

Date: 20090513

Docket: A-536-08

Citation:2009 FCA 158

**CORAM: NOËL J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

IRVIN GORDON KINNEY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on May 13, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on May 13, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on May 13, 2009)

NOËL J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (the Board) dated September 16, 2008, wherein the Board dismissed Mr. Kinney's (the applicant's) appeal from the decision of the Office of the Commissioner of Review Tribunals (the Review Tribunal) affirming the decision of the Minister (the respondent) that the applicant had regained the capacity to work in January 1993 and ceased to be disabled as of December 1992 pursuant to the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Plan).

[2] The applicant has made a number of arguments in support of his application. In our view, the only one which warrants attention is whether the Minister had the statutory authority to give retroactive effect to the disqualification all the way back to December 1992.

[3] The decision of the Minister was made on May 5, 2004 pursuant to section 81(2) of the Plan in response to a request made by the applicant that the Minister reconsider a prior decision made on November 19, 2003 which held that he had ceased to qualify as of July 1, 2003.

[4] In response to this request, the Minister varied the decision of November 19, 2003 and notified the applicant that the disqualification took effect as of December 1992.

[5] It is useful to add that on April 2, 1998 the Minister had rendered the last standing decision on the applicant's file, confirming his eligibility up to that date.

[6] In our view, while the request for reconsideration allowed the Minister to vary the decision of November 19, 2003, since it was directed at that decision, it did not allow the Minister to vary the prior decision of April 2, 1998. As such there was no basis for disqualifying the applicant for the period prior to April 2, 1998.

[7] Otherwise, we are satisfied that the Board properly held that the applicant was capable of remunerative employment, as was found by the Minister and confirmed by the Review Tribunal.

[8] The application will therefore be allowed in part and the matter will be remitted back to the Board for redetermination on the basis that the disqualification operates from April 1998 rather than from January 1993.

[9] The applicant shall have his costs.

“Marc Noël”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-536-08

STYLE OF CAUSE: IRVIN GORDON KINNEY V. THE
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: May 13, 2009

REASONS FOR JUDGMENT OF THE COURT BY: NOËL, NADON, PELLETIER JJ.A.

DELIVERED FROM THE BENCH BY: NOËL J.A.

APPEARANCES:

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Patricia Harewood FOR THE RESPONDENT

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