

**Date: 20080417**

**Docket: A-404-07**

**Citation: 2008 FCA 140**

**CORAM: LÉTOURNEAU J.A.  
SHARLOW J.A.  
TRUDEL J.A.**

**BETWEEN:**

**DARLENE BURTON**

**Applicant**

**and**

**PENSION APPEALS BOARD and  
MINISTER OF SOCIAL DEVELOPMENT**

**Respondents**

Heard at Toronto, Ontario, on April 15, 2008.

Judgment delivered at Toronto, Ontario, on April 17, 2008.

**REASONS FOR JUDGMENT BY THE COURT**

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**REASONS FOR JUDGMENT**

**BY THE COURT**

[1] This is an application for judicial review of a decision of the Pension Appeals Board (Board) which confirmed a unanimous decision of a Review Tribunal dated July 28, 2006. Both the Board and the Review Tribunal confirmed the Minister of Social Development's denial of the applicant's claim for disability benefits received on August 25, 2004. The applicant's claim was made pursuant to paragraph 44(1)(b) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan).

[2] The applicant has been self-represented throughout the proceedings, including the hearing before us. Sometime late in 2003, she had a nervous breakdown which, she says, has prevented her from keeping the job that she had and from obtaining another one thereafter. The Board and the Review Tribunal acknowledged that she has a degree of mental illness, but one which does not meet the disability test under the Plan.

[3] The applicant perceived a lack of procedural fairness in the proceedings before the Board. She felt that she was prevented from cross-examining Dr. Bourassa, an expert witness who testified on behalf of the Minister. She also complains about the absence of recording at the Board's hearing. Finally she believes that the Board misapprehended her evidence.

[4] The *Pension Appeals Board Rules of Procedure (Benefits)*, C.R.C., c. 390 are silent on the recording of hearings before the Board. However, subsection 10.1(1) of the said Rules allows a party to submit, by motion in writing, to the Chairman or Vice-Chairman "any matter that arises, in the course of an appeal or seeking leave to appeal, that can be considered in advance of the hearing of the appeal without the personal appearance of the parties".

[5] In the present instance, there is no evidence on the record which shows that a demand was made to record the hearing before the Board. There appears to be no statutory duty to record that proceeding. In the absence of a transcript or sworn probative evidence as to what transpired at the Board's hearing with respect to the cross-examination of Dr. Bourassa, it is impossible for this Court to either verify the applicant's allegation or assess the credibility of that allegation.

[6] We carefully considered the submissions of the parties, verified the medical evidence and analyzed the Board's decision. The Board concluded that the oral and medical evidence did not establish, on a balance of probabilities, that the applicant's medical condition was, as of December 31, 2005, severe and prolonged, thereby making her "incapable regularly of pursuing any substantially gainful occupation": see the definition of "person deemed disabled" in subsection 42(2) of the Plan. This is the test to be met under the Plan for eligibility to disability benefits.

[7] The finding made by the Board as to the lack of disability on or before December 31, 2005 was one which was open to the Board on the basis of the evidence that was before it and to which it referred in its decision: see paragraphs 9 to 13 for the applicant's evidence and paragraphs 14, 15 and 17 for the medical evidence of Dr. Fraser and Dr. Bourassa.

[8] Absent an error of law or a finding of fact made in an arbitrary, perverse or capricious manner, we do not have the authority to set aside the Board's decision. We have found no such error or finding in the decision.

[9] We should also add that this judicial review proceeding before us is not a retrial of the facts. Nor does it give us the power to reassess the evidence and substitute our views to those of the Board. While we are sympathetic to the applicant's plight, we are bound to apply the law with its constraints.

[10] It is unfortunate that she did not benefit from legal assistance at the proceedings before the Review Tribunal and the Board. Perhaps evidence of her mental condition and the resulting impact could have been presented or tested differently.

[11] For these reasons, we will dismiss the application for judicial review, but without costs. We do not think that costs should be imposed upon the applicant in this case.

“Gilles Létourneau”

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J.A.

“K. Sharlow”

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J.A.

“Johanne Trudel”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-404-07

**STYLE OF CAUSE:** DARLENE BURTON v. PENSION APPEALS  
BOARD and MINISTER OF SOCIAL  
DEVELOPMENT

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 15, 2008

**REASONS FOR JUDGMENT BY  
THE COURT:** LÉTOURNEAU J.A.  
SHARLOW J.A.  
TRUDEL J.A.

**DATED:** April 17, 2008

**APPEARANCES:**

Darlene Burton

ON HER OWN BEHALF

Allan Matte

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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Deputy Attorney General of Canada

FOR THE RESPONDENT