

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130214

Docket: A-287-11

Citation: 2013 FCA 37

**CORAM: SHARLOW J.A.
TRUDEL J.A.
WEBB J.A.**

BETWEEN:

OWEN McDONALD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on February 7, 2013.

Judgment delivered at Ottawa, Ontario, on February 14, 2013.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

SHARLOW J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review by Owen McDonald (the applicant) requesting that this Court set aside a decision of the Pension Appeals Board (the Board) dated July 5, 2011 (CP 27245).

[2] The applicant was diagnosed with schizophrenia in the 1980's and has suffered since from serious conditions resulting from multiple subsequent injuries. The respondent does not contest the applicant's health issues. In December 2007, Mr. McDonald successfully applied for a disability

pension following which he was awarded the maximum allowable period of retroactivity under paragraph 42(2)(b) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP). Paragraph 42(2)(b) has the effect of deeming Mr. McDonald to have become disabled 15 months before the time of the making of his application. On the basis of his medical report, the applicant requests an earlier date of disability than that imposed by the CPP arguing that before December 2007, and since the onset of his schizophrenia in the 1980's, he lacked the physical and cognitive capacity to form the intention to apply for a pension and did not understand the nature of the application.

[3] In the decision under review, the Board found that the applicant did not, at any time, lack the capacity to form or express an intention to make an application for benefits as required by subsections 60(8) and (9) of the CPP. It concluded on the basis of medical records and the applicant's own testimony that the applicant's failure to apply for a disability pension at an earlier date was due to his lack of knowledge that he might be entitled to one. The Board's conclusion affirmed that of the Review Tribunal.

[4] As a result, the issue to be decided is whether the Board made a reviewable error in concluding as it did.

[5] The approach to capacity to form or express an intention within the meaning of subsections 60(8) and (9) of the Plan is now well-established. This Court has affirmed that the Board is to consider capacity in light of the ordinary meaning of the term (*Sedrak v. Canada (Social Development)*, 2008 FCA 86 at paragraphs 3-4). It must consider the medical evidence and the applicant's activities which cast light on his capacity, between the claimed date of commencement

of disability and the date of application (*Canada (Attorney General) v. Danielson*, 2008 FCA 78 at paragraph 7; *Canada (Attorney General) v. Kirkland*, 2008 FCA 144 at paragraph 7.)

[6] On review of the record of medical evidence and of the applicant's activities over the course of his disabilities, it is apparent that the Board carefully considered the evidence before it. It made no reviewable error in finding that the main reason the applicant did not apply earlier was due to his lack of knowledge that he was entitled to a disability pension, rather than to any incapacity. Unfortunately, as the Board pointed out, lack of knowledge is not recognized as incapacity under these provisions of the CPP.

[7] At the hearing of this application, Mr. McDonald presented his case with clarity and conviction. Answering a question from the Court, he admitted that in the late 1990's he would have been able to form the intention to apply for a disability pension, although he would have needed help to prepare it, as writing was difficult for him. This answer is in line with the Board's findings.

[8] I am alive and sympathetic to the difficulties that Mr. McDonald continues to face. However, his application for judicial review cannot succeed. Consequently, I would dismiss the application for judicial review without costs as sought by the Respondent.

"Johanne Trudel"

J.A.

"I agree
K. Sharlow J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-287-11

STYLE OF CAUSE: Owen McDonald v. Attorney
General of Canada

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: February 7, 2013

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

DATED: February 14, 2013

APPEARANCES:

Owen McDonald

SELF-LITIGANT

Michael Stevenson

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE RESPONDENT