Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100329

Docket: A-641-08

Citation: 2010 FCA 85

CORAM: **SHARLOW J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

WAYNE ROBBINS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Edmonton, Alberta, on March 24, 2010.

Judgment delivered at Ottawa, Ontario, on March 29, 2010.

REASONS FOR JUDGMENT BY: LAYDEN-STEVENSON J.A.

CONCURRED IN BY: SHARLOW J.A
DAWSON J.A

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] The applicant, Wayne Robbins, seeks judicial review of a decision of the Pension Appeals Board (the Board) dated November 3, 2008, dismissing his appeal from the decision of a Review Tribunal dated October 17, 2000. The application relates to the provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Act) which provide for payments to the children of disabled

contributors. The primary issue is the period for which retroactive payments can be made with respect to the applicant's children.

Background

[2] Mr. Robbins is a recipient of Canada Pension Plan (CPP) disability benefits as a result of a 1993 application. Originally, his application was refused as was his request for reconsideration. On appeal to a Review Tribunal, the Tribunal concluded that Mr. Robbins had significant psychiatric difficulties that "completely disable him." The Tribunal established the onset of disability to be November, 1996. It expressed scepticism in doing so but, due to a lack of medical evidence, it chose the date when, on the evidence, it appeared Mr. Robbins began seeing a psychiatrist. Mr. Robbins applied for and was granted leave to appeal to the Board.

[3] Following receipt of further medical evidence and prior to the scheduled Board hearing, the Minister of Human Resources Development (the Minister) offered Mr. Robbins disability benefits with the maximum retroactivity permissible under the Act. A Consent to Judgment was presented to the Board. The appeal was allowed and the Board declared that Mr. Robbins became disabled in March, 1992 and was entitled to a disability pension in accordance with the Consent to Judgment (the consent order). The effect was to provide Mr. Robbins with disability benefit payments retroactive to July, 1992.

[4] Mr. Robbins also applied for benefits for his children. The date upon which he did so is a matter of debate. The respondent asserts that the application for children's benefits was made in

November, 1999. Mr. Robbins, however, claims to have submitted applications in 1993, 1995, 1997 and 1999.

[5] Based on the November 1999 application, the Minister granted the children's benefits retroactive to November 1998. Mr. Robbins disagreed with the period of retroactivity. He did not succeed on his subsequent request for reconsideration, or on his appeals to the Review Tribunal and ultimately the Board. It is the Board's decision that is the subject of this application for judicial review.

The Decision

[6] The Board heard the matter *de novo*. It addressed two issues: (a) whether Mr. Robbins's legal incapacity permitted it to deem the children's benefits retroactive; and (b) whether the date of the children's application for benefits was conclusive in determining the start date of those benefits (including retroactivity). The Board determined that subsection 60(8), the incapacity provision of the Act, did not authorize it to make the children's benefits retroactive. Rather, the date of the application was conclusive in ascertaining the start date for the children's benefits.

Issues

[7] Distilled, Mr. Robbins's arguments raise two issues:

(a) whether there was a breach of procedural fairness;

(b) whether the Board erred in its determination regarding the retroactivity applicable to the children's benefits.

Statutory Provisions

[8] The text of the statutory provisions referred to in these reasons is attached as Schedule “A”.

Procedural Fairness

[9] Mr. Robbins claims that the Board breached procedural fairness in failing to grant an adjournment and in refusing to admit the 2008 medical report of Dr. Segal. Based on the record, I do not find these arguments persuasive. The certified tribunal record is reproduced in its entirety in the respondent’s record. For the convenience of the parties, references to the certified tribunal record will be to the pages where they appear in the respondent’s record.

[10] Sandra Gruescu, counsel for the Minister at the hearing before the Board (not counsel on this application), at paragraph 19 of her affidavit sworn March 20, 2009 (respondent’s record at p. 7), states that she does not recall Mr. Robbins requesting an adjournment. At paragraph 15 of its reasons, the Board specifically states that it offered to postpone the matter to enable Mr. Robbins to obtain legal counsel. Mr. Robbins advised that he was “unable to retain a lawyer and insisted that the Board hear his appeal.” Mr. Robbins’s submission is not supported by the record.

[11] With respect to Dr. Segal’s 2008 declaration, it merely attaches a copy of Dr. Segal’s 1993 medical summary, which was already before the Board (respondent’s record at pp. 52-54 and also at pp. 168-170). In any event, the medical report was not material to the Board’s inquiry. There was no debate with respect to Mr. Robbins’s incapacity, or the date of its onset.

[12] It is evident from the record and the Board's reasons that the Board afforded Mr. Robbins a full opportunity to present his case. There was no breach of procedural fairness.

Retroactivity for the Children's Benefits

[13] Mr. Robbins contends that the Board failed to consider relevant law, erred in its conclusion that the consent order did not include his children and erred in determining that he did not submit applications for the children prior to 1999.

[14] In my view, the Board did not fail to consider relevant law. It considered the issue of incapacity as provided for in subsection 60(8) of the Act even though Mr. Robbins does not appear to have argued the point. It concluded that subsection 60(8) did not apply to applications for benefits regarding children of disabled recipients. Consequently, it could not deem an early start date for the children on the basis of Mr. Robbins's incapacity. The Board relied, as it was bound to do, upon the decision of this Court in *Statton v. Canada* (*Attorney General*), 2006 FCA 370. Similarly, it determined that *Goodacre v. Minister of Human Resources Development*, CP07661, referred to by Mr. Robbins, did not assist him (Board's reasons at para. 27).

[15] Further, the Board was correct in concluding that subsection 60(1) of the Act requires that an application be made before benefits can be paid and that section 74 prescribes the maximum retroactivity applicable to the children of disabled contributors.

[16] Regarding the consent order, the Board's conclusion (that the parties did not intend to provide for the children in the order) is a question of fact which attracts significant deference. In this respect, the Board reviewed Mr. Robbins's 1993 application (I will return to the 1993 application later), the Minister's May 13, 1999 correspondence offering disability benefits with the maximum permissible retroactivity for Mr. Robbins, and the consent order document. Based on its review of the noted documents, it determined that the parties did not intend the consent order to include the children.

[17] If it were not for the issue of the alleged 1997 application, I would regard the Board's conclusion regarding the consent order as one that was reasonably open to it. However, Mr. Robbins's submissions to the Board included repeated reference to a 1997 application as well as a copy of the alleged application. I will have more to say about this later in these reasons. For the moment, suffice it to say that an analysis, by the Board, regarding the alleged 1997 application could affect the Board's conclusion in this respect.

[18] Turning to the allegation of prior applications, Mr. Robbins claims to have included his children in his 1993 application. He also maintains that he submitted further applications concerning the children in 1995 and 1997. If Mr. Robbins is correct, any one of the alleged applications could affect the start date for the children's benefits because the assessment of retroactivity begins with the month when the application is received (section 74 of the Act).

[19] The Board addressed the issue of the 1993 application in some detail. It noted that, even if it were to accept Mr. Robbins's statement that he had not put an "x" in the "no" box indicating that he had no children (Mr. Robbins acknowledged that the "x" was in the box), there was no explanation for the failure to answer any one of questions 13(b), 14(a), 14(b), 15, 16(a), 16(b) or 17 of the application form. All of these questions related to the children. The Board properly noted that an affirmative answer to any one of them could have indicated the existence of a child. Notably, Mr. Robbins's second child was not born at the time he completed his 1993 application. The Board reasonably concluded that the 1993 application did not include the children.

[20] Further, I agree with the respondent that Mr. Robbins's assertions regarding alterations to the 1993 application were laid to rest in 2007. As a result of Mr. Robbins's allegations regarding the 1993 application and an alleged 1995 application, the Board, on September 14, 2006, issued a *subpoena* for the production of these applications. The original of the 1993 application was produced and the Board, on August 29, 2007, issued an order that the *subpoena* had been satisfied (respondent's record at pp. 217-218). There is no evidentiary basis for the "alterations" argument.

[21] In relation to the alleged 1995 application, Mr. Robbins raised this issue during earlier proceedings. As noted above, the Board's September 14th *subpoena* related to production of both the 1993 and 1995 applications. Medical Adjudicator Ruth Walden swore an affidavit on August 22, 2007 deposing that, after a thorough review of the file, she was unable to locate any application dated "sometime in 1995" (respondent's record at pp. 181-182 and pp. 215-216). It was following receipt of the Walden affidavit that the Board issued its August 29th order that the *subpoena* had

been satisfied. That order provides a complete answer to Mr. Robbins's submissions relating to a 1995 application. His argument in this respect constitutes a collateral attack on the Board's order.

[22] Turning to the issue of the alleged 1997 application, as stated previously, Mr. Robbins made repeated reference to a 1997 application in his written submissions to the Board (respondent's record at pp. 31, 35, 37, 38 and 39). He also produced a copy of the document (respondent's record at pp. 76-79). The thrust of Mr. Robbins's argument is that the hearing before the Review Tribunal on June 19, 1997 entailed much exploration and discussion. He claims that, during the hearing, the Chairperson suggested to him that he provide a "corrected CPP application which included the children." He maintains that he followed that advice. The document included in the respondent's record at pp. 76-79 is dated June 21, 1997.

[23] Additionally, Mr. Robbins argues that his file has been the subject of an ongoing appeal from the outset. He claims the department provided erroneous advice and failed to exercise due diligence. He refers in particular to: various departmental requests to re-submit documents; the loss of his appeal document (at which point the department invited him to submit a new application); and its subsequent apology for delay after locating the document some three years later. He states that the situation is exacerbated by the fact that he was in such "bad shape" during those years.

[24] The specific allegations regarding the loss of the appeal document, the invitation to submit a new application and the subsequent apology are supported by the record (respondent's record at pp. 51, 55 and 57). The record further supports the assertion that Mr. Robbins had "significant mental

problems" and was completely disabled by his mental difficulties during that time frame (Review Tribunal's reasons dated September 9, 1997, respondent's record at pp. 71-73). See also: medical information, respondent's record at pp. 52-54, 80-81, 168-170. There is nothing in the record that renders the noted submissions implausible.

[25] Counsel for the respondent acknowledges that the file is not without its problems and notes that, upon application, the Act permits the Minister's intervention in circumstances of administrative error. Counsel kindly agreed to meet with Mr. Robbins after the hearing to provide him with information in this respect.

[26] As for the alleged 1997 application, Mr. Robbins's submissions (references cited at paragraph 22 of these reasons) stand unchallenged on the record before us. That is, in spite of Mr. Robbins's submissions and in spite of the fact that the Minister presumably would have been represented by counsel at the 1997 Review Tribunal hearing, the respondent's written submissions to the Board were not responsive to Mr. Robbins's assertions. Similarly, on this application, Mr. Robbins's notice of application, his affidavit (paras. 12, 13, 14, 36 and Exhibit 6) and his memorandum of law (paras. 16, 17, 42 and 45) reiterated his position. The respondent's submissions were not directly responsive with respect to this particular issue.

[27] Although Mr. Robbins's submissions stand unchallenged on the record, we do not have the benefit of a transcript from the hearing before the Board. Moreover, it is inappropriate for this Court to embark upon a fact-finding mission in this respect. Since the issue of the 1997 application was

squarely before the Board and was material to the outcome of Mr. Robbins's appeal, the Board ought to have addressed it and come to a determination with respect to it. Its failure to do so renders its decision unreasonable. Further, as stated previously, this Court is not in a position to speculate as to the effect, if any, the Board's determination (regarding the 1997 application) might have on any determination regarding the consent order. That said, it is readily apparent to me that the file is problematic and requires close scrutiny by the appropriate officials.

Conclusion

[28] I would allow the application for judicial review with costs to the applicant. I would set aside the order of the Pension Appeals Board and remit the matter to the Pension Appeals Board for determination in accordance with these reasons.

"Carolyn Layden-Stevenson"
J.A.

"I agree,
K. Sharlow J.A."

"I agree,
Eleanor R. Dawson J.A."

SCHEDULE "A"
to the
Reasons for Judgment dated March 29, 2010
in
Robbins
and
The Attorney General of Canada
A-641-08

60. (1) No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act.	**60.** (1) Aucune prestation n'est payable à une personne sous le régime de la présente loi, sauf si demande en a été faite par elle ou en son nom et que le paiement en ait été approuvé selon la présente loi.
[…]	[…]
Incapacity	Incapacité
(8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.	(8) Dans le cas où il est convaincu, sur preuve présentée par le demandeur ou en son nom, que celui-ci n'avait pas la capacité de former ou d'exprimer l'intention de faire une demande le jour où celle-ci a été faite, le ministre peut réputer cette demande de prestation avoir été faite le mois qui précède celui au cours duquel la prestation aurait pu commencer à être payable ou, s'il est postérieur, le mois au cours duquel, selon le ministre, la dernière période pertinente d'incapacité du demandeur a commencé.
74. (1) An application for a disabled	

contributor's child's benefit or orphan's benefit may be made on behalf of a disabled contributor's child or orphan by the child or orphan or by any other person or agency to whom the benefit would, if the application were approved, be payable under this Part.

74. (1) Une demande de prestation d'enfant de cotisant invalide ou une demande de prestation d'orphelin peut être faite, pour le compte d'un enfant de cotisant invalide ou pour celui d'un orphelin, par cet enfant ou par cet orphelin, ou par toute autre personne ou tout autre organisme à qui la prestation serait, si la demande était approuvée, payable selon la présente partie.

Commencement of payment of benefit

(2) Subject to section 62, where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,

(*a*) in the case of a disabled contributor's child's benefit, the later of

(i) the month commencing with which a disability pension is payable to the contributor under this Act or under a provincial pension plan, and

(ii) the month next following the month in which the child was born or otherwise became a child of the contributor, and

(*b*) in the case of an orphan's benefit, the later of

(i) the month following the month in which the contributor died, and

(ii) the month next following the

Début du versement de la prestation

(2) Sous réserve de l'article 62, lorsque le paiement d'une prestation d'enfant de cotisant invalide ou d'une prestation d'orphelin est approuvé, relativement à un cotisant, la prestation est payable pour chaque mois à compter :

a) dans le cas d'une prestation d'enfant de cotisant invalide, du dernier en date des mois suivants :

(i) le mois à compter duquel une pension d'invalidité est payable au cotisant en vertu de la présente loi ou selon un régime provincial de pensions,

(ii) le mois qui suit celui où l'enfant est né ou est devenu de quelque autre manière l'enfant du cotisant;

b) dans le cas d'une prestation d'orphelin, du dernier en date des mois suivants :

(i) le mois qui suit celui où le cotisant est décédé,

(ii) le mois qui suit celui où l'enfant est né.

month in which the child was born, but in no case earlier than the twelfth month preceding the month following the month in which the application was received…

Toutefois, ce mois ne peut en aucun cas être antérieur au douzième précédant le mois suivant celui où la demande a été reçue…

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-641-08
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PLACE OF HEARING:	Edmonton, Alberta
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CONCURRED IN BY:	SHARLOW J.A DAWSON J.A
DATED:	March 29, 2010

APPEARANCES:

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