

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111121

Docket: A-57-11

Citation: 2011 FCA 318

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

BETWEEN:

PATRICK BRENNAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at St.John's, Newfoundland and Labrador, on November 17, 2011.

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

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

**NOËL J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review of a Pension Appeals Board (Board) decision bearing file number CP26496 (2011 LNCPEN 2) dismissing the applicant's appeal and denying him disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). Although I sympathise with the applicant's plight, I am of the view that his application cannot succeed.

[2] In April 2007, following work-related injuries sustained in January and February 2004, the applicant submitted an application for CPP disability benefits. His application was denied by the

Minister of Human Resources and Skills Development Canada, both initially and upon reconsideration. His appeal was then dismissed by a Review Tribunal which found that at the time of his minimum qualifying period (MQP) at the end of June 2004, the applicant did not have “a severe and prolonged disability” within the meaning of the Plan.

[3] The applicant was granted leave to appeal the negative decision of the Review Tribunal. An oral hearing *de novo* took place before the Board, which unanimously dismissed the applicant’s appeal. Hence, the within application for judicial review.

[4] The applicant challenges the Board’s decision on two principal grounds: the first pertains to the decision itself while the second concerns matters more of a procedural nature. I shall address each ground in this sequence. But before, I should reiterate what this Court has recently stated in *Erickson v. Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 58 at paragraph 6:

It is settled that the standard of review for a determination of disability by the Board, since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), is the reasonableness standard (*Canada (Attorney General) v. Ryall*, 2008 FCA 164 at paragraphs 10-11, *Janzen v. Canada (Attorney General)*, 2008 FCA 150 at paragraph 5).

1) The Board’s decision is reasonable

[5] The applicant, of course, disagrees with the Board’s decision that denied him the benefits sought. He takes particular issue with the Board’s failure to consider two 2008 reports: that of Dr.

Peter J. Callahan, dictated in June 2008; and that of DeAnne Vincent, dated October 10, 2008 and written in her capacity as Case Manager with the Workplace Health Safety and Compensation Commission.

[6] Although it is accurate to say that the Board did not mention these two particular reports that does not establish that the Board was not alert to the evidence as a whole when it took its decision.

[7] Before reaching a conclusion, the Board does not have to address every piece of evidence that is inconsistent with evidence it accepts (*Canada (Minister of Human Resources Development) v. Bartelds*, 2006 FCA 123 at paragraph 6). The applicant has not persuaded me that the two reports were of such importance that it amounted to an error of law not to refer to them in its decision.

[8] The Board's task was to determine whether the applicant was entitled to disability benefits by reason of a severe and prolonged disability that existed prior to the expiry of his MQP and continuously thereafter . I agree with the respondent that the two reports were not helpful in that regard. Other pieces of evidence did not clearly point in that direction either.

[9] In light of the record as a whole, including these two singled-out reports, it was not unreasonable for the Board to conclude that: "... the medical evidence combined with the evidence of the [applicant] does not support a finding that the [applicant] suffered from a "severe and prolonged" physical or mental disability."

2) The Board's decision is not otherwise flawed

[10] In his Memorandum of Fact and Law, the applicant asks: "Is it fair that Dr. Gonzales make a decision on my application when she has not even examined me?" (at paragraph 5). As well, counsel for the applicant notes that Dr. Gonzales practices family medicine, not orthopaedic medicine.

[11] This ground of complaint is unfounded. Dr. Gonzales was not a decision-maker in the applicant's case. She testified before the Board as an expert witness for the Minister. Since 1989, she has been a Medical Advisor with the Department of Human Resources and Skill Development Canada. As a matter of fact, her testimony was only a small part of the extensive evidence in front of the Board and was not specifically referred to by it.

[12] Finally, the applicant alleges in his affidavit (at paragraph 18) that at the hearing of his appeal, "the female judge continuously nodded off on her chair as she was obviously very sleepy". There is contradictory evidence regarding this serious allegation (affidavit of Dr. Gonzales, respondent's record, volume 1, tab 1 at paragraph 16), so it is of no help in assessing the merits of this application.

[13] For these reasons, I propose to dismiss this application without costs as none were sought.

"Johanne Trudel"

J.A.

"I agree
Marc Noël J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-57-11

STYLE OF CAUSE: Patrick Brennan v.
Attorney General of Canada

PLACE OF HEARING: St.John's, Newfoundland and
Labrador

DATE OF HEARING: November 16, 2011

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
MAINVILLE J.A.

DATED: November 21, 2011

APPEARANCES:

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FOR THE APPLICANT

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