Federal Court		Cour fédérale

Date: 20100709

Docket: T-1650-09

Citation: 2010 FC 740

Ottawa, Ontario, July 9, 2010

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

DOUGLAS JONES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Jones seeks judicial review of the decision denying his request for remedial action pursuant to subsection 66(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP) on the basis of erroneous advice or administrative error in the determination of his first application for CPP disability benefits in May 1987 and again in December 1994.

[2] For the reasons that follow, and despite the sympathy felt for the applicant and the able arguments presented by his counsel, the Court must dismiss the application.

Background

[3] Mr. Jones was born on September 29, 1940. He suffers from diabetes, peripheral neuropathy and diabetic retinopathy. He is now legally blind. He was a tool and die maker by trade.

[4] He first applied for CPP disability benefits in May 1987. In said application, he indicated that he had been laid off in June 1984[1] and that he was self-employed for about a month in 1987. He also mentioned in answer to question 7 of the application questionnaire[2] that he had made no effort to find work compatible with his condition stating that he has trouble sitting and standing for any length of time. Such problems are said to be caused by his diabetes. In answer to the question as to when he plans on returning to work, Mr. Jones indicated: "[i]t may clear up in six months to a year, or longer. Then I would gladly go back to work." A similar answer was given to question 17 (namely, whether his doctor had given him an estimate as to when he may be able to return to some form of work).

[5] Mr. Jones did not include any medical report with his application but he gave the name of his family doctor − Dr. Donald Clunas − as well as the name of Dr. Michael O'Brien, a specialist he had last seen about two months before and who was "trying to stop [his] pain".

[1] His last employer's name was Solkan Enterprises Ltd. (described as having gone bankrupt one year before his application).
[2] Question 7 reads as follows: "What effort up to the present time have you made to find work suitable to your condition? Please explain:".

[6] By letter dated June 23, 1987[3], the applicant was advised that his application was denied as there was evidence[4] that he would "become capable of pursuing some type of gainful occupation within the foreseeable future". At that time, the decision had been made on the basis of the review of the questionnaire and an Observation Sheet filled up when the field officer met with the applicant. The applicant did not appeal this decision.

[7] He reapplied in December 1994, describing his disabling condition as follows: "arthritis in my feet and hands and diabetes. My feet ache all night and I have trouble sleeping". He further added that he could not stand for more than 2 or 3 hours. He indicated that he was laid off in August 1985[5] (question 7) and that he has remained unemployed thereafter. He noted that he felt he was unable to work since September 1985 (question 24).

[8] In the 1994 questionnaire, he said that his main disability resulted from an injury caused by an accident − that is, while working at Frank Tool and Die, a fifty pound bar dropped on both his big toes and broke them. In Mr. Jones' words: "[…] that's where I have the most trouble" (question 25). This apparently occurred in June 1964. Under question 27, he described in detail his problem with standing, walking, lifting and carrying extra weight. Also, this time, apart from referring to his family doctor for "trouble with [his] feet" (question 29(a)), Mr. Jones referred to Dr. Urton, a

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[3] Also the date of the Disability Determination Action Summary Sheet (see p. 239 of the Respondent's record) which refers to question 17 of the questionnaire.

[4] Mr. Jones now contests this, saying that this was pure speculation given that there was no such "evidence" on file. The Court notes that the medical adjudicator may have used this expression loosely as opposed to in a strict legal sense given that a standard form letter was used.

[5] Here he indicated that the name of his last employer was: All Weather Products. Also, in Dr. O'Brien's consultation record dated September 26, 1986, it appears that Mr. Jones was managing a building at the time he went to the hospital for an evaluation of his condition.

podiatrist he was seeing also to help with his feet. Mr. Jones described the medication he was taking for diabetes, arthritis and blood pressure. Finally, he included a medical report dated December 12, 1994 from Dr. Urton. In said report, Mr. Jones' diagnostic is described as:

> Chronic peroneus longus and peroneus brevis tendonitis bilateral greater on left side than right side.

It is worth noting that in the section dealing with previous medical history Dr. Urton notes:

> Patient states symptoms began following car – pedestrian accident 8 years previous.

There is no mention of diabetes or peripheral neuropathy being the cause of his problem with his feet.[6]

[9] On February 2, 1995, Mr. Jones' second application was denied. The decision-maker did mention at this stage (i) that Mr. Jones' last minimum qualifying period ended in 1989, (ii) that "[t]o be considered disabled for CPP purposes, a person must have a disability which is both severe and prolonged. Severe means that a person is incapable of regularly pursuing any substantially gainful occupation by reason of his physical and mental impairment. Prolonged means that such severe disability is likely to be long continued and of indefinite duration" [My emphasis]. He concluded that on the basis of information provided as of the time he applied (1994), Mr. Jones "could still

[6] It appears from the letter submitted to the Appeals Division on April 24, 2005 that Mr. Jones was told by Dr. Urton that he suffered from diabetic neuropathy. Unfortunately, this condition is not disclosed in Dr. Urton's report submitted with the application (Tab 4, page 14 of the Applicant's Record).

perform some form of gainful employment. Therefore, [he could not] be considered disabled within the meaning of paragraph 42(2)(a) of the Canada Pension Plan legislation."

[10] This time Mr. Jones sought reconsideration of the decision on April 24, 1995. It is in the context of this appeal[7] that the Appeals Division of the Income Security Programs Branch contacted Dr. Clunas on June 5, 1995 asking him to provide the following information:

> Mr. Douglas A. Jones has appealed to the Canada Pension Plan for disability benefits. We have current information on file about our client, but we require **additional objective medical information. This client may be eligible for benefits under a special provision that protects applicants who did not apply for benefits as soon as they became severely disabled**.
>
> According to our files, you have treated our client and may be able to assist us. To help us evaluate the extent and duration of this client's disability, please send us **a detailed report** that addresses the period from 1989 to the present.
>
> Your report should include:
>
> - **a medical history**
> - dates of visits and reasons for visits since 1989
> - findings on examination
> - treatments and medications received
> - **pertinent details from consultant' [sic] reports, or the names and addresses of consultants who could provide more information about our client**
> - diagnostic conclusions
> - results of test(s)
> - your prognosis
> - **a comment on our client's condition**
>
> [my emphasis]

A copy of this letter was sent to Mr. Jones.[8]

[11] The process of obtaining further information from an applicant's doctor or specialist was referred to by the parties and in the file as "developing to" (or "develop to") the doctors. This expression will be used hereinafter.

[12] Dr. Clunas' reply is dated September 29, 1995[9]. He refers to nine visits with Mr. Jones since 1989 and one visit on July 18, 1995 with an internist of the clinic, Dr. David Chandler, who allegedly noted two complications, those of diabetic retinopathy and neuropathy. Apparently, Mr. Jones was also showing early nephropathy with microalbuminuria and had recently received laser treatment to stop the exudative process of his diabetic retinopathy. He mentions that on June 16, 1995, when Mr. Jones was seen because he was complaining of burning feet, the patient was **developing** diabetic peripheral neuropathy. The diagnostic as of September 1995 was: "Non-Insulin Dependent Diabetes Mellitius with the complications of Diabetic Retinopathy, Neuropathy and Nephropathy". The prognostic was described as "only fair". At the time, Mr. Jones who had not yet received insulin injections was to start receiving them shortly twice a day to prevent further organ damage.

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[7] The CPP provides for a three-tier appeal process where an applicant can file new evidence at each level.
[8] No evidence or allegation was made that the copy of this letter was not in fact received by Mr. Jones.
[9] It was received on October 11, 1995 after the Department had sent a reminder to Dr. Clunas on September 25, 1995 (See page D-32, Tab 3 of the Applicant's Record).

[13] The initial refusal was maintained on December 20, 1995[10]. In the decision, the Appeals Division explains the requirement of the CPP, particularly the provisions dealing with applications made well after the end of the minimum contributory requirement period − in this case December 1989. It found that it had not been established that Mr. Jones would have been considered disabled as of that date (1989) and that he could not qualify for disability benefits in December 1994 because he did not meet the contributions requirement in 1994.[11]

[14] As suggested in the above-mentioned letter of refusal, Mr. Jones appealed by sending a letter dated January 12, 1996 to the Office of the Commissioner of Review Tribunals. At that time, in addition to Dr. Urton's report of December 1994 and the medical report of Dr. Clunas dated September 29, 1995, Mr. Jones added a brief note from Dr. Clunas dated April 9, 1996 simply stating:

> To Whom It May Concern
>
> Re: DOUGLAS JONES
> D.O.B. SEPT. 29, 1940
>
> Our client has been disabled with diabetes and burning pain in his feet since 1986.
>
> He has been unable to work. If he stands more than 3 hours he experiences severe pain in his feet.

[10] As mentioned, this decision-maker reviewed the file *de novo* and was entitled to consider the additional medical evidence. Like any other decision-maker, it is presumed to have considered all the evidence before it (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL)).

[11] This again simply means that even if he was held to be disabled in 1994, he would not be entitled to a disability benefit.

[15] On September 17, 1996, this appeal was dismissed because the Review Tribunal was not satisfied that the applicant was disabled in December 1989. Although advised that he was entitled to appeal this decision to the Pension Appeals Board, Mr. Jones did not do so.

[16] On June 27, 2001, he filed a third application for disability benefits.[12] The application was denied on July 30, 2001 and Mr. Jones was informed that the 1996 decision was final except if he could present "new facts".

[17] On September 17, 2003, Mr. Jones filed a fourth application which was also denied on January 21, 2004. Again, it was rejected because of the absence of "new facts" which would allow the Review Tribunal to review the previous decision.

[18] On October 5, 2004, Mr. Jones obtained the support of his local MP who wrote to seek reconsideration of his application for CPP disability benefits. Attached to the said letter was a letter from Dr. O'Brien dated May 29, 1987.[13]

[19] On November 5, 2004, following receipt of the MP's letter, Kim Logan from the British Columbia/Yukon Region at Human Resources and Skill Development Canada[14] requested a consultation by the Medical Expertise Division raising the question of whether "an Administrative Error took place at the time of the second application in 1995. Meaning, we had facts in our

[12] In the said application, Mr. Jones lists 8 doctors including Dr. O'Brien but he does not include Dr. Chandler or Dr. Urton.

[13] It is in that context and in order to respond to Mr. Jones's MP's letter that the file was reviewed by Kim Logan and Ms. Prieto, the Team Leader for the Appeals and Privacy Unit.

possession which absolutely required further development and made a decision without doing that development" [Emphasis in the original]. In that context, she discusses two practices − the standard adjudicating practices in 1995-1996 and the standard preparation to proceed to a review to the Review Tribunal which could include ascertaining specialists' reports. She notes however that she did not believe the evidence on file in 1995 was conclusive. There is no evidence as to who Ms. Kim Logan was and what type of expertise she had, if any, at the relevant time, i.e. in 1995-1996.

[20] In answer to this request, Dr. A. Gregory from the Medical Division wrote to Ms. Logan after having reviewed the file "*in toto*". He concluded that there was insufficient information on file in 1995 to indicate that Mr. Jones' condition was severe. Although he says that as of the date of his reply, November 19, 2004, it is obvious that Mr. Jones is disabled especially considering the latest complications he listed. According to said doctor, metabolically speaking Mr. Jones got himself into trouble when his weight increased to "a whooping 230 lbs". In his opinion, "the CPP did not make an administrative error by not developing to specialists" and the adjudicator, at that time, clearly felt that she had sufficient data on file to deny without development. He did agree that, as mentioned by Mr. Jones' MP, time has indeed now proven his disability is permanent. That, however, did not change the fact that for Dr. Gregory the onus was on Mr. Jones to show that employment was prohibitive from his last date of work.

[21] On May 19, 2005, Mr. Jones applied to reopen the 1996 decision pursuant to subsection 84(2) of the CPP. This time Mr. Jones filed five new documents in support of his application,

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[14] See Memorandum of the Respondent, at para. 59.

namely a report from Dr. O'Brien dated May 29, 1987; progress notes of Dr. Clunas covering the period from September 23, 1986 to November 25, 2000, as well as two other notes from his new family physician, Dr. Morgan, dated September 9, 2004 and May 6, 2005, and a letter from his spouse.

[22] In his report, Dr. Morgan explains that when he took over from Dr. Clunas, he reviewed the records and those apparently clearly show that Mr. Jones was significantly disabled in 1987 due to **peripheral neuropathy.**

[23] In fact, in the letter written by Dr. O'Brien to Dr. Clunas dated May 29, 1987, the former clearly concludes as follows:

> The patient is also applying for a disability pension and I think that **if his neuropathy persists** he is certainly eligible for this.
>
> [my emphasis]

[24] On November 8, 2005, the Review Tribunal found that these documents were not new facts and dismissed the application with a strong dissent by one member who found that Dr. Clunas' notes and Dr. O'Brien's report constituted new evidence and held that, if this evidence had been admitted, she would have allowed the application. It is worth mentioning that, in the same dissenting opinion, the member notes that the September 29, 1995 report of Dr. Clunas appears to suggest that the peripheral neuropathy had just started in 1995. The decision was judicially reviewed by this Court on November 10, 2006. The decision was quashed on the basis that the findings with

respect to the discoverability and materiality aspect of the test to determine whether or not evidence constituted new facts contained a reviewable error. This last decision was appealed and the Federal Court of Appeal allowed the appeal only to modify the order deleting the requirement for a hearing *de novo* take place.

[25] The Review Tribunal never heard the matter again given that the matter was settled and Mr. Jones received his CPP disability benefits and CPP retirement benefits as if the 1994 disability pension application had been granted. The maximum amount of retroactivity applicable was 15 months. Thus, the benefits were paid as of September 1993. These payments did not include interest.

[26] On October 3, 2008, the applicant sent a 26-page letter alleging various administrative errors and erroneous advice given in respect of the 1987 and 1994 applications for disability benefits and asking the Minister to take the following remedial action pursuant to subsection 66(4) of the CPP:

a. payment with interest for the disability benefits to which he was entitled to for the period between the start-date corresponding to his 1987 benefits application and December 1993;
b. payment of interest on the retroactive payment of $108,250.56 (which is the amount of payment for CPP disability benefits made on June 13, 2008 and as a result of the delayed approval of his 1994 benefit application); and

c. payment of interest on the payment of $6,630.57 for retirement benefits made approximately June 13, 2008.

[27] The decision under review was issued on August 28, 2009. It rejected Mr. Jones' request because no administrative error or erroneous advice pursuant to subsection 66(4) of the CPP had been established, mainly because it was determined that "the Department did not fail to meet **administrative obligations** as alleged" (see conclusion, page 7). In the extensive reasons attached to the decision, the Minister's representative discusses in some details the numerous allegations made by Mr. Jones.

Analysis

[28] The relevant provisions of the CPP and of *Canada Pension Plan Regulations,* C.R.C., c. 385 (CPP Regulations) are included in Annex A.

[29] According to Mr. Jones, the decision under review is unreasonable. In his detailed submissions, he reviews each and every statement[15] made by the decision-maker to show how they are either contradictory, not supported by evidence or involve pure speculation or improper inferences, and how some points he raised were simply not addressed (see paragraph 66 of the applicant's memorandum in respect of the 1987 application and paragraph 101 of the applicant's memorandum in respect of the 1994 application).

[30] The two main errors relating to the 1987 application are that it was unreasonable to conclude that the Department did not err:

i. when it failed to develop to Dr. Clunas and Dr. O'Brien; and

ii. when it concluded that Mr. Jones was capable of returning to work in a foreseeable future;

[31] With respect to the 1994 application, the list of administrative errors or erroneous advices that should have been recognized in the decision under review are numerous and varied. Rather than attempting to summarize them here, the Court included in Annex B, the list submitted by the applicant.

[32] As indicated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, there is no need in the present case to engage in a standard of review analysis since "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to" the category of questions that were before the decision-maker. It is not disputed that a ruling on the existence of administrative errors or erroneous advices that entails the application of subsection 66(4) of the CPP is subject to the standard of reasonableness (*Manning v. Canada (Human Resources Development)*, 2009 FC 523, 2009 F.C.J. No. 646 at para. 23 (QL) (*Manning*), *Leskiw v. Canada (A.G.)*, 2004 FCA 177, 320 N.R. 175 at para. 9, *Kissoon v. Canada (Minister of Human*

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[15] In respect of the 1994 application, the Department's reasons are said to include some 30 points (in addition to the 8 points dealing with the 1987 application) which according to the application do not withstand scrutiny.

Development Resources), 2004 FC 24, 245 F.T.R. 152 at paras. 4, 5 conf. 2004 FCA 384, 329 N.R. 232).

[33] It is crucial for Mr. Jones to understand that under the standard of reasonableness, the Court is not entitled to simply substitute its own appreciation of the facts and the evidence for that of the decision-maker. The Court can only examine the file to determine if on the facts and the law, the decision reached was one of the possible acceptable outcomes.

[34] Pursuant to subsection 66(4) of the CPP, the Minister shall take remedial action as he considers appropriate when he "is satisfied that, as a result of erroneous advice or administrative error in the administration of the Act" or in French "[d]ans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi". Thus, the Minister is given wide discretion with regard to the remedial action as well as to the informal determination of facts (*Manning*, above at para. 38; *Graceffa v. Canada (Minister of Social Development),* 2006 FC 1513, 306 F.T.R. 193).

[35] Although very little was said about this in the submissions, it is also important to mention, especially in light of the very recent decision of the Federal Court of Appeal in *King v. Canada (A. G.*), 2010 FCA 122, [2010] F.C.J. No. 634 at para. 11 (QL) (*King* 2010), that before taking remedial action, the Minister must be satisfied that the error resulted in the denial of a benefit the appellant was entitled to. Thus, there must be a causal connection, the absence of which is fatal.

[36] Also, during the hearing, the applicant made it clear that he accepts that as a result of the recent teaching of the Federal Court of Appeal in another case involving Mr. King − *King v. Canada (Minister of Human Resources and Social Development)*, 2009 FCA 105, 392 N.R. 227 (*King* 2009), this file does not involve any erroneous advice as this concept was better defined in that case.

[37] In effect, in *King* 2009, at paragraphs 28 to 32, the Federal Court of Appeal explains that this concept relates to incorrect information given by an official to a member of the public as opposed to advice given by the Department to the Minister or her officials in the course of deciding whether a pension should be awarded. It does not cover erroneous "decisions" either.

[38] Moreover, in said decision, Justice J. Edgar Sexton, writing for the Court, also made it clear that the fact that a decision of the Minister or her delegate is later overruled (even in the absence of new evidence) does not constitute proof of erroneous advice having been given for there would be no room left for the Minister to decide the question. This is particularly significant when one considers that Mr. Jones argues that the Court should assume that by settling the matter in 2008, the Department implicitly acknowledged that Mr. Jones met the disability criteria in December 1989, based on the information on file, including Dr. O'Brien's 1987 letter and Dr. Clunas' 1986-1989 progress notes.

[39] Based on the above principles and using a similar reasoning where it can apply to construe "administrative error", the "decisions" made in 1987 and 1994 that Mr. Jones was still capable of

gainful employment and that his condition in 1987 or 1994 was not severe and prolonged within the meaning of the CPP cannot constitute erroneous advices or administrative errors. These decisions could only be challenged through the generous appeal process in the CPP[16] and ultimately through judicial review. The same conclusion applies to all the alleged errors which relate directly to such decisions such as that the reasons given for the refusal were confusing and confused (see para. 104(c), (d), (e), 106(c) and (d) in Annex B).

[40] The Minister's representative very squarely considered and assessed the allegation that the Department should have developed to Mr. Jones' physician(s) **before** evaluating his 1987 application. She notes that medical reports were not necessarily required for the medical adjudicator to make a decision on whether an applicant met the criteria for CPP disability benefits:

> It was common practice to use the "Observation Sheet" completed by the Field Officer and information from the "Disability questionnaire" completed by the applicant, to make a decision. More development could be done, if it was felt necessary.

The Court understands that she then looked at the facts to determine if there was anything that should have put the medical adjudicator on notice that such development was necessary here. It is evident that, given the information in the questionnaire as to the treatment given − namely, only diabetic diet and oral hypoglycemic medication − and the type of pain complained of, she felt no such circumstances existed.

[16] In his supplementary written submissions filed after the hearing, the applicant alluded to the fact that the Court should grant him an extension of time to file such an appeal or to rule that the time limitation for such appeal are or ought to be waived. First, this remedy was never sought in the Notice of Application and second, the Court has no jurisdiction to do so (time fixed in the CPP).

[41] The decision-maker also notes that in these circumstances, especially the type of pain complained of, there was nothing that would have necessarily prevented Mr. Jones from doing some appropriate alternative or sedentary work.[17]

[42] The applicant acknowledged that there is no evidence that there was a practice of developing to doctors or specialists back in 1987. He also acknowledged that there is no obligation to do so in the CPP Regulations[18]. As mentioned, it was not argued that the applicant was given any administrative advice to the effect that his medical condition would be further examined by the adjudicator before reaching a conclusion on his application.

[43] Rather, what the applicant says is that in his view it was necessary in his case to do so. He provides no hard evidence to support this position which may well be one of the possible outcomes when one examines all the circumstances, but is certainly not the only acceptable outcome here in respect of the facts and the law. This is especially so when one considers, like the decision-maker did, that the onus of disclosing all relevant medical information to establish his right to a benefit was on Mr. Jones.

[44] In fact, it is clear that the applicant's arguments are made with the hindsight that had this been done, the Department might have obtained the letter dated May 29, 1987 from Dr. O'Brien to Dr. Clunas. The Court notes that here we are dealing more with causality than with whether or not

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[17] In fact, much later during the hearing before the Review Tribunal, Mr. Jones admitted that had he been able to find such employment, he could have worked as a watchman. In a letter written years later, he explains that at the relevant time, he could not face the full extent of his disability and tended to adopt an optimistic view.

[18] See *King* 2010.

the decision not to develop falls within the concept of "an administrative error". The Court also notes that if one is to use hindsight, one should also consider the fact that when Dr. Clunas was asked to give the medical history (in addition to what occurred between 1989 and 1994) and what advice had been received from consultants, he did not refer to the opinion of Dr. O'Brien. Not only did he not refer to it in his September 1995 letter, he also failed to refer to it in April 1996 when asked (by Mr. Jones presumably) to provide objective evidence of Mr. Jones' condition prior to 1989, and specifically in 1986-87.

[45] The Court is not persuaded that the Minister's representative has made a reviewable error in reaching the conclusion that there was no administrative error in not developing to either Dr. Clunas or Dr. O'Brien in 1987.

[46] In the jurisprudence, the type of errors that entails the application of subsection 66(4) of the CPP include for example misplacing or loosing an application (*Canada (A. G.) v. Vinet-Proulx*, 2007 FC 99, 308 F.T.R. 134 at para. 15)[19], seeking information about the wrong year (for example, 1972 instead of 1973, in the case of *Bartlett v. Canada (A. G.)*, 2007 FC 89, 308 F.T.R. 169 at para. 13 (*Bartlett*)).

[47] The applicant relied heavily on the decision in *Bartlett*, stating that the facts therein are strikingly parallel to those in his case. The Court disagrees. In *Bartlett*, it is clear that the decision-maker had undertaken some enquiry (thereby assuming the duty to do it correctly) and in the

process of doing so mistakenly sought information about the wrong year. This case does not stand for the proposition that there is an administrative duty to seek evidence to establish an applicant's right to CPP benefits when he or his doctors failed to provide it.

[48] The Court now turns to the 1994 application (which is relevant to the claim for interest on the CPP disability benefits between January 1994 and September 2005). Here again, Mr. Jones focuses on the fact that the May 29, 1987 letter of Dr. O'Brien and the notes of Dr. Clunas for the period between 1986 and 1989 should have been before the decision-maker at the time he made his application in 1994 or shortly thereafter and certainly before the first refusal in February 1995. He argues that the absence of such evidence is the result of repeated administrative errors in the processing or handling of his application. In that respect, there are two major themes:

i) The Department failed to ensure that Mr. Jones and Dr. Clunas were aware of the fact that his disability had to exist as of December 1989 and continued thereafter until the time of his application (in fact, he argues that the questionnaire as well as the letter of the Appeals Division to Dr. Clunas dated June 5, 1995 requiring further medical information were both misleading in that respect);

ii) The Department failed to develop to Dr. Clunas and to the specialists listed in his 1987 and 1994 applications before February 1995 as well as after receiving the letter from Dr. Clunas in October 1995 − in order to obtain further details, as well as copies of these consultants' reports − and, in any event, before sending the file to the Review Tribunal in 1996.

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[19] This decision dealt with section 32 of the *Old Age Security Act*, R.S.C. 1985, c. O-9 that uses substantially the same language than subsection 66(4) of the CPP.

[49] With respect to the Department's alleged failure to ensure that both Mr. Jones and his doctors properly understood that his condition had to exist not only in 1994 or 1995 but also in 1989, the Court notes that in addition to there being no statutory obligation to explain the CPP legislation to applicants, the June 5, 1995 letter was clear enough. Also, as of February 1995, and certainly well before the next decision in December 1995, Mr. Jones and his doctors ought to have been aware of the importance of such date.[20]

[50] Certainly, by the time he filed the further report from Dr. Clunas dated April 9, 1996, one could reasonably infer that Mr. Jones knew very well that he had to establish that he was disabled and incapable of working prior to December 1989. Again, it is worth mentioning that in April 1996, even though Dr. Clunas was clearly asked to address Mr. Jones' condition prior to 1989, he made no reference to Dr. O'Brien's letter of May 29, 1987. One should also note at this stage that in her dissenting opinion which ultimately helped Mr. Jones settle the matter with the Minister, at page 10 of the reasons of the Review Tribunal, the Chairperson comments that Dr. Clunas had not provided the full history and background concerning Mr. Jones' condition during the period from 1989 to 1995 as well as prior to March [sic][21] 1989.

[51] The Court has not been persuaded that the decision-maker erred when she decided that the use of a "standard" questionnaire and a "standard" letter to doctors did not constitute an administrative error in the administration of the Act.

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[20] See references to 1989 in the February 2, 1995 decision, the letter of June 5, 1995 to Dr. Clunas with copy to Mr. Jones and the Request for additional information signed by Mr. Jones on July 12, 1995.
[21] Should read December 1989.

[52] Turning now to the second theme in the decision under review, the Minister's representative says that in Mr. Jones' case, the medication he was taking in 1994 did not suggest a poorly controlled diabetic condition. This view was reinforced by the fact that Mr. Jones chose to provide a medical report from his podiatrist and focussed on the pain he experienced in his legs and feet.

[53] As mentioned earlier, there was nothing in the report of the podiatrist (the specialist) that could link the foot condition to the applicant's diabetic condition. In fact, the specific reference to a car accident six years earlier would suggest otherwise.

[54] Given that the February 1995 decision was taken on the basis of Mr. Jones' condition in 1994-1995, there could be no error in failing to enquire further on his condition in December 1989 since the failure to meet the statutory requirement at the time of the application was in itself fatal.

[55] Mr. Jones argues that the decision-maker did not specifically address the November 5, 2004 memorandum from Kim Logan when dealing with the need to develop to Dr. Clunas before issuing a decision in February 1995. In his submissions to the Minister, this issue is dealt with in a single sentence at the bottom of page 12 of the 26-page letter and Ms. Logan's memorandum is referred to in footnote 24. As mentioned, we have little knowledge of who Ms. Logan was (Mr. Jones' counsel referred to her as a clerk in the Department) and there is no evidence with respect to her experience as to the Department's practices 10 years before the date of her memorandum. Also, it is clear that

her concerns were not shared by Dr. Gregory[22], the specialist she consulted. In the circumstances, the Court is not willing to infer that this evidence was not properly considered by the decision-maker simply because it is not referred to expressly in the decision (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 at paras. 14-17 (F.C.); *Canada (A. G.) v. Clegg*, 2008 FCA 189, 80 N.R. 275 at paras. 34-38).

[56] The Court is satisfied that this failure to develop does not constitute an administrative error, as claimed by Mr. Jones, given that there is no statutory obligation or any published policy to that effect (*King* 2010 and *Mulveney v. Canada (Human Resources Development)*, 2007 FC 869, 160 A.C.W.S. (3d) 187 *(Mulveney)*). In any event, even assuming that such an error had indeed occurred, it is evident that this error was corrected when Mr. Jones appealed the February 1995 decision[23]. There is absolutely no reason to believe that Dr. Clunas would have answered any enquiry made prior to February 1995 differently than he did when the Department enquired in June 1995. History tells us that this information was not found to be sufficient to establish Mr. Jones' right to CPP benefits.

[57] Having sought a full history and narrative report from Dr. Clunas including any pertinent report from consultants, the Court is not persuaded that the decision-maker made a reviewable error when she concluded that there was no obligation nor any good reason to view the decision not to develop with the specialists listed in the 1994 or even the 1987 application as an administrative

[22] This again shows how there can be more than one opinion on a given set of facts.
[23] Mr. Jones argues that an error cannot be cured by what happens later. It is clear that among other things what happened later had an impact on the causal link necessary to obtain a remedy under subsection 66(4) of the CPP.

error. The same is true with respect to what was done when the file was sent to the Review Tribunal[24].

[58] Each one of the other issues raised could be addressed in detail but the Court believes that it would serve little purpose to do so given that none are persuasive. In fact, if the position taken by the applicant was accepted, namely that before reviewing an application, the Department must obtain whatever evidence is available from the family doctor or any specialist listed in an application or prior application, whether or not it is filed by the applicant, that it must explain the CPP for him and that it must tell him what information is missing from his file, including whether he should file additional evidence, then the fact that the CPP Regulations put the burden of proof on the applicant would have no meaning.

[59] On the contrary, an applicant would be better off providing no medical evidence at all, leaving it to the Department to do all the enquiries itself, so that if anything is missing, he can simply bypass the three-tier appeal process by going directly to subsection 66(4) of the CPP to obtain not only the benefits themselves but also the related interest which are not even otherwise payable under the CPP.

[60] It simply cannot be so and the Court agrees with the approach taken by Justice Eleanor Dawson in *Mulveny*:

[24] In fact, the Minister's representative says that the Department has no jurisdiction to add evidence to the file after an appeal has been launched with the Review Tribunal.

> 18 In my view, it was not patently unreasonable for the Minister's delegate to rely upon the written advice provided to Ms. Mulveney in 1994 and 1995 with respect to Ms. Mulveney's obligation to notify HRDC of any return to work. For the delegate to have found the failure to provide more frequent advice about Ms. Mulveney's obligations to constitute erroneous advice or administrative error, the delegate would have had to construe the Act and its associated regulations so as to impose a positive obligation upon the Minister and his department to regularly remind benefit recipients of their obligation to inform HRDC of any return to work or change in their medical condition. I can find no provision in the Act or the *Canada Pension Plan Regulations*, C.R.C., c. 385 (Regulations), that justifies such a conclusion.

[61] There is simply no justification for setting aside the decision under review.

[62] As mentioned, the main reason for rejecting the request was not the lack of causal link. Therefore, there is little need to address this issue even though the respondent dealt with it at length in his memorandum and at the hearing. The Court agrees that it is far from clear that such causal link exists and certainly not, as suggested by the applicant, simply on the basis of the settlement finally reached in 2008.

[63] There is also no need to deal with the parties' argument with respect to the Minister's power to grant interest pursuant to subsection 66(4) of the CPP, except to note that the case law referred to by the parties[25] only addresses the issue by way of *obiter* or as a suggestion. A more thorough analysis will be required when this question really needs to be determined especially considering the

[25] *Scheuneman v. Canada (Human Resources Development)*, 2005 FCA 254, 337 N.R. 307; *King* 2009; *King v. Canada*, 2007 FC 272, [2007] F.C.J. No. 359 (QL); *Whitton v. Canada (A.G.)*, 2002 FCA 46, 291 N.R. 318.

grave consequences it would have not only on claims under this Act but under similar provisions in many other legislations.

[64] In light of the foregoing the application is dismissed.

ORDER

THIS COURT ORDERS that the application is dismissed.

"Johanne Gauthier"
Judge

ANNEX A

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

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 is likely to result in death; and (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.	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 indéfinie ou devoir entraîner vraisemblablement le décès; 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.

66. (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied
(a) a benefit, or portion thereof, to which that person would have been entitled under this Act,
(b) a division of unadjusted pensionable earnings under section 55 or 55.1, or
(c) an assignment of a retirement pension under section 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.

66. (4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
a) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
b) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
c) la cession d'une pension de retraite conformément à l'article 65.1,
le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

Canada Pension Plan Regulations, C.R.C., c. 385

68. (1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:
(a) a report of any physical or mental disability including

68. (1) Quand un requérant allègue que lui-même ou une autre personne est invalide au sens de la Loi, il doit fournir au ministre les renseignements suivants sur la personne dont l'invalidité est à déterminer :
a) un rapport sur toute invalidité physique ou mentale indiquant les éléments suivants :

(i) the nature, extent and prognosis of the disability,	(i) la nature, l'étendue et le pronostic de l'invalidité,
(ii) the findings upon which the diagnosis and prognosis were made,	(ii) les constatations sur lesquelles se fondent le diagnostic et le pronostic,
(iii) any limitation resulting from the disability, and	(iii) toute incapacité résultant de l'invalidité,
(iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant;	(iv) tout autre renseignement qui pourrait être approprié, y compris les recommandations concernant le traitement ou les examens additionnels;

ANNEX B

Applicant's Memorandum of Fact and Law, paragraphs 102-107:

102. In conclusion regarding the 1994 application, it is respectfully submitted that the Department was unreasonable in concluding that there was no administrative error regarding its denial of Mr. Jones's 1994 disability benefits application.

103. It is submitted that the Department had administrative responsibilities in the handling of Mr. Jones's 1994 application that the Department did not meet. In receiving and processing Mr. Jones's 1994 application before denying it in February 1995, the Department erred administratively in:
(a) providing Mr. Jones and Dr. Urton with standard forms of Disability Questionnaire and Medical Report, respectively, asking for information only as of the date of the application, without having a process in place to obtain additional information pertinent to the applicant's condition at the time of the MQP in the event that the MQP was determined to be earlier than the date of the application,
(b) failing to recognize that there was a substantial difference between Mr. Jones's 1989 MQP and his 1994 application date, and that the difference meant that the information from the standard forms of Disability Questionnaire and Medical Report completed by Mr. Jones and Dr. Urton, respectively, would not be expected to, and did not, provide information regarding Mr. Jones's physical condition at the time of his MQP; or, alternatively, failing to take any effective action in response to such knowledge,
(c) failing to inform Mr. Jones that his MQP had been determined to be December 1989, and failing to explain to him the crucial need for information regarding his physical condition specifically in December 1989, his MQP,
(d) failing to inform Mr. Jones that the Department required the Medical Report to be completed by a "medical physician" rather than by the podiatrist Dr. Urton,
(e) failing to develop to Dr. Clunas at all, given the absence of a medical report by a "medical physician" and the absence of any information, from Mr. Jones, Dr. Urton or a medical physician, regarding Mr. Jones's physical condition in December 1989,
(f) failing to develop to Dr. O'Brien, the internal medicine specialist who the Department knew, or ought to have known, had seen Mr. Jones for his diabetes before the expiry of his MQP, and
(g) in the result, allowing Mr. Jones's application to go forward for decision-making without the file containing sufficient information regarding Mr. Jones's physical condition and his capacity to pursue substantially gainful employment as of his MQP in December 1989 to allow the Department to make a properly informed decision whether to approve or deny his benefits application.

104. In making the February 1995 decision denying Mr. Jones's 1994 application, the Department erred administratively in:
(a) completing the decision-making process, rather than sending the application back for further information, knowing

(i) that Mr. Jones's 1989 MQP was substantially earlier than his 1994 application date,
(ii) that all of the information from Mr. Jones's 1994 Disability Questionnaire and Dr. Urton's Medical Report related to Mr. Jones's physical condition in December 1994 and not to his condition in December 1989,
(iii) that the Medical Report on file had not been completed by a "medical physician," and that there was no information on the file from a "medical physician,"
(iv) that there had been no development to Mr. Jones's family physician Dr. Clunas, and
(v) that there had been no development to Dr. O'Brien, the internal medicine specialist whose name was listed on Mr. Jones's 1987 application,

(b) concluding that Mr. Jones was capable of some form of gainful employment as of December 1994, in the absence of any evidence supporting such a conclusion,
(c) in the decision letter, failing to explain to Mr. Jones the meaning of his "minimum qualifying period" of "1989" and the consequent need for information regarding his physical condition specifically in December 1989,
(d) in the decision letter, failing to provide any reason for the denial of the application that related to Mr. Jones's MQP of December 1989, thereby confusing the legal significance of Mr. Jones having an MQP of December 1989, and
(e) in the decision letter, stating that Mr. Jones cannot be considered disabled within the meaning of the *CPP* because it had been determined that Mr. Jones was capable of some form of gainful employment *at the time of his December 1994 applicatio*n, thereby further obscuring the crucial importance of information about Mr. Jones's condition at his MQP in December 1989.

l05.After the February 1995 denial decision and while preparing the file for Mr. Jones's appeal to the Minister, the Department erred administratively in:
(a) failing to notify Mr. Jones and Dr. Urton of the crucial importance of information about Mr. Jones's condition in December 1989,
(b) asking Dr. Clunas to provide information about Mr. Jones's medical history from 1989 to present, without
(i) mentioning the legal significance of Mr. Jones's condition specifically in December 1989,
(ii) asking Dr. Clunas for any information prior to 1989 that would shed light on Mr. Jones's condition in December 1989,
(iii) asking Dr. Clunas for his opinion as to whether Mr. Jones had a severe and prolonged disability in December 1989, or
(iv) asking Dr. Clunas to provide copies of any consult letters from specialists and his own progress notes that would support his opinions regarding Mr. Jones's condition and employability in December 1989,

(c) failing to evaluate whether Dr. Clunas's September 1995 opinion letter provided sufficient information regarding Mr. Jones's condition specifically in December 1989 to allow a proper decision to be made whether to approve or deny Mr. Jones's appeal; or, alternatively, failing to determine that Dr. Clunas's letter did not provide sufficient information regarding the MQP

because, among other things; the concluding diagnosis could reasonably be considered to be as of 1995, rather than December 1989,
(d) failing to develop further to Dr. Clunas,
(e) making a recommendation that Mr. Jones's 1994 application be denied on the grounds that he was capable of some form of gainful employment in December 1989 without there being any evidence on the file that reasonably supported such a conclusion, and
(f) allowing the file to proceed to an appeal decision without there being sufficient information on the file to allow a proper decision as to whether Mr. Jones met the *CPP* disability criteria as at his MQP of December 1989.

l06. In making the December 1995 decision to deny Mr. Jones's appeal, the Department erred administratively in:
(a) completing the decision-making process, rather than sending the file back for further information, knowing that
    (i) neither Mr. Jones nor Dr. Clunas had been informed of the crucial legal significance of information about Mr. Jones's condition specifically at December 1989,
    (ii) Dr. Clunas's September 1995 letter spoke to Mr. Jones's condition in 1995 and not to his condition in December 1989,
    (iii) Dr. Clunas had not been asked to express, and had not expressed, an opinion on whether Mr. Jones had a severe and prolonged disability in December 1989 or on whether Mr. Jones was incapable of substantially gainful employment due to his disability in December 1989, and
    (iv) there had been no development to Dr. O'Brien,
(b) determining that Mr. Jones did not meet the disability eligibility requirements in December 1989 without there being any evidence on the file that reasonably supported a conclusion that Mr. Jones was capable of any substantially gainful employment in December 1989,
(c) in the decision letter, incorrectly stating Mr. Jones's 1994 application had been denied in February 1995 for failure to meet the minimum contributory requirements *at the time of the application*, thereby continuing to confuse the significance of the December 1989 MQP, and
(d) in the decision letter, failing to provide reasons for the conclusion that Mr. Jones did not meet the disability eligibility requirements in December 1989, thereby making it that much more difficult for Mr. Jones to understand why his application had been denied and to present an effective appeal to the Review Tribunal.

l07. After the December 1995 appeal denial decision and while preparing the file for Mr. Jones's appeal to the Review Tribunal, the Department erred administratively in:

(a) failing to develop further to Dr. Clunas and to develop to Dr. O'Brien regarding Mr. Jones's physical condition and ability to pursue any form of substantially gainful employment in December 1989,
(b) concluding that there was sufficient medical information on the file to allow a proper decision on whether Mr. Jones's application should be approved or denied,

(c) concluding and arguing to the Review Tribunal that Mr. Jones was capable of some form of substantially gainful employment in December 1989, without there being any evidence on the file that reasonably supported such a conclusion, and
(d) in the result, allowing the file to be presented to the Review Tribunal for a decision on the appeal when there was a conspicuous absence of objective (i.e., medical) information on the file regarding Mr. Jones's physical condition and ability to pursue substantially gainful employment as of December 1989.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1650-09
STYLE OF CAUSE:	DOUGLAS JONES v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	April 28, 2010
REASONS FOR ORDER:	GAUTHIER J.
DATED:	July 9, 2010

APPEARANCES:

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