



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Public Service Pension Plan Corporation v. Boyles*,
2023 NLCA 10

Date: April 12, 2023

Docket Number: 202201H0030

BETWEEN:

THE PUBLIC SERVICE PENSION PLAN
CORPORATION, trading as PROVIDENT ¹⁰

APPELLANT

AND:

DONALD BOYLES

RESPONDENT

Coram: F. P. O'Brien, G. D. Butler and F. J. Knickle JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 202101G6669

Appeal Heard: December 13, 2022

Judgment Rendered: April 12, 2023

Reasons for Judgment by: G. D. Butler J.A.

Concurred in by: F. P. O'Brien and F. J. Knickle JJ.A.

Counsel for the Appellant: Twila E. Reid and Meghan R. Foley

Counsel for the Respondent: Megan S. Reynolds

Authorities Cited:

CASES CITED: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *O'Rourke v. Workplace Health, Safety and Compensation Commission*, 2022 NLCA 14, 7 C.A.N.L.R. 349; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23; *Zaroooben v. The Worker's Compensation Board*, 2022 ABCA 50; *Blue v. Canada (Attorney General)*, 2021 FCA 211; *Sibbald v. Canada (Attorney General)*, 2022 FCA 157.

STATUTES CONSIDERED: *Public Service Pensions Act, 1991*, SNL 1991, c. 12, section 16(1)(b), as repealed by *Public Service Pensions Act, 2019*, SNL 2019, c. P-44.01; *Public Service Pensions Act, 2019*, SNL 2019, c. P-44.01, section 15.

Butler J.A.:**INTRODUCTION**

[1] This appeal addresses Donald Boyles' application for medical disability retirement under the *Public Service Pensions Act, 1991*, SNL 1991, c. 12 and judicial review of a decision of an Appeal Commissioner under the *Public Service Pensions Act, 2019*, SNL 2019, c. P-44.01. The test that Mr. Boyles was required to meet was established in the 1991 Act but the relevant internal review and judicial review process was established in the 2019 legislation.

BACKGROUND

[2] Donald Boyles joined the public service in 1987 and was a member of the Public Service Pension Plan. He retired on May 14, 2020 after more than 32 years of employment with the Province of Newfoundland and Labrador. Near the end of his career and based upon a diagnosis of major depressive disorder, he made two applications to the Public Service Pension Plan Corporation, trading as Provident¹⁰ (“Provident”) for medical disability retirement. Mr. Boyles' first application made on October 29, 2015 was denied on February 22, 2016; the second dated April 10, 2016 was denied on July 25, 2016.

[3] The following medical records had been supplied to Provident respecting Mr. Boyles' applications for medical disability retirement:

October 27, 2015	Assessment Form for Medical Disability Retirement completed by Mr. Boyles' family physician, Dr. Paul Jackman.
January 19, 2016	Independent Psychiatric Assessment by Dr. Anthony D. Walsh completed at Provident's request and forwarded to Dr. Charles McVicker at Atlantic Offshore Medical Services.
February 8, 2016	Letter from Dr. Charles McVicker to Atlantic paraphrasing the conclusions of Dr. Walsh.
April 2, 2016	Report of registered psychologist, Susan Stone, to whom Mr. Boyles had self-referred in 2015. He had originally seen Ms. Stone between December 2012 and June 2013.
June 24, 2016	Updated assessment by Dr. Walsh following Susan Stone's report.
July 16, 2016	Dr. McVicker's letter to Provident, again paraphrasing Dr. Walsh's updated assessment

[4] Mr. Boyles appealed Provident's decisions to deny him benefits to the Supreme Court of Newfoundland and Labrador. In *Boyles v. Newfoundland and Labrador*, 2020 NLSC 47, (the "2020 Decision") the judge concluded that Provident had relied upon opinions expressed by Provident's medical advisors (Drs. Anthony Walsh and Charles McVicker) who referenced an incorrect test of "total and permanent disability" when determining his entitlement to medical disability retirement.

[5] The judge stated the correct test as follows:

[4] The test employed for this pension entitlement therefore is that an employee is medically certified to the satisfaction of the decision-maker as having a condition which is '**likely to be permanent**'.

(Emphasis added.)

[6] The judge set aside the decisions denying Mr. Boyles' benefits and remitted the matter back for reconsideration on the basis of the correct test (2020 Decision, at para. 35).

[7] As part of the reconsideration process, Provident engaged Dr. Sujay Patel to conduct a paper review of the medical records on file and provide an opinion on Mr. Boyles' entitlement based upon these records. In addition to the medical records referenced earlier, Dr. Patel was given a copy of an updated medical report prepared by Dr. Jackman on October 24, 2017 in support of Mr. Boyles' application for a Canada Pension Plan ("CPP") disability pension.

[8] Based upon his review of the documents, Dr. Patel provided his report to Provident on or about December 18, 2020.

[9] According to Provident's process, the first decision on reconsideration of Mr. Boyles' application was to be made by the Director of Pension Administration (Jason Durdle). Mr. Durdle denied Mr. Boyles' application. Provident's process next provided for an internal appeal to a Review Officer. Mr. Boyles' appeal to a Review Officer (Lisa Blundon) was similarly denied. Provident's process provided for a final appeal to an Appeal Commissioner. On appeal to an Appeal Commissioner, Provident's original decision was confirmed.

[10] Mr. Boyles sought judicial review of the Appeal Commissioner's decision in this province's Supreme Court. On judicial review, the Applications Judge found that the Appeal Commissioner did not act reasonably in rejecting Mr. Boyles' appeal. The Applications Judge ordered *certiorari* to quash the decision and found Mr. Boyles entitled to a medical disability retirement for a period of approximately five years effective August 11, 2015 to May 14, 2020 when Mr. Boyles retired (*Boyles v. Public Service Pension Plan Corporation (Provident¹⁰)*, 2022 NLSC 28 (the "Applications Judge's Decision")).

[11] Provident appeals asserting that the Applications Judge erred:

- (a) in concluding that the Appeal Commissioner did not take the appropriate factors and evidence into account and that he ought to have given greater weight to certain medical evidence;
- (b) by subsequently re-weighing the evidence;
- (c) in finding that the lack of an in-person assessment by Dr. Patel was a relevant concern before the Appeal Commissioner; and

- (d) in finding Mr. Boyles entitled to a medical disability retirement instead of remitting the matter back to Provident.

ISSUES

[12] The issues raised on this appeal are:

- (i) Did the Applications Judge identify the correct standard of review?
- (ii) Did the Applications Judge correctly apply the standard of review?
- (iii) Did the Applications Judge err in his choice of remedy?

STANDARD OF REVIEW

[13] The Supreme Court of Canada has affirmed that “[a] reviewing judge’s selection and application of the standard of review is reviewable for correctness” (*Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, at para. 10).

ANALYSIS

Issue 1: Did the Applications Judge Identify the Correct Standard of Review?

[14] The Applications Judge cited *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, for the presumption of reasonableness as the appropriate standard of review and under what “limited exceptions” the presumption could be rebutted (para. 11, citing *Vavilov*, at para. 17).

[15] Noting that the presumption of reasonableness as the standard of review could be displaced by a statutory provision, the Applications Judge considered whether section 15 of the new *Public Service Pensions Act, 2019*, SNL 2019, c. P-44.01 displaced the presumption (paras. 12, 45-58). It states:

15(1) A person may, in accordance with the pension plan, appeal a decision of the corporation in a matter related to, connected with or arising out of his or her entitlement to or payment of, a pension benefit or other money under this Act.

(2) A person may apply for judicial review of a decision under subsection (1) within 60 days after receipt of the decision by filing an application with the Supreme Court.

[16] The Applications Judge concluded that Mr. Boyles had proceeded by way of judicial review under section 15(2) and that there was no ambiguity in the

section. Therefore, he held that the reasonableness standard of review had not been displaced by the legislation (paras. 50-51).

[17] None of the other “limited exceptions” identified in *Vavilov* applied. The case did not raise a constitutional question, a question of law of central importance to the judicial system as a whole or a question related to jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at para. 17).

[18] No error is established in the Applications Judge’s conclusion that the standard of review was reasonableness.

Issue 2: Did the Applications Judge Correctly Apply the Standard of Review?

The Role of the Court of Appeal

[19] In determining whether the reasonableness standard of review was applied properly, this Court is required to “view the matter from the perspective of the applications judge” (*O’Rourke v. Workplace Health, Safety and Compensation Commission*, 2022 NLCA 14, 7 C.A.N.L.R. 349, at para. 16). This has been described as “ ‘stepping into the shoes’ of the lower court” such that the “appellate court’s focus is, in effect, on the administrative decision” (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 46, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247). In *Northern Regional Health Authority*, the Supreme Court of Canada endorsed this description, at paragraph 10, noting that:

This approach accords no deference to the reviewing judge’s application of the standard of review. Rather, the appellate court performs a *de novo* review of the administrative decision.

[20] Thus, the issue for this Court’s consideration is whether the Applications Judge correctly applied the reasonableness standard of review to the decision of the Appeal Commissioner.

The Test for a Medical Disability Retirement

[21] Section 16(1)(b) of the *Public Service Pensions Act, 1991*, SNL 1991, c. 12 (the “Act”) establishes the test for a medical disability retirement:

16(1) An employee shall be retired under the pension plan

...

(b) where, after the employee has used up all sick leave entitlement, he or she is unable to perform efficiently the duties of his or her position or the duties of an alternative position owing to incapacity that is medically certified to the satisfaction of the corporation as **likely to be permanent**, from a date to be determined by the corporation.

(Emphasis added.)

[22] As noted in the 2020 Decision, at paragraph 3, this statutory language is repeated in Provident’s assessment forms that were provided to the assessing physicians. While the wording is not identical, the judge in the 2020 Decision found the language to be consistent with section 16(1). The forms state:

A pre-requisite for medical retirement is that the plan member is unable to perform efficiently the duties of his/her position or the duties of an alternate position owing to a condition that is medically certified as **likely to be permanent**.

(Emphasis added.)

[23] The 2020 Decision was not appealed and no issue is taken with the judge’s conclusion at paragraph 4 of the 2020 Decision that:

The test employed for this pension entitlement therefore is that an employee is medically certified to the satisfaction of the decision-maker as having a condition which is “**likely to be permanent**”.

(Emphasis added.)

The Applications Judge’s Approach

[24] Respecting the application of the reasonableness standard, at paragraphs 13 and 57, the Applications Judge cited paragraphs 12-15 and 100 of *Vavilov*. From these portions of *Vavilov*, the Applications Judge was aware that his review must entail a sensitive and respectful but robust evaluation of the Appeal Commissioner’s decision and that the court’s intervention was required only where it is truly necessary. The Applications Judge was conscious of the fact that he should consider the outcome of the Appeal Commissioner’s decision in

light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. He was also aware that in order to set aside a decision as unreasonable there must be sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency.

[25] The Applications Judge found that the Appeal Commissioner had a duty to consider all the evidence, the statutory context for the decision under review, the views of the parties, and to reach a fair and justifiable decision based on that review. He concluded that it was “clear from reviewing his decision that the Appeal Commissioner did not do that” (para. 60) and he found that the Appeal Commissioner did not act reasonably when he rejected Mr. Boyles’ appeal (para. 90).

Did the Applications Judge err in concluding the Appeal Commissioner did not take the appropriate factors and evidence into account and that the Appeal Commissioner ought to have given greater weight to certain medical evidence?

[26] In justification for his conclusion, the Applications Judge addressed the medical records that were before the Appeal Commissioner, and summarized what each had said relative to the test to be met for medical disability retirement (paras. 62-77).

[27] As part of his analysis, the Applications Judge noted at paragraph 64 that the Appeal Commissioner declined to deal with Mr. Boyles’ claim that Dr. Walsh had not considered the correct test in reaching his conclusion. The Appeal Commissioner stated “this factor is not what is currently under appeal, it is the May 17, 2021, decision of Review Officer Lisa Blundon which (*sic*) presently being reviewed and therefore this issue does not warrant further comment given the specific grounds of appeal as raised by the Appellant” (Appeal Commissioner’s Decision, at page 10; Appellant’s Appeal Book, Tab 5, at page 48).

[28] The Applications Judge found the Appeal Commissioner’s refusal to address whether the correct test had been applied to be unreasonable. He explained that Dr. Walsh’s opinion, based upon an incorrect test, (that Mr. Boyles’ was not “permanently and totally disabled”) had permeated the file for six years and had been relied upon by both the Director of Pension Administration in the Reconsideration Decision, and by the Review Officer, notwithstanding that both had been directed to apply the different test of “condition medically certified as likely to be permanent” (2020 Decision, at

paras. 3-4, 29). Dr. Walsh did not update his reports following the 2020 Decision.

[29] In reviewing what the Appeal Commissioner had considered on the question of whether Mr. Boyles' condition was "likely to be permanent", the Applications Judge noted that Dr. Patel had conducted a paper review of the file records. These records included reports from family physician, Dr. Paul Jackman, and psychologist Susan Stone, both of which addressed the correct test and used terms such as "chronic", "lifelong" or "expected to be of indefinite duration" (Applications Judge's Decision, at paras. 22, 25, 77).

[30] For example, Dr. Jackman had diagnosed Mr. Boyles with depression in 2015, noting symptom onset in 2011. His prognosis was that Mr. Boyles would not be expected to recover sufficiently to perform his duties and was now permanently disabled. Dr. Jackman explained that Mr. Boyles had made several attempts at medications and counseling which did not resolve his symptoms and that the specialist waitlist was two years in length.

[31] As well, the Applications Judge noted that the registered psychologist (Susan Stone) had concluded her report with the following:

In short, behavioral, cognitive and affective domains are impacted, with moderate to severe anxious distress which has been present for a prolonged period. Neuro development disorder diagnoses are considered lifelong disabilities. Symptoms of ADHD fall within the severe range for this gentleman. The secondary depression with anxious distress, as a likely result of inadequate work performance and occupational problems, has been present with little remission for 3-5 years now and therefore, could also be expected to be of indefinite duration.

(Applications Judge's Decision, at para. 25)

[32] The Applications Judge noted at paragraph 71 that the evidence of Dr. Jackman and Ms. Stone had not been properly considered by the Appeal Commissioner:

Neither Dr. Jackman's views about the severity of Mr. Boyles' disability nor Ms. Stone's 'guarded prognosis' for his return to work, figures consequentially in subsequent assessments of his eligibility for a medical disability retirement, right up to the Appeal Commissioner. They receive passing references in Dr. Patel's "psychiatric paper review" in December 2020 but no more than that. Yet, Dr. Jackman and Ms. Stone both had long-term associations with Mr. Boyles and each knew intimately his family background, his personal history, his work history, and his general milieu.

[33] The Applications Judge considered the Appeal Commissioner's decision and determined that it was unreasonable because it relied heavily upon evidence in a report from Dr. Walsh that set out the wrong test for entitlement to medical disability retirement and because it did not appropriately consider other relevant evidence in the reports of Dr. Jackman and Ms. Stone:

[75] Let me now consider the "reasonableness" of the Appeal Commissioners' decision in this context. Dr. Walsh's opinion has permeated this file for six years and those "decision makers" who have dealt with it in the intervening years – the Deputy Minister of Finance in 2016 or Jason Durdle, Lisa Blundon and the Appeal Commissioner in 2021 – have relied on it to reject Mr. Boyles' claim. Dr. Walsh's opinion was also critical to the conclusions that Dr. Charles McVicker and Dr. Patel came to about Mr. Boyles.

[76] I do not question the validity of Dr. Walsh's opinion, as far as it went, but it is only part of the context that Mr. Boyles' application occupies that is relevant to his request for medical disability retirement. Dr. Jackman and Ms. Stone are also a relevant part of that context, as is the notable fact the Canada Pension Plan ("CPP") accepted his application for a disability benefit in 2018, making it retroactive to 2016.

[77] I note that Dr. Jackman supported Mr. Boyles' application for the CPP disability and stated the following for Mr. Boyles' prognosis: "After a 4.5 yr. battle with this – it will be chronic. He has already seen a psychiatrist. Not capable of gainful employment. Sad case/had functioned at a high level finance. Now financially destitute. Please approve" (Record of Authority, Tab 18).

[78] The Appeal Commissioner knew this context just as Mr. Durdle and Ms. Stone did and it behove him, as it did them, to take those factors into account. It does not appear by the record that he did. The hallmarks of a reasonable decision are, as I noted earlier: its justifiability, its intelligibility, and its transparency. Deciding to reject Mr. Boyles' application, supported only by the thin line of authority that emanated from Dr. Walsh in 2016, does not meet those criteria.

[79] The Appeal Commissioner failed to consider as fulsomely as needed the lingering concerns that pervade this file: What did Dr. Jackman and Ms. Stone know about Mr. Boyles' disability and why were they so convinced he was unable to work? Why did their reports not receive greater consideration than it appears they did? Why did the other specialists who were engaged over the last six years, including Dr. Patel, not meet in person with Mr. Boyles and assess him before them, rather than just do paper reviews of his file?

[34] For these reasons the Applications Judge concluded that the Appeal Commissioner's decision was unreasonable and should be set aside:

[80] Overall, I find that the Appeal Commissioner did not act reasonably when he rejected Mr. Boyles' appeal of Provident¹⁰'s refusal to accept his application for medical disability retirement in 2016.

[35] No error is established in the Applications Judge's conclusion that the Appeal Commissioner did not take appropriate factors and evidence into account. Provident's assertion of error in the weight assigned to the evidence is addressed below.

Did the Applications Judge err by re-weighing the evidence?

[36] Provident asserts that in proceeding as he did, the Applications Judge improperly re-weighed the evidence. I disagree.

[37] As stated in *Vavilov*:

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

[38] The Appeal Commissioner had refused to address the fact that Dr. Patel was relying upon reports from Dr. Walsh which applied a test of "total and permanent disability" instead of the correct test of "condition that is medically certified as likely to be permanent" (2020 Decision, at paras. 29, 33).

[39] Like all other decision makers before him, the Appeal Commissioner continued to rely upon Dr. Walsh's reports notwithstanding the established error in the test he applied. Further, the Appeal Commissioner ignored the conclusions reached by other medical providers who accurately addressed the correct test of whether Mr. Boyles' condition was "likely to be permanent". In doing so, the Appeal Commissioner did not explain why evidence favourable to Mr. Boyles' entitlement was rejected nor did the Appeal Commissioner resolve the obvious conflicts in the medical reports.

[40] As a result of his failure to account for the evidence before him (*Vavilov*, at para. 126), the Appeal Commissioner's decision "fails to fall within the range of possible, acceptable outcomes which are defensible with respect to the facts and law" (*Zarooben v. The Worker's Compensation Board*, 2022 ABCA 50, at paras. 17-18, 59, 65).

[41] The Applications Judge did not err in finding that the Appeal Commissioner failed to properly consider relevant evidence (the reports of Dr. Jackman and Ms. Stone). This conclusion does not amount to a re-weighting of the evidence.

Did the Applications Judge err in finding that the lack of an in-person assessment by Dr. Patel was a relevant concern before the Appeal Commissioner?

[42] Provident also asserts that the Applications Judge erred in finding that Dr. Patel's decision not to conduct an in-person assessment was a relevant concern.

[43] It is correct that the Applications Judge had noted that in the five years prior to the Appeal Commissioner's decision, no other medical personnel met with Mr. Boyles (para. 74) and that the only new report generated before the Reconsideration hearing was provided by Dr. Patel at Provident's request. However, in noting that this report resulted from a paper review only (para. 31), the Applications Judge was merely reviewing the factual context, which was entirely appropriate. In concluding that the Appeal Commissioner did not act reasonably, the Applications Judge placed no reliance upon the lack of an in-person assessment by Dr. Patel (paras. 75-80). Instead, he found that Dr. Walsh's report (based upon an incorrect test) was the critical opinion relied upon by Drs. McVicker and Patel, and ultimately by Provident, to deny Mr. Boyles' claim (para. 75).

Exhaustion of Available Treatment Options as a Prerequisite to Entitlement

[44] As the Applications Judge noted at paragraph 40, Mr. Boyles' second ground of appeal had been Provident's failure to inform him that his application depended on completion of the "multiple available evidence-based treatments [*sic*] options".

[45] The Appeal Commissioner stated:

In reviewing both the decision of Lisa Blundon dated May 17, 2021, and Jason Durdle dated March 25, 2021, nowhere do I find language that states that approval for disability pension benefits was 'dependent' upon the completion of multiple available evidence-based treatment options. Any mention of the same is done so by way of reference as to what additional avenues were available to the Appellant in supporting his application and is not stated by way of a condition precedent required for approval of the Applicant's claim.

(Appeal Commissioner's Decision, at page 11; Appellant's Appeal Book, Tab 5, at page 49)

[46] The Appeal Commissioner's conclusion is directly contradicted by the decisions of the Director of Pension Administration (Jason Durdle), and the Review Officer (Lisa Blundon).

[47] In denying Mr. Boyles' applications, the Director of Pension Administration, Jason Durdle stated:

According to Dr. Patel's report, you are not medically certified as unable to perform efficiently the duties of your position or the duties of an alternative position. As of your most recent assessment, there were multiple available evidence-based treatment options. As such, it could not have been considered that you reached maximum psychiatric recovery, and therefore, you did not have a permanent incapacity.

(Appellant's Appeal Book, Tab 5, at pages 69-70)

(Original emphasis deleted. Underlining added.)

[48] The Review Officer, Lisa Blundon, similarly determined that:

...[T]o be satisfied Mr. Boyles' incapacity is likely to be permanent, a medical determination must be made as to whether all options for treatment have been exhausted. If it is determined ... there are treatment options that have not been

exhausted, there is a possibility of improvement and return to work therefore, until all treatments have been tried, an applicant cannot be deemed permanently disabled.”

(Appellant’s Appeal Book, Tab 5, page 77)

[49] In concluding as they did, the Director of Pension Administration and the Review Officer relied upon medical reports from Drs. Walsh, McVicker and Patel, all of which also made exhaustion of available treatment options a condition precedent to Mr. Boyles’ entitlement.

[50] I conclude that, contrary to the Appeal Commissioner’s conclusion, the Director of Pension Administration and the Review Officer had both found exhaustion of treatment options to be a pre-requisite to Mr. Boyles satisfying the test of “condition medically certified as likely to be permanent”.

[51] The Appeal Commissioner’s conclusion at page 11 (that approval was not dependent upon exhaustion of treatments options) therefore reflects a fundamental misapprehension of the evidence (*Vavilov*, at para. 126) and cannot meet the standard of reasonableness.

[52] Further, neither the statutory definition in section 16(1)(b) of the Act nor the assessment forms Provident provided to assessing physicians, made reference to such a pre-requisite. Similar to the finding in the 2020 Decision, “the reasonableness of outcomes cannot be assessed in circumstances where the wrong test is used to evaluate them” (para. 33).

Conclusion on Issue 2

[53] I conclude that, consistent with *Vavilov*, at paragraphs 12 and 15, the Applications Judge performed a “sensitive and respectful but robust” evaluation of the Appeal Commissioner’s decision. The Applications Judge considered “the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole [was] transparent, intelligible and justified”. The Applications Judge focused on the decision the Appeal Commissioner “actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place”. As *Vavilov* states at paragraph 86:

Attention to the decision maker’s reasons is part of how courts demonstrate respect for the decision making process.

[54] The Appeal Commissioner’s decision had sufficient serious shortcomings such that it cannot be said to exhibit the required degree of justification, intelligibility and transparency (*Vavilov*, at para. 100) to meet the reasonableness standard of review.

[55] No error is established in either the Applications Judge’s application of the legal principles to the facts of this case or in his conclusion that the Appeal Commissioner’s decision was unreasonable.

Issue 3: Did the Applications Judge Err in his Choice of Remedy?

[56] Provident challenges the Applications Judge’s decision to order *certiorari* to quash the Appeal Commissioner’s decision and his finding that Mr. Boyles was entitled to a medical disability retirement effective August 11, 2015 and payable until he retired on May 14, 2020.

[57] In support of his choice of remedy, the Applications Judge cited *Vavilov*. Therein, the Supreme Court of Canada exercised its discretion not to remit the matter back to the Registrar for redetermination because Mr. Vavilov “explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so” (para. 195).

[58] *Vavilov* does not restrict the circumstances under which the Applications Judge could order *certiorari* and declare Mr. Boyles’ entitlement to the relief requested, instead of remitting the matter back.

[59] *Vavilov* recognized that there would be exceptions where “remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D’Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 18-19” (at para. 142). At paragraph 142 the Court outlined elements that may influence the exercise of a Court’s discretion in this respect:

... An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. ... Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court’s discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

[60] Relying on *Vavilov*, in *Blue v. Canada (Attorney General)*, 2021 FCA 211, the Federal Court of Appeal declined to remit the matter of entitlement to a Canada Pension Plan disability pension on similar considerations. It stated:

[49] Ms. Blue’s appeal has now been through both the General Division and Appeal Division processes on two separate occasions. Sending the matter back to the Appeal Division for a third redetermination would give rise to what the Supreme Court described as an “endless merry-go-round of judicial reviews and subsequent reconsiderations”: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 142.

[50] It is true that courts should generally respect Parliament’s intention to entrust matters to administrative decision-makers: *Vavilov*, above at para. 142. That said, in this case, the General Division has already carefully examined the evidence adduced by Ms. Blue. It then applied the appropriate legal test in determining that it was more likely than not that she lacked the capacity to formulate or express the intent to apply for a disability pension in the period between April of 2004 and April of 2016.

[51] Thus, the first-instance administrative decision-maker has already had a genuine opportunity to weigh in on the issue in question. Considering this, as well as other factors identified by the Supreme Court at paragraph 142 of *Vavilov* such as concerns about delay, fairness to the parties, costs to the parties and the efficient use of public resources, I would exercise my discretion to decline to remit the matter to the Appeal Division for redetermination, leaving the decision of the General Division in place.

[61] To similar effect, see *Sibbald v. Canada (Attorney General)*, 2022 FCA 157, where the Court considered fairness, a long delay, that the matter was restricted to a question of fact, and that the decision maker had the opportunity to weigh the evidence in concluding as follows:

[61] In my view, sending this matter back to the Appeal Division for a re-determination would continue to delay the payment of benefits intended for the child, who now is well over 18 years of age. It is true that courts should generally respect Parliament’s intention to entrust matters to administrative decision-makers: *Vavilov* at para. 142. However, the matter before us was restricted to a question of fact under paragraph 58(1)(c) of the DESD, and the General Division had the opportunity to hear the parties and weigh the evidence. Considering the delay and in fairness to the child in question, I would exercise my discretion to decline to remit the matter to the Appeal Division for redetermination, leaving the decision of the General Division in place: *Blue v. Canada (Attorney General)* 2021 FCA 211, 337 A.C.W.S. (3d) 534 at paras. 49–51.

[62] In considering the appropriate remedy in this case, the Applications Judge noted that Mr. Boyles’ health, especially his mental health, in 2015 and 2016

were critically important to the appeal process, that Mr. Boyles’ medical records for that time period were fixed and that it was “opportune to have looked more carefully at his circumstances then and it was not done” (para. 87). The Applications Judge also noted that the matter had “languished too long already, and that it should be dealt with in as timely a manner as possible” (para. 84).

[63] These were appropriate considerations.

[64] Six years and four months had passed between Mr. Boyles’ initial application and the Applications Judge’s decision. No fresh evidence would be presented if the matter were remitted back because the case turned on a question of fact, namely, the status of Mr. Boyles’ medical condition in 2015 and 2016. Three different decision makers had already weighed in on this question since the matter was remitted back to Provident in 2020. The case had been before this province’s Supreme Court twice between 2020 and 2022. Efficient use of public and judicial resources as well as costs and fairness to the parties spoke in favour of the Applications Judge’s decision not to remit the matter back to Provident a second time.

[65] I would therefore not interfere with the Applications Judge’s exercise of discretion to grant *certiorari* instead of remitting the matter back for further reconsideration.

DISPOSITION

[66] For these reasons I would dismiss the appeal.

COSTS

[67] The Respondent has been successful and is entitled to his costs to be taxed on Column 3.

G. D. Butler J.A.

I concur: _____
F. P. O’Brien J.A.

I concur: _____
F. J. Knickle J.A.