

Federal Court



Cour fédérale

Date: 20091216

Docket: T-300-09

Citation: 2009 FC 1278

Ottawa, Ontario, December 16, 2009

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

RHEA TAIT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Rhea Tait, claimed disability benefits and received a favourable decision from a Review Tribunal (the Tribunal) appointed under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Act). The Respondent requested a 17 day extension of time to seek leave to appeal the Tribunal decision. On August 18, 2008, a Member of the Pension Appeals Board (PAB) granted the

extension of time and leave to appeal (the PAB Decision). This is the decision challenged by the Applicant on Judicial Review. However, she only takes issue with the granting of the extension of time.

[2] The Applicant was self-represented on this application.

THE FACTS

[3] The Applicant is 53 years old and lives in Welland, Ontario, where she drives a school bus for approximately 2 hours a day.

[4] The Applicant has had difficulties with her left knee since 1986. In 2002, she began to have difficulty breathing and recurrent lung infections. The Applicant has been diagnosed with pulmonary fibrosis, osteoarthritis and an unstable left knee.

[5] The Applicant first applied for disability benefits under the Canada Pension Plan (CPP) on February 22, 2006. Her claim was denied.

[6] The Applicant sought a reconsideration of the decision to deny benefits, and her application was refused. She then appealed to the Tribunal. In a decision dated March 17, 2008, the Tribunal found in the Applicant's favour. It deemed her disabled as of November 2004, and ordered payments to begin retroactively as of March 2005 (the Tribunal Decision).

[7] However, it appears that under subparagraph 44(1)(b)(i) of the Act, the Applicant did not actually qualify for disability benefits at that time because she had not met the Minimum Qualifying Period (MQP) as defined in subsection 44(2) of the Act. The Applicant had not contributed to the CPP during at least four of the last six calendar years prior to the date of her deemed disability. I refer to the Tribunal's error as the MQP Mistake.

[8] The following facts about the Respondent's actions after receiving the Tribunal Decision are taken from the Affidavit of Sheryl Bell sworn July 10, 2008 (the Bell Affidavit). Sheryl Bell is a Medical Adjudicator employed by the Respondent's Medical Expertise Division (MED). MED is responsible for deciding whether to appeal decisions made by the Tribunal.

[9] The Tribunal Decision, in this case, was initially received by the Respondent's regional office in Chatham, Ontario on March 26, 2008. The regional office in Chatham forwarded it to MED in Ottawa on April 7, 2008. MED failed to notice the MQP Mistake, and a decision was therefore made not to appeal the Tribunal Decision. Accordingly, on April 24, 2008, MED returned the Applicant's file to the regional office in Chatham for processing.

[10] On June 12, 2008, the regional office notified Sheryl Bell by telephone and e-mail that its computer system was unable to process the Applicant's payment because she had not satisfied the MQP requirements under the Act.

[11] In the same e-mail, the regional office warned Ms. Bell that “Our appeal period is almost over.” As discussed below, this fact is not mentioned in the Bell Affidavit.

[12] Sheryl Bell contacted a Senior Manager of CPP Disability Adjudication and Appeals about this problem on June 20, 2008. On that day, according to the Bell Affidavit, the Senior Manager contacted the Office of the Commissioner of Review Tribunals and asked the Tribunal to “amend” its decision. When the Tribunal refused, the Respondent decided to seek leave to appeal the Tribunal Decision.

[13] Section 83(1) of the Act provides that the Minister may seek leave to appeal a decision of the Review Tribunal decision within 90 days of the day the decision is communicated to the Minister. The Tribunal Decision, in this case, was received by the Respondent’s regional office in Chatham, Ontario on March 26, 2008. Accordingly, the appeal period expired 90 days later on June 24, 2008.

[14] The Respondent submitted its application for leave to appeal and its request for the extension of time on July 11, 2008, seventeen days after the appeal period expired.

[15] The Respondent submitted the following grounds for its appeal:

1. The MQP Mistake;
2. The Tribunal’s conclusion that the Applicant was unable to pursue substantially gainful employment, because she is able to work part-time driving a school bus;

3. The effect of the Tribunal Decision which meant that, contrary to law, the Applicant could be both a CPP contributor and recipient at the same time.

THE ISSUES

[16] In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, Madam Justice Judith Snider identified the following four criteria to be considered in deciding whether to grant an extension of time to file an application for leave to appeal to the PAB:

1. There was a continuing intention to pursue the appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay;
4. There is no prejudice to the other party in allowing the extension.

[17] The PAB Member considered Justice Snider's decision, and concluded that all four criteria were met in this case.

[18] During the hearing, the Applicant acknowledged that she had not suffered any prejudice. As well, she agreed that the Tribunal had erred in its treatment of her MQP and that she is not entitled to payments as of March 2005. This means that that the Respondent has an arguable case for an appeal to the PAB.

[19] Accordingly, the only matters at issue in this Judicial Review are the continuing intention to appeal, and the reasonableness of the Respondent's explanation for its delay.

DISCUSSION

[20] With regard to these issues, the PAB said the following:

I have considered the Affidavit of Sheryl Bell sworn on July 10, 2008, and I accept that the Minister had a continuing intention to appeal, and that the delay in filing the appeal was due to an administrative misunderstanding as to when the 90-day appeal period expired.

[21] The Bell Affidavit provided the following information on the issues:

Unfortunately, I believed that the [Respondent] could apply for leave to appeal until July 7, 2008, 90 days after April 7, 2008, the day the decision was communicated to the MED. I have come to know that the Review Tribunal's March 17, 2008 decision was received by the [Respondent]'s Regional Office in Chatham on March 26, 2008 and that this is the correct day after which the 90-day period to apply for leave to appeal begins. [. . .]

It has been the Minister's intention to seek leave since learning of the [Office of the Commissioner of Review Tribunals'] refusal to correct and amend the Review Tribunal's March 17, 2008 decision.

Was There a Continuing Intention to Appeal?

[22] During the appeal period, the Respondent first decided against an appeal and then changed its mind once the MQP Mistake was discovered. The Applicant says that this shows that the Respondent did not have a continuing intention to appeal. However, if I were to accept the

Applicant's view, parties would be denied the opportunity to use the entire 90 day period to formulate a final decision about an appeal. In my view, the requirement for a continuing intention to appeal means that a final decision to appeal must be made during the appeal period and continue from that date until the date on which an application is made for an extension of time.

[23] The evidence is clear that the Respondent made a final decision to seek leave to appeal on June 20, 2008, before the 90 day appeal period expired on June 24, 2008. Although the Respondent waited until late in the appeal period to make its decision, it was entitled to do so, and there is no doubt that the intention to appeal was present continuously thereafter.

Was There a Reasonable Explanation for the Delay?

[24] Ms. Bell deposed that she did not know that the 90 day appeal period ran from the date the Respondent first received the Tribunal Decision at the Chatham regional office. However, in view of the following facts, I have serious doubts about the credibility of her explanation.

1. MED is the department that organizes the committee responsible for deciding whether or not to seek leave to appeal Tribunal decisions. For this reason, it is unreasonable to believe that MED would not know how to calculate the appeal period.
2. Sheryl Bell had worked at MED since 1993 and had fifteen years' experience at the material time. In these circumstances I cannot accept that she did not realize that the appeal period ran from the date the Respondent first received a Tribunal decision.

3. Sheryl Bell mentioned in her Affidavit that the Chatham regional office contacted her on June 12, 2008 to inform her of the MQP Mistake. However, as noted above, she failed to mention the third line of the e-mail she received that day, which reads, “Our appeal period is almost over.” She said she thought the appeal period expired on July 7, 2008. We now know that she held this belief in spite of a warning. The warning makes her belief appear less reasonable, and the fact that she failed to disclose the warning gives me additional concern about her credibility.

[25] I have therefore concluded that it was unreasonable for the PAB Member to accept Sheryl Bell’s explanation for the delay.

[26] I now turn to the question of how to resolve this application.

[27] In *Canada (Attorney General) v. Blondahl*, 2009 FC 118, Madame Justice Johanne Gauthier considered the four criteria identified by Justice Snider in *Gattellaro* and stated as follows:

Turning to another issue, it is now clear, and accepted by the Attorney General, that ultimately, the four pronged test is a measure of fulfilling the underlying consideration, which is to ensure that justice is done between the parties (see *Hogervorst* at para. 33 and *Pentney* at para. 34). As such, an extension may be granted even if one of the factors mentioned in this test is not satisfied.

[28] If the Tribunal Decision were to stand, the Applicant would receive payments to which she is not entitled. As well, I observe that the Respondent was only 17 days late and that three of the four criteria in *Gattellaro* have been met.

[29] Accordingly, in all of these circumstances, this application for Judicial Review will be dismissed but without costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that, for the reasons given above, this application for judicial review is hereby dismissed.

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-300-09

STYLE OF CAUSE: RHEA TAIT v. THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: TORONTO, ON

DATE OF HEARING: NOVEMBER 11, 2009

REASONS FOR JUDGMENT: SIMPSON J.

DATED: DECEMBER 16, 2009

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