Federal Court of Appeal | Cour d'appel fédérale

**Date: 20150917**

**Docket: A-126-14**

**Citation: 2015 FCA 201**

**CORAM:** **DAWSON J.A.**
**RYER J.A.**
**NEAR J.A.**

**BETWEEN:**

**DONALD J. MACKENZIE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Halifax, Nova Scotia, on September 17, 2015.

Judgment delivered from the Bench at Halifax, Nova Scotia, on September 17, 2015.

REASONS FOR JUDGMENT OF THE COURT BY: RYER J.A.

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Halifax, Nova Scotia, on September 17, 2015).**

**Ryer J.A.**

[1] This is an application for judicial review of a decision of the Social Security Tribunal – Appeal Division (the "SST") (Appeal No: CP 29089), dated July 30, 2014, which confirmed that Mr. Donald MacKenzie was not entitled disability benefits pursuant to paragraph 44(1)(*b*) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "CPP Act").

[2] The CPP Act creates a compulsory social insurance arrangement that provides contributors and their families with specified benefits upon the retirement, disability or death of contributors. To qualify for a disability pension, the claimant must establish that he has a severe and prolonged mental or physical disability, within the meaning of paragraph 42(2)(*a*) of the CPP Act. That provision reads as follows:

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| (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 ; |

[3] A disability is "severe" if it renders the pension claimant incapable of regularly pursuing any substantially gainful occupation. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or is likely to result in death.

[4] An additional requirement of the CPP Act is that a claimant must have made contributions throughout a minimum qualifying period of time ("MQP") determined under

subsection 44(2) of the CPP Act. Essentially, the MQP is a period of coverage at the end of which the disability must exist.

[5] The SST found that the Applicant was not entitled to a disability pension because he had not established that his condition was severe, as required by subparagraph 42(2)(*a*)(i) of the CPP Act. In reaching this conclusion, the SST determined that the Applicant's MQP ended on December 31, 2000, and that he was required to establish that his disability arose on or before that date.

[6] The SST then went on to evaluate the medical evidence that was presented to it. In particular, it reviewed medical reports covering a period from June of 1981 to December of 2011. These reports were prepared by at least eight different physicians and one physiotherapist. In all of this evidence, the SST found that only Dr. Park, the Applicant's family physician, concluded that the Applicant was suffering from a severe disability that existed at the end of the MQP.

[7] The SST concluded that Dr. Park's medical reports should be given little weight, as they were lacking in objectivity. Instead, the SST gave more weight to the specialists, including Drs. Howe and Yabsley, whose reports were made relatively close to the end of the MQP and who concluded that the Applicant was able to undertake light or medium to light work.

[8] Citing this Court's decision in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, [2003] F.C.J. No. 378, the SST then determined that a claimant who is found to have a condition

that prevents him or her from undertaking his or her normal employment, but who has the capacity to do some kind of meaningful work, must demonstrate that he or she has made efforts to find alternative work. In the circumstances, the Applicant admitted that he did not work, or look for work, after April of 1998. As a result, the SST determined that the Applicant had failed to establish entitlement to a disability pension.

[9] Unsatisfied with this outcome, the Applicant asks this Court to review the SST's decision.

[10] In *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, [2014] F.C.J. No. 840, at paragraphs 24 and 32, this Court determined that in an application for judicial review of a decision of the SST under subsection 42(2) of the CPP Act, questions of fact, mixed fact and law and the proper legal interpretation of provisions of the CPP Act are to be reviewed on the standard of reasonableness.

[11] In addition, in *Gaudet v. Attorney General of Canada*, 2013 FCA 254, [2013] F.C.J. No. 1189, at paragraph 9, this Court stated:

> [9] In an application for judicial review, this Court's powers are limited. We are not allowed to retry the factual issues, reweigh the evidence or re-do what the Board did. Rather, we are to assess whether the Board reached an outcome that was acceptable and defensible on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47. This is a deferential standard. In a case like this, where the decision is mainly factual, the range of defensible and acceptable outcomes available to the Board is relatively wide: *First Nations Child and Family Caring Society of Canada*, 2013 FCA 75 at paragraph 13.

[12] Before this Court, the Applicant asks that we give preference to the medical evidence provided by Dr. Park, his family doctor, over the evidence provided by a number of other physicians, including the specialists, Drs. Howes and Yabsley, who saw the Applicant close to the end of the MQP and concluded that he had the capacity to do light or medium to light work when he saw them.

[13] In effect, the Court is being asked to reweigh and assess the evidence that was before the SST and to substitute its judgment on these factual matters for that of the SST. As stated in *Gaudet*, it is not the task of this Court to reweigh evidence on an application for judicial review of a decision of the SST under subsection 42(2) of the CPP Act.

[14] In our view, the SST considered the significant amount of evidence that was presented to it and made factual findings that were open to it. In doing so, the reasoning of the SST is apparent. They preferred the evidence of the other physicians over that of Dr. Park.

[15] Having accepted cogent evidence that the Applicant's condition did not preclude him from undertaking light or medium to light work and in relying upon the Applicant's admission that he had not sought any work after April of 1998, the SST's conclusion that the Applicant had not established that he was disabled at the end of the MQP and therefore was not entitled to a disability pension is, in our view, an outcome that falls within the range of outcomes defensible on the facts and the law. As such, it is our view that the decision of the SST is reasonable and must be sustained.

[16] For these reasons, the application will be dismissed without costs.

"C. Michael Ryer"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-126-14 |

**(APPEAL FROM A DECISION OF THE SOCIAL SECURITY TRIBUNAL DATED JULY 30, 2014, DOCKET NUMBER CP 29089).**

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| **STYLE OF CAUSE:** | Donald J. MacKenzie v. Attorney General of Canada |
| **PLACE OF HEARING:** | HALIFAX, NOVA SCOTIA |
| **DATE OF HEARING:** | SEPTEMBER 17, 2015 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | DAWSON J.A.<br>RYER J.A.<br>NEAR J.A. |
| **DELIVERDED FROM THE BENCH BY:** | RYER J.A. |

**APPEARANCES:**

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| Donald J. MacKenzie | ON HIS OWN BEHALF |
| Vanessa Luna | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| William F. Pentney<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |