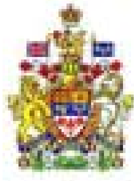
Federal Court of Appeal  Cour d'appel fédérale

Date: 20101130

Docket: A-10-10

Citation: 2010 FCA 324

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

BETWEEN:

JENNIFER WHITNEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

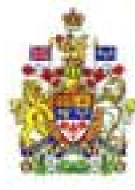
Heard at Calgary, Alberta, on November 29, 2010.

Judgment delivered at Calgary, Alberta, on November 30, 2010.

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

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

Federal Court of Appeal



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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.:

[1] The applicant, Jennifer Whitney, seeks judicial review of a decision of the Pension Appeals Board (PAB) allowing an appeal by the respondent (the Crown) from a decision of the Review

Tribunal (RT) under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Act). For the reasons that follow, I would dismiss the application.

[2] Ms. Whitney first applied for a CPP disability benefit in March 1998. Her minimum qualifying period (MQP) was December 31,1999. This means that she had to establish that she was disabled, within the meaning of the Act, on or before December 31,1999, and continued to be so disabled. Ms. Whitney was unsuccessful on her initial application and on reconsideration by the Minister. She appealed to the Office of the Commissioner of Review Tribunals and a hearing before the RT was conducted on February 22, 2000. There was extensive medical evidence before the RT, including several reports from her family physician, Dr. Nichol. The RT determined that Ms. Whitney was not disabled, within the meaning of the Act, on or before the MQP, December 31, 1999. No appeal was taken from this decision.

[3] Ms. Whitney applied again for a CPP disability benefit on April 23 2002. The Minister informed her that a decision had already been rendered regarding her application. Absent new facts that would allow the reopening of the previous application, her condition could be assessed only from April 2000, that being the month and year of the RT decision.

[4] On July 2, 2004, Ms. Whitney applied under subsection 84(2) of the Act to reopen the RT decision. Subsection 84(2) allows for the rescission or amendment of a previous decision on new facts. She also appealed the Minister's reconsideration decision denying her second application. On September 24, 2004, the RT dismissed her appeal, but determined that the reports from Dr. Nichol,

dated July 3, 2003, and Dr. Taenzer, dated September 2, 2003, qualified as new facts. Based on the new fact evidence, the RT concluded that Ms. Whitney's condition "has never improved" and she was deemed disabled as of the date she stopped working in April 1997.

[5] The Crown sought and was granted leave to appeal the September 24, 2004 RT decision to the PAB. The PAB granted the Crown's appeal on the basis that Ms. Whitney had not established new facts as required under subsection 84(2) of the Act.

[6] The standard of review applicable to a PAB finding with respect to the existence of new facts under subsection 84(2) of the Act is reasonableness: *Higgins v. Canada* (*A.G.*), 2009 FCA 322, 313 D.L.R. (4th) 13 at para. 35; *Gaudet v. Canada* (*A.G.*), 2010 FCA 59, 403 N.R. 110 at para. 4.

[7] For evidence to be admissible as a new fact, it must meet a two-part test. First, it must establish a fact that existed at the time of the original hearing but was not discoverable before that hearing by the exercise of due diligence. Second, the evidence must reasonably be expected to affect the result of the prior hearing: *Higgins* at para. 8; *Gaudet* at para. 3.

[8] The PAB accepted that the new reports showed a new and different diagnosis, but found that these were a result of the passage of time and retrospective analysis concerning facts that evolved in 2003 rather than facts that existed at the date of her MQP. The PAB went on to find that the reports did not contain new facts.

[9] I agree with Ms. Whitney, and Crown counsel conceded at the hearing, that psychologist Dr. Taenzer's conclusion that she was incapable of pursuing employment between April 1998 and March 2000 could not be based on facts that evolved in 2003 because he did not see her beyond March 2000. However, the PAB specifically noted that the information must not only have existed at the date of the MQP, but also that it "should not then have been discoverable at [Ms. Whitney's] MQP (or before that time) – using reasonable diligence." There is nothing in the record demonstrating that Dr. Taenzer's report could not have been discoverable, on or before the MQP, by the exercise of due diligence. Consequently, the PAB's conclusion that the report did not constitute new evidence was not unreasonable.

[10] Regarding Dr. Nichol's report, his conclusion that Ms. Whitney's condition is permanent was based on the fact that her condition had not changed over a period of time ending in 2003. Again, I agree with Ms. Whitney that he did not provide a different diagnosis of the underlying medical condition. To the contrary, he acknowledged that there had been no change. It is true that Dr. Nichol's letter of October 13 1998 stated that it "is unlikely that she will become fit for employment in the near future, that is, the next four to five years" (Crown record at p. 187). Yet, his later letter of January 8, 1999 (which was before the original RT) said:

> [Ms. Whitney] continues to suffer from several medical conditions, that make it impossible for her to pursue any employment. Until these conditions remit, either spontaneously or through advances in medical care, she will remain unfit for employment. This recommendation is for an indefinite period because it is impossible to predict the timing of any future improvement (Crown record at p. 191).

[11] He reiterated the same concern in a letter dated June 17, 1999 and added that Ms. Whitney "suffers from invisible chronic illnesses and is completely disabled as a result" (Crown record at p. 206).

[12] In view of the medical information that was before the RT in 2000, the PAB's conclusion that Dr. Nichol's report of July 3, 2003 did not contain new facts was reasonably open to it. Moreover, although the PAB did not find it necessary to discuss the second step of the test, it did specifically state that the information "is not so conclusive that it could reasonably be expected to affect the result of the prior hearing." On the record, that finding is also reasonable.

[13] For these reasons, I would dismiss the application for judicial review. The Crown did not request costs and I would not award any.

"Carolyn Layden-Stevenson"
J.A.

"I agree
M. Nadon J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-10-10
STYLE OF CAUSE:	JENNIFER WHITNEY v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Calgary, Alberta
REASONS FOR JUDGMENT BY:	LAYDEN-STEVENSON J.A.
CONCURRED IN BY:	NADON J.A. DAWSON J.A.
DATED:	November 30, 2010

APPEARANCES:

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Nancy Luitwieler	FOR THE RESPONDENT

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