Federal Court of Appeal | Cour d'appel fédérale

Date: 20141212

Docket: A-546-12

Citation: 2014 FCA 294

CORAM: **DAWSON J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

RAYMOND CONNOLLY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at St. John's, Newfoundland and Labrador, on November 5, 2014.

Judgment delivered at Ottawa, Ontario, on December 12, 2014.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: DAWSON J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Raymond Connolly has filed an application for judicial review of the decision of the Pension Appeals Board (PAB) dated November 28, 2012 (CP28018). The PAB determined that Mr. Connolly was not eligible for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, (*CPP*) because he had not established that, as of his minimum qualifying period (MQP), his disability was severe, as determined for the purposes of the *CPP*. The PAB dismissed

his appeal from the decision of the Review Tribunal dated April 21, 2011. The Review Tribunal had also concluded that he was not eligible for disability benefits under the *CPP*.

[2] Raymond Connolly also brought a motion to introduce additional evidence at the hearing of his application for judicial review. This evidence was not before the PAB when it considered his appeal from the Review Tribunal.

[3] For the reasons that follow, I would dismiss his motion to introduce additional evidence and I would dismiss his application for judicial review, all without costs.

Motion to Introduce Additional Evidence

[4] Raymond Connolly was seeking to introduce copies of the following:

- his application requesting leave to appeal to the appeal division of the Social Security Tribunal;

- the Arbitration Award dated June 8, 2009 in which the arbitrator found that Raymond Connolly's employer had just cause to dismiss him;

- a report entitled "Air Quality Report Robinson-Blackmore Building" dated October 2008 including appendices and photographs;

- a letter from Eastern Health dated May 6, 2014; and

- a Reply of Transcontinental (a division of Optipress GP) dated February 18, 2010 that appears to be in relation to a complaint under the *Occupational Health and Safety Act*, R.S.N.L. 1990, c. O-3.

[5] Since this is an application for judicial review and not an appeal, the applicable Rule under the *Federal Courts Rules* is Rule 312:

312. With leave of the Court, a party may	**312.** Une partie peut, avec l'autorisation de la Cour :
(*a*) file affidavits additional to those provided for in rules 306 and 307;	a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(*b*) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(*c*) file a supplementary record.	c) déposer un dossier complémentaire.

[6] In *Forest Ethics Advocacy Assn. v. Canada (National Energy Board)*, 2014 FCA 88, [2014] F.C.J. No. 356, Stratas J.A. outlined the requirements that must be satisfied to obtain an Order under Rule 312:

> **4** At the outset, in order to obtain an order under Rule 312 the applicants must satisfy two preliminary requirements:
>
> > (1) The evidence must be admissible on the application for judicial review. As is well known, normally the record before the reviewing court consists of the material that was before the decision-maker. There are exceptions to this. See *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.); *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.
> >
> > (2) The evidence must be relevant to an issue that is properly before the reviewing court. For example, certain issues may not be

> able to be raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654.

5 Assuming the applicants establish these two preliminary requirements, they must convince the Court that it should exercise its discretion in favour of granting the order under Rule 312. The Court exercises its discretion on the basis of the evidence before it and proper principles.

6 In Holy Alpha and Amega Church of Toronto v. Canada (Attorney General), 2009 FCA 101 at paragraph 2, this Court set out the principles that guide its discretion under Rule 312. It set out certain questions relevant to whether the granting of an order under Rule 312 is in the interests of justice:

> (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> (c) Will the evidence cause substantial or serious prejudice to the other party?

[7] In *Association of Universities and Colleges of Canada and the University of Manitoba v. The Canadian Copyright Licensing Agency Operating as "Access Copyright",* 2012 FCA 22; [2012] F.C.J. No. 93, Stratas J.A. discussed the differing roles of administrative decision makers and the courts that review their decisions. With respect to the admission of additional evidence by the reviewing court (that was not before the administrative decision maker) Stratas J.A. noted that:

> **19** Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he

> essential purpose of judicial review is the review of decisions, not the determination, by trial *de* novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.
>
> **20** There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> > (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
> >
> > (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: *e.g*, *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
> >
> > (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, *supra*.

[8] In this case, the documents (except the leave to appeal application and the letter from Eastern Health) could be considered background information related to tests done at his former

place of employment or actions related to his dismissal from employment by his former employer. These documents were available at the time of the hearing before the PAB but Raymond Connolly chose not to attempt to introduce them. These documents, however, do not assist in understanding the issue that was before the PAB. The issue before the PAB was whether Raymond Connolly was suffering from a severe and prolonged mental or physical disability as of December 31, 2011, not what might have caused his medical problems. These documents are of no assistance in determining whether he was disabled as of December 31, 2011.

[9] The letter from Eastern Health is from his physiotherapist. This letter is dated May 6, 2014 (almost two and half years after December 31, 2011) and does not provide any information concerning his medical condition as of December 31, 2011 (which was the issue before the PAB).

[10] His leave to appeal application was necessarily created after the PAB rendered its decision and is also of no assistance in understanding the issues in this judicial review.

[11] As a result, I would dismiss Raymond Connolly's motion to introduce additional evidence, without costs.

Decision of the PAB

[12] The PAB reviewed the testimony of Raymond Connolly and the medical evidence that was before it. The PAB noted that:

> [27] The Board has held consistently that the term "severe" relates to the capacity of an applicant to work. The test is not whether an applicant can do his or her former job, but rather it is whether he or she has the ability to perform some meaningful employment, even part time or sedentary.

[13] The PAB concluded that Raymond Connolly had "failed to establish that as of the MQP date his disability was 'severe' as that term is defined in the *CPP"* (paragraph 28 of the decision of the PAB).

Standard of Review

[14] In this case there was no argument that the PAB did not apply the correct test to determine if Raymond Connolly's disability was severe for the purposes of the *CPP*. The standard of review applicable to the factual findings made by the PAB is reasonableness. This Court will not reweigh the evidence and can only interfere with the decision of the PAB if the decision is unreasonable (*Nahajowich v. Canada (Attorney General)*, 2011 FCA 293, [2011] F.C.J. No. 1474).

Issues

[15] Raymond Connolly's memorandum of fact and law is essentially a request for this Court to reweigh the evidence and arrive at a different conclusion than the PAB. However, as noted above this is not the role of this Court.

[16] In his memorandum Raymond Connolly did, however, raise the issue that the PAB did not refer to the letter from his doctor, Dr. McCarthy, dated November 3, 2010. It also appeared

from the hearing that the PAB misquoted a sentence from the report of Dr. Duguid dated February 2, 2009. The issue for this Court is whether this omission and this misstatement render the decision of the PAB unreasonable.

[17] Raymond Connolly, in his memorandum of fact and law, also submitted that the PAB had erred by "disregarding Dr. Baribeau's potential bias" since "he is an employee of HRDC". If the PAB would have considered the evidence of Dr. Baribeau, this would be a question of what weight should be given to his testimony. However, the PAB does not refer to the evidence of Dr. Baribeau in its reasons. There is no basis for this argument of Raymond Connolly.

Analysis

[18] The PAB referred to various reports and letters from Dr. McCarthy. The most recent correspondence cited by the PAB was the letter dated September 21, 2009 (the September Letter) to Service Canada that she wrote in support of Raymond Connolly's application for a disability pension. In her concluding paragraph she stated that:

> Mr. Connolly's diagnosis for full recovery is guarded. It appears that he has had chest wall pain for a number of years which has not improved. Potentially he may have some stabilization of his symptoms if he is able to obtain further treatment perhaps in the form of active release therapy or acupuncture. I think it highly unlikely that he will recover to the extent of being able to work in any capacity.

[19] The last sentence was quoted by the PAB in paragraph 16 of its reasons. Dr. McCarthy also wrote another letter dated November 3, 2010 (the November Letter) which was presented to the PAB. The PAB did not refer to this subsequent letter in its reasons. In this letter Dr. McCarthy stated that:

> As you are aware, Mr. Connolly has applied for CPP disability benefits and long term disability from Manulife Financial. I understand you are writing for clarification regarding a report sent to Service Canada on September 21, 2009. At this time, I indicated that I thought it was highly unlikely that Mr. Connolly would recover to the extent of being able to work in any capacity. Certainly, Mr. Connolly's symptoms have been of a long term nature. I did state that he may potentially have some stabilization of his symptoms if he was able to obtain further treatment, for example, physiotherapy or active release therapy or acupuncture. Mr. Connolly has been unsuccessful in obtaining these treatments through Worker's Health and Safety as well as other avenues. Given the length of time that has elapsed since the beginning of his symptoms, he would be an unlikely candidate for full recovery. Therefore, I can say with confidence that Mr. Connolly's disability is prolonged.
>
> The other aspect of disability is the severity of the patient's symptoms. Mr. Connolly has had severe chest and back pain which prevents him from doing many daily duties as well as any gainful employment. His work related and environmental sensitivities and allergies are severe and prevent him from returning to his previous employment in any capacity.

[20] In *Barrington v. Institute of Chartered Accountants of Ontario*, 2011 ONCA 409, [2011] O.J. No. 2378, Karakatsanis J.A. (as she then was), writing on behalf of the Ontario Court of Appeal stated that:

> **114** A tribunal is not required to refer to all the evidence or to answer every submission. In the words of this Court in *Clifford v. Ontario Municipal Employee Retirement System* (2009), 98 O.R. (3d) 210 (C.A.), at para. 29, leave to appeal refused [2009] S.C.C.A. No. 461, the DC was required to identify the "path" taken to reach its decision. It was not necessary to describe every landmark along the way.

[21] Therefore it is not necessary for the PAB to refer to each document that was presented to it. It should also be noted that the November Letter was a clarification of the September Letter. The only additional fact that was included in the November Letter was that Mr. Connolly was unable to obtain the treatments that Dr. McCarthy had referred to in the September Letter.

[22] Dr. Thomas Loane had been retained to provide an independent medical report on Raymond Connolly. As part of his report, dated July 20, 2011, Dr. Loane was asked to provide his "opinion as to the diagnosis, course of treatment, and prognosis" submitted by Dr. McCarthy. In his response, Dr. Loane referred to the November Letter. After reviewing this letter and the other documents that were submitted to him and examining Mr. Connolly, Dr. Loane concluded, at page 16 of his report (page 298 of the Respondent's Motion Record) that:

> …In general, however, I do not see any significant illness or injury that should prevent him from working. Initially, there may be some modifications for heavier lifting activities until his condition is appropriately treated.

[23] The PAB referred to the report of Dr. Loane and in particular quoted the summary which included these last two sentences. In *Inclima v. Canada (Attorney General)*, 2003 FCA 117, [2003] F.C.J. No. 378, Pelletier J.A., on behalf of this Court, stated that:

> **2** Subsection 42(2) of *Canada Pension Plan, supra*, says that a person is severely disabled if that person " is incapable regularly of pursuing any substantially gainful occupation". In *Villani v Canada* [2002] 1 F.C. 130 at paragraph 38, this court indicated that severe disability rendered an applicant incapable of pursuing with consistent frequency any truly remunerative employment.
>
> **3** This was put into context in paragraph 50 of the same decision where the following appears:
>
> > This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed *as will evidence of employment efforts and possibilities*. (emphasis in original)
>
> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts

> at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[24] Therefore there was evidence before the PAB that would support a finding that Mr. Connolly was capable of some form of employment. The PAB acknowledged the contrary opinion of Dr. McCarthy in paragraph 24 of its reasons but accepted the evidence of the other medical practitioners and found that Mr. Connolly had failed to establish that his disability was severe for the purposes of the *CPP*. As noted above, it is not our role to reweigh the evidence. A reasonableness standard means that there may be more than one possible conclusion that could be considered to be reasonable (*Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paragraph 41). Accepting the evidence of certain witnesses over that of other witnesses does not render the decision unreasonable.

[25] As a result, the failure of the PAB to specifically refer to the November Letter would not render the decision of the PAB unreasonable.

[26] Raymond Connolly also referred to the following comments of the PAB in relation to the report of Dr. Nigel Duguid:

> [14] On February 2, 2009, Dr. Nigel Duguid, a respirologist, was consulted for the Appellant's chest pain of five years duration. He noted that since Mr. Connolly quit work, these symptoms have improved considerably….

[27] This comment of Dr. Duguid is at the end of the first paragraph of his report. The statement should be viewed in the context of the entire first paragraph, which was as follows:

> He has in the past been working as a printer and approximately eight years ago he developed symptoms of itching and welts of an urticarial nature on his arms.

> These bothered him over a number of years and he has had allergy testing with no allergens being identified and is shortly scheduled to see one of the dermatologists. For about five years now he has been complaining of chest pains. These chest pains sound musculoskeletal in type. They are present on an almost daily basis and is located in the left chest. It appears that there are three different locations in the left chest where he has symptoms. There is sometimes chest wall tenderness. His chest may be particularly bad in the morning when he wakens, they tend to be aggravated by deep inspiration and relieved by ice. They are really very chronic. He has had problems with his nose and indeed was having problems with bloody nasal discharge. He has subsequently seen Dr. Lee and has been told that he has vasomotor rhinitis. ***Since moving out of the workplace there has been considerable relief of these symptoms***. (emphasis added)

[28] The reference to his symptoms improving in Dr. Duguid's report appears to relate to Mr. Connolly's problems with his nose, not his chest pains. Dr. Duguid's final conclusion was that he "would be very pessimistic that he could reasonably be expected to resume work in similar environments" (page 2 of the report of Dr. Duguid, page 208 of the Respondent's Motion Record).

[29] The error made by the PAB in misstating the reference by Dr. Duguid to Mr. Connolly's improving conditions, does not render the decision of the PAB unreasonable. The issue for the PAB was whether he was disabled, not whether his conditions were improving. As well, the test under the *CPP* is whether Mr. Connolly is capable of any employment, not just the same employment that he was carrying on previously.

[30] The failure of the PAB to specifically refer to the November Letter and the misstatement by the PAB in relation to comments of Dr. Duguid on his improving condition do not, individually or collectively, render the decision of the PAB unreasonable. There was medical evidence before the PAB to support their conclusions.

[31] As a result, I would dismiss Raymond Connolly's application for judicial review. Since the Respondent has asked that this application be dismissed without costs, no costs will be awarded.

"Wyman W. Webb"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Self-represented	FOR THE APPLICANT
Martin Kreuser	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT