

**Date: 20070808**

**Docket: T-1657-06**

**Citation: 2007 FC 820**

**Ottawa, Ontario, August 8, 2007**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**JOHN KABATOFF**

**Applicant**

**and**

**THE MINISTER OF HUMAN RESOURCES  
AND SOCIAL DEVELOPMENT  
ATTORNEY GENERAL OF CANADA**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Mr. John Kabatoff was injured in May 1993 while working as a roofer. He has been trying since 1995 to obtain disability benefits under the Canada Pension Plan. His most recent attempt, in April 2006, involved a request to the Minister of Human Resources and Social Development to reconsider, on the basis of new facts, a 1996 decision denying him benefits. In August 2006, an official wrote to Mr. Kabatoff on the Minister's behalf explaining that the 1996 decision could not be reconsidered given that a final and binding decision of a Review Tribunal dealing with the same issue had been rendered in 2004. However, the official suggested that Mr. Kabatoff could request the Review Tribunal to reconsider its decision.

[2] Mr. Kabatoff asks me to order the Minister to reconsider the 1996 decision. However, I can find no error in the Minister's decision not to do so, and must, therefore, dismiss this application for judicial review.

### I. Issue

[3] Did the Minister err in concluding that he could not reconsider his earlier decision denying Mr. Kabatoff benefits?

[4] The Minister also argued that the response from the Minister's representative was not amenable to judicial review because it was merely a courtesy letter, not a decision. Assuming, without deciding, that the letter amounted to a decision, I have addressed the legal issue raised by Mr. Kabatoff.

### II. Analysis

[5] Under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, decisions of the Minister can be appealed to a Review Tribunal and then, with leave, to the Pension Appeals Board. The statute provides that decisions of the Review Tribunal and the Pension Appeals Board are "final and binding" (s. 84(1)), with two exceptions. First, those decisions can be the subject of judicial review in the Federal Court. Second, the Minister, the Review Tribunal or the Pension Appeals Board may,

on the basis of new facts, rescind or amend a decision he or it previously made (s. 84(2)) (statutory provisions are set out in an Annex).

[6] Mr. Kabatoff argues that the legislation permits the Minister to reconsider an earlier decision even if the Review Tribunal has also addressed the same issue. The statute does not say, he argues, that the Minister has no jurisdiction to reconsider an issue that has also been before the Review Tribunal.

[7] I agree with Mr. Kabatoff that the statute does not explicitly state that the Minister cannot reconsider a decision if the Review Tribunal has dealt with the same issue. However, I agree with the Minister that a sensible reading of the legislation leads to that result. Further, I am persuaded that the Federal Court of Appeal has recently determined that the statute should be read in the manner suggested by the Minister: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, [2007] F.C.J. No. 37 (C.A.) (QL). There, Justice Gilles Létourneau held that the *Canada Pension Plan* should be read so as to disallow collateral attacks on decisions, reduce the possibility of conflicting decisions, and give due respect to the principle of finality. In circumstances similar to those in Mr. Kabatoff's case, Justice Létourneau concluded that a person could not, in 2005, appeal a 1997 decision of the Review Tribunal when, in 2001, the Review Tribunal had concluded that the person was not disabled during the relevant period of time. The 2001 decision was "final and binding" according to s. 84(1) and could not be displaced by an appeal of an earlier decision.

[8] In Mr. Kabatoff's case, he is asking the Minister to reconsider a 1996 decision even though the Review Tribunal, in 2004, concluded that he was not disabled. It is true that, in 1996, the Minister could not have considered whether Mr. Kabatoff was disabled as of December 31, 1997, the last day on which he was eligible for benefits, while the Review Tribunal was able to make that determination in 2004. Mr. Kabatoff argues, therefore, that his application does not involve a collateral attack on the Review Tribunal's decision and raises no risk of inconsistency because the two decision-makers were dealing with two different time frames. The same argument was raised and rejected in *Hogervorst*. As Justice Létourneau stated: "Indeed, a finding of disability for the period ending November 4, 1997 could hardly co-exist with a finding that the respondent is not disabled for the period from November 5, 1997 to December 31, 1997" (at para. 19). Here, a finding that Mr. Kabatoff was disabled in April 1996 could hardly co-exist with a finding that he was not disabled in December 1997. It must be remembered that a disability is a condition that is "severe and prolonged" and renders the person incapable of regularly pursuing any gainful occupation for a long and indefinite period of time (s. 42(2)(a)).

[9] Therefore, in these circumstances, the Minister was correct in determining that he could not review his 1996 decision, given that the Review Tribunal had issued a final and binding decision on the same issue in 2004. However, Mr. Kabatoff can ask the Review Tribunal to reconsider its 2004 decision, given that s. 84(2) permits the Tribunal to "rescind or amend a decision under this Act given by ... the Tribunal" when there are new facts.

**JUDGMENT**

**THIS COURT'S JUDGMENT IS THAT:**

1. The application for judicial review is dismissed.
2. There is no order as to costs.

“James W.O’Reilly”

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Judge

## Annex "A"

*Canada Pension Plan, R.S.C. 1985, c. C-8*

*Régime de pensions du Canada, L.R.C. 1985, ch. C-8*

When person deemed disabledPersonne déclarée invalide

**42(2)** For the purposes of this Act,

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

(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,

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) 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

(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) 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 is likely to result in death;

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

Authority to determine questions of law and factDécision sur les questions de droit et de fait

**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 may be, is final and binding for all purposes of this Act.

La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf 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.

#### Rescission or amendment of decision

(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.

#### Annulation ou modification de la décision

(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.

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

**DOCKET:** T-1657-06

**STYLE OF CAUSE:** JOHN KABATOFF v. MIN. OF HUMAN  
RESOURCES AND SOCIAL DEVELOPMENT,  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** NELSON, B.C.

**DATE OF HEARING:** July 12, 2007

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** August 8, 2007

**APPEARANCES:**

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