

Date: 20070317

Docket: T-1704-06

Citation: 2008 FC 351

Toronto, Ontario, March 17, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

THERESA MURPHY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 2005, Ms. Theresa Murphy asked a Review Tribunal to consider additional evidence to support her claim for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. The Tribunal had previously dismissed her claim in 1999 on the basis that the evidence did not show that her circumstances fell within the definition of a disability under s. 42(2) of the CPP (provisions cited are set out in an Annex).

[2] The Tribunal found that the evidence Ms. Murphy put before it did not constitute new evidence and refused to reconsider its earlier decision denying her claim.

[3] Ms. Murphy argues that the Tribunal's conclusion was unreasonable and asks me to order it to consider her supplementary evidence. However, I can find no basis for overturning the Tribunal's decision and must, therefore, dismiss this application for judicial review.

I. Issue

[4] Was the Review Tribunal's conclusion that Ms. Murphy's evidence was not "new" unreasonable?

II. Analysis

1. Factual Background

[5] For many years, Ms. Murphy worked as a waitress in the military. In 1996, she accepted a government buy-out offer and has not worked since.

[6] Since the early 1990s, Ms. Murphy has had trouble with her knees. She has been examined, diagnosed and treated by various physicians over the years. In her 1998 claim for disability benefits, she presented reports from her family physician, a rheumatologist, an orthopaedic surgeon and a psychiatrist. The Tribunal considered this evidence and found that Ms. Murphy could not be considered disabled. It relied particularly on the opinion of Dr. Kevin Orell, the orthopaedic surgeon, who stated that Ms. Murphy "would have difficulty with a job that involved long standing

or posturing in one position for a great deal of time” and “would have trouble with lifting or heavy labour”. The CPP states that a person is “disabled” if he or she has a “severe and prolonged” disability, rendering him or her “incapable regularly of pursuing any substantially gainful occupation” for a long period of time or indefinitely (s. 42(2)(a)). In light of this evidence and Dr. Orell’s opinion, the Review Tribunal denied Ms. Murphy’s claim.

[7] In 2005, Ms. Murphy asked the Review Tribunal to exercise its authority under s. 84(2) of the CPP to rescind its earlier order on the basis of “new facts”. She had gathered additional medical records from the 1990s and another opinion from Dr. Orell. The Review Tribunal concluded that this evidence did not disclose any “new facts” because it did not add anything to what was considered by the Tribunal in 1999.

2. Legal Framework

[8] Ms. Murphy’s qualifying period for disability benefits expired on December 31, 1998. The issue before the Tribunal in 1999, therefore, was whether Ms. Murphy was disabled on or before that date. As mentioned, the Tribunal can subsequently consider new facts and rescind a previous decision, but the essential question remains whether Ms. Murphy was disabled at the end of 1998.

[9] There are two criteria for determining whether facts should be considered “new” for purposes of s. 84(2) of the CPP. First, the evidence put forward by the applicant must not have been discoverable with due diligence prior to the first hearing. Second, the evidence must be material in

the sense that it could reasonably be expected to affect the outcome of the previous hearing (*Kent v. Canada (Attorney General)* (2004), 248 D.L.R. (4th) 12; *Mazzotta v. Canada (Attorney General)*, [2007] F.C.J. No. 1209 (F.C.A.) (QL)).

[10] The Tribunal accepted that the first criterion was met here, so it is not in issue. The only question is whether the evidence Ms. Murphy provided in 2005 could reasonably be expected to affect the earlier conclusion that she was not disabled in 1998.

3. The Evidence

[11] The evidence Ms. Murphy provided in 2005 consisted primarily of medical records from the 1990s. These records showed that Ms. Murphy had been having knee trouble since the early 1990s, and that her situation was worsening over time. These records were reviewed by Dr. Orell who prepared a second opinion on March 8, 2005 in which he stated:

It was my opinion that this lady was significantly disabled in 1998. I felt that the arthritis that was seen radiologically as well as viewed during the arthroscopic procedure was sufficient to explain why this lady was having difficulty with activities of daily living in her own home. I did feel that she was so uncomfortable with everyday ordinary activities that she would find it very difficult to perform any type of gainful employment. It was my opinion that she was disabled.

In fact, it was my opinion that this lady was totally disabled when I first evaluated her in August, 1998.

[12] In my view, the medical records supplied by Ms. Murphy did not disclose “new facts”. They simply reveal that she was having serious knee problems in the 1990s for which she sought medical attention. The Tribunal was well aware of that back in 1999; these additional records could not reasonably affect the earlier decision.

[13] As for Dr. Orell’s second opinion, I note a striking difference between it and his earlier report. He had stated in 1998, in effect, that Ms. Murphy could work but not in any strenuous vocation. In 2005, he revised that opinion and claimed that Ms. Murphy had been totally disabled and incapable of any gainful employment as of the date he had first examined her in August 1998. He did not cite any basis for revising his assessment of Ms. Murphy’s ability to work. In these circumstances, the Tribunal’s conclusion that Dr. Orell’s second opinion was unlikely to affect the outcome of its earlier decision was reasonable.

[14] Accordingly, I must dismiss this application for judicial review with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed with costs.

“James W. O’Reilly”

Judge

Annex "A"

*Canada Pension Plan, R.S.C. 1985, c. C-8**Régime de pension du Canada, L.R.C. 1985, ch. C-8*

When a person deemed disabled

Personne 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; and

(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;

(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été établie.

Rescission or amendment of decision

Annulation ou modification de la décision

84 (2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding

(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se

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.

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

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1704-06

STYLE OF CAUSE: MURPHY v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Sydney, Nova Scotia

DATE OF HEARING: March 12, 2008

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

DATED: March 17, 2008

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