

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241120

Docket: A-12-24

Citation: 2024 FCA 194

**CORAM: STRATAS J.A.
MACTAVISH J.A.
BIRINGER J.A.**

BETWEEN:

ALEXANDRE DMITRIENKO

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Edmonton, Alberta, on November 20, 2024.
Judgment delivered from the Bench at Edmonton, Alberta, on November 20, 2024.

REASONS FOR JUDGMENT OF THE COURT BY:

MACTAVISH J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Edmonton, Alberta, on November 20, 2024).

MACTAVISH J.A.

[1] Alexandre Dmitrienko is a Regular Member of the Royal Canadian Mounted Police. He sustained an injury to his knee while he was on duty, which required a surgical repair. Following his surgery, Mr. Dmitrienko developed blood clots in his leg (deep vein thromboses) and in both of his lungs (pulmonary emboli or PE). The PE caused shortness of breath and chest pain, amongst other symptoms. Although Mr. Dmitrienko's PE was successfully treated, his symptoms

did not improve with time, and he was left with ongoing cardiorespiratory symptoms, including chest pain, shortness of breath, dizziness and fatigue. Mr. Dmitrienko says that these symptoms left him virtually housebound. The respondent does not dispute that Mr. Dmitrienko suffers from significant cardiorespiratory symptoms but does take issue with the cause of these symptoms.

[2] Veterans' Affairs Canada granted Mr. Dmitrienko's application for a disability pension in part, as it related to his original knee injury, but his claim for benefits for his cardiorespiratory condition was dismissed. Mr. Dmitrienko appealed this decision to an Assessment Review Panel of the Veterans' Review and Appeal Board (VRAB), submitting that his cardiorespiratory impairment resulted from the PE that developed after his knee surgery. The Review Panel dismissed Mr. Dmitrienko's appeal, finding that the medical evidence did not establish a link between his cardiorespiratory symptoms and the blood clots in his lungs.

[3] Mr. Dmitrienko appealed this decision to an Assessment Appeal Panel of the VRAB. The Appeal Panel found that medical reports from qualified medical practitioners stated that Mr. Dmitrienko's cardiorespiratory symptoms were not related to his PE, and that he was therefore not entitled to any additional pension benefits. Mr. Dmitrienko's application for reconsideration of the Appeal Panel's decision was dismissed at the screening stage, and the Federal Court subsequently found that he had been treated fairly by the Appeal Panel and that its reconsideration decision was reasonable.

[4] Our role in an appeal such as this is to determine whether the Federal Court identified the correct standard of review—correctness or reasonableness—and whether it properly applied that

standard: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10–12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–47. In other words, we have to “step into the shoes” of the Federal Court judge, focusing on the administrative decisions below. While the Federal Court correctly identified reasonableness as the standard of review to be applied in assessing the substance of the Appeal Panel’s reconsideration decision, it erred in finding that decision to be reasonable.

[5] There were a number of medical reports before the Appeal Panel relating to Mr. Dmitrienko’s medical condition. While several doctors acknowledged that Mr. Dmitrienko suffered from relatively severe cardiorespiratory symptoms, most of the medical reports stated that there was no link between his ongoing cardiorespiratory symptoms and the PE. However, one report, prepared by Dr. Cameron Stuart on behalf of Veterans’ Affairs Canada, came to a different conclusion. Dr. Stuart noted that Mr. Dmitrienko had developed blood clots in his leg after his knee surgery which had led to his PE, and that his PE had left him with “severe residual symptoms”. Although Dr. Stuart did not provide a diagnosis for Mr. Dmitrienko’s condition, he stated that all of his cardiorespiratory symptoms “related to his Pensioned Condition” (my emphasis). Dr. Stuart went on to observe that although Mr. Dmitrienko could see some slow improvement in his condition, “any further improvement will likely be minimal at best”.

[6] Although the Appeal Panel discussed many of the medical reports in both its original decision and in its reconsideration decision, no mention was made of Dr. Stuart’s report in either decision, even though Mr. Dmitrienko repeatedly drew it to the Panel’s attention. This results in these decisions being fatally flawed.

[7] While administrative decision makers may, in some circumstances, be presumed to have considered all of the evidence before them, that presumption cannot operate to save the Appeal Panel's decision in this case. This is because the Supreme Court of Canada has told us in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 that administrative decision makers must provide reasoning on key issues affecting the outcome of a case. In addition, section 39 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, instructs the VRAB to draw every reasonable inference in favour of an applicant based on the evidence presented to it, and to resolve any doubt in favour of the applicant.

[8] The Appeal Panel had evidence before it that supported Mr. Dmitrienko's claim that his ongoing cardiorespiratory symptoms resulted from the PE that he suffered following his knee surgery for his on-duty injury. While the Appeal Panel was not required to accept Dr. Stuart's opinion as to the linkage between these events (and indeed, the Review Panel appears to have had concerns with respect to this report), it had to at least come to grips with it in determining whether Mr. Dmitrienko had established a case. Having failed to do so, the Board cannot be said to have fulfilled its obligations under *Vavilov* and section 39 of the Act.

[9] This error was perpetuated in the Appeal Panel's reconsideration decision, where, once again, the Panel discussed much of the medical evidence, but studiously avoided any mention of Dr. Stuart's opinion, notwithstanding Mr. Dmitrienko having once again drawn this evidence to the attention of the Panel.

[10] Administrative decision makers do not have to deal with every issue raised by a case, however subordinate, collateral or incidental. However, the causal link between Mr. Dmitrienko's PE and his cardiorespiratory symptoms was the central issue in this case. The failure of the Appeal Panel to engage with Dr. Stuart's evidence means that the reconsideration decision lacks the transparency, intelligibility and justification required of a reasonable decision: *Vavilov*, above at paras. 96–98, 127–128.

[11] The Federal Court addressed Dr. Stuart's report at paragraphs 68–71 of its decision, explaining why, in its view, the report was entitled to little weight and would not have made a difference to the Appeal Board's decision. It is not, however, the role of the Federal Court to weigh the evidence and make findings of fact to buttress an administrative decision. That responsibility rests with the administrative decision maker, and "even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome": *Vavilov*, above at para. 96.

[12] Therefore, this appeal will be allowed. Mr. Dmitrienko's application will be remitted to a differently constituted Appeal Panel of the VRAB for a fresh hearing with the direction that it engage with all of the medical evidence, including Dr. Stuart's report and any other evidence and key submissions made by Mr. Dmitrienko. Mr. Dmitrienko shall have his costs, fixed in the amount of \$1,000.00.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-12-24

STYLE OF CAUSE: ALEXANDRE DMITRIENKO v.
THE ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: NOVEMBER 20, 2024

**REASONS FOR JUDGMENT OF THE COURT
BY:** STRATAS J.A.
MACTAVISH J.A.
BIRINGER J.A.

DELIVERED FROM THE BENCH BY: MACTAVISH J.A.

APPEARANCES:

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