Date: 20060626

Docket: T-889-05

Citation: 2006 FC 812

Ottawa, Ontario, June 26, 2006

PRESENT: THE HONOURABLE MR. JUSTICE BLAIS

BETWEEN:

NISSIM EZERZER

Applicant

and

MINISTER OF HUMAN RESOURCES DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act* R.S. 1985, c. F-7 of a decision of the Review Tribunal, dated March 25, 2002, which determined that there were no "new facts" pursuant to subsection 84(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Plan) that would justify the re-opening of the initial Revue Tribunal decision which found that the applicant was not disabled within the meaning of section 42 of the Plan.

RELEVANT FACTS

[2] The applicant was a taxi driver who was involved in two motor vehicle accidents. The first occurred on September 10, 1997 and the second on June 3, 1998. As a result of the accidents, the applicant alleges that he suffers from chronic pain and severe depression complicated by diabetes. His application for disability benefits was received by the respondent on or about April 7, 2000. The applicant was involved in a third motor vehicle accident in May 2000.

[3] The Review Tribunal found that the applicant was not disabled within the meaning of section 42 of the Plan, when he last met the contributory requirements in 1999 (first Review Tribunal decision). The applicant did not appeal this decision. Instead, he sought to re-open it pursuant to the "new facts" provision under subsection 84(2) of the Plan. The applicant presented three documents which he argued constituted "new facts". Specifically, the applicant presented: 1) report of Dr. Elisabeth Zoffmann, dated April 26, 2001; 2) medical records from the Thorson Health Centre, dated between April and June 2001; and 3) report of Dr. Morris Gordon, dated November 6, 2001.

DECISION OF THE REVIEW TRIBUNAL

[4] On March 25, 2002, the Review Tribunal denied the applicant's application to re-open the Review Tribunal decision dated October 22, 2001, pursuant to subsection 84(2) of the Plan (second Review Tribunal decision).

[5] The Review Tribunal found that the three documents submitted by the applicant did not meet the test for new facts. The aforementioned test consists of demonstrating that the new evidence is both material and discoverable. The Review Tribunal found the new evidence not to be material because it was speculative.

ISSUE

[6] Did the Revue Tribunal err in denying the applicant's application to re-open the Review Tribunal decision dated October 22, 2001, pursuant to subsection 84(2) of the Plan?

ANALYSIS

[7] Portions of the applicant's affidavit contain new evidence which was not presented to the Revue Tribunal. The said evidence is Exhibit D, found in the applicant's affidavit sworn on June 15, 2005. Exhibit D is a photocopy of a description and discussion of Amitriptyline as contained in the 2003 Compendium of Pharmaceuticals and Specialties.

[8] In *Wood v. Canada (Attorney General)* [2001] F.C.J. No. 52, Justice W. Andrew MacKay, at paragraph 34, reiterated that evidence is not admissible in this Court if it has not been presented previously to the administrative decision-maker:

> On judicial review, a Court can consider only evidence that was before the administrative decision-maker whose decision is being reviewed and not new evidence (see Brychka v. Canada (Attorney General), supra; Franz v. Canada (Minister of Employment and Immigration) (1994), 80 F.T.R. 79; Via Rail Canada Inc. v. Canada (Canadian Human Rights Commission) (re Mills) (August 19, 1997), Court file T-1399-96, [1997] F.C.J. No. 1089; Lemiecha v. Canada

(Minister of Employment & Immigration) (1993), 72 F.T.R. 49, 24 IMM L.R. (2d) 95; Ismaili v. Canada (Minister of Citizenship and Immigration), (1995) 100 F.T.R. 139, 29 Imm L.R. (2d) 1).

[9] In light of the above, Exhibit D found in the applicant's record will not be considered by this Court, as was agreed by the applicant.

[10] The applicant submits that there has been a breach of natural justice because he was denied an adjournment of the hearing before the Review Tribunal on September 17, 2001. I find this argument to be irrelevant. The applicant could have chosen to appeal the first Review Tribunal decision but instead opted to apply for a re-opening pursuant to subsection 84(2) of the Plan. The present matter deals with the second Review Tribunal's decision of March 25, 2002 which denied the re-opening of the first Review Tribunal decision because it was determined that the documents submitted by the applicant did not constitute new facts pursuant to subsection 84(2) of the Plan. As such, the question of whether or not natural justice was breached at the first Review Tribunal hearing because an adjournment was not granted is not an issue in the present matter.

Did the Revue Tribunal err in denying the applicant's application to re-open the Review Tribunal decision dated October 22, 2001, pursuant to subsection 84(2) of the Plan?

[11] Subsection 84(2) of the Plan is an exception to subsection 84(1) of the Plan which states that a decision of the Minister, the Review Tribunal or the Pension Appeals Board is final and binding. In the present matter, the Review Tribunal determined that the alleged new documents submitted by

the applicant did not qualify as new facts that would justify a reconsideration of the prior Review Tribunal decision.

[12] Subsection 84(2) of the Plan is as follows:

84. (1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to	84. (1) Un tribunal de révision et la Commission d'appel des pensions ont autorité pour décider des questions de droit ou de fait concernant :
(*a*) whether any benefit is payable to a person,	*a*) la question de savoir si une prestation est payable à une personne;
(*b*) the amount of any such benefit,	*b*) le montant de cette prestation;
(*c*) whether any person is eligible for a division of unadjusted pensionable earnings,	*c*) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension;
(*d*) the amount of that division,	*d*) le montant de ce partage;
(*e*) whether any person is eligible for an assignment of a contributor's retirement pension, or	*e*) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant;
(*f*) the amount of that assignment,	*f*) le montant de cette cession.
and the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case	La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf

may be, is final and binding for all purposes of this Act.	contrôle judiciaire dont elle peut faire l'objet aux termes de la *Loi sur les Cours fédérales*, est définitive et obligatoire pour l'application de la présente loi.
(2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.	(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

[13] The second Review Tribunal decision acknowledged that there is no definition in the Plan as to what constitutes "new facts". However, the Court of Appeal has established guidelines as to what qualifies as "new facts". In *Canada (Minister of Human Resources Development) v. Macdonald*, [2002] F.C.J. No. 197, at paragraph 2, the Court of Appeal outlined a two step test for the determination of whether there are new facts. First, the proposed "new facts" must not have been discoverable, with due diligence, prior to the first hearing. Second, the proposed "new facts" must be "material".

[14] Determining whether the documents submitted by the applicant constitute "new facts" pursuant to subsection 84(2) of the Plan is reviewable on a standard of patent unreasonableness. In *Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293, the Court of Appeal stated the following at paragraph 12:

> Materiality and due diligence are questions of mixed fact and law with a heavy emphasis on fact. Discoverability is obviously a question of fact. The standard of review for types of questions such as this is patent unreasonableness and this is accepted by the applicant: see Kent (supra) at paragraph 34; Spears v. Canada, [2004] F.C.J. No. 854, 2004 FCA 193 at paragraph 10.

[15] In *Kent v. Canada (Attorney General)* [2004] F.C.J. No. 2083, the Court of Appeal elaborated on the two step test determination process by stating the following at paragraphs 34 and 35:

> Whether a fact was discoverable with due diligence is a question of fact. The question of materiality is a question of mixed fact and law, in the sense that it requires a provisional assessment of the importance of the proposed new facts to the merits of the claim for the disability pension. The decision of the Pension Appeals Board in Suvajac v. Minister of Human Resources Development (Appeal CP 20069, June 17, 2002) adopts the test from Dormuth v. Untereiner, [1964] S.C.R. 122, that new evidence must be practically conclusive. That test is not as stringent as it may appear. New evidence has been held to be practically conclusive if it could reasonably be expected to affect the result of the prior hearing: BC Tel v. Seabird Island Indian Band (C.A.), [2003] 1 F.C. 475. Thus, for the purposes of subsection 84(2) of the Canada Pension Plan, the materiality test is met if the proposed new facts may reasonably be expected to affect the outcome.
>
> In the context of an application to reconsider a decision relating to entitlement to benefits under the Canada Pension Plan, the test for the determination of new facts should be applied in a manner that is sufficiently flexible to balance, on the one hand, the Minister's legitimate interest in the finality of decisions and the need to encourage claimants to put all their cards on the table at the earliest reasonable opportunity, and on the other hand, the legitimate interest of claimants, who are usually self-represented, in having their claims assessed fairly, on the merits. In my view, these considerations generally require a broad and generous approach to the determination of due diligence and materiality.

[16] In the present matter the Review Tribunal concluded the following:

> After a careful review of the new evidence, the Tribunal notes that the comments in the independent psychiatric examination regarding Mr. Ezerzer's psychiatric condition in December 1999 are speculative as the psychiatrist was not seeing the patient at that time, and, therefore, was based on the patient's own view of his condition in December 1999. We also note that in the file none of the physicians mention depression or other psychological problems in December 1999.
>
> If we look at the Applicant's questionnaire he does not indicate any problem with depression at the time of his application.
>
> In effect, the Tribunal believes that the decision of any Tribunal deciding this case would not change, given this new evidence.
>
> (Decision of the Review Tribunal dated March 25, 2002, at page 291 of the applicant's record)

[17] The Review Tribunal points out that Dr. Zoffmann was not seeing the patient back in 1999, when he was still eligible for a disability pension. As such, the Review Tribunal concludes that her report is speculative because it's based on the patient's own view of his condition. Adding to the Review Tribunal's opinion that Dr. Zoffmann's report is speculative is the fact that at the time of the applicant's application for disability benefits, he did not indicate any problem with depression. Because the findings of the report are speculative, the Review Tribunal is of the opinion that the aforementioned document does not meet the materiality requirement of the test for "new facts". That is, there is not a reasonable possibility that if the findings of the report had been before the Review Tribunal, the decision of the said tribunal would have been different.

[18] I disagree with the Review Tribunal's finding that Dr. Zoffmann's report does not qualify as new facts. Upon review of Dr. Zoffmann's report, I conclude that her findings regarding the applicant's depression in 1999 is not based solely on speculation. She states the following in her report:

> Mr. Ezerzer states that he has had previous episodes of depression. He states that he was treated by Dr. Jaime Davis in the late 1980's or early 1990's. He also states that he saw Dr. Davis again in 1994.
>
> I would state at this point that Dr. Davis' report from that time recognized that Mr. Ezerzer had problems with chronic dysthymia and superimposed depression.
>
> I am of the opinion that, notwithstanding the pre-existing dysthymic diathesis, this man's current presentation with depressive symptoms is inextricably linked with his experience of the motor vehicle accidents. While it is recognized that the accidents in and of themselves would not be directly causative of depression, the interplay between his experience of somatic symptoms, his underlying predisposition to dysthymia and depression and the resulting perception of malintent from the environment are stressors which trigger, entrench and reinforce the depressive episode.
>
> (Dr. Elizabeth Zoffman's report dated April 26, 2001, at pages 13 and 25 of the applicant's record) [my emphasis]

[19] In her analysis, Dr. Zoffmann used documented evidence from Dr. Davis confirming that the applicant had previously suffered from depression. Dr. Zoffmann, in her findings, notes the applicant had a history of depression and that his condition was exacerbated by the motor vehicle accidents. As such her findings are not solely based on the applicant's interpretation of his condition as it was in 1999.

[20] In *Kent*, above, the Court of Appeal recognized that in certain situations, a disability can exist without being properly diagnosed. The Court also mentions at paragraphs 32 and 36,that when this occurs, a less rigid assessment of whether someone qualifies for a disability pension should be applied:

> At the risk of oversimplifying, it is apparent that in this case, the most important "new fact" relating to Ms. Kent's application for a disability pension is a medical opinion rendered on September 19, 2000 that, for the first time, makes a formal diagnosis of depression (a mental illness). That medical opinion also indicates that depression may have been present in 1994, but had not been diagnosed at that time for various reasons (including the fact that the efforts of the medical experts were focused on Ms. Kent's other conditions). Indeed, the medical opinion suggests that it may be the depression that has made it difficult for Ms. Kent to recover from her other conditions.
>
> For most disabling conditions, it is reasonable to expect the claimant to present a complete picture of his or her disability at the time of the first application, or on a first appeal to the Review Tribunal or the Pension Appeals Board. However, there are some disability claims, such as those based on physical and mental conditions that are not well understood by medical practitioners that must be assessed against the background of an evolving understanding of a claimant's condition, treatment and prognosis. It is especially important in such cases to ensure that the new facts rule is not applied in an unduly rigid manner, depriving a claimant of a fair assessment of the claim on the merits.

[21] In conclusion, I find that Dr. Zoffmann’s report was not solely based on speculation. Further, I find that the report confirms that it is highly possible that the applicant’s depression, although present in December 1999, went undiagnosed. As such, I find that the failure of the Review Tribunal to consider the applicant’s new submissions as “new facts” pursuant to subsection 84(2) of the Plan patently unreasonable. If the Review Tribunal had read the documents as “new

facts" a determination might have been formed that the applicant had a disabling condition at the relevant time. Such a finding would differ from the original Review Tribunal finding that the applicant was not disabled in December 1999. The documents did meet the test for "new facts" because they were in fact material.

JUDGMENT

1. The application for judicial review is granted;
2. The matter is returned to the Review Tribunal for a re-assessment by a differently constituted panel in light of these reasons.

"Pierre Blais"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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