

Federal Court



Cour fédérale

Date: 20100806

Docket: T-1712-09

Citation: 2010 FC 808

Ottawa, Ontario, August 6, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

TAMMY ANN MURRAY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Ms. Tammy Ann Murray sought disability benefits under the Canada Pension Plan (CPP) but was turned down by the Minister of Health, and by a Review Tribunal. Both decision-makers concluded that Ms. Murray's disability did not meet the criteria for benefits because, during the period she was eligible, it was not "severe and prolonged".

[2] Ms. Murray asked the Pension Appeal Board (PAB) for leave to appeal the Review Tribunal's decision but the PAB dismissed her application. Ms. Murray argues that the PAB erred

and asks me to order a re-assessment of her application. However, I can find no basis on which to overturn the PAB's decision and must, therefore, dismiss this application for judicial review.

[3] The sole issue is whether the PAB applied the correct test and rendered a reasonable decision.

II. Factual Background

[4] Ms. Murray was laid off from her position as a hotel night clerk in 2006. In the summer of 2007, she began feeling stiff and experiencing pain in her feet. She saw a specialist in the fall of 2007 who suspected Ms. Murray had seronegative rheumatoid arthritis.

[5] Ms. Murray applied for disability benefits in December 2007. Based on her previous contributions to the CPP, Ms. Murray qualified for benefits up to December 31, 2007. However, the Minister denied her claim because the medical evidence did not indicate that her disability was severe and prolonged as required under the CPP. Test results and X-rays showed that her condition was improving.

[6] Ms. Murray continued to experience chronic pain and was re-examined by her specialist in March 2008. The specialist suspected that, although her arthritis was in remission, Ms. Murray was experiencing fibromyalgia. The fibromyalgia might have been caused by the inflammation brought about by the pre-existing arthritis.

[7] Based on this information, Ms. Murray asked the Minister to reconsider her benefits claim, but without success. Ms. Murray appealed this decision to the Review Tribunal. The Tribunal also concluded that Ms. Murray had not shown that she had been experiencing a severe and prolonged disability prior to December 31, 2007, the last date on which she qualified for benefits. According to the Tribunal, the medical evidence did not refer either to fibromyalgia or to an inability to work during the relevant time period. Evidence on those two points did not appear until March 2008. In addition, later medical assessments indicated that Ms. Murray's arthritis had remitted, but she was experiencing ongoing pain due to fibromyalgia. The Tribunal noted that the cause of fibromyalgia is unknown.

[8] After receiving the Review Tribunal's decision, Ms. Murray marshalled additional evidence and launched an appeal to the PAB. The PAB concluded that the evidence did not establish that Ms. Murray had a severe and prolonged disability as of December 31, 2007, or even in 2009, when it rendered its decision.

III. Did the PAB Err?

(a) Did the PAB apply the correct test?

[9] When deciding whether to grant leave to appeal, the role of the PAB is to decide whether the applicant has presented an arguable case. If the PAB applies the wrong test, its decision must be overturned.

[10] Here, the PAB noted that the evidence before the Review Tribunal did not establish a disability as defined under the CPP during the time she was eligible for benefits. Nor did her supplementary evidence. Accordingly, the PAB concluded that Ms. Murray had not presented an arguable case, and it refused leave to appeal.

[11] The PAB applied the correct test – whether Ms. Murray had presented an arguable case for appeal.

(b) Was the PAB's decision reasonable?

[12] A decision is reasonable if it falls within a range of possible, acceptable outcomes that are defensible based on the facts and the law. Here, the PAB's decision would be reasonable if its conclusion that Ms. Murray had failed to present an arguable case fell within that range, considering the factual record before it and the statutory definition of a disability. Under the CPP, applicants are entitled to benefits if the evidence shows that, during the period of their eligibility, they have a severe and prolonged disability that prevents them from pursuing any substantially gainful employment (*Villani v. Canada (Attorney General)*, 2001 FCA 248, at para. 50).

[13] In addition to the record that was before the Review Tribunal, Ms. Murray presented the following new evidence to the PAB:

- A letter to the PAB dated June 9, 2009 in which she states that she disputes her specialist's conclusion that her arthritis had remitted, given that she was still

experiencing pain. She explained that she was going to see another specialist in July 2009.

- A letter dated May 22, 2009 from her family doctor to the new specialist summarizing Ms. Murray's medical history and requesting an opinion.
- General information Ms. Murray obtained about arthritis from the internet.
- A letter to the PAB dated August 10, 2009, in which Ms. Murray describes her recent appointment with her new specialist who, according to Ms. Murray, has confirmed that her inflammatory arthritis has advanced.
- A letter dated July 16, 2009 from the new specialist to Ms. Murray's family doctor, in which he outlines her medical history and concludes that she has "polyarthralgias with very minimal findings in the hands, but not the other joints" which are "inflammatory in nature". Based on a physical examination of Ms. Murray, he concluded that "her pain seems out of proportion to the physical findings" and stated that he planned to carry out further tests, including a bone scan.
- A report dated July 17, 2009 setting out the findings of a bone scan: "mild hyperemia is present in the region of the right ankle joint" which "may reflect an inflammatory arthropathy. Infection or fracture could result in a similar appearance."

- A report dated July 26, 2009 setting out the findings of an x-ray of Ms. Murray's right ankle: "The area of increased uptake noted in the bone scan does not correspond to a noticeable radiographic abnormality."
- Miscellaneous diagrams of the hand and two test results (ESR and CRP), presumably conducted by the specialist who saw her in July 2009. In his report, he had noted that she had a "mild elevation of ESR and CRP."

[14] In deciding whether the PAB's decision was reasonable, I can only consider the evidence that was before it, not the additional documents that Ms. Murray presented on her application for judicial review.

[15] As I see it, none of the new information Ms. Murray presented to the PAB could cast any doubt on the conclusions of the Review Tribunal in respect of the key question before it – whether Ms. Murray was experiencing a severe and prolonged disability that prevented her from pursuing any gainful employment during the period ending December 31, 2007. Accordingly, in effect, Ms. Murray had not presented the PAB with any grounds on which to conclude that the Review Tribunal had made any error, whether of law or fact.

[16] In the circumstances, therefore, I cannot find that the PAB's decision was unreasonable.

IV. Conclusion and Disposition

[17] Given the evidentiary record before it, I find that the PAB's conclusion that Ms. Murray had not presented an arguable case was not unreasonable. Ms. Murray had not provided any evidence showing that the Review Tribunal had erred when it found that she was not entitled to disability benefits in the period ending December 31, 2007. Accordingly, I must dismiss her application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is dismissed.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1712-09

STYLE OF CAUSE: MURRAY v. AGC

PLACE OF HEARING: Vancouver, B.C.

DATE OF HEARING: June 9, 2010

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

DATED: August 6, 2010

APPEARANCES:

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