pelletier's osteoarthritis and his prosthetic implant were contributing causes to his injury.

D. *The VRAB's decision is unreasonable*

(1) There was no medical evidence of causation

[25] As Mr. Pelletier points out, and the Attorney General does not dispute, none of the medical evidence before the VRAB stated that either Mr. Pelletier's osteoarthritis or his prosthetic implant caused, or even contributed to, his injury. Dr. Hobden's initial assessment gives only a preliminary diagnosis of the injury expressed with question marks (her notes read "?fracture/dislocation" and "?dislocation or fracture around hardware") and does not address the cause of the injury. Neither Dr. Rancourt's operative report nor her subsequent letters say the osteoarthritis or the prosthesis was a contributing cause. Dr. Rancourt's operative report referred to "periprosthetic fracture" as a potential *risk* of the surgery, along with other risks such as nerve damages, infection, leg length discrepancy, and postoperative pain. But she does not give any opinion that the osteoarthritis or the prosthesis *caused* the fracture Mr. Pelletier had suffered.

[26] As for Dr. Toms, while he was asked for his medical opinion on the claim, both the pension adjudicator's request and Dr. Toms' opinion were focused on the severity criteria in section 48.3 of the *Veterans Well-being Regulations* and not on causation. Dr. Toms' opinion does not say Mr. Pelletier's osteoarthritis and/or prosthesis were causes of the injury or give any other opinion on causation.

[27] There was, in short, no evidence from any of the physicians involved that Mr. Pelletier's osteoarthritis and/or hip prosthetics caused or contributed to his broken bone or, more generally, that osteoarthritis and/or hip prosthetics cause or contribute to bone breakage near the prosthetic.

[28] The Attorney General conceded at the oral hearing of this matter that there was no medical evidence on the issue of causation. However, the Attorney General argues the VRAB drew a reasonable factual inference regarding causation based on the evidence before it, including the circumstances of the injury at the soccer-baseball game and the repeated references in the medical reports to the proximity between the break and the prosthesis, to conclude that the osteoarthritis and implant contributed to the break.

[29] I am conscious of the importance of reviewing courts not "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55. However, this cannot prevent a reviewing court from reviewing evidence to determine whether the evidence is capable of supporting the factual findings of an administrative decision maker. A decision that is not supported by or consistent with the evidence may be regarded as unreasonable: *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184 at para 86, citing *Vavilov* at para 126.

(2) The factual inference could not be drawn without medical evidence

[30] Factual inferences, including those pertaining to causation, are regularly drawn by finders of fact from the evidence before them, general knowledge, experience, logic, and "common sense." A difficulty arises, however, where an inference is drawn that goes beyond such common experience or common sense, and requires scientific knowledge or evidence to support the inference. In my view, the VRAB's findings fall into the latter category. Whether, or the extent to which, either osteoarthritis or a hip resurfacing prosthetic are contributing causes to a broken

femur at the hip are not matters of mere experience, logic, or common sense. The sequelae of such medical conditions and in particular their impact on the likelihood of bone fractures are matters of medical knowledge and expertise.

[31] This Court has cautioned the VRAB from making its own medical findings and inferences not based in the evidence, noting that section 38 of the *VRAB Act* gives the VRAB the ability to obtain independent medical advice: *Rivard v Canada (Attorney General)*, 2001 FCT 704 at paras 39–43; *Macdonald v Canada (Attorney General of Canada)*, 2003 FC 1263 at paras 21–24; *Thériault v Canada (Attorney General)*, 2006 FC 1070 at paras 55–60; *Dugré v Canada (Attorney General)*, 2008 FC 682 at paras 24–28. In *Rivard*, Justice Nadon, then of this Court, relied on section 38 and the "Rules of evidence" provision in section 39 of the *VRAB Act* to conclude that the VRAB should not second-guess an applicant's medical evidence without supporting evidence:

> In my opinion, the very existence of section 38 suggests that the Board does not have an inherent jurisdiction over medical matters. It does not have any particular medical expertise that would enable it to state without supporting evidence that Dr. Sestier's opinion and the article he adduced in this case were not part of the medical consensus. Therefore, I believe that the Board could not present medical facts that had not been adduced as evidence for the purpose of rebutting the applicant's evidence. If the Board required evidence other than that adduced by the applicant or evidence representing the medical context, it had only to invoke section 38 and seek medical advice.
>
> Therefore, I am of the view that sections 38 and 39 of the VRAA and the case law, when read together, require that contradictory evidence be adduced in the file before rejecting medical evidence adduced by the applicant. Unless the Board believed that the evidence was not credible, which was not the case here, it could not reject Dr. Sestier's opinion without having contradictory evidence before it.

> Therefore, I believe that by rejecting Dr. Sestier's opinion, the Board erred in its application of section 39 of the VRAA and breached its duties therein. As mentioned by the case law cited above, this constitutes a jurisdictional error that nullifies the decision in its entirety.
>
> [Emphasis added; *Rivard* at paras 42–44.]

[32] Relying on *Rivard*, Justice Lemieux in *Macdonald* held that the VRAB had "embarked upon forbidden territory making medical findings to discount uncontradicted credible evidence when it had no inherent medical expertise and had the ability to obtain and share independent medical evidence on points which troubled it": *Macdonald* at para 24. To the same effect, Justice Shore in *Thériault* criticized the VRAB's reliance on a medical dictionary found on the Internet to substitute its opinion for that found in the applicant's medical evidence, relying on sections 38 and 39, and the *Rivard* and *Macdonald* cases: *Thériault* at paras 55–59.

[33] Justice Blanchard's decision in *Dugré* bears some similarities to the current case, as the veteran suffered a fall and there was an issue regarding whether some of his subsequent problems were attributable to a pre-existing condition: *Dugré* at paras 4–6, 21–22. Justice Blanchard noted there was no evidence "that the debilitating effects suffered by the applicant are attributable to the pre-existing condition" and found it unreasonable for the VRAB to infer they were: *Dugré* at paras 24–28.

[34] The Attorney General correctly points out that in each of the foregoing cases, the applicant had presented medical evidence of causation and the VRAB's error lay in reaching contrary findings in the absence of medical evidence. In the present case, Mr. Pelletier did not file medical evidence stating that his fall was the unique cause of his fracture. The

Attorney General underscores that it is a claimant's onus to prove their claim, including as to causation, even in the face of section 39: *Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at para 5.

[35] I agree that *Rivard*, *Macdonald*, *Thériault*, and *Dugré* each involved the VRAB drawing medical inferences without evidence that contradicted the claimant's evidence. Nonetheless, the principles expressed in those cases underscore more generally the importance of the VRAB not drawing inferences on medical matters going beyond common experience, in the absence of any evidentiary support. This is true as a general matter of evidence, and is particularly so where the resulting inference is not "in favour of an applicant": *Veterans Well-being Act*, s 43; *VRAB Act*, s 39.

[36] This is not to say that the VRAB is required to accept any medical hypothesis or evidence put forward by an applicant uncritically. The *Veterans Well-being Act* and *VRAB Act* themselves only call on the VRAB to draw "every reasonable inference in favour of the applicant" [emphasis added] and to accept uncontradicted evidence where it considers it to be credible: *Veterans Well-being Act*, s 43(*a*)–(*b*); *VRAB Act*, s 39(*a*)–(*b*). Evidence filed on behalf of a veteran that is baseless, speculative or not credible can be rejected, even without the benefit of independent medical advice: *Jarvis v Canada (Attorney General)*, 2011 FC 944 at paras 16–17, 25; *Wannamaker* at paras 6, 28–31.

[37] This is not that case, however. In the present case, the uncontradicted evidence was that Mr. Pelletier's injury followed the fall at the soccer-baseball game. There is no dispute that that

fall was, at the very least, *a* cause of his broken hip. The VRAB recognized it as such, describing the fall as part of the "chain of events" causing the injury.

[38] In this regard, I cannot accept Mr. Pelletier's contention that the *Rivard* line of cases means the VRAB cannot make *any* findings of "medical fact" that are not supported by evidence. Some factual findings and inferences that touch on the "medical" may nonetheless be readily within the VRAB's fact-finding competence as they are matters of common experience or knowledge. For example, the fact that a fall can cause a broken bone could be considered to touch on the medical. But it is so clearly within the scope of common knowledge that it requires no medical expertise or evidence to infer that a fall that preceded a broken bone was a cause of the break. The VRAB's conclusion that the fall was a cause of the break was thus reasonable even though none of the medical reports state that Mr. Pelletier's broken femur was caused by the fall.

[39] The same cannot be said of the VRAB's conclusion that there were other events in the causative chain, notably Mr. Pelletier's osteoarthritis and hip prosthetic. In my view, this conclusion was unreasonable. Without any evidence, whether in the form of a medical opinion, a hospital or medical report, or otherwise, to support the inference that the osteoarthritis and/or hip prosthetic were causes of Mr. Pelletier's broken hip, it was not open to the VRAB to make this factual finding.

[40] The VRAB's reasons highlight the references in the medical reports to the hip resurfacing and the prosthesis, as well as the repeated use of the term "periprosthetic." None of the medical

evidence defines the word “periprosthetic.” Mr. Pelletier submits that without evidence of the meaning of the term, it was unreasonable for the VRAB to interpret the word “periprosthetic” to indicate some form of causation between the injury and the prosthetic, as opposed to just proximity. I do not agree that the VRAB interpreted “periprosthetic” as indicating causation. To the contrary, the VRAB appears to have interpreted the term exactly as Mr. Pelletier proposes, namely as meaning simply in the periphery, around, or in proximity to the prosthetic (“*en périphérie de l’implant prothétique autour ou à proximité de cet implant*”). Neither party suggested the term had any other meaning.

[41] However, having interpreted the term in this way, the VRAB then appears to conclude that since the medical reports used the term, and referred to the location of the injury as being near the prosthetic, the break was not just *near* the prosthetic but *associated causally* with the prosthetic. As noted above, the medical evidence does not give this indication, and there was no evidence before the VRAB that would allow it to infer as a medical matter that a break near the prosthetic was caused by the prosthetic. This may be a sound medical inference to draw, or it may not. But in the absence of evidence establishing that it was a sound medical inference, it was not open to the VRAB to draw the inference, particularly given its statutory obligation to draw every reasonable inference in favour of Mr. Pelletier: *Veterans Well-being Act*, s 43; *VRAB Act*, s 39.

[42] In this regard, I cannot agree with the Attorney General that the mere fact that the term “periprosthetic” was used in the medical reports must mean that it was medically relevant and that this must imply some degree of causation. The fact that the break was periprosthetic may

well be medically relevant. Indeed, it appears to have been highly relevant to the surgery required to treat the injury. However, this does not mean, without further medical evidence to this effect, that it was a cause of the break.

[43] Nor can I agree with the Attorney General that the mere circumstances of the injury—the fact that a jump and fall at a soccer-baseball game resulted in a broken hip—itself indicates that there must have been other causes. I question whether such an inference would be sound, given the potential variety of injuries that can arise in sports. In any case, it is not an inference the VRAB itself made. The VRAB did not conclude that there must have been other causes because of the nature of the injury. Rather, it found Mr. Pelletier's osteoarthritis and his prosthetic were causes of the injury based on the references to the medical reports, even though those reports did not support that inference.

[44] I note that the VRAB also did not purport to apply its own specialized medical knowledge or expertise. While an administrative decision maker's expertise may be relevant to performing reasonableness review, that expertise must be demonstrated through their reasons: *Vavilov* at para 93. As noted above, this Court has found that the VRAB does not have specialized medical expertise as an institution: *Rivard* at para 42. In any case, the VRAB did not profess in its reasons to apply or demonstrate any particular or specialized knowledge with respect to osteoarthritis or hip prosthetics in drawing its inferences. Rather, it relied on the medical evidence, which did not support those inferences.

[45] Finally, I reject the Attorney General's reliance on Mr. Pelletier's onus to prove his claim, including as to causation. Mr. Pelletier adequately demonstrated that the fall at the soccer-baseball game caused his injury. While the onus is on a member of the Canadian Forces or veteran to establish their eligibility for a benefit under the *Veterans Well-being Act*, this does not require the member or veteran to disprove every other possible or hypothesized cause of the injury, particularly where such other causes are not established in any of the medical evidence. A claimant's onus does not justify the drawing of inferences that are not supported by the evidence.

(3) The standard of causation

[46] Mr. Pelletier argues the VRAB erred in its approach to causation under section 44.1 of the *Veterans Well-being Act* by rejecting his claim because his injury was caused by a chain of events. He argues that paragraph 44.1(1)(*b*) requires the injury to be the "the result of a sudden and single *incident*" [emphasis added] but does not require it to be the only cause or contributing factor to the injury. Mr. Pelletier points to the Supreme Court's decision in *Athey v Leonati*, where the Court rejected the notion of "apportionment of causation" in tort cases between tortious and non-tortious conduct and confirmed that a plaintiff was not required to show the defendant's conduct to be the "sole cause" of their injury: *Athey v Leonati*, [1996] 3 SCR 458 at paras 12–20.

[47] In light of my determination above regarding the VRAB's inferences, I need not decide whether the VRAB's approach to causation was reasonable. I consider it more appropriate to refer the matter back to the VRAB, which can consider these issues anew if necessary, including whether the tort principles in *Athey v Leonati* are applicable in the context of assessing causation

under the *Veterans Well-being Act* and, as a related matter, whether a pre-existing medical condition precludes a critical injury benefit, if there is evidence the condition contributed to the injury. I note in this regard that the VRAB did not have the assistance of Mr. Pelletier's submissions on this point when rendering its decision. This was likely because the earlier decision of the review panel that was appealed to the appeal panel determined the "sudden single incident" issue on different grounds, namely whether Mr. Pelletier was "abruptly exposed to external factors" at the soccer-baseball game.

IV. Conclusion

[48] The application for judicial review is therefore granted. Mr. Pelletier's appeal is remitted for redetermination by a differently constituted appeal panel of the VRAB.

[49] Mr. Pelletier sought his costs of the application for judicial review. The Attorney General did not seek costs. In light of Mr. Pelletier's success on the application, and considering the factors set out in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106, he is entitled to costs at the usual level.

JUDGMENT IN T-1039-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed. Jonathan Pelletier's appeal is remitted for redetermination to a differently constituted appeal panel of the Veterans Review and Appeal Board.
2. Costs are payable to Mr. Pelletier in accordance with the middle of Column III.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1039-21
STYLE OF CAUSE:	JONATHAN PELLETIER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 9, 2022
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APPEARANCES:

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