

**Date: 20070731**

**Docket: T-267-06**

**Citation: 2007 FC 805**

**Ottawa, Ontario, July 31, 2007**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**HARBANS KHOTA**

**Applicant**

**and**

**MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of a Review Tribunal, constituted under section 82 of the *Canadian Pension Plan*, R.S.C. 1985, c. C-8 (CPP). The decision was dated April 29, 2002 and it dismissed an appeal from the Respondent's refusal to award the Applicant a long term disability pension (the Decision). The Applicant seeks an order from the Court setting aside the Decision and remitting the matter back to a newly constituted Review Tribunal for re-determination.

## **BACKGROUND**

[2] Ms. Harbans Khota (the Applicant) was born in India in 1950 and immigrated to Canada in 1970. Between 1975 and 1995 she was employed in a variety of positions including seasonal berry picking and dishwashing. In the fall of 1995, she became unable to work due to a number of physical and mental ailments.

[3] The Applicant has thrice applied for a CPP disability pension. Her initial application was made on June 3, 1996. On that application form the Applicant stated that constant back problems prevented her from working. The Respondent (the Minister) denied this application and the Applicant did not seek a reconsideration. The Applicant applied the second time on August 25, 1997. Again she indicated that she stopped working in September 1995 due to back problems. In the questionnaire which accompanied her application, the Applicant described her main disabling conditions as problems with her “spinal disk” [sic], arthritis in her joints, low sugar level, “ritus hestimy [sic] taken out right side no ovary”. She also wrote that she was seeking medical attention for depression. Importantly, no mention was made of osteoarthritis of her cervical spine.

[4] The Minister denied the second application both initially and after reconsideration, on the ground that the Applicant had failed to establish that her disability was “severe and prolonged” within the meaning of subsection 42(2) of the CPP.

[5] On April 22, 1998, the Applicant appealed this decision to the Review Tribunal. At its hearing on August 26, 1998, the Applicant testified that her main medical condition was lower back pain. The medical evidence in the form of a report dated August 13, 1997 from her family physician, Dr. MacCharles, confirmed that her medical problems were chronic lower back pain caused by degenerative disc disease and depression. No mention was made of osteoarthritis of the cervical spine.

[6] In a decision dated November 6, 1998, the Review Tribunal upheld the Minister's decision and concluded that neither her lower back problems nor her depression prevented the Applicant "from some regular gainful work, even on a part time basis" (the First RT Decision). The Applicant applied for leave to appeal this decision but on August 27, 1999, the Pension Appeals Board refused leave.

[7] The Applicant's third application for a CPP disability benefit was made on January 6, 2000. The Minister denied the third application, both initially and after reconsideration, and the Applicant again appealed the Minister's decision to the Review Tribunal. At the hearing, the Applicant was self-represented. The Review Tribunal heard the appeal on March 7, 2002 and, on its own motion, decided to treat the appeal as an application under subsection 84(2) of the CPP to amend the First RT Decision based on new fact evidence.

[8] The new evidence took the form of two medical reports. One was a letter from Dr. George MacCharles dated March 4, 2002 (the MacCharles' Letter). It mentioned osteoarthritis

of the cervical spine for the first time and reads, in part, as follows (the passage in italics was handwritten on the original):

This patient has refractory mental illness. She has been diagnosed with depression and dysthymia. It's refractory to all forms of treatment. Because of this, I believe her pain thresholds are lower and she doesn't have energy. It is suspected she has fibromyalgia and chronic fatigue syndrome, however specialty referrals for this are pending.

She also has osteoarthritis of her cervical spine causing symptoms related to this. This is unresponsive to medical therapy. *This is a new finding based on Xrays but likely has been present for many years. There are some findings in a 1997 neck Xray.*

[9] Based on the MacCharles' Letter, the Applicant says that she presented the Review Tribunal with new evidence of fibromyalgia, chronic fatigue syndrome (CFS) and cervical osteoarthritis.

[10] The second medical report which the Applicant said included new facts was a letter from Dr. Sohal of March 5, 2002 (the Sohal Letter). It introduced Dyspepsia and Dyslipidemia as new conditions but provided no information about the timing of their development or their severity. The letter reads, in part, as follows:

This is to inform you that Ms. Khota is under my care since March 2001. She is suffering from several medical problems including diabetes mellitus, dyslipidemia, dyspepsia, menopausal symptoms [sic], anxiety and depression. She is also suffering from fatigue and musculoskeletal pain. She is taking several medications including metformin, elavil, clonazepam, zantac, lipitor, naprosyn and premarin.

At present Ms. Khota is unable to do any meaningful [sic] because of her multiple medical problems.

## **THE ISSUES**

[11] The following are the issues:

- (i) Did the Tribunal err in concluding that the MacCharles' Letter did not contain evidence of new facts about CFS and Fibromyalgia?
- (ii) Did the Tribunal err in concluding that the Sohal letter did not contain evidence of new facts about Dyspepsia and Dyslipidemia?
- (iii) Was there a breach of the requirement of procedural fairness because the Decision failed to include adequate reasons?

## THE LAW

[12] Subsection 42(2) of the CPP establishes the requirement for a severe and prolonged disability. It says:

42(2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or

42(2) Pour l'application de la présente loi :

a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :

(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,

(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et

is likely to result in death;

indéfinie ou devoir entraîner  
vraisemblablement le décès;

[13] Subsection 84(2) of the CPP deals with new fact evidence. It says:

84(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.

84(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.

[14] In *Minister of Human Resources v. Macdonald*, [2002] F.C.J. No. 197 at paragraph 2, the Federal Court of Appeal said that for the purposes of subsection 84(2) of the Act, new facts "...must not have been previously discoverable with reasonable diligence and must be material".

## **STANDARD OF REVIEW**

[15] In *Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293, at paragraph 12, the Federal Court of Appeal described the standard of review applicable to a determination about new facts under subsection 84(2) of the Act. It said:

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 ...

[16] Accordingly, issues (i) and (ii) will be reviewed on standard of patent unreasonableness. However, in my view, issue (iii) does not require a pragmatic and functional analysis because the adequacy of reasons is a question of procedural fairness and is therefore not a subject on which deference is shown.

## **DISCUSSION**

[17] No information was provided by Dr. Sohal about when the Applicant's ailments were first noticed and the diagnoses of CFS and fibromyalgia in the MacCharles Letter were only "suspected". This meant that there was no evidentiary basis in either the MacCharles Letter or the Sohal Letter for considering fibromyalgia, CFS, Dyspepsia and Dyslipidemia as new fact evidence. Accordingly, the Decision with respect to these ailments was not patently unreasonable.

[18] The Review Tribunal properly focussed its attention on the cervical osteoarthritis mentioned in the MacCharles' Letter. In that regard, the MacCharles' Letter said that, although not diagnosed in 1997, neck Xrays in that year indicated that osteoarthritis had been present. Further, it was not responding to treatment in March of 2002.

[19] Unfortunately, with regard to this evidence, the Decision simply said:

The Tribunal has some reservations as to whether the above evidence falls within the parameter of "new fact" evidence, the Tribunal is of the view that it would probably fail on the second element of the legal test, that is to say, it probably would not have had an important influence on the first Tribunal's decision.

[20] The Applicant submits that the Decision does not give reasons why the cervical osteoarthritis would probably not have been material.

[21] Given that the condition apparently existed at the material time (i.e. before December 31, 1997 when the Applicant's qualifying period expired) it is my view that it was incumbent on the Review Tribunal to address the severity and duration of the Applicant's cervical osteoarthritis in order to support its conclusion about materiality. In the absence of reasons dealing with these issues, the Decision is inadequate.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES** that the Decision is set aside only as it relates to cervical osteoarthritis.

The question of whether there is new fact evidence within the meaning of subsection 84(2) of the Act relating to cervical osteoarthritis is sent back for reconsideration *de novo* by another Review Tribunal. The parties are entitled to submit further evidence about the cervical osteoarthritis mentioned in the MacCharles Letter if they choose to do so.

“Sandra J. Simpson”

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JUDGE

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-267-06

**STYLE OF CAUSE:** Harbans Khota v. Minister of Human Resources and Skills Development

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** April 10, 2007

**REASONS FOR JUDGMENT:** SIMPSON J.

**DATED:** July 31, 2007

**APPEARANCES:**

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