Federal Court  Cour fédérale

Date: 20191205

Docket: T-94-19

Citation: 2019 FC 1561

Ottawa, Ontario, December 5, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ARNOLD STENGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review challenges a decision made by a delegate of the Minister of Employment and Social Development (Delegate) acting under subsection 66(4) of the *Canada Pension Plan*, RSC 1985 c C-8 (CPP). The Applicant, Arnold Stenger, argues that the decision to deny his claim to disability benefits between the years 2004 and 2012 resulted from an administrative error that was not corrected by the Delegate, and was thus unreasonable.

I. Background

[2] Mr. Stenger has a lengthy administrative history in the pursuit of CPP disability benefits. He applied first for benefits in 2004. His claim was denied by a medical adjudicator on February 2, 2005, for the following reasons:

> We reviewed all the information and documents in your file including all the reports you sent and all requested reports. These are the reports we have on file:
>
> - your application and your questionnaire
> - your family doctor's report dated April 15, 2004 with enclosures including copies of a report from a rheumatologist dated October 20, 1997, copies of reports from a second rheumatologist dated July 19, 2000, November 5, 2001 & April 15, 2002, a copy of a report from a respirologist dated December 19, 2001, clinic chart notes dated January 22, 2001 & February 7, 2001 and copies of reports from family doctors dated February 16, 2001 & December 2, 2002
> - your self-employment questionnaire dated January 20, 2005 and your T4A tax forms from Royal Lepage Noralta real estate for the years 2001, 2002 & 2003
>
> We recognize that you have identified limitations resulting from health problems related to ankylosing spondylitis. However, we concluded that your condition did not stop you from working in December 2001. We considered the following factors in making the decision.
>
> - According to your respirologist, in December 2001, you appeared well and still had reasonable chest expansion.
> - According to your self-employment questionnaire, you reduced your hours of work drastically in 2003, which is well after the end of your qualifying period a CPP disability benefit.
> - According to your T4A tax forms, you had self-employment earnings for 2001, 2002 & 2003 and your 2002 earnings were substantially gainful.

> We concluded that you were able to do some type of work in & since December 2001.

[3] Mr. Stenger could have sought a reconsideration of the above decision followed by the option of appeal. He did neither.

[4] In 2012, Mr. Stenger applied again for disability benefits. Despite being initially denied, he ultimately reached an agreement with the Minister on January 26, 2017, deeming him disabled and entitled to benefits retroactive to January, 2012.

[5] In 2015, based on the denial of benefits in 2005 and again in 2012, Mr. Stenger asked the Minister for relief under subsection 66(4) of the CPP. That provision affords a discretion to the Minister to reverse a decision denying benefits in limited circumstances. Mr. Stenger's request became moot with respect to the 2012 decision when the Minister agreed to accept his claim to disability benefits onward from 2012. Mr. Stenger's claim to subsection 66(4) relief in connection with the 2005 denial of benefits remained active, and was ultimately rejected by the Delegate in a decision rendered on December 11, 2018. It is from that decision that this application arises.

II. Standard of Review

[6] The parties agree that the Delegate's decision is one of mixed fact and law to be assessed against the deferential standard of reasonableness. This accords with the decision of the Federal Court of Appeal in *Canada (Attorney General) v Torrance*, 2013 FCA 227 at paragraph 34, 366 DLR (4th) 556.

III. Was The Delegate's Decision Unreasonable?

[7] Subsection 66(4) of the CPP grants some authority to the Minister to rectify a denial of benefits if the decision resulted from the provision of erroneous advice or from an administrative error. It states:

66(4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied	66(4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(a) a benefit, or portion thereof, to which that person would have been entitled under this Act,	a) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(b) a division of unadjusted pensionable earnings under section 55 or 55.1, or	b) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(c) an assignment of a retirement pension under section 65.1, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	c) la cession d'une pension de retraite conformément à l'article 65.1, le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

[8] Mr. Stenger argues that the Delegate failed to recognize two "administrative" errors that were initially made by the medical adjudicator when his 2005 claim was rejected. He says that

those errors were effectively "baked in" by the Delegate, and render the 2018 subsection 66(4) decision unreasonable. The first error is said to arise from the medical adjudicator's reliance on Mr. Stenger's gross self-employment income as a part-time real estate agent, instead of his more pertinent net income. The second asserted error concerns the Delegate's failure to identify and correct the medical adjudicator's supposed selective treatment of the relevant medical evidence. Mr. Stenger argues that the medical adjudicator failed to give appropriate weight to his diagnosed conditions of fibromyalgia and chronic fatigue and that this constitutes an administrative error.

[9] The Delegate's treatment of these issues is contained in the following passages from the decision letter:

> With respect to the claim that the primary reason for the denial of benefits was the finding of substantially gainful employment after December 2001, our review found that your applications were not denied solely based on your earnings, but rather on the totality of the available medical and non-medical evidence. The Adjudication Framework policy document: "Severe Criterion for 'Incapable Regularly of Pursuing any Substantially Gainful Occupation'" advises medical adjudicators to look at the medical information in conjunction with self-employment information on file when determining whether a person meets the "severe" and "prolonged" criteria. The policy document explains that when assessing a self-employed person for eligibility, it is not so much the profitability of the business that is important, but how the profitability, considered together with productivity and performance, reflects the person's regular capacity for work. Earnings information only provides some indication of a person's capacity for work and is only pertinent when it is reviewed in relation to the medical condition.
>
> With respect to the specific claim that the medical adjudicators used gross income rather than net income, when determining substantially gainful employment, our review showed that the medical adjudicator took steps to analyze your involvement in your business as a self-employed realtor to determine if you were incapable regularly of pursuing any substantially gainful

> occupation and not just the job you were doing in a self-employed capacity. The medical adjudicator took steps to clarify your T4A earnings from your work by requesting profit and loss statements as well as a self-employment questionnaire. When no profit and loss statements were received from you to substantiate the net earnings provided, the medical adjudicator used the gross earnings information on file to analyze the profitability component in accordance with the productivity and performance information to evaluate your work capacity for substantially gainful employment. These adjudication actions are in keeping with the guidance found in the Adjudication Framework policy: "Severe Criterion for 'Incapable Regularly of Pursuing any Substantially Gainful Occupation'".
>
> …
>
> With respect to the claim that the medical adjudication paid little to no concern with regards to your medical condition at the time of your first application, our review found that the medical adjudicator reviewed and considered all the medical reports on file, the nature of the condition, your functional limitations, the impacts of treatment, and prognostic statements, when determining your eligibility for a CPP disability benefit. This is in keeping with the guidance found in the Adjudication Framework policy: "Severe Criterion for the Prime Indicator (Medical Condition)".

[10] Mr. Stenger argues that these reasons are not sufficiently transparent to allow him to understand the basis of the Delegate's decision. I do not agree with that concern, but, in any event, the Delegate's decision is further supported by a lengthy administrative error submission prepared in response to Mr. Stenger's claim. That submission dealt with his concerns in the following more detailed way:

> As Mr. Stenger had reported self-employment income of $5,733.50 for 2001, $16,582.00 for 2002, and $6,857.40 for 2003, after his LPDOO, the Medical Adjudicator took steps to analyze the client's involvement in the business to determine if the client was incapable regularly of pursuing any substantially gainful occupation, and not just the job they were doing in a self-employed capacity.

The Adjudication Framework policy document: "Severe Criterion for "Incapable Regularly of Pursuing any Substantially Gainful Occupation" advises Medical Adjudicators to look at the medical information in conjunction with the self-employment information on file when determining if the client meets the severe and prolonged criteria.

The policy document explains that when assessing a self-employed client for eligibility, it is not so much the profitability of the business that is important, but how the profitability, considered together with productivity and performance, reflects a client's regular capacity for work. Earnings information only provides some indication of a person's capacity for work at SGO and is only pertinent when it is reviewed in relation to the medical condition.

To assess the interrelationship between Mr. Stenger's performance, productivity and profitability to determine his work capacity, the adjudicator requested a SE questionnaire and Profit and Loss statements from Mr. Stenger. Although Mr. Stenger provided the adjudicator with a completed SE questionnaire he did not provide any Profit and Loss statements, but instead provided the adjudicator with copies of his T4As, on which there were handwritten figures indicating his net income for the years 2001 to 2003. However, without supporting information to substantiate how these net figures were determined, the adjudicator used the gross earnings information on the T4A to analyze the profitability component in accordance with the productivity and performance information on file to determine his work capacity. As per the onus policy, the onus was on Mr. Stenger to provide the information to support his application, such as the Profit and Loss statements.

The February 2005 initial adjudication summary shows that the Medical Adjudicator reviewed and considered all medical and non-medical evidence in support of Mr. Stenger's 2004 application prior to determining his eligibility. The adjudicator referenced the medical reports and non-medical information reviewed during the adjudication. This included all Medical Reports, Prognostic Statements from the Family Practitioner, and Personal Characteristics, (Age, Education, Work experience). The medical evidence ranged from October 1997 to April 2004, covering the period before and after MQP. The adjudicator noted that Mr. Stenger's self-employment income was earned after the end of Mr. Stenger's December 2001 MQP and that no CPP contributions had been made during these years of earnings. The adjudicator also noted that Mr. Stenger started his self-employment business activity in 2001, reduced his hours of work drastically in early

2003 and effectively stopped working in the spring and summer of 2004. All these time frames for self-employment work activity occurred after the LAP LPDOO of December 2001.

The evidence in the Decision Rationale supports that the Adjudication Framework policy guideline: "Severe Criterion for "Incapable Regularly of Pursuing any Substantially Gainful Occupation" was followed when the adjudicator analyzed Mr. Stenger's Medical Condition and Work Capacity evidence, (including his SE earnings) and determined that Mr. Stenger did not meet CPP's definition of severe and prolonged at his December 31, 2001, LPDOO.

With respect to Dr. Wodak's statement that the medical adjudicator noted the absence of CPP contributions in 2001 to 2003, but made no attempt to reconcile the apparent contradiction, the statement that there were no CPP contributions in 2001 to 2003, would confirm that the adjudicator reviewed the self-employment earnings and did not identify any new contributions. Had the adjudicator identified new contributions, the adjudicator would have evaluated these earnings to see if this would have advanced Mr. Stenger's MQP to a later date. In this case, the adjudicator noted in her adjudication summary that there were no contributions made on the self-employed earnings. The absence of contributions on the self-employment earnings would not have been a factor in the evaluation of Mr. Stenger's work capacity.

With respect to Dr. Wodak's statement in his letter of May 21, 2015, that the medical adjudicator "did not comment on the T5007 information slips," social assistance benefits are not considered earned income and would therefore not be considered by the adjudicator when evaluating earnings.

In conclusion, the decision of February 2, 2005, to deny CPP disability benefits was not based solely on the earnings component but rather on the totality of the available evidence as per the Adjudication Framework and Adjudication Framework policies and procedures. The Medical Adjudicator conducted a thorough review of the medical and non-medical evidence on file and concluded that Mr. Stenger retained capacity for suitable part-time employment after December 2001. As such Mr. Stenger did not meet the severe and prolonged criteria at his December 2001 LPDOO and his 2004 disability application was denied.

[11] The Delegate's treatment of Mr. Stenger's employment income evidence does not disclose a reviewable error. Quite to the contrary, the Delegate's analysis reflects an appropriate holistic approach that gave precedence to Mr. Stenger's medical status over his employment history. The Delegate also noted the probative weakness of Mr. Stenger's evidence of net income and his failure to produce requested profit and loss statements. As the Delegate observed, Mr. Stenger bore the onus of proof but failed to present a robust case for diminished earnings during the relevant period.

[12] Mr. Stenger's additional concern that the Delegate overlooked the medical adjudicator's "selective" reading of the medical evidence from 2005 is not supported by the record. Detailed adjudication summaries were prepared by the medical adjudicator at that time. Those summaries describe in considerable detail Mr. Stenger's medical complaints, observed conditions and treatment. On balance, while they recognize Mr. Stenger's "significant health challenges", they do not establish that he was incapable of holding down gainful part-time employment. Indeed, as of January 28, 2005, Mr. Stenger reported that he was in the Yukon looking for employment opportunities.

[13] I am satisfied that the Delegate's assessment of the medical adjudicator's decision, including the issues raised by Mr. Stenger, was in all respects intelligible, justified and transparent; in other words, it was reasonable.

[14] Notwithstanding my determination of the reasonableness of the Delegate's decision, I have another significant concern about Mr. Stenger's attempt to exploit subsection 66(4) as a

means to overcome the 2005 denial of benefits decision. This provision was never intended to be an alternative to the generous rights of reconsideration and appeal that are available to applicants who are denied CPP benefits. What Mr. Stenger is attempting to do is to mount a collateral attack on the 2005 denial of benefits decision that he could and should have challenged at that time. Using subsection 66(4) in this way is an inappropriate attempt to launch a merits-based appeal that is otherwise time-barred.

[15] The limited scope of relief available under subsection 66(4) of the CPP was described by the Federal Court in *Jones v Canada (Attorney General)*, 2010 FC 740, 373 FTR 142. In that case, the applicant for disability benefits unsuccessfully exercised a number of appeal options under the CPP, after which he sought relief under subsection 66(4). At paragraphs 37-39, the Court stated clearly that this provision had no application to decisions made in the course of deciding on the merits whether a disability pension should be awarded:

> **37** In effect, In *King* 2009, at paragraphs 28 to 32, the Federal Court of Appeal explains that this concept relates to incorrect information given by an official to a member of the public as opposed to advice given by the Department to the Minister or her officials in the course of deciding whether a pension should be awarded. It does not cover erroneous "decisions" either.
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> **38** Moreover, in said decision, Justice J. Edgar Sexton, writing for the Court, also made it clear that the fact that a decision of the Minister or her delegate is later overruled (even in the absence of new evidence) does not constitute proof of erroneous advice having been given for there would be no room left for the Minister to decide the question. This is particularly significant when one considers that Mr. Jones argues that the Court should assume that by settling the matter in 2008, the Department implicitly acknowledged that Mr. Jones met the disability criteria in December 1989, based on information on file, including Dr. O'Brien's 1987 letter and Dr. Clunas' 1986-1989 progress notes.
>
> **39** Based on the above principles and using a similar reasoning where it can apply to construe "administrative error", the

> "decisions" made in 1987 and 1994 that Mr. Jones was still capable of gainful employment and that his condition in 1987 or 1994 was not severe and prolonged within the meaning of the CPP cannot constitute erroneous advices or administrative errors. These decisions could only be challenged through the generous appeal process in the CPP[16] and ultimately through judicial review. The same conclusion applies to all the alleged errors which relate directly to such decisions such as that the reasons given for the refusal were confusing and confused (see para. 104(c), (d), (e), 106(c) and (d) in Annex B). [Footnotes omitted.]

[16] These statements apply with equal force to Mr. Stenger's claim to relief. He is not entitled to challenge a decision made more than a decade ago on the basis of asserted evidentiary errors by the medical adjudicator that could have been appealed.

[17] It is clear to me that the Delegate could have rejected Mr. Stenger's claim on the sole basis that the issues he raised were not amenable to resolution under subsection 66(4). In fact, there is a reference to this issue in the administrative error submission noting that it had been raised in a March 3, 2016 letter to Mr. Stenger's representative (see Certified Tribunal Record (CTR), volume 1 at p 14). For whatever reason, the Delegate elected to decide the matter on its evidentiary merits, but there is no doubt that Mr. Stenger had no claim to relief under subsection 66(4) on the strength of the issues he raised.

[18] For the foregoing reasons, this application is dismissed. The Minister is appropriately not seeking costs, and none are awarded.

JUDGMENT in T-94-19

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

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