

Date: 20100219

Docket: A-614-08

Citation: 2010 FCA 53

**CORAM: LÉTOURNEAU J.A.
NADON J.A.
DAWSON J.A.**

BETWEEN:

DENNIS GERVAIS

Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT

Respondent

Heard at Regina, Saskatchewan, on February 17, 2010.

Judgment delivered at Ottawa, Ontario, on February 19, 2010.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**LÉTOURNEAU J.A.
NADON J.A.**

Date: 20100219

Docket: A-614-08

Citation: 2010 FCA 53

**CORAM: LÉTOURNEAU J.A.
NADON J.A.
DAWSON J.A.**

BETWEEN:

DENNIS GERVAIS

Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

The Issue in this Proceeding

[1] This is an application for judicial review of a unanimous decision of the Pension Appeals Board (Board) dated November 4, 2008. The issue before us is whether the Board erred when it determined that the Minister of Social Development (Minister) had properly terminated Mr. Gervais' disability pension benefits.

The Board's Decision

[2] The Board found the termination of disability pension benefits to be proper because the Minister had met the onus of establishing, on a balance of probabilities, that as of April, 1984, Mr. Gervais was no longer disabled within the meaning of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan).

[3] Paragraph 42(2)(a) of the Plan provides that a person is deemed to be disabled in the following circumstances:

42. (2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph, (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death.

42. (2) Pour l'application de la présente loi :

a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa : (i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice, (ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès.

[4] The Board found that Mr. Gervais' serious back ailment had improved to the extent that by April of 1984 he was capable of regularly engaging in a substantially gainful occupation. The Board further found the evidence to establish that, prior to the termination of benefits, Mr. Gervais worked regularly in a grocery store doing such things as training staff, working the

cash register and meeting sales representatives. The Board concluded that, notwithstanding the limitations flowing from his back condition, as of April, 1984 Mr. Gervais had retained work capacity and was capable of pursuing with consistent frequency a remunerative occupation, namely assisting in the family grocery store.

The Standard of Review

[5] The standard of review to be applied to the Board's decision is reasonableness. See: *Erickson v. Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 58.

Analysis of the Board's Decision and the Applicant's Submissions

[6] Mr. Gervais submits that the Board erred by:

1. Ignoring his testimony that the income he received from the operation of the grocery store was based upon his ownership interest in the store. Mr. Gervais states that that income was not remuneration for services that he provided.
2. Considering events that occurred subsequent to the termination of benefits.

[7] The reasons of the Review Tribunal show that Mr. Gervais testified before the Review Tribunal that he attended at the grocery store seven days a week. While there, Mr. Gervais functioned as an owner/operator, able to perform most of the day to day tasks of the business.

[8] The Board referred to "undisputed evidence" that Mr. Gervais worked regularly in the grocery store. In his affidavit filed in support of this application, Mr. Gervais admits that he performed a number of functions at the store, but states that he would only attend when his condition would allow.

[9] There was also evidence before the Board that prior to the termination of benefits, Mr. Gervais was head instructor of a boxing club with a grueling training schedule, was a member of a championship bowling team and played fastball in the physically demanding role of pitcher. One orthopedic surgeon reported that he had "a lot of questions and doubt about the degree of difficulty and pain that this patient does have."

[10] There was evidence to support the Board's conclusion that Mr. Gervais' back ailment had improved to the extent that he was capable of regularly engaging in a substantially gainful occupation as of April, 1984. In substance, Mr. Gervais is asking this Court to reweigh the evidence and come to the opposite conclusion from that reached by the Board. That is not the function of this Court on an application for judicial review.

[11] With respect to the second asserted error, the consideration of events that post-dated the termination of disability, the Board's reasons, particularly at paragraph 33, show that the Board was very conscious of the relevant time for assessing the existence of disability. Thus, the Board did not err as asserted by Mr. Gervais. The fact that Mr. Gervais remained gainfully employed following April of 1984 is consistent with the conclusion that the Minister properly denied

disability benefits for the entire period beginning in April, 1984 and so was a relevant consideration for the Board.

[12] The Board's decision was supported by the evidence and Mr. Gervais has not demonstrated any reviewable error. For these reasons, I would dismiss the application.

[13] The respondent did not seek costs and so I would not award costs.

“Eleanor R. Dawson”

J.A.

“I agree
Gilles Létourneau J.A.”

“I agree
M. Nadon J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-614-08

STYLE OF CAUSE: DENNIS GERVAIS v.
THE MINISTER OF SOCIAL
DEVELOPMENT

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: February 17, 2010

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
NADON J.A.

DATED: February 19, 2010

APPEARANCES:

Dennis Gervais

SELF-REPRESENTED

Allan Matte

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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

FOR THE RESPONDENT