Date: 20080221

Docket: A-527-06

Citation: 2008 FCA 69

CORAM: **DESJARDINS J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ROMAIN RICHARD

Respondent

Heard at Fredericton, New Brunswick, on February 19, 2008.

Judgment delivered from the Bench at Fredericton, New Brunswick, on February 21, 2008.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Fredericton, New Brunswick, on February 21, 2008)

TRUDEL J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (PAB) dated October 17, 2006. The PAB upheld a decision of the Review Tribunal (RT) of July 28, 2004, which found the respondent disabled within the meaning of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, (CPP) as of May 1998.

[2] Pursuant to subsection 84(2) of the CPP, the RT was considering the respondent's application to reopen a prior decision dated August 21, 2000 (2000 decision).

Background

[3] Mr. Richard, the respondent, first applied for CPP disability benefits in July 1999. His request was denied initially and upon reconsideration by the Minister of Human Resources and Development (minister). The RT dismissed his appeal by its 2000 decision.

[4] On May 23, 2002, the respondent applied a second time for CPP disability benefits.

[5] Once again, the minister denied his request initially (July 2002), and upon reconsideration (December 2002). The respondent appealed the decision to the RT.

[6] On March 23, 2004, pending the determination of a date for the hearing, the respondent made his subsection 84(2) application to the RT to rescind or amend the 2000 decision on the basis of "new facts".

[7] This is the application which lead the RT, on July 28, 2004, to decide that the respondent was "deemed disabled, for payment purposes, as of May 1998 … [and that] such disability continued, without interruption, until the date of his second application" (RT 2004 decision, p. 7).

As stated previously, the PAB upheld the decision. Hence the present application for judicial review.

The applicant's submissions

[8] The applicant submits that the decision of the PAB is patently unreasonable. The grounds of appeal transpire from the proposed issues to be determined: (applicant's memorandum, at paragraph 61)

a. the application to reopen the initial RT decision dated August 21, 2000 on the basis of "new facts" under section 84(2) was a collateral attack on the Minister's decision in the second application and therefore improper;
b. the reasons provided by the PAB in its decision of October 17, 2006 are inadequate and therefore not reviewable;
c. the evidence filed by the Respondent in support of his application to reopen the initial RT decision was inadequate to meet the test for new facts:
    i. firstly, whether the proposed "new facts" were discoverable, i.e. that the new facts were not known to the Respondent at the time of or prior to the hearing before the RT and that the new facts could not, with due diligence, have been discovered sooner; and
    ii. Secondly, where they were material, i.e. that the new facts could reasonably be expected to change the outcome of the initial decision by the RT; and
d. In the event that the materials were "new facts", whether the prior decision ought to be rescinded or amended on the basis of these new facts; …

[9] The respondent has made no submissions.

New facts and prior evidence

[10] In his request to reopen the 2000 decision, the respondent refers the RT to two documents dated July 21, 2003 as constituting "new facts": an AP spine bone density report and a left femur bone density report (applicant's record, Vol. 1, pages 293-299).

[11] At paragraph 2 of its decision, the PAB frames its task in an appeal from a decision under section 84(2). It states:

> [2] … the Board must consider the facts on which the Tribunal's decision was originally based (in this case,…[the 2000 decision]) and the evidence that it admitted as "new facts" before ruling on the merits of the application.

[12] The PAB goes on saying:

> [3] In order to consider and find the evidence as "new facts," the evidence sought to be introduced must meet a two-part test: (1) the evidence must not have been discoverable before the original hearing by the exercise of reasonable diligence; and (2) there must be a reasonable possibility, as opposed to probability, that the evidence, if admitted, could lead the Review Tribunal to change its original decision.

[13] Regarding Dr. Quintal's report of 2001, the PAB notes that "it was not in existence to be discovered in 2000", ignoring the fact that it must have been "in existence to be discovered" at the time of the second application in May 2002 (at paragraph 4).

[14] Throughout its decision, the PAB cites from previous reports signed by Dr. Quintal and found in the respondent's record (paragraphs 4-7).

[15] Regarding the 2003 bone density reports, the PAB writes that "they were not in existence at the date of the original hearing … in June 2000 … although somewhat similar to previous bone density report" (at paragraphs 4 and 17).

[16] Finally, the PAB finds that the respondent "has clearly proven, on a balance of probabilities, by overwhelming evidence and in particular the medical evidence, that he was disabled … in May 1998" (at paragraph 18).

Analysis

[17] To succeed, the applicant must show that the PAB's decision is patently unreasonable (*Taylor* v. *Canada (Minister of Human Resources Development)*, 2005 FCA 293; *Osborne* v. *Canada (Attorney General)*, 2005 FCA 412; *Canada (Minister of Human Resources Development)* v. *Patricio*, 2004 FCA 409; *Canada (Minister of Human Resources Development)* v. *Wade*, 2001 FCA 286).

[18] The RT had to determine first if the two documents could be admitted as new facts because (1) they establish the existence of a condition which was in existence at the time of the original hearing but could not have been discovered with the exercise of reasonable diligence and; (2) this evidence may reasonably be expected to affect the outcome (*Mazzotta* v. *Canada (Attorney*

General), 2007 FCA 297 at paragraph 54; *Canada (Minister of Human Resources Development* v. *McDonald*), 2002 FCA 48 at paragraph 2; *Leskiw* v. *Canada (Attorney General)*, 2003 FCA 345, at paragraph 5; *Kent* v. *Canada (Attorney General)*, 2004 FCA 420 at paragraph 34).

[19] Once it was determined that those two reports qualified as "new facts", the RT had to determine if, combined with the documents that were before it on August 21, 2000, the respondent was disabled within the meaning of the CPP as of May 1998.

[20] The RT did not proceed this way. In its decision, it referred to the entire file of Mr. Richard, and treated as "new facts" not only the documents which were introduced as such by the respondent, but two other documents that were reviewed during the second application. It appears as though the RT collapsed two proceedings in one and heard, at the same time, the section 84(2) application and the appeal on the second application. Yet, it is clear from the decision of the RT that it understood its mandate to be restricted to a subsection 84(2) review: "This is an application, under Subsection 84(2) of the *Canada Pension Plan*, <u>to reopen the Review Tribunal decision dated August 21, 2000</u>" (Applicant's Record, Vol 1, Tab 3-P at p.81). [I underline]

[21] By upholding the RT decision and its particular review process of the respondent's application, the PAB committed a patently unreasonable error warranting this Court's intervention.

[22] As noted, the RT, in the course of this confused process, treated as "new facts" evidence which had been tendered by the respondent in the course of his second application and which was

now before the RT as result of his appeal against the minister's second decision. In my view, "new facts" within the meaning of subsection 84(2) cannot include facts that are before the RT by way of an appeal pursuant to 82(1).

[23] This leaves the 2003 bone density reports as the only documents which could qualify as "new facts". The question whether the RT would have considered these reports, looked upon independently, as "new facts", is unclear. This is particularly so since the RT did not single out the 2003 reports in its reasons as it immediately embarked on the examination of evidence submitted by the respondent in the course of his second application, application which was not, at the time, before the RT.

[24] In the circumstances, it is best to leave this matter to be determined by the RT in the first instance.

Costs and Conclusions

[25] The applicant seeks his costs. Considering that the PAB's decision goes well beyond the allegations of the respondent's section 84(2) application, and that numerous grounds of appeal bear on the RT's review process, we feel that it would be unfair to award the costs against the respondent.

[26] Therefore, the application for judicial review will be allowed without costs and the decision of the Pension Appeals Board, dated October 17, 2006, will be set aside. The matter will be

referred back to the Pension Appeals Board with the direction to send it back to a differently constituted Review Tribunal for a redetermination of the respondent's application to reopen the Review Tribunal decision, dated August 21, 2000 on the basis of the alleged "new facts", described as an AP spine bone density report and a left femur bone density report, both dated July 21, 2003.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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