Federal Court  Cour fédérale

Date: 20110517

Docket: T-1832-10

Citation: 2011 FC 561

Ottawa, Ontario, May 17, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

DARLENE A. TAKER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Pension Appeals Board (the Board), dated September 28, 2010, under section 83 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Plan), refusing the applicant leave to appeal a decision of the Review Tribunal.

PRELIMINARY MATTER

[2] A preliminary note is that the Court at the hearing ordered the changing of the style of cause in this case to name the respondent Attorney General of Canada, and not the Minister of Human Resources and Skills Development. The decision under review is a decision of the Board, which is a tribunal independent of the Minister. According to Rule 303 of the *Federal Courts Rules*, SOR/98-106 (the Rules), the Attorney General of Canada is to be named as respondent in an application for judicial review where there is no person, other than the tribunal that made the decision, directly affected by the decision, or otherwise statutorily required to be named as a party.

FACTS

The statutory scheme for applying for a disability pension

[3] Before detailing the specific facts relating to the applicant's attempts to obtain a disability pension, the Court will provide a brief explanation of the statutory scheme established by the Plan for obtaining a disability pension.

[4] Section 60 of the Plan provides that the first step in obtaining a benefit under the Plan is an application to the Minister.

[5] If that application is denied, Section 81 of the Plan provides for a right to apply to the Minister for reconsideration of that decision.

[6] If the reconsideration is unsuccessful, section 82 of the Plan provides a right of appeal to the Review Tribunal. The Review Tribunal consists of three members, and must give the applicant a hearing at which the application will be re-determined.

[7] If the appeal is denied, Section 83 of the Plan provides that a party may apply to the Chairman or Vice-Chairman of the Pension Appeals Board for leave to appeal the decision of the review tribunal. If leave is granted, the application is re-determined by the Pension Appeals Board at a full hearing.

[8] Section 84(1) of the Plan provides that, "except as provided in this Act," the decision of a review tribunal, where leave is not granted, or of the Pension Appeals Board, where leave is granted, is final, except for judicial review before this Court.

[9] Section 84(2) of the Plan provides that any final decision can be re-opened if "new facts" arise.

The applicant's application history

[10] The applicant suffers from chronic pain and fibromyalgia, which began in October 1996. Since October 1996, the applicant has at various times received social services payments, including, for example, Workers' Compensation benefits from October 1996 to June 1997.

[11] The applicant filed two applications for disability benefits under the Plan: on August 6, 1998, and on November 23, 1999. Both applications were denied and the denial was maintained on reconsideration.

[12] The applicant appealed the denial of her November 23, 1999, application to the Review Tribunal, which heard her case on March 6, 2001, and dismissed her appeal on that same day. The Review Tribunal found that although the applicant suffered from fibromyalgia, the medical evidence demonstrated that she could return to work at a job that did not involve the same heavy lifting required at her former employment. Thus, the applicant did not qualify for the disability benefits because of a statutory requirement that the disability be "severe and prolonged":

> The medical evidence before the Review Tribunal is that Ms. Taker has been diagnosed as suffering from fibromyalgia, but the diagnosis made by Dr. Sutton is that it should not prevent her from a return to work. The only individual who appears to support a decision not to return to work is Ms. Taker's family physical, Dr. Gregus, and he offers no explanation as to why the return to work would not be possible for Ms. Taker, other than to indicate her education and age are personal factors that limit her employability in areas that do not require physical labour. The Review Tribunal notes that none of the specialists who have examined Ms. Taker indicated she was not capable of some form of physical labour, therefore, these personal findings cannot be determinative for the Review Tribunal.

[13] The applicant did not request leave to appeal the Review Tribunal's decision. The decision was therefore a final and binding decision, pursuant to section 84(1) of the Plan.

[14] On August 23, 2006, the applicant submitted a third application for Plan disability benefits. This application was denied because the Minister determined that the application was *res judicata* – that is, had already been finally determined by the March 6, 2001, appeal hearing. The applicant appealed this refusal to the Review Tribunal. Her appeal was dismissed on July 5, 2007.

[15] On December 22, 2008, the applicant filed an application under section 84(2) of the Plan to re-open the March 6, 2001, decision of the Review Tribunal. As stated above, section 84(2) of the

Plan provides that “on new facts” a decision maker under the *Canada Pension Plan* may rescind or amend a decision that they have made, even though that decision was final under section 84(1).

[16] In a decision dated June 14, 2010, a new Review Tribunal (the Tribunal) dismissed the applicant’s application. The reasons of the Tribunal are detailed below.

[17] The applicant requested leave to appeal the June 14, 2010, decision of the Tribunal. In a decision dated September 28, 2010, the Pension Appeals Board dismissed the applicant’s request. It is this decision that is the subject of this judicial review application.

DECISIONS BELOW

Decision of the Tribunal

[18] The applicant represented herself before the Tribunal, and the respondent was represented by counsel. The Tribunal dismissed the applicant’s section 84(2) application because it found that no new facts existed.

[19] The Tribunal stated that the onus was on the applicant to demonstrate that new facts existed. The Tribunal cited *Kent v. Canada (Attorney General)*, 2004 FCA 420, in which the Federal Court of Appeal enumerated a two-step test to determining whether “new facts” have been established that establish disability existing during the relevant period: first, the facts must not have been discoverable before the original hearing by the exercise of reasonable diligence, and, second, it must be “material”—that is, there must be a reasonable probability that the evidence, if admitted, could lead to a change in the original Tribunal’s decision.

[20] The Tribunal provided the following relevant dates:

a. Date of the original tribunal hearing: March 6, 2001;

b. Date of the application for disability benefits: November 23, 1999; and

c. The relevant end date for determining whether the applicant has met the requisite "minimum qualifying period." The applicant must have become disabled prior to the end of her minimum qualifying period: December 31, 1998.

[21] The Tribunal enumerated the "new facts" that the applicant had submitted in support of her application, either before the hearing or at the hearing:

a. A medical report by Dr. Gregus, dated August 27, 2006;

b. A second medical report by Dr. Gregus, dated February 19, 2001;

c. A diagnostic imaging report, dated July 31, 2006;

d. An operative report, dated June 21, 2001;

e. A medical report by Dr. S. Ouellette, dated December 15, 2004;

f. Two medical reports by Dr. E. Sutton, dated March 27, 2001 and February 13, 2001;

g. A medical report by Dr. K Chisholm, dated August 10, 2000;

h. A medical report by Dr. D. I. Alexander, dated April 10, 2000;

i. A medical report by Dr. K. Malaviarachchi, dated February 27, 2001;

j. Three patient diagnostic imaging reports, dated February 12, 2004, July 31, 2006, and August 21, 2007;

k. Three handwritten doctor's notes – one undated, and two dated 1997; and

l. A "bundle of various documents created by the Nova Scotia Department of Community Services."

[22] The Tribunal reviewed the parties' submissions. First, it considered the applicant's submission that because the original decision had committed an error of law, therefore the applicant did not in fact require new facts in order to have the decision reconsidered.

[23] The Tribunal did not explicitly consider this argument, but its analysis demonstrates that it rejected it. The Tribunal emphasized what was required in order for the application to succeed:

> ¶14. As mentioned above, in order to allow this application and reopen the hearing, the Tribunal must find that the information submitted by the Applicant was 1) not reasonably discoverable at the time of the first hearing and 2) could reasonably lead to a reversal of the Tribunal's decision made following the first hearing.

[24] The Tribunal then considered whether the evidence submitted by the applicant met the test for "new facts" that it had enunciated. The Tribunal found that none of the evidence met the test. First, the Tribunal rejected all of the documents that pre-dated the March 6, 2001, hearing:

> ¶15. The Applicant did not demonstrate, on the balance of probabilities, that the documents which pre-date the original March 6, 2001 hearing were not reasonably discoverable at that time.

[25] Second, the Tribunal found that some of the evidence, specifically a report by Dr. Sutton, was included in the original hearing file.

[26] Third, the Tribunal found that the undated doctor's note could not have provided information that would reasonably have led to a reversal of the Tribunal's original decision, because it was addressed "to whom it may concern," and stated only that most of the applicant's visits to the doctor had been related to her injury.

[27] Finally, the Tribunal found that all of the other documents referred to information that post-dated the time of the first hearing and therefore could not constitute "new facts."

Decision under review – Decision of the Pension Appeals Board

[28] The applicant applied to the Board for leave to appeal the decision of the Tribunal. The Board stated that the applicant did not contest the Tribunal's finding that the applicant had not submitted any "new facts" evidence. Instead, the applicant submitted that the established facts had to be considered in light of a Supreme Court of Canada decision that the applicant submitted reinterpreted the meaning of "disability" under the Plan.

[29] The Board found that the Tribunal had properly interpreted the facts and the law:

> ¶1. The Review Tribunal gave full consideration to the matter of reconsidering a decision on the basis of new facts and properly concluded that the facts of this claim did not lead to a consideration of new facts and correctly concluded the matter could not be revisited.

[30] The Board paraphrased the applicant's claim as follows:

> ¶4. In other words, it is her claim that the fact is "*res judicata*" unless re-opened due to "new facts" as the Supreme Court decision makes a finding of disability retroactive.

[31] The Board concluded that the applicant's submission "is a complete misinterpretation of the law and of the principles enunciated in the Supreme Court decision."

[32] The Board concluded that the applicant could have no arguable case to present on appeal because she had not appealed the original decision and there were no new facts upon which to re-open it. Therefore the Board denied leave.

ISSUE

[33] The issue is whether the Board erred in finding that the applicant could have no arguable case to present on appeal.

RELEVANT LEGISLATION

[34] Section 84 of the Plan provides that a Review Tribunal or the Pension Appeals Board may determine any question of law or fact, and that this determination will be final, unless new facts are presented:

84**.** (1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to (*a*) whether any benefit is payable to a person, (*b*) the amount of any such benefit, (*c*) whether any person is eligible for a division of unadjusted pensionable earnings, (*d*) the amount of that division, (*e*) whether any person is eligible for an assignment of a contributor's retirement pension, or (*f*) the amount of that assignment, and the decision of a Review	84. (1) Un tribunal de révision et la Commission d'appel des pensions ont autorité pour décider des questions de droit ou de fait concernant : *a*) la question de savoir si une prestation est payable à une personne; *b*) le montant de cette prestation; *c*) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension; *d*) le montant de ce partage; *e*) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant; *f*) le montant de cette

Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.	cession. La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf contrôle judiciaire dont elle peut faire l'objet aux termes de la *Loi sur les Cours fédérales*, est définitive et obligatoire pour l'application de la présente loi.
(2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.	(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

STANDARD OF REVIEW

[35] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[36] It is clear as a result of *Dunsmuir* and *Khosa* that questions of fact or mixed fact and law are to be reviewed on a standard of reasonableness. The Board's decision regarding whether an arguable case exists is a decision of mixed fact and law that is reviewable on a standard of reasonableness: *Williams v. Canada (Attorney General)*, 2010 FC 701, at paragraph 12.

[37] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at paragraph 47; *Khosa* at paragraph 59.

ANALYSIS

The legal requirements for eligibility for disability pension

[38] In order to receive a disability pension under the Plan, a person must satisfy two requirements:

a. The person must meet the earnings and contributory requirements of sections 44(1)(b) and 44(2) of the Plan (also known as the "Minimum Qualifying Period"); and

b. The person must have been disabled within the meaning of section 42(2) of the Plan when the earnings and contributory requirements were met.

[39] The earnings and contributory requirements of sections 44(1)(b) and 44(2) of the Plan establish a time period during which the applicant must be found to have become disabled. In this case, the applicant accepted that to be eligible for disability benefits she had to establish that she was disabled no later than December 31, 1998.

[40] Section 42(2) requires that in order to qualify for disability benefits, the applicant's disability must be "severe and prolonged." The section further specifies that a disability is "severe" if it renders a person "incapable regularly of pursuing any substantially gainful occupation" and is "prolonged" if it "is likely to be long continued and of indefinite duration or is likely to result in death".

[41] In *Klabouch v. Canada (Social Development)*, 2008 FCA 33, at paragraphs 14 to 17, the Federal Court of Appeal reviewed the law with regard to interpreting the "severe and prolonged" requirements of the Plan. The Court of Appeal stated that the severity of a disability is measured in terms of its effect on the applicant's capacity to work, regardless of the nature of the disability. Moreover, the capacity to work is to be measured with respect to any substantially gainful occupation, and not the applicant's usual job. In addition, the applicant must provide evidence not only of her disability, but also that she has made efforts and obtaining and maintaining employment that have failed as a result of the disability.

Re-opening a decision

[42] As stated above, section 84(2) of the Plan provides that despite section 84(1), a decision-maker may rescind or amend a previous decision if there are "new facts." The Tribunal correctly stated the law with respect to what constitutes "new facts." "New facts" must (1) relate to a condition that existed during the relevant period, but not discoverable with reasonable diligence, and (2) be material, in the sense that they could reasonably be expected to affect the outcome of the case: see, e.g., *Kent*, above, at paragraph 33, *Gaudet v. Canada (Attorney General*), 2010 FCA 59, at paragraph 3, and *Canada (Attorney General) v. Jagpal*, 2008 FCA 38, at paragraph 23.

[43] If there are no new facts, then the decision-maker's prior decision must stand. If, however, there are new facts, then a decision on the merits must be made, taking those new facts into account.

[44] The Court must stress, therefore, that an application for judicial review of the decision of the Board denying the applicant leave to appeal the decision of the Tribunal cannot consider the merits underlying the applicant's original claim. Although much of the applicant's evidence and submissions stress the reasons that she believes that the initial determination that she does not qualify for disability benefits was mistaken, that is not a question properly before this Court. Had the applicant wished to contest that finding, the applicant had to appeal the original decision of the Review Tribunal.

[45] Instead, this Court must determine whether the Board was reasonable in holding that the applicant had no arguable case for appeal because she had failed to present "new facts" that could provide a basis for re-opening the Tribunal decision.

The new facts

[46] Before this Court, the applicant has provided new evidence that was not before the Tribunal when it found that there were no "new facts" or before the Board when it upheld that decision. In particular, the following documents were submitted by the applicant for the first time on this application:

a. A letter from Dr. John M. Sperry, dated June 2, 1997, providing an assessment of the behavioural and emotional effects of her chronic pain on her;

b. Reports from Portland Physiotherapy Clinic, with various dates between November 1996 and March 1997, reporting on the applicant's response to physiotherapy treatments;

c. Workers' Compensation Board of Nova Scotia physician report forms, also of various dates;

d. radiological reports dated March 27 and August 21, 2007, and June 17, 2009;

e. A letter from Nova Scotia Social Assistance dated May 15, 1998, and containing notations from September and October, 2000; and

f. Various reports from Dr. Gregus, most dated between February 1998 and September 1999, but also including a doctor's note dated November 22, 2010 (i.e., after the September 28, 2010 decision of the Board). Of these reports, it appears that only two, the March 6, 1997, and May 15, 1998, are in the certified tribunal record that was before the Board.

[47] Because the issue in this case is whether the Board erred in upholding the Tribunal's finding that the applicant had not presented "new facts" sufficient to re-open the case under section 84(2), the Court cannot consider additional evidence that was not presented to the Tribunal or the Board.

[48] In order to have presented an arguable case, the applicant had to have presented "new facts" to the Tribunal. Before the Board, the applicant submitted that *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, a Supreme Court of Canada decision that post-dated the Minister's assessment in her case, constituted "new facts" that showed that fibromyalgia is a condition that can be recognized as a disability under the Plan.

[49] The Court finds that the Board reasonably concluded that the applicant did not raise an arguable case on that ground. First, the *Martin* case dealt with a challenge to a provision of the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, which expressly prevented chronic pain

sufferers from collecting workers' compensation benefits. The Supreme Court ruled that the provision was unconstitutional because it violated the equality guarantee of section 15 of the *Canadian Charter of Rights and Freedoms*.

[50] No similar provision affected the assessment of the applicant's application for benefits under the Plan. As stated above, the factors critical to determining whether an applicant suffers from a disability such as to entitle her to disability benefits under the Plan relate to the impact of the applicant's disability on her capacity to work and not on the name attributed to the symptoms from which she suffers. In this case, the Tribunal accepted that the applicant suffered from chronic pain and fibromyalgia, but found that the evidence failed to show that this disability was severe or prolonged enough to qualify her to receive disability benefits, because it found that she should still be able to perform some work. In fact, the Tribunal has, in the past, found persons with fibromyalgia and chronic pain are entitled to a disability pension in certain cases.

[51] Moreover, the Court accepts the respondent's position that a new Supreme Court decision cannot constitute "new facts" for the purposes of section 84(2) of the Plan.

[52] The second ground upon which the applicant submits that the Board was unreasonable in concluding that she had no arguable case, was in its finding that she had failed to present new facts to the Tribunal. Although she did not pursue this argument at the Board, the Board did consider this question. Before this Court, the applicant has submitted that the additional documents that she provided to the Tribunal support her submission that her disability is severe and prolonged and that she therefore qualifies for disability benefits.

[53] The Court repeats that there is a two-part test that must be met in order for evidence to be considered “new facts” for the purpose of section 84(2): the evidence must not have been discoverable at the time of the original hearing, and the evidence must be material.

[54] The Court finds that the Board reasonably concluded that the applicant did not have an arguable case for appeal, because she had failed to present new facts before the Tribunal.

[55] As stated above, the test for “new facts” is that the facts must relate to a condition that existed during the applicant’s qualifying period (that is, no later than December 31, 1998) but not have been discoverable at the time of the original hearing, and the facts must be material to the outcome of the application.

[56] In this case, the documents provided by the applicant to the Tribunal were numerous medical reports relating to her condition. The Court finds that the Tribunal reasonably concluded that those documents that pre-dated the original March 6, 2001 hearing date could not constitute “new facts” because they were discoverable by the applicant at that time.

[57] With regard to the documents post-dating the March 6, 2001, hearing, the Tribunal found that the evidence related to conditions that had arisen subsequent to the end of the applicant’s minimum qualifying period:

> ¶18. All the other documents submitted as new facts were created after the March 6, 2001 hearing and contain information which did not exist at the time of the Applicant’s MQP, or at the time of the

> first hearing. Therefore, none of those reports can be characterized as new facts.

[58] The Federal Court of Appeal established the circumstances in which medical reports that post-date the hearing will be considered “new facts” in *Canada (Attorney General) v. MacRae*, 2008 FCA 82:

> ¶17. Consequently, Courts have considered medical reports written after the original hearing of the application to be admissible pursuant to subsection 84(2) of the CPP where, for example, the condition which they attest to exists at the time of the original hearing but could not have been diagnosed or known to the applicant through the exercise of due diligence by the applicant (see e.g. *Kent, supra*; *Macdonald*, *supra*). However, in cases where the medical reports reiterate what is already known or has been diagnosed, the reports will not be considered as evidencing "new facts" (*Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293, [2005] F.C.J. No. 1532 (F.C.A.)).

[59] The Court finds that the Tribunal’s conclusion regarding the reports that post-date the original March 6, 2001 hearing date was unclear, but that its overall analysis demonstrates that it correctly understood the law with respect to what constitutes a “new fact” and was reasonable in how it applied this law to the applicant’s evidence. In particular, the Tribunal’s analysis demonstrates that it understood the above law that medical reports that post-date the original hearing may be considered “new facts” where they add something to the material that was initially presented, regarding the condition that existed at the time of the hearing.

[60] In this case, however, none of the reports that post-date the decision add anything to the conditions that were thoroughly considered in the original March 6, 2001 decision that the applicant’s condition was not such as to prevent her from being able to return to some sort of employment. The March 6, 2001 decision accepted that the applicant suffered from chronic pain

and fibromyalgia. The applicant has submitted only more evidence of the same. The applicant did not demonstrate to the Tribunal that any of the new evidence added insight into why she could not work, as suggested by the initial finding.

CONCLUSION

[61] The Court finds that the Board's decision to refuse the application for leave to appeal was reasonable. The Board reasonably found that the Tribunal had made no error of fact or law in its decision that there were no new facts before it upon which to re-open its March 6, 2001 decision.

[62] The Court emphasizes that the applicant's burden before the Tribunal, Board and this Court was to demonstrate the existence of "new facts" as described above. These applications are not appeals of the initial decision of the Tribunal denying the applicant's application for disability benefits under the Plan. That decision was final when the applicant chose not to appeal it, and could only be re-visited were new facts to arise.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1832-10
STYLE OF CAUSE:	*Darlene A. Taker v. Attorney General of Canada*
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	May 11, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	May 17, 2011

APPEARANCES:

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