

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111021

Docket: A-147-10

Citation: 2011 FCA 293

**CORAM: NADON J.A.
SHARLOW J.A.
DAWSON J.A.**

BETWEEN:

SHAUNA NAHAJOWICH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Edmonton, Alberta, on October 12, 2011.

Judgment delivered at Ottawa, Ontario, on October 21, 2011.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

NADON J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] In Appeal CP26112 a majority of the Pension Appeals Board (Board) determined that Shauna Nahajowich had failed to establish, on a balance of probabilities, that she was disabled within the meaning of subsection 42(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan). In the view of the majority, she had not established that she was “incapable regularly of pursuing any substantially gainful occupation” as required by subparagraph 42(2)(a)(i) of the Plan. This is an application for judicial review of that decision.

[2] The reasons of the Board are lengthy. After describing in some detail the evidence before it and the applicable legal principles, the majority of the Board began its analysis of the evidence. It noted that Ms. Nahajowich had not worked since March of 2003 after being injured at work while physically restraining a resident of a group home where she worked as a youth care counsellor. The majority then reviewed the evidence, which in its view supported the conclusion that Ms. Nahajowich was capable of returning to work or doing modified sedentary work. The reports referred to and relied upon by the majority were prepared over the period from April of 2003 to August of 2004. The Board also referred to a report said to be prepared in February of 2005 by Dr. Campbell in which he was said to state that if Ms. Nahajowich entered into an exercise program her prognosis would be excellent, and a report prepared in April of 2006 in which Dr. Chiu was said to have encouraged Ms. Nahajowich to be active. The majority of the Board then concluded as follows:

[84] I have examined and reviewed the very many medical reports that have been prepared and filed. The Respondent's family physician, Dr. Schwalfenberg, is of the view that her condition prevents her from doing any type of work on a regular basis and that her condition is unlikely to improve in the future. The other medical evidence however does not support such a conclusion.

[85] From my review of the other medical evidence my understanding of it does not support or establish that the disability of Ms. Nahajowich is one that is "severe" within the meaning of the term as defined in Paragraph 42(2)(a) of the *Plan*. Except for the medical reports of Dr. Schwalfenberg, the other reports of medical doctors and therapists by and large state that she could either return to work or could do modified sedentary work. The exercise programs

and strengthening exercises that have been suggested have not been followed. Other than her family doctor the medical specialists in several different disciplines who have examined Ms. Nahajowich have not found any pathology or clinical evidence to support her position that her disability renders her incapable of performing some type of gainful work.

[3] On an application for judicial review of a decision of the Board, this Court may only interfere with the Board's assessment of the evidence or its application of the law to the evidence if the Board's decision is unreasonable. This Court may not reweigh the evidence or reapply the law to the evidence.

[4] Notwithstanding this deferential standard of review, I have concluded that the Board's decision is unreasonable for the following reasons.

[5] First, missing from the Board's analysis is any consideration of the evolution and deterioration of Ms. Nahajowich's medical condition. While initially her condition was described to be pain, mainly in the upper body, resulting from the injury she received while restraining a youth, over time her condition deteriorated. She was diagnosed with chronic fibromyalgia triggered by her workplace injury, chronic pain in a diffuse nature, chronic fatigue and resulting depression. The deterioration in her condition is described as follows in a letter dated January 18, 2005 from Alberta Human Resources and Employment, Labour Market and Income Support:

The supports that Shauna required were being set up for September of 2003 but due to a delay in getting the supports purchased (e.g. Voice recognition software), training being done on this software, etc., she was unable to attend. When the supports were finally in place in January 2004, Shauna's injury has deteriorated and evolved into Fibromyalgia/Chronic Myofacial Pain and as a result, she was deemed unfit to attend school and take the necessary voice recognition training.

[6] Second, and related to this, Ms. Nahajowich's minimum qualifying period date (MQP) was agreed to be December 31, 2005. Thus, Ms. Nahajowich was required to establish that her disability existed as of that date.

[7] As the majority correctly noted, Dr. Schwalfenberg consistently provided medical opinions to the effect that Ms. Nahajowich was disabled within the definition contained in the Plan. For example, on November 22, 2006, Dr. Schwalfenberg opined that Ms. Nahajowich's symptoms had not improved over the past two years and it did not appear that she would be gainfully employed in the future (respondent's record, page 230). To similar effect is his report of October 9, 2007, where he noted her condition prevented her from any type of work on a regular basis (respondent's record, page 233).

[8] However, as shown above, the evidence relied upon by the Board to find Ms. Nahajowich was not disabled described her condition prior to September of 2004. While the Board did refer to a

report from Dr. Campbell prepared in February of 2005, the index of relevant material to the Board's hearing does not contain any reference to a report prepared by Dr. Campbell in February of 2005. In February of 2006, Dr. Campbell did provide a report in which he stated that he was "unable to comment on her capacity or restrictions for any job suitable to her medical condition at this time. However, in April of 2005 she was probably restricted in what she could do." (respondent's record, page 419). Dr. Chiu's report of April, 2006 relied upon by the Board stated that her "prognosis is difficult to determine at this time." (respondent's record, page 226).

[9] The evidence relied upon by the Board to discredit Dr. Schwalfenberg's evidence was therefore not directed to an assessment of Ms. Nahajowich's condition at the end of her MQP. The two reports prepared in 2006 referred to by the Board were, at best, equivocal.

[10] These two errors cause the Board's decision to be unreasonable.

[11] For these reasons, I would allow the application for judicial review with costs and remit the matter to a differently constituted panel of the Board for redetermination.

“Eleanor R. Dawson”

J.A.

“I agree
M. Nadon J.A.”

“I agree
K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-147-10

STYLE OF CAUSE: SHAUNA NAHAJOWICH v.
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: October 12, 2011

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

DATED: October 21, 2011

APPEARANCES:

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