**Date: 20080128**

**Docket: A-32-06**

**Citation: 2008 FCA 33**

**CORAM:** **RICHARD C.J.**
**DESJARDINS J.A.**
**NADON J.A.**

**BETWEEN:**

**RENÉ KLABOUCH**

**Applicant**

**and**

**MINISTER OF SOCIAL DEVELOPMENT**

**Respondent**

Heard at Ottawa, Ontario, on January 15, 2008.

Judgment delivered at Ottawa, Ontario, on January 28, 2008.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: RICHARD C.J.
DESJARDINS J.A.

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## REASONS FOR JUDGMENT

**NADON J.A.**

[1] The applicant has been a bus driver with OC Transpo since November 1986. Because of pain in his right ischial area, i.e. in his right buttock, he has not worked since July 2000. On November 23, 2001, he applied for a disability pension, alleging that the pain prevented him from performing any work whatsoever. His application was denied by the Minister of Social Development (Minister), a decision which the Review Tribunal confirmed on September 24, 2003. The applicant appealed this decision to the Pension Appeals Board (Board), which dismissed his appeal on November 3, 2005.

[2] Although it recognized that the applicant was suffering hardship by reason of his condition, the Review Tribunal concluded that he had not established that he was disabled within the meaning of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). In the Review Tribunal's view, the applicant "could pursue a gainful occupation suitable to his situation (i.e. part-time, sedentary)" (page 3 of its decision).

[3] The Board dismissed the applicant's appeal because, in its view, he had failed to show that, as of December 31, 2002, i.e. the minimum qualifying period under the CPP, he was suffering from a disability that was both "severe" and "prolonged". In so concluding, the Board pointed to the fact that none of the medical doctors who had examined the applicant, with the possible exception of Dr. Bourque, a neurosurgeon, had expressed the view that the applicant could not work in positions which did not require him to remain seated for long periods. The Board further noted that the applicant had brought no evidence to show that he had searched for employment appropriate to his condition, i.e. which did not require him to spend too much time sitting.

[4] The Board also relied on a Functional Abilities Evaluation Report, dated March 28, 2005, carried out by the CBI Physiotherapy and Rehabilitation Centre (CBI Report), which concluded, at page 8 (p. 349 of the Respondents' Record), with the following recommendations:

> Based on the results of the Functional Abilities Evaluation, Mr. Klabouch would be capable of working at the Sedentary level of strength at a job that allows him the opportunity to alternate sitting with standing or walking. Continued exploration of seating options may facilitate an increase in sitting tolerance. You may consider a trial of a Roho wheelchair cushion; however, given the duration of this client's pain and the level of perceived disability, the prognosis remains poor.
>
> [Emphasis added]

[5] For the reasons that follow, I am of the opinion that this judicial review application should be dismissed.

[6] The applicant makes a number of submissions in support of his judicial review application. First, he submits that the Board erred in law by applying the wrong legal test for determining disability under the CPP, in that it focussed on whether he lacked motivation to get better and hence return to work, rather than on the criteria provided for in paragraph 42(2)*(a)* of the CPP, i.e. whether his disability was “severe” and “prolonged”.

[7] Second, the applicant submits that the Board erred in law and ignored principles of natural justice by failing to make a clear adverse finding of credibility against him before rejecting his testimony and by failing to provide sufficient reasons.

[8] Third, the applicant submits that the Board erred in basing its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. More particularly, the applicant submits that the Board ignored the evidence of Drs. Chow, Kissick, Bourque, Robinson, Langlois, Bertrand, the diagnosis of chronic pain syndrome, and the fact that he had tried alternate work.

[9] In my view, all of these submissions are without merit. First, I am satisfied that the Board made no error with respect to the applicable legal test for the determination of whether the applicant

was disabled within the meaning of paragraph 42(2)*(a)* of the CPP. To be entitled to a disability pension, an applicant must demonstrate that he has made valid contributions to the CPP for a minimum qualifying period and that his or her disability is “severe” and “prolonged”. The term “severe” requires that the disability render the person incapable of regularly pursuing any substantially gainful occupation, while the term “prolonged” requires that the disability be either likely to be of indefinite duration or likely to result in death. This test, in my view, was correctly identified by the Board.

[10] The fact that the Board primarily concentrated on the “severe” part of the test and that it did not make any finding regarding the “prolonged” part of the test does not constitute an error. The two requirements of paragraph 42(2)*(a)* of the CPP are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the CPP fails.

[11] The applicant’s second challenge to the Board’s decision is that it erred in failing to make a clear adverse finding of credibility against him before rejecting his testimony and by failing to provide adequate Reasons.

[12] With respect to the adequacy of the Board’s Reasons, I see no merit to the applicant’s submission. The Board’s Reasons are clearly sufficient. I also see no merit in the applicant’s submission that the Board erred by failing to make an adverse finding of credibility against him. As the Minister argues, the Board neither rejected his testimony nor did it question it. The Board was simply not persuaded by the evidence before it that the criteria required under paragraph 42(2)*(a)* of

the CPP had been met. Consequently, the Board's determination was not premised on the applicant's credibility, but rather on its assessment of the evidence.

[13] I now turn to the applicant's third ground of attack, i.e. that the Board, in reaching its conclusion, disregarded the evidence before it. However, before addressing the merits of this challenge, it is important to have in mind a number of principles which have been enunciated by both the Supreme Court of Canada and this Court in dealing with disability pension applications under the CPP.

[14] First, the measure of whether a disability is "severe" is not whether the applicant suffers from severe impairments, but whether his disability "prevents him from earning a living" (see: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703, paragraphs 28 and 29). In other words, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP.

[15] Second, as a corollary to the above principle is the principle that the determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work, i.e. "any substantially gainful occupation" (see: *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, at paragraphs 7 and 8).

[16] Third, this Court has consistently held that an applicant must adduce before the Board not only medical evidence in support of his claim that his disability is "severe" and "prolonged", but

also evidence of his efforts to obtain work and to manage his medical condition. In *Villani v. Canada (Attorney General)*, 2001 FCA 248, Isaac C.J., at paragraph 50, expressed the following opinion:

> [50] 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 added]

[17] In the same vein, in *Inclima v. Canada (A.G.)*, 2003 FCA 117, Pelletier J.A., after quoting the above passage from Isaac C.J.'s pronouncement in *Villani, supra*, made the following remarks at paragraph 3:

> [3] … 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 because of that health condition.**
>
> [Emphasis added]

[18] I now turn to the Board's assessment of the evidence which, the applicant submits, constitutes an error because it ignored relevant medical evidence.

[19] In its Reasons, the Board makes reference to or reproduces some portions of the opinions of the applicant's treating physicians, as well as those of specialists retained on his behalf. More particularly, the Board considered the evidence of Drs. Kissick, Robinson, Chow, Langlois, Bourque, Hardy and Bertrand (see paragraphs 6 though 19 of the Board's Reasons)". The reports

and opinions of the medical doctors discuss the applicant's condition, his treatment and, in some cases, his ability to work. Further, the Board had before it the evidence of Dr. Jewer, the Minister's expert. As is often the case, the medical evidence was not entirely *ad idem* and was not entirely clear one way or the other.

[20] In its Reasons, the Board addressed the applicant's condition, his work history, his medical evidence and his personal circumstances. Although the evidence proved that the applicant had chronic pain, there was nothing in the evidence, in the Board's opinion, that established that the pain prevented him from regularly pursuing any substantially gainful occupation. Although the applicant was, for a short period, put on lighter duties by his employer in 1997, there was no evidence to show that he had worked or sought other employment possibilities that were appropriate to his condition after July 2000.

[21] In my view, there can be no doubt that the Board clearly considered the totality of the medical evidence in rendering its decision. To this, I would add that the issue as to whether the applicant attempted to find alternative work or lacked motivation to do so was clearly a relevant consideration in determining whether his disability was "severe".

[22] In making his argument that the Board disregarded relevant evidence, the applicant further says that the Board ignored the evidence of Dr. Bertrand who, in a letter dated August 29, 2005, criticised the CBI Report for its failure to understand that his disability stemmed "from a problem

with pain … in the right buttock, not from a low back problem, which appears to be the basis of the evaluation performed at the CBI Physiotherapy and Rehabilitation Centre".

[23] Although the Board did not expressly refer to Dr. Bertrand's letter, it noted, at paragraph 6 of its Reasons, that the applicant did not agree with the CBI Report because "they were concerned about his 'lower back pain', which he does not have, rather than his buttock pain". This is precisely the nature of the criticism found in Dr. Bertrand's letter of August 29, 2005.

[24] It therefore cannot be said, in my view, that the Board was not aware of possible shortcomings in the CBI Report. Consequently, I am not prepared to find that the Board's failure to refer to Dr. Bertrand's letter constitutes a reviewable error.

[25] In the end, what the applicant is asking us is to reassess the evidence that was before the Board and to reach a different conclusion regarding the "severe" part of the disability test. Such an exercise is not open to us on a judicial review application.

[26] To conclude, the applicant has not persuaded me that the Board erred in law, that it misapprehended the evidence or that it failed to consider relevant evidence in reaching its conclusion. As a result, I see no basis for us to intervene.

[27] For these reasons, I would dismiss this judicial review. As the respondent does not seek costs, no such order will be made.

"M. Nadon"

J.A.

"I. agree.
J. Richard C.J."

"I agree.
Alice Desjardins J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-32-06 |
| **STYLE OF CAUSE:** | RENÉ KLABOUCH v. MINISTER OF SOCIAL DEVELOPMENT |
| **PLACE OF HEARING:** | Ottawa, ON |
| **DATE OF HEARING:** | January 15, 2008 |
| **REASONS FOR JUDGMENT BY:** | NADON J.A. |
| **CONCURRED IN BY:** | RICHARD C.J.<br>DESJARDINS J.A. |
| **DATED:** | January 28, 2008 |

**APPEARANCES:**

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| Rene Klabouch | THE APPLICANT ON HIS OWN BEHALF |
| Marcus Davies | FOR THE RESPONDENT |

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