

Date: 20081126

Docket: A-586-06

Citation: 2008 FCA 375

**CORAM: LINDEN J.A.
RYER J.A.
TRUDEL J.A.**

BETWEEN:

ROBIN SLATER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on November 26, 2008.

Judgment delivered from the Bench at Calgary, Alberta, on November 26, 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 Calgary, Alberta, on November 26, 2008)

TRUDEL J.A.

[1] This is an application for judicial review of a decision made by the Pension Appeals Board (the Board), CP23550, dated November 7, 2006, dismissing the appeal from a decision of the Review Tribunal of Social Development Canada, now Human Resources and Skills Development Canada, on the grounds that the applicant had correctly received the maximum retroactive disability payments allowable under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP or the Plan) and that an exercise of discretion under subsections 60(8) to (11) of the Plan to award disability benefits as

of April 16, 1984 was not warranted because the applicant was not a person incapable of forming intention to apply for benefits within the meaning of the Plan.

[2] The applicant suffered a traumatic brain injury as a result of a motor vehicle accident on April 16, 1984 following which she received disability payments from her employer's insurer who required her to apply for CPP disability benefits. The applicant was aware of this requirement, but appears to have taken no further steps (Reasons at paragraphs 10-11; AR at pp. 279-281 to apply at that time or thereafter until she applied in 2001.

[3] In May 2000, the applicant suffered a mild closed head injury as a result of a fall and, in December, began receiving social assistance (*Ibid.* at paragraphs 20-21).

[4] On January 23, 2001, the applicant's application for disability benefits was received by the respondent. On January 30, 2002, she was awarded a maximum retroactive payment for 15 months commencing in February 2000 in accordance with section 69 of the Plan (RR, Vol. 1, Tab 1 at pp. 79-90). Her appeals of that decision were dismissed at all levels. Hence, the within application for judicial review.

[5] While the applicant raises numerous points in her memorandum of fact and law, the only issue on this application is whether the Board made a reviewable error in concluding that the applicant was not incapable of forming or expressing an intention to make an application for disability benefits within the meaning of subsections 60(8) and (9) of the Plan. The applicant's

disability is not an issue on this application because, as previously noted, she is currently receiving disability benefits.

[6] The approach to capacity to form or express an intention within the meaning of subsections 60(8) and (9) of the Plan is now well-established in the decisions of the Board and the jurisprudence of this Court.

[7] In *Morrison v. Minister of Human Resources Development*, Appeal CP04182, March 7, 1997, the Board stated that it was necessary to look at both the medical evidence and “the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of application which cast light on the capacity of the person concerned during that period of so “forming and expressing” the intent” (*Ibid.* at p. 5).

[8] This approach was approved by this Court in *Canada (Attorney General) v. Danielson*, 2008 FCA 78 at paragraph 7 and *Canada (Attorney General) v. Kirkland*, 2008 FCA 144 at paragraph 7. The approach is also consistent with the fact that “the capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of his world view does not indicate a lack of capacity.” Thus, “nothing in the scheme requires us to give to the word “capacity” a meaning other than its ordinary meaning” (*Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86 at paragraphs 3-4).

[9] In light of the jurisprudence of this Court and its own decisions, the Board correctly stated the requirements for capacity of forming or expressing an intention within the meaning of subsections 60(8) and (9) of the Plan.

[10] The record of medical evidence and of the applicant's activities during the alleged period of disability before the Board were sufficient for us to conclude that the Board had a reasonable appreciation of the evidence before it and made no reviewable error in finding that the evidence did not support a conclusion that the applicant was incapable of forming an intention to apply for disability benefits between 1984 and 2000.

[11] Despite Ms. Slater's impressive and informative presentation, unfortunately the application will be dismissed without costs.

“Johanne Trudel”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-586-06

**APPEAL FROM A DECISION MADE BY THE PENSION APPEALS BOARD, CP23550,
DATED NOVEMBER 7, 2006.**

STYLE OF CAUSE: Robin Slater v.
Attorney General of Canada

PLACE OF HEARING: Calgary (Alberta)

DATE OF HEARING: November 26, 2008

REASONS FOR JUDGMENT OF THE COURT BY: (LINDEN, RYER, TRUDEL J.J.A.)

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

APPEARANCES:

Robin Slater ON HER OWN BEHALF

Patricia Harewood FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada