Federal Court  Cour fédérale

Date: 20140410

Docket: T-1215-13

Citation: 2014 FC 350

Ottawa, Ontario, April 10, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

PATRICIA BERNARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of a Designated Member of the Pension Appeals Board [the Board], pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. On March 19, 2013, the Board refused the Applicant an extension of time to seek leave to appeal a decision of the Canada Pension Plan Review Tribunal [the Review Tribunal], dated August 27, 2012.

I. Issue

[2] The issue raised in the present application is as follows:

- Was the Board's decision to refuse the Applicant an extension of time to request leave to appeal the Review Tribunal's decision unreasonable?

II. Background

[3] On November 8, 2010, the Applicant applied for disability benefits under the Canada Pension Plan [CPP] because of carpal tunnel syndrome and severe depression. She had previously worked at a call centre and as a cleaner, and had surgery on her wrists in 2007 and 2008.

[4] In a letter dated January 10, 2011, a representative of Service Canada [the Representative] denied the Applicant's application for disability benefits on the grounds that she had not provided information that she had been referred to a specialist for her depression, or that her carpel tunnel syndrome prevented her from doing other forms of work. Based on this, the Representative concluded that further treatment options were available, and as such, the Applicant did not meet the requirement that her disability was "severe" as defined under the *Canada Pension Plan*, RSC 1985, c. C-8 [the Act].

[5] On August 2, 2011, the Applicant appealed the Representative's decision to the Review Tribunal. On August 27, 2012, the Review Tribunal dismissed the Applicant's appeal, finding

that the Applicant's disability was not severe at the time of her minimum qualifying period of December 31, 2011.

[6] On November 30, 2012, the Applicant's counsel requested an extension of time until January 31, 2013, to seek leave to appeal the Review Tribunal's decision.

[7] In a letter erroneously dated December 11, 2011, which the parties agree should be dated December 11, 2012, the government noted that the Applicant's request for an extension of time was received two days past the 90-day deadline to appeal a Review Tribunal's decision, as stipulated in what was then 83(1) of the Act. Owing to this fact, the government requested that the Applicant provide submissions by January 31, 2013, on the four factors described in *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 (FCA) and restated in *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883 [*Gattellaro*]. The factors from *Gattellaro* guide the discretion of the Board in granting an extension of time to file leave to appeal:

- A continuing intention to pursue the application or appeal;
- The matter discloses an arguable case;
- There is a reasonable explanation for the delay; and
- There is no prejudice to the other party in allowing the extension.

[8] The Board found that all of the *Gattellaro* factors were satisfied, save for whether the Applicant's appeal discloses an arguable case. The Board noted the precedent in *Callihoo v*

Canada (Attorney General), [2000] FCJ No 612 guides an evaluation of this factor. *Callihoo* at para 22 states as follows:

> In the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision maker finds the application raises a question of an error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence. The decision maker here found no such error is raised by the application for leave. That decision on the leave application does not contain an error that would be a basis for the Court to intervene.

[9] The Applicant's submission to the Board with respect to whether the matter discloses an arguable case was:

> Ms. Bernard is appealing the Review Tribunal's decision to deny her the Canada Pension Plan disability benefit. She advises her condition has worsened since the Review Tribunal hearing held in Winnipeg, Manitoba on July 4, 2012 and there will be further medical evidence to submit to support her case. The Review Tribunal had found that not all treatment methods had been tried by the Appellant in dealing with her long term medical conditions. Ms. Bernard has advised she has undergone further testing and treatment and that her medical condition has worsened. It is submitted there is an arguable case that Ms. Bernard is eligible for a CPP disability benefit once the new medical information has been submitted to support her case.

[10] The Board found:

> 16 I can find nothing in the complete file before me that would allow me to determine that the applicant has an arguable case in accord with the principles of law set out in Callihoo.
>
> 17 There is no significant new or additional evidence not considered by the RT.
>
> 18 In my opinion, there is no error of law measured by a standard of correctness and the RT applied the proper law to the facts.

and therefore refused the request for an extension of time.

III. Standard of Review

[11] The Applicant states that the standard of review in this application is correctness, as at issue is whether the Board considered the proper legal factors in the exercise of its discretion (*Canada (Attorney General) v Pentney*, 2008 FC 96 at paras 26-27).

[12] However, the *Pentney* decision preceded *Dunsmuir v New Brunswick*, 2008 SCC 9 and other cases which changed the standard of review applicable to a decision to grant an extension of time pursuant to what was 83(1) of the Act. The standard of review for this issue is reasonableness (*Villeneuve v Canada (Attorney General)*, 2013 FC 498 at para 20; *Dunsmuir* at para 47).

IV. Analysis

[13] With respect to the discretion of the Board to grant an extension in this case, the parties agree that the Board accepted that the Applicant made out three of the four criteria set out in the *Gattellaro* case. At issue is only whether it was reasonable for the Board to conclude that the Applicant did not establish an arguable case.

[14] Further, the Board's application of the *Gattellaro* criteria should be guided by a consideration of whether justice will be done between the parties, in granting or refusing the requested extension of time (*Chan v Canada (Attorney General)*, 2013 FCA 130, at para 5).

[15] As a preliminary matter, the Respondent argues that paragraphs 25-28 of the Applicant's affidavit and the evidence contained in Exhibit I of her affidavit are not admissible as they were not before the decision-maker (*TG v Canada (Attorney General)*, 2013 FCA 254 at paras 3-4).

[16] I agree that this evidence was not before the Board and ought not to be considered for the purposes of the instant application. While the Applicant referred me to the case of *Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 26, the exception described in that case does not apply here.

[17] The Respondent argues that in her application for an extension of time, the Applicant failed to satisfy any of the criteria from *Callihoo* that establish an arguable case. She did not submit any significant new or additional evidence that was not considered by the Review Tribunal, nor did she argue any error of law or fact that was unreasonable in light of the evidence.

[18] The Respondent notes that it was insufficient for the Applicant to assert that new evidence supportive of her case was forthcoming. Rather, the Applicant was required to submit new evidence to the Board (*Villeneuve* at para 46). The Board made it clear that no new evidence had been received by the time of its decision.

[19] The Respondent also argues that other relevant factors argued by the Applicant are not relevant in light of the fact that the Board found the Applicant did not have an arguable case.

Likewise, a lowered burden of proof on appeal is of no assistance to the Applicant, considering that no arguable case has been demonstrated.

[20] Finally, the Respondent argues that the Review Tribunal committed no errors in reaching its conclusion that would warrant a finding that the Applicant has demonstrated she has an arguable case on the facts, as the Review Tribunal's reasons adequately explain the evidentiary basis of its decision.

[21] I find that no significant new or additional evidence was produced for the Board that would establish an arguable case. The Applicant's submission to the Board relied on a promise of future evidence establishing an arguable case. The Board reasonably concluded that such anticipatory or speculative evidence is insufficient to demonstrate an arguable case, as per *Villeneuve* at para 46. Moreover, the additional evidence sought to be introduced by the Applicant does not relate to the relevant time considered by the Review Tribunal.

[22] This leaves the possibility that the Board erroneously concluded that there was no arguable case because the Applicant had not shown that the Review Tribunal erred in law or fact in coming to its decision. I do not believe this to be the case. While the Applicant argues errors of fact in her Memorandum of Fact and Law, this was not argued before the Board – the Applicant relied exclusively on the fact that additional medical evidence was forthcoming.

[23] Given the above, I do not believe that the arguable case factor from *Gattellaro*, as described in *Callihoo*, was unreasonably decided by the Board. As it is not the role of this Court

to reweigh factors considered by the Board, I find that the Board's decision as a whole was also reasonable.

[24] Finally, while it may be reasonably inferred that the Board considered the *Gattellaro* factors to be conjunctive, not disjunctive, I do not find this fatal to its final decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application dismissed.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1215-13
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STYLE OF CAUSE:	BERNARD V AGC
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	APRIL 8, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	MANSON J.
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