Federal Court  Cour fédérale

Date: 20140311

Docket: T-448-13

Citation: 2014 FC 238

Ottawa, Ontario, March 11, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JANUSZ TEODOR KAMINSKI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of a decision of a designated member [Member] of the Pension Appeal Board [Appeal Board] dated 27 November 2012 [Decision], which refused the Applicant's request for leave to appeal a decision of a Review Tribunal [Tribunal] dated 26 September 2012. The Tribunal's decision denied the Applicant's application for disability benefits under the *Canada Pension Plan*, RSC, 1985, c C-8 [CPP or Plan].

BACKGROUND

[2] The dispute at issue here has a long history. The Applicant first applied for CPP disability benefits on 2 January 2003 [2003 Application]. In that application, he indicated that he had stopped working as a refractory bricklayer in September 2000 due to a "shortage of work," and listed April 2001 as the date when he felt he could no longer work due to his medical condition, which included "sharp pain in my arms, elbows, wrists, upper and lower back pain, cracks in every joint. Pain in my knees and ankles. Numbness in my left hand… and on left side of face (around mouth)."

[3] To be eligible for disability benefits under the CPP, one must have contributed to the Plan in four of the six years preceding the disability. This is called the "Minimum Qualifying Period" [MQP], and is defined in section 44 of the Plan. Given that the Applicant made contributions to the CPP in 1997, 1998, 1999 and 2000, and not since, it was necessary for him to show that he was "disabled" as defined in section 42(2) of the Plan by 31 December 2002 at the latest, as this was the last date on which he could satisfy the MQP requirement.

[4] The Minister of what is now Employment and Social Development Canada (formerly Human Resources and Skills Development Canada) [Minister] denied the 2003 application both initially and upon reconsideration. The Applicant appealed the Minister's decision. That appeal was heard by a Review Tribunal in November 2005 – following an adjournment of over a year to allow the Applicant to obtain additional medical evidence, seek legal counsel, and arrange to have a Polish interpreter present – and was dismissed in a decision dated 16 January 2006. The Applicant was granted leave to appeal to the Appeal Board, which dismissed his appeal in a decision dated 1

March 2007. The Applicant sought judicial review of the Appeal Board's decision by the Federal Court of Appeal, which dismissed the application in a decision dated 27 June 2008: *Kaminski v Canada (Social Development)*, 2008 FCA 225. The Applicant sought leave to appeal to the Supreme Court of Canada, which was denied: SCC No. 32807, dated 22 January 2009. The Applicant then sought reconsideration by the Federal Court of Appeal, which was denied: Order of 14 May 2009 in file A-171-07. The Applicant sought leave to appeal the refusal to reconsider to the Supreme Court, but leave was once again refused: SCC No. 32807, dated 22 October 2009.

[5] On 11 August 2011, the Applicant made another application for CPP disability benefits [2011 Application]. While he had obtained new medical evidence, his MQP dates had not changed, as he had made no CPP contributions since 2000. The Minister denied the 2011 Application both initially and upon reconsideration, finding that the Appeal Board's decision on the 2003 Application was final and binding with respect to whether the Applicant had a disability as of 31 December 2002 that entitled him to benefits. The Applicant appealed this decision, and the Tribunal dismissed that appeal on 26 September 2012, finding that the question of whether the Applicant qualified for CPP disability benefits was *res judicata*, having already been finally determined by the Appeal Board. The Applicant sought leave to appeal the Tribunal's decision to the Appeal Board, but a designated member of that Board denied his application for leave on 27 November 2012. That is the Decision under review here.

[6] The Applicant filed his application for judicial review in the Federal Court of Appeal, but since the Decision of a single member of the Appeal Board denying leave to appeal is reviewable by

this Court and not the Court of Appeal, the application was ordered to be transferred to this Court by and Order dated 8 March 2013 (file A-542-12, per Sharlow JA).

DECISION UNDER REVIEW

[7] The Decision under review here is brief. It reads in its entirety:

> [1] The Review Tribunal's (RT) decision as to this application being res judicata cannot be faulted.
>
> [2] The applicant is left with no arguable case to be presented on appeal.
>
> [3] Leave to appeal is refused.

[8] To understand and evaluate this Decision, it is necessary to make reference to the Tribunal decision from which the Applicant sought leave to appeal. It reads in part:

> [2] The Tribunal made a long opening statement at the beginning of the hearing. It informed the Appellant that his application was problematic. The Appellant filed a first application in 2003. A Review Tribunal heard the case in 2005, which was dismissed. Then the Appellant appealed that decision to the Pension Appeals Board that heard and dismissed the appeal in 2007.
>
> [3] As per the rules of res judicata, the Tribunal cannot change the finding of an earlier Tribunal, and therefore no facts can be considered before 2007.
>
> [4] As the MQP is December 31, 2002, it is impossible for a Review Tribunal to render any decision in favour of the Appellant, and it informed the Appellant of such and that they could not hear any new evidence.
>
> [5] The Appellant then decided not to present any evidence, but requested a written decision from the Tribunal.
>
> […]
>
> [14] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2002.

> [15] The Tribunal dismisses the appeal for the reasons mentioned in the Preliminary Matters section.
>
> [16] After the hearing, the Tribunal found out the Appellant had also appealed the PAB decision to the Federal Court of Appeal who dismissed the appeal in 2008.

ISSUES

[9] The only issue in this application is whether the Decision refusing leave to appeal the Tribunal's decision to the Appeal Board was reasonable.

STANDARD OF REVIEW

[10] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[11] In my view, it is well established in the jurisprudence that the question of whether the Member applied the correct test is reviewable on a standard or correctness, while the application of the test in granting or refusing leave to appeal is reviewable on a standard of reasonableness: see *Misek v Canada (Attorney General)*, 2012 FC 890 at para 12, *Canada (Attorney General) v Zakaria*, 2011 FC 136 at para 15 [*Zakaria*]; *Vincent v Canada (Attorney General)*, 2007 FC 724 at

para 26; *Mebrahtu v Canada (Attorney General)*, 2010 FC 920 at para 8; *Samson v Canada (Attorney General)*, 2008 FC 461 at para 14.

[12] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[13] The following provisions of the Plan, as it read at the time of the Decision, are applicable in these proceedings:

42 […]	42 […]
When person deemed disabled	**Personne déclarée invalide**
(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

(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 is deemed to have become or to have ceased to be disabled at the time that 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 — including a contributor referred to in subparagraph 44(1)(b)(ii) — 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.

[…]

Benefits payable

44. (1) Subject to this Part,

[…]

(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 — notamment le cotisant visé au sous-alinéa 44(1)b)(ii) — 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 faite.

[…]

Prestations payables

44. (1) Sous réserve des autres dispositions de la présente partie :

[…]

(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :

(i) has made contributions for not less than the minimum qualifying period,

(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;

(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;

[…]

[…]

Calculation of minimum qualifying period in case of disability pension and disabled contributor's child's benefit

Calcul de la période minimale d'admissibilité dans le cas d'une pension d'invalidité et d'une prestation d'enfant de cotisant invalide

(2) For the purposes of paragraphs (1)(b) and (e),

(2) Pour l'application des alinéas (1)b) et e) :

(a) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions on earnings that are not less than the basic exemption of that contributor, calculated without regard to subsection 20(2),

(i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period, for at least four years,

[…]

Appeal to Pension Appeals Board

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the Old Age Security Act, or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply

a) un cotisant n'est réputé avoir versé des cotisations pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations sur des gains qui sont au moins égaux à son exemption de base, compte non tenu du paragraphe 20(2), selon le cas :

(i) soit, pendant au moins quatre des six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable, soit, lorsqu'il y a moins de six années civiles entièrement ou partiellement comprises dans sa période cotisable, pendant au moins quatre années,

[…]

Appel à la Commission d'appel des pensions

83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la Loi sur la sécurité de la vieillesse — ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le

in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.

Decision of Chairman or Vice-Chairman

(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.

Décision du président ou du vice-président

(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.

Designation

(2.1) The Chairman or Vice-Chairman of the Pension Appeals Board may designate any member or temporary member of the Pension Appeals Board to exercise the powers or perform the duties referred to in subsection (1) or (2).

Désignation

(2.1) Le président ou le vice-président de la Commission d'appel des pensions peut désigner un membre ou membre suppléant de celle-ci pour l'exercice des pouvoirs et fonctions visés aux paragraphes (1) ou (2).

Where leave refused

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.

Permission refusée

(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

[…]

[…]

ARGUMENT

Applicant

[14] The Applicant, who is self-represented, made very brief written submissions in support of his application for judicial review. In his affidavit, he states that at the time of the Appeal Board hearing on his 2003 Application, in February 2007, he did not have "the crucial… documents regarding my spine disease (cervical and lumbar)," which he says "was developing through the years since my childhood." He also attests that although he had complained of cervical and lumbar pains to his Rheumatologist since June 2002, he did not get a referral to a spine surgeon, and that "[i]t came to my knowledge from the nurse that my file in hospital was missing and at the meeting with the Human Resources and Skills Development worker I was told that my file was based on false reports." He attached copies of diagnostic reports – an MRI of the cervical spine from January 2013 and a bone scan from November 2010. He also attached a consultation report from a Dr. B. Weening from March 2007 discussing his right hip, leg and lower back pain, and an October 2012 letter from Dr. D. Feldman supporting his request for a transfer to a quieter apartment and stating that he "suffers from a number of medical conditions, including depression, chronic pain, fibromyalgia, osteoarthritis, and coronary artery disease with past history of myocardial infarction." The Applicant claims that several of his Charter rights have been breached, referencing sections 1, 2(b), 2(c), 6(1), 6(2)(b), 6(3)(b), 7, 11(d), 12, 15(1) and 15(2).

Respondent

[15] The Respondent notes that there is no appeal as of right to the Appeal Board from a decision of a Review Tribunal: *Zakaria*, above, at para 43. Neither does the CPP set out any criteria for determining whether leave to appeal should be granted. However, the jurisprudence establishes that

the test for whether leave should be granted is whether there is an "arguable case": *Callihoo v Canada (Attorney General)* (2000), 190 FTR 114, [2000] FCJ No 612 (TD) at para 15; *Canada (Attorney General) v Carroll*, 2011 FC 1092 at para 14. This is akin to determining whether an applicant, legally, has a "reasonable chance of success": *Fancy v Canada (Minister of Social Development)*, 2010 FCA 63 at paras 2-3; *Zakaria*, above, at para 37. The applicant must raise "some arguable ground upon which the proposed appeal might succeed": *Zakaria*, above, at para 39. The Respondent argues that the Applicant could not have succeeded on appeal because the matter at issue had already been previously determined by the Appeal Board, and the doctrine of *res judicata* therefore applies. The Member identified and applied the correct test and found that there was "no arguable case to be presented on appeal" because there was no error in the Tribunal's decision to apply the doctrine of *res judicata*.

[16] The Respondent notes that, ordinarily, a person will be deemed to be disabled no earlier than 15 months prior to the receipt of their application (Plan, paragraph 42(2)(b)). For the Applicant's 2011 Application, the relevant date would be May 2010. As such, he would need to have contributed to the CPP during four of the six years between 2005 and 2010 inclusive in order to meet the MQP requirement, which he did not do. However, by virtue of subparagraph 44(1)(b)(ii), an applicant who does not meet the MQP requirement at the time of their application may still qualify for benefits if they can establish that they were disabled at an earlier time when they last met the contributory requirements, and continued to be so disabled. The Respondent says that the Applicant last met the contributory requirements on 31 December 2002, and the question of whether he was disabled at that time was conclusively and finally determined by the Appeal Board in its March 2007 decision on the Applicant's 2003 Application.

[17] The Respondent says an issue is *res judicata* when it has been definitively settled by a judicial decision: *Black's Law Dictionary*, 7th ed., s.v. "res judicata." Issue estoppel is a branch of the *res judicata* doctrine, and engages the inherent power of the Court to prevent the misuse of its procedure by precluding the relitigation of issues, so as not to violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, [2003] 3 SCR 77 at paras 23-24. The doctrine applies where issues have been conclusively decided in prior proceedings, including the proceedings of administrative officers and tribunals: *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCR 460 at paras 21-22 [*Danyluk*].

[18] Determining whether issue estoppel applies involves a two step process. First, it must be determined whether the moving party has established the three preconditions for its operation, as outlined in *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at 254 and restated in *Danyluk*, above, at para 25:

1) that the same question has been decided;
2) that the judicial decision which is said to create the estoppel was final; and
3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

If the three preconditions are met, the Court "must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied": *Danyluk*, above, at para 33.

[19] The Respondent notes that the parties agreed before the Tribunal that the last time the Applicant met the MQP requirement was December 2002. This has not changed since the 2003 Application, as the Applicant did not have any additional earnings. The doctrine of *res judicata* applies, the Respondent argues, to prevent the Applicant's attempt to re-litigate the question of whether he was disabled, within the definition set out in the Plan, as of 31 December 2002.

[20] The Respondent says that the three preconditions for issue estoppel are satisfied here:

- The Appeal Board decision regarding Mr. Kaminski's eligibility to receive CPP disability benefits based on an MQP ending 31 December 2002 was a judicial decision;
- The decision was pronounced, and reasons for the decision were released;
- The Appeal Board had competent jurisdiction to make the decision;
- The decision was final;
- The decision was a determination of the exact same question the Applicant sought to have determined in the current appeal, as there is no change in the Applicant's MQP;
- The parties were the same in both the previous litigation and the current matter; and
- The Appeal Board's decision was upheld by the Federal Court of Appeal.

[21] Thus, the Respondent argues, it was eminently reasonable for the Member to find that the Applicant did not raise an arguable case because his appeal was *res judicata*.

ANALYSIS

[22] The Applicant has chosen to represent himself in this application. He has provided very little in the way of written submissions. The gist of his argument is that he feels his disability should

have been re-assessed in the light of new medical evidence that has arisen since the Pension Appeal Board decision of March 2007. It is difficult to see how this evidence could have had any relevance to that decision because, after reviewing it, it is obvious that it does not speak to the Applicant's condition as it existed at the 31 December 2002 MPQ date. The Applicant made no further contributions after December 2002, so he can assert no other MPQ date.

[23] In any event, the Applicant is asking the Court to review the Decision of Justice Mercier dated 27 November 2012 which denied him leave to appeal a decision of the Review Tribunal of 26 September 2012, which upheld the Minister's decision to refuse the Applicant's request for disability benefits in accordance with subsection 44(1)(b) of the Plan.

[24] As the Respondent points out,

> 31. Subsection 42(2) of the Plan provides that a person shall be considered to be disabled only if that person is determined to have a severe and prolonged mental or physical disability. To qualify for a disability pension under the Plan, an individual must satisfy three requirements:
>
> - Meet the contributory requirements;
> - Be [severely] disabled when the contributory requirements were [met]; and
> - Continue to be so disabled for a prolonged period.

[25] As the Respondent also points out,

> 32. The contributory requirements concerning disability pensions are clearly set out in s. 44(2). Specifically, s. 44(2)(1) requires an individual to have made valid contributions to the *Plan* in at least four of the last six calendar years before the date of onset of disability. Subparagraph 42(2)(b) of the *Plan* provides that a person shall be deemed disabled no earlier than 15 months before an application for disability pension is received by the Respondent. In the Applicant's case, the second application for a disability pension

> was received in August 2011. Therefore the earliest the Applicant could be deemed to be disabled is May 201, fifteen months prior. Therefore, the Appellant's contributory period could end no earlier than May 2010; and the last six years in the contributory period would be the years 2005 to 2010 inclusive.
>
> 33. The Applicant does not have four years of valid contributions in the last six years. Therefore, he does not qualify for disability benefits on the date of his application.
>
> 34. Subparagraph 44(1)(b)(ii) of the Plan provides that applicants who do not meet the contributory requirements at the time of application may, nonetheless, qualify for disability benefits if they can establish that they were disabled at an earlier time when they last met the contributory requirements and continued to be so disabled. Based on valid contributions the Applicant made in the years 1997, 1998, 1999 and 2000, he last met the contributory requirements on December 31, 2002, having made valid contributions in four of the last six year period ranging from 1997 to 2002.

[26] Justice Mercier's Decision simply confirms the Review Tribunal's decision based upon *res judicata*. When read together with the Review Tribunal's decision, it is clear that *res judicata* applied in this case and that no reviewable error occurred when Justice Mercier refused the Applicant's leave to appeal to the Appeal Board. The Applicant had no arguable case to make on appeal because his claim had already been decided by a judicial decision, and so was *res judicata*.

[27] It became apparent at the hearing of this application before me (as the transcript will show) that the Applicant is less concerned with the Decision of Justice Mercier than with the whole progress of his attempts to receive disability payments under the Plan. In particular, he appears to feel that his doctors did not provide a proper and full diagnosis for his 2003 Application. Consequently, he feels that a new assessment should now be made on new evidence. There is no evidence on the record before me to support allegations that a full and proper diagnosis was not

made at the material time, and this was not, in any event, a matter before Justice Mercier. Consequently, it is not something I can address or take into account on review. On the evidence before me, Justice Mercier correctly understood the test to be applied and the Decision not to grant leave to appeal was reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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