Federal Court  Cour fédérale

Date: 20130704

Docket: T-1370-12

Citation: 2013 FC 746

Ottawa, Ontario, July 4, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HARRY DEVLIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to the *Federal Courts Act*, RSC 1985, c F-7, section 18.1(4), of a decision refusing to grant leave to appeal a finding that the applicant did not qualify under section 42(2)(ii) of the *Canada Pension Plan* act, RSC 1985, c C-8 [CPP] for a disability pension by reason of a severe and prolonged disability.

[2] The applicant, Mr. Devlin, stated that he was injured on the job on August 28, 2000. He applied for disability benefits on August 10, 2009. The Minister denied the application on April 28, 2010 and denied it again upon reconsideration on December 3, 2010. Mr. Devlin appealed to the

Review Tribunal. On November 29, 2011, the Review Tribunal also dismissed his application. Mr. Devlin sought leave to appeal the Tribunal decision. On May 15, 2012, a Designated Member, the vice-chairman of the Pension Appeals Board, refused leave.

[3] Mr. Devlin represented himself in his application for leave and on this application. While his written reasons for seeking leave were scant, he ably reviewed the history of his application for benefits in his oral submissions to the Court and candidly acknowledged that information he had previously provided pertaining to his work history was incorrect. He also candidly reviewed the history of his prior applications for benefits and substance abuse.

DECISION UNDER REVIEW:

[4] In his decision, the Designated Member reviewed the history of the case. He described the Tribunal's decision, commenting that it had conducted a lengthy and detailed review of the evidence, and that it had correctly identified the criterion under s 42(2)(ii) of the CPP and had decided that the requirements were not met. He cited *Callihoo v Canada (Attorney General)*, [2000] FCJ No 612 (QL) (TD) for the test for granting leave to appeal and *Canada (Attorney General) v Carroll*, 2011 FC 1092 at para 14 for the test for an arguable case:

> 14 The PAB also has a duty to apply the correct test for granting leave to appeal. The test is whether the applicant requesting leave has raised an arguable case (Callihoo v Canada (Attorney General), [2000] FCJ No 612 (TD)). An applicant will raise an arguable case if she puts forward new or additional evidence (not already considered by the RT), raises an issue not considered by the RT, or can point to an error in the RT's decision.

[5] The Designated Member found that Mr. Devlin had not identified any error of law nor specified what important information had been overlooked. No new or additional evidence had been presented and no new issues were raised. He refused leave to appeal.

ISSUE:

[6] The issue is whether the Designated Member made unreasonable findings based on the evidence before him.

STANDARD OF REVIEW:

[7] The applicant is not arguing that the wrong legal test was applied, but that the determination of whether his application raised an arguable case was in error. The standard of review is therefore reasonableness (*Canada (Attorney General) v Zakaria*, 2011 FC 136, at paras 14-15). Applying that standard, the Court may not interfere with the decision if it was justified, transparent, and intelligible, and fell within the range of possible, acceptable outcomes which were defensible in respect of the facts and the law.

APPLICABLE LEGISLATION:

Canada Pension Plan	Régime de pensions du Canada
R.S.C., 1985, c. C-8	L.R.C. (1985), ch. C-8
42. (1) In this Part,	42. (1) Les définitions qui suivent s'appliquent à la présente partie.
[. . .]	[. . .]

(2) For the purposes of this Act,	(2) Pour l'application de la présente loi :
(*a*) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	*a*) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	(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;

ANALYSIS:

[8] The applicant argued that the Review Tribunal had misinterpreted the facts. He relied on his affidavit and a new occupational rehabilitation report dated 2011/07/11 to demonstrate that he was

not fit to work due to his back problems, and was disabled well before December 31, 2002, the agreed minimum qualifying period (MQP) date.

[9] The respondent submitted that an "arguable case" was akin to a "reasonable chance of success", although the hurdle for leave was lower than that for success at the hearing on the merits (*Canada (Attorney General) v Zakaria*, 2011 FC 136 at paras 37, 39). An arguable case required the applicant to put forward new or additional evidence, raise an issue not considered by the tribunal, or point to an error in the tribunal decision (*Canada (AG) v Carroll*, 2011 FC 1092 at para 14). The respondent argued that the applicant had done none of these. The occupational rehabilitation report the applicant was relying upon was not before the Designated Member and related to an assessment in July 2011, long after the qualifying period and the application. The respondent submitted that even if this report was considered, it did not raise an arguable case. The late identification of a Hepatitis C infection was unrelated to the accident in 2000 nor was it connected to an earlier injury in 1985 in the medical reports before the review tribunal. The effect of the medication the application was taking to manage his pain on his ability to work was a relevant consideration that the Review Tribunal had been aware of.

[10] I find that the Designated Member's determination was made according to the tests prescribed by the jurisprudence and the record before him and was reasonable. While the Member erred in stating the year of the injury giving rise to the application, it was clear from his decision as a whole that he was aware that the correct date was 2000. While it is the Member's decision that is under review in this application, I am also satisfied that there were no errors warranting intervention made by the Review Tribunal.

[11] The claim that the applicant was not employable in his previous occupation or any other job was not before the Designated Member but was considered by the Review Tribunal. The Tribunal considered the applicant's medical reports up to seven years after the MPQ date and thoroughly reviewed the applicant's history, including his short lived efforts to work at other occupations. The Tribunal noted the diagnosis of multiple ailments in 2009 and other reports including those by the neurosurgeons concerning the possible exacerbation of earlier injuries, degenerative disc disease and observed improvements from therapy. The finding that the applicant did not suffer a severe and prolonged injury as of the MQP date was open to the Tribunal on the record before it. It may have been unreasonable for the Tribunal to consider the applicant's use of a motorcycle, which he indicated had been acquired as a restoration project and was driven only occasionally, but this was not a significant factor in the outcome.

[12] The applicant raised no new issues in his application for leave and the Member reasonably concluded that the Tribunal had weighed the evidence diligently and made acceptable findings. The new medical report dated after the Tribunal decision does not appear to me to change the situation. I acknowledge that this may be difficult for the applicant to accept given the pain that he continues to experience.

CONCLUSION:

[13] The application is denied. No costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is denied.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1370-12
STYLE OF CAUSE:	HARRY DEVLIN AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Kelowna, British Columbia
DATE OF HEARING:	June 6, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	July 4, 2013

APPEARANCES:

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Michael Stevenson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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