Federal Court of Appeal | Cour d'appel fédérale

Date: 20101110

Docket: A-49-10

Citation: 2010 FCA 302

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

BETWEEN:

MARY J. GILROY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on November 9, 2010.

Judgment delivered at Halifax, Nova Scotia, on November 10, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DAWSON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board dated January 8, 2010. The Board declined to re-open its previous decision, dated June 19, 2006. In this previous decision, the Board denied the applicant disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

[2] The Board declined to re-open this previous decision because there were no new facts that would have affected its previous decision denying disability benefits. For the reasons set out below,

I conclude that there are no grounds for this Court to intervene. Therefore, I would dismiss the application.

A. Background

[3] On January 24, 2003, the applicant applied for disability benefits under subsection 44(2) of the *Canada Pension Plan*. Under that subsection, a person is considered to be disabled only if the person has a "severe and prolonged mental or physical disability." Under paragraph 44(2)(*a*), a disability is "severe" if the person is "incapable regularly of pursuing any substantially gainful occupation." The inability to pursue any substantially gainful occupation must be present at a time known as the "minimum qualifying period." In the applicant's case, the end of the minimum qualifying period was December 31, 2004.

[4] The Minister dismissed the applicant's claim for disability benefits. The applicant appealed to the Board. The Board assessed her medical condition as of December 31, 2004 on the basis of the evidence before it. It accepted that the applicant had pain in various parts of her body. It noted that the applicant had been diagnosed as having repetitive strain injury resulting in fibromyalgia and myofascial pain. However, as of December 31, 2004, the applicant had exhibited no objective signs of disease. The Board also found that, as of that time, the applicant could work in a sedentary environment that did not involve highly repetitive arm movement. For those reasons, the Board dismissed the applicant's appeal.

[5] The applicant then applied to this Court for judicial review. During the hearing on April 1, 2008, she submitted that her medical condition had deteriorated since December 31, 2004 and that she was now in constant pain and could no longer work.

[6] This Court dismissed her application for judicial review: 2008 FCA 116. It explained (at paragraph 2) that "the Court has a limited function on an application for judicial review: to determine whether the Board made any reviewable error on the evidence before it concerning the severity of her disability at the end of December 2004." This Court noted (at paragraph 3) that "[t]he Board [had] carefully reviewed the various medical reports before it" and had found that the evidence did not establish a disability that was "severe" as of December 31, 2004. There was nothing to suggest that the Board's fact-finding was perverse in any way. Therefore, the Board's decision denying benefits to the applicant was left undisturbed.

[7] One year later, the applicant applied to the Board to reopen the matter on the basis of new evidence. The new evidence consisted of two letters from a doctor, a radiology report, a letter written by the Worker's Compensation Board and an electromyography report. The Board also heard evidence from the applicant and, in response, a doctor. Before the Board, the applicant testified that her condition had deteriorated since December 31, 2004: her condition had progressed to spondylosis, causing severe pain in her back that has significantly changed her lifestyle and has left her completely disabled. The doctor testified in response that there was nothing in the new

evidence that was different from the evidence that was originally before the Board. The doctor testified that the applicant had spondylosis before December 31, 2004, but in milder form.

[8] The Board concluded that the appellant's condition has become more disabling since its original decision. However, in its view, the new evidence would not have affected the original decision. The evidence did not show that the appellant was suffering a "severe" disability as of December 31, 2004. From this decision, the applicant applies to this Court for judicial review.

B. Analysis

[9] As this Court has done before, I would emphasize to the applicant that this Court has a limited function on an application for judicial review. This Court only has the power to review – not redo – the Board's decision in light of the factual findings it made. The Supreme Court tells us that in reviewing the decision, we are to ask ourselves this question: did the Board's decision fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law? (See *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at paragraph 47).

[10] In this case, this means that this Court looks at all of the evidence that was before the Board, and considers whether the decision that the Board made was one that was within the range of possibilities available to it.

[11] As mentioned in paragraph 3, above, the applicant had to establish that she was not able to pursue any substantially gainful occupation as of December 31, 2004. The Board found that the new evidence offered by the applicant could not establish that. It noted that the new evidence did show that her condition has gotten worse since December 31, 2004. However, the new evidence did not establish that the applicant was unable to pursue any substantially gainful occupation as of December 31, 2004. The new evidence offered by the appellant had to create a reasonable probability that the Board's original decision might be different: *Mazzotta v. Canada (Attorney General)*, 2007 FCA 297, 286 D.L.R. (4th) 163. The Board found that the new evidence did not do that.

[12] In my view, these conclusions were open to the Board based on the law and the evidence before it. No error has been shown that would allow us to quash the Board's decision.

[13] This Court is very sympathetic to the applicant's medical problems. Based on the evidence in this record, we believe the applicant when she submitted to us that she is experiencing great pain and significant impairment of the quality of her life today. We believe the applicant when she told us that her pain and impairment is getting worse. We know that the applicant is deeply frustrated with her condition. We know that she feels that she should get benefits, as a matter of common sense.

[14] But both the Board and this Court must follow the law exactly as written by Parliament, and nothing else. The law written by Parliament tells us that benefits are payable only if, among other

things, the applicant could not pursue any substantially gainful occupation as of a time in the past (in this case, December 31, 2004), not today. The new evidence does not establish this. Therefore, under the law written by Parliament, the applicant is not entitled to disability benefits.

C. Disposition

[15] I would dismiss the application for judicial review. The respondent does not seek its costs, and so I would award none.

"David Stratas"
J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
Carolyn Layden-Stevenson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-49-10
Application for judicial review from a decision dated January 8, 2010 of the Pension Appeals Board	
STYLE OF CAUSE:	Mary J. Gilroy v. Attorney General of Canada
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	November 9, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Dawson, Layden-Stevenson JJ.A.
DATED:	November 10, 2010

APPEARANCES:

Mary J. Gilroy	ON HER OWN BEHALF
Bahaa Sunallah	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT