Federal Court of Appeal | Cour d'appel fédérale

Date: 20100623

Docket: A-364-09

Citation: 2010 FCA 172

CORAM: **BLAIS C.J.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BARBARA FLEWIN

Respondent

Heard at Winnipeg, Manitoba, on June 21, 2010.

Judgment delivered at Winnipeg, Manitoba, on June 23, 2010.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: BLAIS C.J.
STRATAS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an application for judicial review of a unanimous decision of the Pension Appeals Board (Board) made pursuant to subsection 84(2) of the *Canada Pension Plan*, R.S. 1985, c. C-8 (Plan). The determinative issue on this appeal is whether Ms. Flewin established the existence of "new facts" that would allow the Board to rescind or amend a prior, final decision of a Review Tribunal that had concluded Ms. Flewin was not disabled within the meaning of the Plan.

Facts and Procedural History

[2] The operative provisions of the Plan were described by this Court in *Higgins v. Canada (Attorney General)* (2009), 395 N.R. 344 (F.C.A.). To qualify for disability benefits under the Plan an individual must:

i. meet the contributory requirements;

ii. be determined to be disabled within the meaning of the Plan when the contributory requirements were met; and

iii. continue to be disabled.

See: subsection 42(2), paragraph 44(1)(*b*) and subsection 44(2) of the Plan.

[3] Here, Ms. Flewin was required to establish that she was disabled as of December 31, 2002.

[4] The definition of "disability" is contained in paragraph 42(2)(*a*) of the Plan which provides that 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." The provision goes on to state that “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."

[5] Ms. Flewin applied for disability benefits in September of 2001. She described her principal disabling conditions as: depression, irritable bowel syndrome, bursitis in left knee, back problems,

sciatic nerve, carpal tunnel syndrome in both hands, migraine headaches, rotator cuff difficulties in her right shoulder, tendinitis in the right arm and heel, and panic attacks. Her application was denied at both the initial and reconsideration stages. An appeal to a Review Tribunal was heard on February 19, 2003 and dismissed on April 7, 2003 on the ground that the Review Tribunal was of the view that Ms. Flewin was capable of sedentary work. Leave to appeal to the Board was denied on December 1, 2003.

[6] On May 9, 2005, Ms. Flewin applied to the office of the Commissioner of Review Tribunals to reopen the decision of the Review Tribunal. A second Review Tribunal heard Ms. Flewin's application. The second Review Tribunal allowed Ms. Flewin to reopen the prior final decision and found Ms. Flewin to be disabled as of December 31, 2002. It is this decision that the Minister of Human Resources and Skills Development appealed to the Board.

The Decision of the Board

[7] The issue before the Board was whether Ms. Flewin's case should be reopened on the basis of the existence of new facts, as contemplated by subsection 84(2) of the Plan. Subsection 84(2) provides:

84(2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.	84(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

[8] The Board correctly articulated the two-part test to be applied when considering whether new facts have been established. First, the evidence must establish a fact existed at the time of the original hearing which was not discoverable before the original hearing by the exercise of due diligence. Second, the new fact must reasonably be expected to affect the result of the prior hearing. See: *Higgins* at paragraph 8.

[9] The Board applied the two-part test as follows:

> 9. The medical evidence here confirms that the Respondent had a condition, COPD, at the time of the hearing in 2003, but unfortunately the condition was not definitely diagnosed by Dr. Homik until April 2003; in other words, after the hearing. Clearly what we have here is the doctor suspects that she had COPD, wants to do more testing but unfortunately only confirms the diagnosis after the hearing. This is not a situation where the new medical reports reiterate what is already known. Rather, it is the confirmation of a diagnosis of COPD after further testing.
>
> 10. We are of the view that the medical evidence before us meets that test as set out by the courts in interpreting Section 84(2) of the *Plan*. All of the evidence before us confirms she was suffering from COPD at the time of the first hearing in 2003. Unfortunately, the tests were not completed until after the hearing. The diagnosis of COPD was only confirmed in a report dated April 1, 2003. That is exactly the situation referred to in the *McCrea* decision (*supra*). Finally, there is no doubt this evidence is material.

The Asserted Errors

[10] The Attorney General asserts that in so concluding the Board erred in two respects. First, it is argued that the Board erred in finding the evidence established any new fact. Second, it is said that the Board failed to provide adequate reasons for its conclusion that the new evidence was material. For the purpose of this application for judicial review it is not necessary to consider other matters raised at the hearing by the Attorney General.

The Standard of Review

[11] Whether a case should be reopened on the basis of new facts is a question of mixed fact and law that attracts review on the reasonableness standard. See: *Higgins* at paragraph 35.

Application of the Standard of Review

[12] After briefly describing the oral evidence before it, the Board referenced four medical reports in evidence. They were:

i. Report of Ms. Flewin's family doctor, Dr. Dhanjal, dated January 30, 2002.

ii. Report of Ms. Flewin's respiratologist, Dr. Homik, dated November 25, 2002.

iii. Report of Dr. Dhanjal dated January 31, 2003.

iv. Report of Dr. Homik dated April 1, 2003.

[13] The first three reports were in evidence before the first Review Tribunal. They established that:

i. Ms. Flewin suffered from the conditions set out in her application for disability benefits

ii. Dr. Dhanjal believed that Ms. Flewin's condition was deteriorating and so he referred her to Dr. Homik.

iii. Dr. Homik assessed Ms. Flewin for obstructive airway disease. He reported that Ms. Flewin had noticed a progression in exertional shortness of breath and this had

become "quite bothersome" in the last two to three months. Having conducted physical examinations and mechanical tests the doctor stated "[i]n assessment, I suspect there may be a combination of asthma and [chronic obstructive pulmonary disorder (COPD)]."

iv. On January 31, 2003, Dr. Dhanjal described Ms. Flewin's most significant medical problem to be "asthma/COPD".

[14] It is the fourth report that formed the basis of the Board's conclusion that new facts had been established. The Board found this report to be significant because it contained Dr. Homik's formal diagnosis of COPD.

[15] Before considering the medical evidence in more detail, it is important to remember that what is relevant under the Plan is the effect of a disability. The question to be answered is whether the disability renders a person incapable regularly of pursuing any substantially gainful occupation. This was explained by this Court in the following way in *Klabouch v. Canada (Minister of Social Development)* (2008), 372 N.R. 385 at paragraph 14:

> First, the measure of whether a disability is "severe" is not whether the applicant suffers from severe impairments, but whether his disability "prevents him from earning a living" (see: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, paragraphs 28 and 29). In other words, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP. [Emphasis added.]

[16] Returning to the evidence, the Board made no mention of Dr. Homik's report of January 22, 2003. This report was provided to the first Review Tribunal. In it, Dr. Homik reported on a

reassessment conducted on January 15, 2003 "with regards to airflow obstruction suspected as representing both asthma and COPD." After reporting on the results of his examination, Dr. Homik advised that "[h]er spirometry will be repeated in 2 months to assess if there is further improvement in lung function or if she has achieved best possible control."

[17] Turning to the April 1, 2003 report of Dr. Homik, there the doctor reported about a reassessment conducted on March 31, 2003 "with regards to chronic airflow obstruction." He went on to state that a new inhaler he had prescribed "was of no further benefit improving symptoms or lung function." He recommended discontinuance of the particular inhaler.

[18] In my respectful view, the Board misapprehended the significance of the April 1, 2003 report. It did not establish that further testing established a diagnosis not available with reasonable diligence at the first hearing before the Review Tribunal. Nor did it establish any change in Ms. Flewin's capacity to work. Rather, read with the January 22, 2003 report, it showed that Ms. Flewin was known to suffer from airflow obstruction at the time of the first Review Tribunal hearing. What was unknown was whether there would be any further improvement in lung function "or if [Ms. Flewin] had achieved best possible control." Unfortunately, the subsequent April 1, 2003 report showed no further benefit. Her capacity to work was unchanged.

[19] When a decision is judicially reviewed on the standard of reasonableness, the reviewing court considers the existence of justification, transparency and intelligibility in the underlying

decision and whether the decision falls within the range of possible, acceptable outcomes that are defensible on the basis of the facts and law.

[20] Despite the able submissions of counsel for the respondent, and the sympathy we feel for Ms. Flewin, the Board's misapprehension of the effect of the April 1, 2003 report renders its decision unjustified and unreasonable, and cause it to reach a conclusion that was outside the range of possible, acceptable outcomes. For that reason, I would allow the application for judicial review.

[21] It is not necessary to consider the second asserted error with respect to the adequacy of the Board's reasons.

[22] Costs are not sought by the applicant and I would award no costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Pierre Blais C.J."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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