Date: 20070706

Docket: T-573-05

Citation: 2007 FC 722

Ottawa, Ontario, July 6, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

HARRY DEAN

Applicant

and

OFFICE OF THE COMMISSIONER OF REVIEW TRIBUNALS and the MINISTER OF SOCIAL DEVELOPMENT CANADA (SDC), formerly HUMAN RESOURCES DEVELOPMENT CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision by the Canada Pension Plan Review Tribunal dated March 1, 2005, which refused to reconsider the Review Tribunal's decision of August 25, 1997, which denied the applicant disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP).

[2] The applicant requests that the Court set aside the March 1, 2005 decision of the Review Tribunal, and order that a new hearing take place in order to determine the merits of his appeal. In the alternative, the applicant requests that the application be allowed and that the Court set aside the March 1, 2005 decision of the Review Tribunal and refer the matter back for redetermination.

Background

First CPP Application

[3] The applicant, Harry Dean, first applied for disability benefits under the CPP in 1996, when he was thirty-five years old. He had worked as a quality control inspector from 1987 until he was laid off in April 1994. He claimed to be suffering from anxiety, depression and post-traumatic stress disorder as a result of the death of his father. The applicant was involved in a car accident in June 1996, when an intoxicated driver rear-ended his car. As a result, he experienced constant headaches and back pain. His application for disability benefits under the CPP was denied both initially, and upon reconsideration. The applicant appealed the decision to the Review Tribunal and the appeal was heard on June 10, 1997. The appeal was dismissed on August 25, 1997.

First Review Tribunal Decision: August 25, 1997

[4] The Review Tribunal found that the applicant's condition was not severe and prolonged as defined in subsection 42(2) of the CPP. The applicant's evidence indicated that his daily life was affected by his health conditions; however, he could drive, exercise and walk without difficulty. Dr. Levy provided a medical report dated February 1996, in which he diagnosed the applicant with

anxiety and depression. The applicant's prognosis was described as fair. Dr. Waldenberg, a psychiatrist, provided a report dated March 1996, which indicated that the applicant was reluctant to seek treatment for excessive drinking and as such, could not be helped.

[5] The Review Tribunal concluded that the preponderance of the medical evidence did not support functional impairment that would prevent the applicant from pursuing any substantially gainful occupation. His prognosis was "fair" and he led an active lifestyle. There was no evidence that the applicant had a psychiatric disorder precluding gainful employment.

Second CPP Application

[6] The applicant made a second application for disability benefits under the CPP in November 2002. He described his medical conditions as severe sadness, depression and "also physical." The applicant was employed as a courier driver from March 2000 until March 2001, when he stopped working due to health problems. His second application for disability benefits was denied both initially and upon reconsideration. The applicant appealed the decision to the Review Tribunal. On January 12, 2005, the Review Tribunal held a new facts hearing with respect to the applicant's first CPP application (1997 decision), and an appeal hearing with respect to his second application (2002 decision).

Second Review Tribunal Decision: March 1, 2005

[7] Despite the fact that he did not formally complete an application to re-open the 1997 decision of the Review Tribunal under subsection 84(2) of the CPP, the second Review Tribunal applied the following test for new facts to the additional material submitted by the applicant:

> First, the evidence must not have been discoverable before the original hearing by the exercise of reasonable diligence, and second, there must be reasonable possibility as opposed to probability that the evidence, if admitted, could lead the Review Tribunal to change its original decision.

[8] The minimum qualifying period (MQP) was December 31, 1997; therefore the applicant had to be found to be disabled before that date, and the additional information had to relate to his medical condition on or before December 31, 1997. The Review Tribunal noted the following:

- A 2002 report form Dr. Tysdale showed no evidence of neurological disorder or obsessive compulsive disorder. The report noted that the applicant was “fairly disabled” and not ready to move into the workforce. The prognosis was “guarded.”
- A 1997 report from psychologist Dr. Goldberg, which indicated that the applicant was capable of handling the mental demands of his previous work, and there was no evidence that he had disabling levels of emotional impairment.
- A 1998 report from rehabilitation consultant T.D. Pearce, which suggested a referral to a chronic pain program. The applicant attended for two weeks and left without explanation.

- The applicant worked from March 20, 2000 until March 16, 2001; therefore he was capable of being employed. His employer reported that he worked about 28 hours weekly and worked properly.

[9] The Review Tribunal concluded that there were no new facts to allow it to amend or rescind the 1997 decision of the first Review Tribunal. The Review Tribunal also considered whether the applicant had become disabled after his hearing in June 1997, and before the end of his MQP in December 1997. It was found that the applicant did not meet the definitions of severe and prolonged during that period; therefore the appeal was dismissed.

[10] The applicant applied for judicial review of the Review Tribunal's decision, dated March 1, 2005, that there were no new facts warranting the reopening of the 1997 decision. This is the judicial review of the Review Tribunal's decision in this regard.

Issues

[11] The applicant submitted the following issue for determination:

Did the Review Tribunal apply the wrong test, misapply the legal test or address the wrong question when assessing the applicant's application to re-open the 1997 hearing based on new facts?

[12] I would rephrase the issue as follows:

Did the Review Tribunal err in finding that there were no "new facts" warranting the re-opening of the 1997 decision of the first Review Tribunal?

Applicant's Submissions

[13] The applicant applied the pragmatic and functional approach to the determination of the standard of review, and submitted that the standard applicable to the second Review Tribunal's decision regarding whether there were new facts within the meaning of subsection 84(2) of the CPP, was closer to correctness. At the hearing, the applicant used the standard of patent unreasonableness.

[14] It was submitted that the test for new facts was: (1) the evidence must not have been discoverable before the original hearing by the exercise of reasonable diligence; and (2) the evidence must be material (see *Canada (Minister of Human Resources Development)* v. *MacDonald*, 2002 FCA 48). The applicant submitted that the first part of the test was met. It was noted that most of the medical information submitted to the Review Tribunal in 2005 did not exist prior to the original 1997 hearing. The applicant saw the psychiatrist and was diagnosed with temporomandibular joint disorder after the June 1997 hearing; therefore the evidence could not have been discovered prior to that hearing.

[15] The applicant submitted that the Review Tribunal erred in its application of the second part of the test for new facts. It was submitted that the Review Tribunal should have looked at the evidence as a whole and determined whether it raised a reasonable possibility that it could have changed the original decision (see *Kent* v. *Canada (Attorney General)* (2004), 248 D.L.R. (4th) 12,

2004 FCA 420). The applicant noted that in *Kent*, the new facts admitted by the Court were reports about medical conditions that were undiagnosed at the time of the original hearing.

[16] The applicant submitted that the Review Tribunal failed to look at all of the evidence in making the determination as to new facts. The Review Tribunal did not mention any of the conditions identified by the applicant's dental specialists, and these conditions were undiagnosed at the time of the original hearing in 1997. Further, it was submitted that the Review Tribunal erred in finding that the applicant's employment in 2000 and 2001 disposed of the new facts application. The applicant submitted that having found a new fact, the Review Tribunal had to determine the appeal on its merits.

[17] The applicant submitted that the new facts shed light on the disabilities he suffered from, and that the evidence did not exist at the time of the original 1997 hearing. It was submitted that the facts were not discoverable but were material, and were therefore new facts pursuant to subsection 84(2) of the CPP.

Respondent's Submissions

[18] The respondent submitted that where the correct legal test was applied, the standard of review applicable to a determination of new facts under subsection 84(2) of the CPP was patent unreasonableness (see *Jones* v. *Canada (Attorney General)*, 2006 FC 1366).

[19] Pursuant to subsection 42(2) of the CPP, a person is disabled only if he or she is determined "in a prescribed manner" to have a severe and prolonged mental or physical disability. Pursuant to section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385 (the Regulations), an applicant must provide objective medical evidence of impairment and the resulting limitations. It was submitted that doctors did not determine whether an individual was disabled, and should not become advocates on behalf of their patient's claims (see *Canada (Minister of Human Resources Development)*, v. *Angheloni* (2003), 50 Admin. L.R. (3d) 165, 2003 FCA 140).

[20] The respondent submitted that it was capacity to work, not the diagnosis that determined the severity of disability under the CPP (see *Minister of Human Resources* v. *Scott* (2003), 300 N.R. 136, 2003 FCA 34). It was submitted that applicants must demonstrate that they suffer from a serious and prolonged disability that renders them incapable of pursuing any substantially gainful occupation (see *Villani* v. *Canada (Attorney General)*, [2002] 1 F.C. 130, 2001 FCA 248).

[21] The respondent submitted that the new facts test required the applicant to prove on a balance of probabilities that the new evidence which existed at the time of the original hearing could not have been discovered with reasonable diligence, and that had it been made available to the first Review Tribunal, it would probably have changed the result. It was submitted that the new evidence had to be material to the issue of whether the applicant was disabled within the meaning of the CPP when he last met the MQP in December 1997. In *Taylor* v. *Canada (Minister of Human Resources Development*) (2005), 340 N.R. 290, 2005 FCA 293), the Court found that new evidence based on previously available and known clinical data failed to meet this test.

[22] The respondent submitted that the first Review Tribunal was correct in finding that the evidence did not establish that the applicant was incapable of regularly pursuing any substantially gainful occupation. It was submitted that the only new evidence before the second Review Tribunal were the reports of Dr. Goldberg, dated May 20, 1997, and Dr. Stechey, dated September 1997, since the remaining evidence post-dated the first Review Tribunal's decision and related to his medical condition at the time the documents were prepared.

[23] Dr. Goldberg reported that the applicant was capable of handling the demands of his previous work and that there was no evidence that he had disabling levels of emotional impairment. Dr. Stechey, saw the applicant for routine dental cleaning and evaluations. His report indicated that the applicant's teeth were still heat and cold sensitive, although most were no longer a problem. The report noted that the temperomandibular joint had resolved reasonably well with analgesics and anti-inflammatory. The dentist concluded that the applicant would need on-going monitoring and treatment.

[24] The respondent submitted that the Review Tribunal was correct in determining that the evidence did not meet the criteria for new facts under subsection 84(2) of the CPP. It was submitted that the Review Tribunal was correct in finding that the new evidence that existed at the time of the first Review Tribunal hearing did not provide new information that might have changed the decision. The respondent submitted that the Review Tribunal's decision was not patently unreasonable.

Analysis and Decision

Standard of Review

[25] The Review Tribunal's decision pursuant to subsection 84(2) of the CPP regarding whether to reconsider an earlier decision on the basis of new facts, is reviewable on the standard of patent unreasonableness (see *Taylor* above).

[26] **Issue**

Did the Review Tribunal err in finding that there were no "new facts" warranting the re-opening of the 1997 decision of the first Review Tribunal?

Pursuant to subsection 84(2) of the CPP, a Review Tribunal may, notwithstanding subsection 84(1), on new facts, rescind or amend a decision under the CPP given by the Tribunal. The applicant submitted that there were new facts that warranted the re-opening of the decision made by the first Review Tribunal in August 1997. The respondent submitted that the second Review Tribunal was correct in determining that the evidence provided by the applicant did not meet the criteria for new facts.

New Facts Test

[27] The second Review Tribunal set out the test for new facts as follows:

> First, the evidence must not have been discoverable before the original hearing by the exercise of reasonable diligence.
>
> Second, there must be reasonable possibility as opposed to probability that the evidence, if admitted, could lead the Review Tribunal to change its original decision.

[28] In *Kent* above, Justice Sharlow, speaking for the Court, described the test for new evidence as follows:

> 33. The jurisprudence of this Court has established a two-step test for the determination of whether there are new facts. First, the proposed new facts must not have been discoverable, with due diligence, prior to the first hearing. Second, the proposed new facts must be "material": *Canada (Minister of Human Resources Development)* v. *MacDonald*, 2002 FCA 48, 112 A.C.W.S. (3d) 177.
>
> 34. Whether a fact was discoverable with due diligence is a question of fact. The question of materiality is a question of mixed fact and law, in the sense that it requires a provisional assessment of the importance of the proposed new facts to the merits of the claim for the disability pension. The decision of the Pension Appeals Board in *Suvajac* v. *Minister of Human Resources Development* (Appeal CP 20069, June 17, 2002) adopts the test from *Dormuth* v. *Untereiner*, [1964] S.C.R. 122, 43 D.L.R. (2d) 135, that new evidence must be practically conclusive. That test is not as stringent as it may appear. New evidence has been held to be practically conclusive if it could reasonably be expected to affect the result of the prior hearing: *BC Tel* v. *Seabird Island Indian Band (Assessor)*, [2003] 1 F.C. 475, 216 D.L.R. (4th) 70 (C.A.). Thus, for the purposes of s. 84(2) of the Canada Pension Plan, the materiality test is met if the proposed new facts may reasonably be expected to affect the outcome.

Applying this jurisprudence to this case, I am of the view that the Review Tribunal applied the proper test.

[29] The following portion of the Review Tribunal's decision deals with the application of the test for new facts in this case:

> The Appellant at the Hearing submitted a report of his doctor, Dr. A. T. Tysdale, dated November 21, 2002, which is marked Exhibit A1 and a list of medications that the Appellant has taken for a considerable period of time which is marked as Exhibit A2.
>
> The report of Dr. Tysdale indicates no evidence of neurological disorder nor an obsessive compulsive disorder – the report does state that he sees the Appellant as "fairly disabled" and not ready to move into the workforce. He stated that his prognosis is "guarded." Dr. Goldberg, a psychologist, in his report of May 20, 1997, indicated that the Appellant is capable of handling the mental demands of his previous work. As well, he stated there is no evidence on psychometric measures that he has disabling levels of emotional impairment.
>
> T.D. Pearce, Rehabilitation Consultant, in his report dated November 9, 1998 (page B-27), suggests a referral to the chronic pain program at Chedoke McMaster Hospital. The Appellant did attend for the pain program, but left after 2 weeks with no explanation given.
>
> The review of the additional medical information did not provide new information that could provide a reasonable possibility that if admitted could lead the Review Tribunal to change its original Decision. Underscoring all of the new information is the fact that the Appellant had valid earnings and contributions in the year 2000 which indicated he was capable of performing a substantially gainful occupation. He worked from the 20th of March 2000, to 15th of March, 2001 (page 54).
>
> The work report of his employer, Laserage Inc., indicated he was working part-time approximately 28 hours weekly. The quality of his work, according to his employer, was that he completed his work properly and customers liked him (page 55).

> In conclusion, the Review Tribunal finds that there are no "new facts" to allow this Tribunal to amend or rescind the previous Decision of the Review Tribunal held on June 10, 1997.

[30] I have reviewed the proposed new facts submitted by the applicant and I cannot conclude that the Review Tribunal's decision was patently unreasonable. It made reference to the reports of Dr. Tysdale, Dr. Goldberg and T. D. Pearce. The applicant submitted that the Review Tribunal did not specifically mention or deal with the reports of Dr. Stechey. However, the Review Tribunal did state above that it reviewed the additional medical information, and that it did not contain new information that could provide a reasonable possibility that if admitted, could lead the Review Tribunal to change its original decision. Thus, the second part of the new facts test was not met by the evidence provided by the applicant.

[31] The applicant also submitted that the Review Tribunal used the fact that the applicant was employed from March 2000 to March 2001 to decide the new facts issue. I do not agree the Review Tribunal made a reviewable error in this respect. It merely noted as a supporting factor that the applicant was employed in this period.

[32] The application for judicial review is therefore dismissed.

JUDGMENT

[33] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Canada Pension Plan*, R.S.C. 1985, c. C-8.:

42. . . .	42. . . .
(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;
84.(1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to	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) whether any benefit is payable to a person,

a) la question de savoir si une prestation est payable à une personne;

(b) the amount of any such benefit,

b) le montant de cette prestation;

(c) whether any person is eligible for a division of unadjusted pensionable earnings,

c) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension;

(d) the amount of that division,

d) le montant de ce partage;

(e) whether any person is eligible for an assignment of a contributor's retirement pension, or

e) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant;

(f) the amount of that assignment,

f) le montant de cette cession.

and the decision of a Review 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.

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.

The *Canada Pension Plan Regulations*, C.R.C., c. 385:

68(1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:	68(1) Quand un requérant allègue que lui-même ou une autre personne est invalide au sens de la Loi, il doit fournir au ministre les renseignements suivants sur la personne dont l'invalidité est à déterminer:
(a) a report of any physical or mental impairment including	a) un rapport sur toute détérioration physique ou mentale indiquant
(i) the nature, extent and prognosis of the impairment,	(i) la nature, l'étendue et le pronostic de la détérioration,
(ii) the findings upon which the diagnosis and prognosis were made,	(ii) les constatations sur lesquelles se fondent le diagnostic et le pronostic,
(iii) any limitation resulting from the impairment, and	(iii) toute incapacité résultant de la détérioration, et
(iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant;	(iv) tout autre renseignement qui pourrait être approprié, y compris les recommandations concernant le traitement ou les examens additionnels;
(b) a statement of that person's occupation and earnings for the period commencing on the date upon which the applicant alleges that the disability commenced; and	b) une déclaration indiquant l'emploi et les gains de cette personne pendant la période commençant à la date à partir de laquelle le requérant allègue que l'invalidité a commencé; et
(c) a statement of that person's education, employment experience and activities of daily life.	c) une déclaration indiquant la formation scolaire, l'expérience acquise au travail et les activités habituelles de la personne.

(2) In addition to the requirements of subsection (1), a person whose disability is to be or has been determined pursuant to the Act may be required from time to time by the Minister

(2) En plus des exigences du paragraphe (1), une personne dont l'invalidité reste à déterminer ou a été déterminée en vertu de la Loi, peut être requise à l'occasion par le ministre

(a) to supply a statement of his occupation and earnings for any period; and

a) de fournir une déclaration de ses emplois ou de ses gains pour n'importe quelle période; et

(b) to undergo such special examinations and to supply such reports as the Minister deems necessary for the purpose of determining the disability of that person.

b) de se soumettre à tout examen spécial et de fournir tout rapport que le ministre estimera nécessaire en vue de déterminer l'invalidité de cette personne.

(3) The reasonable cost of any examination or report required under subsection (2) shall be

(3) Le coût raisonnable de tout examen ou rapport requis en application du paragraphe (2) sera

(a) paid by way of reimbursement or advance, as the Minister deems fit;

a) payé par remboursement ou avance, selon l'avis du ministre;

(b) paid out of the Consolidated Revenue Fund; and

b) payé à même le Fonds du revenu consolidé; et

(c) charged to the Canada Pension Plan Account as a cost of administration of the Act.

c) imputé au compte du régime de pensions du Canada comme frais d'application de la Loi.

(4) For the purposes of this section, "cost" includes travel and living expenses that the Minister deems necessary of the person whose disability is to be determined and of a person to accompany that person.

(4) Aux fins du présent article, les «frais» comprennent les dépenses de voyage et de séjour que le ministre estime nécessaires pour la personne dont l'invalidité doit être déterminée et pour celle qui doit l'accompagner.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-573-05
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