Date: 20090422

Docket: T-1235-08

Citation: 2009 FC 400

Ottawa, Ontario, April 22, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HOLWYN PETERS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7 (Act), for judicial review of a decision dated March 20, 2008 (Decision), by a member of the Pension Appeals Board (Board) refusing the Applicant's application for leave to appeal a December 4, 2007 decision of a Review Tribunal (Tribunal) which found that the Applicant was not eligible for disability benefits under the *Canada Pension Plan*, R.S., 1985, c. C-8 (CPP).

BACKGROUND

[2] The Applicant applied for disability benefits under the CPP on July 11, 2003. In the questionnaire that accompanied his application, he indicated that he stopped working as an employment counsellor in April 1999 due to a lack of energy and stamina, as well as somnolence and depression. His main medical conditions were diabetes, spinal stenosis, partial paralysis, arthritis, stress, depression and somnolence.

[3] The contributory nature of the CPP requires that disability be established within the contributor's Minimum Qualifying Period (MQP). The Applicant's MQP ended on December 31, 1997. The Minister denied the Applicant's application for disability benefits on November 3, 2003, on the ground that he was not disabled within the meaning of the CPP at the time of his MQP and continuously thereafter. The Minister reconsidered the Applicant's application on November 28, 2003 and confirmed the initial denial.

[4] The Applicant appealed the matter to the Office of the Commissioner of Review Tribunals on January 19, 2004. A Tribunal was convened on August 30, 2007 in Orilla, Ontario.

[5] The Tribunal heard the Applicant and his wife testify at the hearing. The Tribunal also reviewed the Applicant's medical evidence and letters to his local Member of Parliament and to the Federal Income Security Programme.

[6] The Applicant's appeal was dismissed by the Tribunal on December 4, 2007, because they concluded that he was not disabled on or before the date of his MQP, which was December 31, 2007 under the CPP.

[7] On September 17, 2007, the Applicant wrote to the Commissioner of Review Tribunals to express his concerns about the manner in which the hearing on August 30, 2007 had been conducted. The Applicant raised the following:

1) The Chairman asked the Applicant if there was any point in going through with the hearing;
2) The Chairman would not accept the book of authorities and outline of the Applicant's presentation;
3) The Chairman did nor heed the suggestion of the Applicant that an adjournment be granted for the Board to read the book of authorities and presentation outline;
4) The Applicant's wife was questioned first and the Applicant was not able to question her;
5) The Applicant's wife was asked questions by the Tribunal about matters of which "she had little or no knowledge";
6) The Applicant was not allowed to proceed with his presentation due to the questions of the Tribunal;
7) The Applicant was not allowed to refer to the medical evidence in the case file;
8) The Applicant was told at the end of two hours that his time was up, regardless of his request for an afternoon hearing;

9) The "Tribunal had used approximately 1/3 of [the Applicant's] time asking questions of their own rather than listening to his presentation of his case."

[8] Between December 7, 2007 and February 22, 2008 the Applicant corresponded with the Commissioner of Review Tribunals regarding the Commissioner's investigation into the conduct of the hearing on August 30, 2007.

[9] The Applicant filed an application for Leave to Appeal and Notice of Appeal to the Board on April 29, 2008. On March 31, 2008, his application for leave was dismissed. On April 29, 2008, the Applicant applied to the Federal Court for Judicial Review of the decisions of the Tribunal of August 30, 2007 and the Board on March 31, 2008.

[10] On May 7, 2008, the Federal Court Registry returned the Applicant's material "as not correct in some manner." On May 16, 2008, the Applicant filed a Notice of Motion for an extension of time to file his applications for Judicial Review, as the deadline had passed. On May 21, 2008, the Applicant's Notice of Motion was retuned by the Federal Court Registry "as not correct." On June 18, 2008, the Applicant filed two revised Motion Records for Judicial Review of the decisions of the Tribunal and the leave judge. On July 8, 2008, the Applicant received an Order from the Federal Court that his extension for time to apply to the Federal Court had been granted.

[11] On August 25, 2008, the Applicant received a letter from the Federal Court that confirmed a direction by Madam Prothonotary Tabib that jurisdictional issues had to be raised either in a motion

to strike or on the merits of the application. On October 27, 2008, the Applicant received an Order from the Federal Court that the Applicant's application for judicial review of the decision of the Tribunal was dismissed for a lack of jurisdiction.

DECISION UNDER REVIEW

[12] The Board found that the Applicant did not qualify for a disability pension at the end of his MQP of December 1997. This is because, for two years from 1995 to 1996, the Applicant went to George Brown College and completed a two-year course. He also wrote to his local Member of Parliament stating that he was not disabled in 1997.

ISSUES

[13] In his written materials the Applicant raises the following issues:

1) Did the Board apply the wrong test in denying the Applicant's leave to appeal a decision of the Tribunal to the Board?
2) Did the Board consider the alleged breaches of natural justice by the Tribunal? If so, would these breaches of natural justice be grounds to grant the Leave to Appeal?

[14] At the hearing of this matter in Toronto on March 18, 2009, the Applicant re-characterized the issues as follows:

1) Did the board commit serious errors of fact and base its Decision on inferences that were incorrect and/or unreasonable?

2) Did the Board entirely disregard the procedural fairness issues advanced by the Applicant?

3) Did the Board provide inadequate reasons?

STATUTORY PROVISIONS

[15] The following provisions of the CPP are applicable in these proceedings:

When 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	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière

disability is likely to be long continued and of indefinite duration or is likely to result in death; and

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.

Appeal to Pension Appeals Board

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the *Old Age Security Act*, or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either

Appel à la Commission d'appel des pensions

83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la *Loi sur la sécurité de la vieillesse* — ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long

before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

qu'autorise le président ou le vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.

Decision of Chairman or Vice-Chairman

(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.

Décision du président ou du vice-président

(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.

Designation

(2.1) The Chairman or Vice-Chairman of the Pension Appeals Board may designate any member or temporary member of the Pension Appeals Board to exercise the powers or perform the duties referred to in subsection (1) or (2).

Désignation

(2.1) Le président ou le vice-président de la Commission d'appel des pensions peut désigner un membre ou membre suppléant de celle-ci pour l'exercice des pouvoirs et fonctions visés aux paragraphes (1) ou (2).

Where leave refused

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.

Permission refusée

(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

Where leave granted	**Permission accordée**
(4) Where leave to appeal is granted, the application for leave to appeal thereupon becomes the notice of appeal, and shall be deemed to have been filed at the time the application for leave to appeal was filed.	(4) Dans les cas où l'autorisation d'interjeter appel est accordée, la demande d'autorisation d'interjeter appel est assimilée à un avis d'appel et celui-ci est réputé avoir été déposé au moment où la demande d'autorisation a été déposée.
…	…
Powers of Pension Appeals Board	**Pouvoirs de la Commission d'appel des pensions**
(11) The Pension Appeals Board may confirm or vary a decision of a Review Tribunal under section 82 or subsection 84(2) and may take any action in relation thereto that might have been taken by the Review Tribunal under section 82 or subsection 84(2), and shall thereupon notify in writing the parties to the appeal of its decision and of its reasons therefor.	(11) La Commission d'appel des pensions peut confirmer ou modifier une décision d'un tribunal de révision prise en vertu de l'article 82 ou du paragraphe 84(2) et elle peut, à cet égard, prendre toute mesure que le tribunal de révision aurait pu prendre en application de ces dispositions et en outre, elle doit aussitôt donner un avis écrit de sa décision et des motifs la justifiant à toutes les parties à cet appel.

STANDARD OF REVIEW

[16] The Respondent submits that subsection 83(2.1) of the CPP stipulates that the Chairman or Vice-Chairman may designate any member or temporary member of the Board to exercise the powers referred to in subsection 83(2) of the CPP. The Respondent relies upon *Bagri v. Canada (Attorney General)* 2001 FCT 638 at paragraph 6 which held that, when granting or refusing leave

to appeal pursuant to subsection 83(1) and 83(2) of the CPP, a designate member is entitled to a high degree of deference.

[17] The Respondent also submits that whether a leave application raises an arguable case in the context of the CPP is a mixed question of fact and law. The Respondent cites *Callihoo v. Canada (Attorney General)*, [2000] F.C.J. No. 612 (F.C.T.D.) (*Callihoo*) for the proposition that, in the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision-maker finds the application raises a question of an error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence.

[18] The Applicant says that this application involves an erroneous interpretation of facts and a finding that, on the evidence, has no factual support. He says this is an error of law that should be reviewed against a standard of correctness. He says, however, that even if this involves an issue of mixed fact and law, so that the standard is reasonableness, the Decision cannot stand.

[19] The Applicant also says that the Board's complete neglect of the procedural fairness issues which he raised in his leave application means that he was denied any right to present his case. He characterizes this failure of the Board to consider and rule upon procedural fairness issues as an error of law that should be reviewed against a standard of correctness.

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[21] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] The Applicant raises errors of law and procedural fairness that should be reviewed against a standard of correctness. Procedural fairness and natural justice issues are reviewed on a standard of correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

ANALYSIS

[23] The Applicant’s decision to appoint legal counsel to represent him on the eve of the hearing of this application for judicial review has resulted in discrepancies between the issues and

arguments in his written materials and the issues and arguments put forward at the hearing in Toronto on March 18, 2009. Counsel for the Respondent was not notified in advance of these changes and, in some ways, was clearly disadvantaged by the lack of notice.

[24] In particular, the Applicant advanced a new ground of review – inadequate reasons – that the Respondent could not have anticipated from the written materials. Understandably, counsel for the Respondent took exception to the lack of notice on this issue and I agree with his submissions that this particular ground of review has not been properly raised and placed before the Respondent and the Court. Hence, I will not consider the arguments advanced on that issue.

[25] On the other hand, the brevity of the Decision under review in this application does give rise to other issues that I believe are evident in the Applicant's written materials and which the Respondent should have reasonably anticipated.

[26] Essentially, the Applicant raises the following objections to the Decision:

a. The Board committed serious errors of fact and based its Decision on inferences that were incorrect and/or unreasonable;
b. The Board entirely disregarded the procedural fairness issues advanced by the Applicant.

[27] I agree with the Respondent that the question for the Board was whether the Applicant had raised an arguable case for leave to appeal and that this involved a consideration of the evidence that

had been presented to the Tribunal and any new evidence submitted to the Board with the application for leave, as well as the relevant provisions of the CPP. See *Pannu v. Canada (Human Resources Development)*, 2007 FC 1348 (T.D.) (Q.L.) at paragraph 18.

[28] The Board dismissed the application for leave for two reasons:

a. For two years, 1995 and 1996, the Applicant went to George Brown College and successfully completed the two-year course; and

b. The Applicant wrote to his local Member of Parliament stating that he was not disabled in 1997.

[29] The problem with these reasons is that they are unresponsive to the grounds put forward in the leave application and suggest that the Board either did not understand the Applicant's submissions and/or overlooked important facts on the record.

[30] The Applicant's point in his leave application to the Board was that the issue of whether or not he was disabled within the MQP was essentially a medical decision and that anything he might have said or done at a time when he was hoping to overcome his disability and return to normal life cannot be regarded as determinative of whether, in fact and on the medical evidence, he was disabled.

[31] In confining itself to the Applicant's own words and actions, the Board appears to have entirely missed this point and so failed to address the medical evidence before it.

[32] Secondly, there is no mention at all of the procedural fairness grounds put forward by the Applicant. In this regard, the Decision is, once again, unresponsive to the Applicant's grounds for leave. Hence, there is no way to tell whether the Board overlooked those grounds, did not consider them of significance, or just did not understand the nature of the Applicant's complaint.

[33] I do not think that a Decision that simply reiterates two findings of the Tribunal can be considered responsive to the two principle grounds of appeal that the Applicant advanced for an arguable case.

[34] This mistake can be characterized in various ways. I agree with the Applicant that it was an error of law for the Board not to consider and rule upon the procedural fairness issues. The Board's failure to address the medical evidence, as opposed to simply basing its Decision upon what the Applicant may have said to his MP and the fact that he had attended George Brown College, is either an error of law or unreasonable within the meaning of *Dunsmuir*, depending upon why the Board took this approach. Due to the brevity of the Decision, it is just not possible to tell. But either way the Decision should be sent back for reconsideration.

[35] This is not to say that the Applicant was disabled at the relevant time or that he has arguable grounds for an appeal. My conclusions are simply that the Decision was unresponsive and the Applicant's application for leave needs to be reconsidered in a way that addresses the grounds advanced.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application for judicial review of the Pension Appeals Board Decision is allowed. The Decision is quashed and the matter is returned for reconsideration by a different Pension Appeals Board member in accordance with the governing jurisprudence.

2. The Applicant has not asked for costs. Consequently, none are awarded.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1235-08
STYLE OF CAUSE:	HOLWYN PETERS
	APPLICANT
	- and -
	ATTORNEY GENERAL OF CANADA
	RESPONDENT
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 18, 2009
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	April 22, 2009

APPEARANCES:

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