Federal Court of Appeal | Cour d'appel fédérale

Date: 20110606

Docket: A-249-10

Citation: 2011 FCA 189

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

BETWEEN:

THOMAS WALKER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on May 31, 2011.

Judgment delivered at Ottawa, Ontario, on June 6, 2011.

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

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

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REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.A.

[1] Mr. Walker seeks judicial review of a decision of the Pension Appeals Board (the PAB) determining that a recent diagnosis of sleep apnea submitted for consideration under subsection 84(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP) did not meet the test for "new facts" required to re-open its previous decision that Mr. Walker was not suffering from a severe and prolonged disability as of the minimum qualifying period (MQP), December 31, 1998.

[2] Mr. Walker first applied for disability benefits nearly 11 years ago. For present purposes, I need only refer to the PAB decision dated June 5, 2006 (the 2006 decision) dismissing his application. Judicial review of that decision was dismissed by this Court. Subsequently, he unsuccessfully applied again.

[3] On June 4, 2009, Mr. Walker requested reconsideration of the 2006 decision on the basis of "new facts", specifically the diagnosis of Dr. Rick Balys contained in a medical report dated May 27, 2009. Dr. Balys diagnosed Mr. Walker as suffering from severe sleep apnea. Dr. Balys indicated that he suspected the condition had existed for 10 years and would have been diagnosed before the 2006 hearing, had appropriate sleep studies been undertaken.

[4] Mr. Walker also provided a letter from his long-standing family physician, Dr. M. Teresa Dykeman. She explained that sleep apnea "was not truly appreciated as a diagnosis" and "wasn't in vogue" at the time of Mr. Walker's car accident in 1997, but in retrospect, "he had symptoms of this since 1997."

[5] Subsection 84(2) of the CPP permits the PAB to rescind or amend a decision on the basis of "new facts". There are specific requirements that must be met for evidence to constitute "new facts". Mr. Walker must meet the two-part test most recently articulated in *Gaudet v. Canada* (*Attorney General*), 2010 FCA 59 (*Gaudet*). First, it is necessary to establish a fact (usually a medical condition in the context of the Plan) that existed at the time of the original hearing, but was not discoverable before the original hearing by the exercise of due diligence (the discoverability

test). Second, the fact must reasonably be expected to affect the result of the prior hearing (the materiality test). Both parts of the test must be satisfied to meet the definition of "new facts" within the meaning of the CPP.

[6] The PAB dismissed the "new facts" application by relying on the test in *Gaudet*. It noted several references to Mr. Walker's sleeping difficulties in the 2006 record and it relied on the evidence of the respondent's witness, Dr. Gonsalves, who testified that sleep apnea had in fact been in the medical literature since 1965, with successful therapy being used since 1995. On that basis, the PAB concluded, "it has not been demonstrated that sleep apnea would not have been discovered with due diligence." With respect to whether Mr. Walker's diagnosis of sleep apnea would have materially affected the outcome of the 2006 decision, the PAB found, "on the contrary, an early diagnosis would likely have served to advance his treatment and decrease his disability."

[7] Mr. Walker attacks the PAB decision on two fronts. First, he asserts error in the application of the two-part test. He argues that the PAB erred in preferring the evidence of Dr. Gonsalves over his own doctor's testimony and further erred in penalizing him for his doctor's failure to diagnose his sleep apnea in 1997. He maintains that discoverability should have been considered only from his perspective as a claimant. In assessing materiality, Mr. Walker claims the PAB erred by basing its conclusion on a generic view that any prior evidence of sleep deprivation would have rendered the diagnosis of sleep apnea irrelevant to the 2006 decision. In doing so, it contravened the "broad and generous approach" to new facts advocated in *Kent v. Canada* (*Attorney General*), 2004 FCA 420 and *Canada* (*Attorney General*) *v. MacRae*, 2008 FCA 82.

[8] Second, in his written submissions, he argues that the reasons are inadequate because the PAB failed to provide a full written explanation for its decision. According to Mr. Walker, there is insufficient explanation in the decision to determine whether the PAB properly applied the test. This argument was not pursued at the hearing.

[9] The standard of review applicable to a decision of the PAB regarding "new facts" under subsection 84(2) of the CPP is reasonableness: *Gaudet*; *Higgins v. Canada* (*Attorney General*), 2009 FCA 322. To be reasonable, the PAB's decision must demonstrate "justification, transparency and intelligibility in the decision making process" and fall "within the range of possible, acceptable outcomes": *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[10] At the hearing, the respondent's counsel advised that he was not arguing the discoverability aspect of the test, but was relying on the PAB's finding with respect to materiality. Therefore, I will assume, for purposes of this appeal, that Mr. Walker is correct in relation to discoverability. However, I find the PAB's conclusion with respect to the materiality aspect of the test to be reasonable. Further, the PAB's reasons do reveal a consideration as to whether the diagnosis of sleep apnea could have impacted the 2006 decision with respect to the level of disability prior to the date of the MQP. Consequently, the conclusion that Mr. Walker's recent diagnosis of sleep apnea does not constitute "new facts" for the purpose of subsection 84(2) of the CPP was reasonable.

[11] Mr. Walker does not dispute the finding that the 2006 record was replete with references of problematic sleep patterns and sleep deprivation. Although the initial claim for benefits was centered on Mr. Walker's back and muscle problems, it cannot be said that the inability to consider a diagnosis of sleep apnea prevented him from presenting a complete account of his disability at the time of the application. As the PAB noted, "it is not the diagnosis of sleep apnea that is material, but rather the impact of the lack of restorative sleep on the applicant's capacity to work."

[12] Further, as stated by the PAB, the current diagnosis is not in question. The issue (in relation to materiality) concerns the potential for the sleep apnea diagnosis to affect the 2006 decision that a severe and prolonged disability had not been established by the MQP date of December 31, 1998. In this respect, the medical opinions do not strongly point to a condition that could have materially affected an assessment of Mr. Walker's work capacity on that date. Dr. Balys put forth a suspicion and Dr. Dykeman offered a rather oblique comment that "in retrospect he had symptoms of this since 1997."

[13] Most significantly, the medical opinion of Dr. Balys indicates that Mr. Walker is "very responsive" to his sleep apnea treatment and, since his diagnosis, "his mood and energy is improving and they will continue to do so." Mr. Walker acknowledges that since beginning his treatment, he is "finally able to get some sleep after many long years (probably decades) of sleepless nights." Although this evidence speaks directly to the issue before the PAB in 2006 (whether a severe and prolonged disability existed as of the MQP date of December 31, 1998), it would not

have affected, let alone advanced, Mr. Walker's claim for benefits. As the PAB correctly noted, "an early diagnosis would likely have served to advance his treatment and decreased his disability."

[14] I acknowledge and appreciate Mr. Walker's frustration. It is difficult for him to accept the finality of the 2006 decision, which he views as wrong. However, unless he can establish "new facts", the 2006 decision must stand. This Court must defer to the PAB's decision on "new facts" unless it is unreasonable.

[15] The PAB did not err in concluding that Mr. Walker did not meet the materiality aspect of the test to establish "new facts" within the meaning of subsection 84(2) of the CPP. Nor do I believe that its reasons fail to demonstrate justification, transparency and intelligibility in the decision making process.

[16] For these reasons, I would dismiss the application for judicial review without costs.

"Carolyn Layden-Stevenson"
J.A.

" I agree
M. Nadon J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	Halifax, Nova Scotia
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