Date: 20060314

Docket: T-1345-05

Citation: 2006 FC 322

Ottawa, Ontario, March 14, 2006

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MINISTER OF HUMAN RESOURCES DEVELOPMENT

Applicant

- and -

NOEL P. LEWIS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (the Board), dated July 7, 2005, which denied the applicant leave to appeal a decision of the Review Tribunal granting the respondent a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP).

[2] The applicant requests that:

1. the application for judicial review be allowed, without costs; and

2. the matter be remitted to a different member designate of the Board for re-determination.

Background

[3] Mr. Noel P. Lewis (the respondent) sustained injuries from a motor vehicle accident in July 2002 which brought an end to his employment as a paramedic. He applied for CPP disability benefits in October 2003. On his application form, he described his main disabling conditions as an open patella fracture, left shoulder and rotator cuff tear, left acromioplasty and removal of bursa, head injury, right temporal traumatic epileptic seizure, and subconjunctival haemorrhage and running of the right eye. He also indicated that he had difficulties in ascending and descending stairs, lifting, bending, kneeling and carrying; a reduced range of motion; and seizure activity. The Minister of Human Resources Development (the applicant) denied the respondent's application because the evidence revealed that although the respondent may not be able to do his usual work, he was able to do some type of work. This decision was confirmed upon reconsideration. The respondent then appealed this decision to a Review Tribunal, which allowed his appeal on December 21, 2004. The Review Tribunal found that the respondent could not return to his work as of the date of his motor vehicle accident, and therefore awarded him a disability pension with a date of onset of July 2002.

[4] The Minister filed an application for leave to appeal the Review Tribunal's decision. Leave to appeal was refused by the Board on July 7, 2005. This is the judicial review of the Board's decision refusing leave to appeal.

Reasons for the Board's Decision

[5] The Board's decision is reproduced below in full:

> The Review Tribunal found that the Respondent was disabled within the meaning of the Canada Pension Plan as of July 2002, the month of his motor vehicle accident.
>
> The Tribunal in comprehensive reasons reviewed the medical evidence and the submission of the Minister. It is noted that Drs. Shaikh and Tumilty confirmed that Mr. Lewis was disabled and unable to work. While medication mostly controlled his traumatic epilepsy, he has had difficulty tolerating the medication. His driver's permit has been revoked.
>
> The Tribunal issued reasons which allow everyone to know how they reached their conclusion; they put considerable faith in the evidence of Mr. Lewis which was their right. *Giannaros v. Minister of Social Development*, 2005 FCA 187 at page 4 reviews a similar situation and finds in that case the Board was entitled to deal with the evidence. Leave to appeal is refused.

Issue

[6] The applicant raised the following issue:

In refusing leave to appeal, did the Board apply the right test, that is, whether the applicant raised an arguable case?

Applicant's Submissions

[7] The applicant submitted that when a party applies to the Board pursuant to subsection 83(1) of the CPP for leave to appeal a decision of the Review Tribunal, the party does not have to prove his or her case. Leave to appeal is a first and lower hurdle to meet than the hurdle that must be met on the hearing of the appeal on the merits (see *Kerth* v. *Canada (Minister of Human Resources Development)* (1999), 173 F.T.R. 102 at paragraph 24 (T.D.)).

[8] The applicant submitted that while the CPP does not set out any criteria for determining leave applications under section 83, case law has established that the test is whether the application raises an arguable case (see *Callihoo* v. *Canada (Attorney General)* (2000), 190 F.T.R. 114 at paragraph 15 (T.D.)).

[9] The applicant submitted that the Board assessed the Review Tribunal's decision on its merits on the disability issues rather than asking whether the applicant had an arguable case, and in so doing, the Board applied the wrong test. It was submitted that the Board went further than considering whether an arguable case was raised.

[10] The Board in its reasons cited the decision of *Giannaros* v. *Canada (Minister of Social Development)*, 2005 FCA 187, which concerns an application for judicial review of a decision of

the Board dismissing an appeal on its merits. The applicant submitted that the *Giannaros* decision is not relevant to the assessment of a request for leave to appeal.

[11] The applicant submitted that in its application for leave to appeal, it provided evidence of an arguable case that the respondent is able to pursue a substantially gainful occupation within the meaning of subparagraph 42(2)(a)(i) of the CPP.

Respondent's Submissions

[12] The respondent did not file any written submissions and did not attend the hearing before me.

Analysis and Decision

[13] **Issue 1**

In refusing leave to appeal, did the Board apply the right test, that is, whether the applicant raised an arguable case?

In *Callihoo* above, Justice MacKay stated that judicial review applications in respect of applications for leave to appeal to the Pension Appeals Board generally involve two issues:

> 1. whether the decision maker has applied the right test - that is, whether the application raises an arguable case without otherwise assessing the merits of the application, and

> 2. whether the decision maker has erred in law or in appreciation of the facts in determining whether an arguable case is raised. If new evidence is adduced with the application, if the application raises an issue of law or of relevant significant facts not appropriately considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the grant of leave.

[14] This application is concerned with the first issue, namely, whether the Board applied the right test in deciding whether to grant leave to appeal. As this is a question of law, the Board's decision will be set aside if it applied the incorrect test. See, for example, *Martin* v. *Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141 (F.C.A.), where Justice Malone wrote at paragraphs 6 and 7:

> On examination of the reasons given by the PAB Vice-Chairman in refusing leave to appeal it is evident that he went much further than merely considering whether an arguable case or question of law or jurisdiction had been raised and instead considered whether the appellant could succeed on the merits. This is an error of law. The Vice-Chairman stated (Appeal Book, page 60):
>
> > It is difficult to see how the Board could come to any different conclusion from that reached by the Review Tribunal. The medical evidence does not support the contention that the applicant is incapable regularly of pursuing any gainful occupation. It shows he is limited as to what work he can do, but supports the Minister's contention that less physically demanding work would be within his capacity. As to the applicant's education qualifications, any limitation flowing from that consideration are not based on disability. Leave to appeal cannot be justified.
>
> We are of the respectful view that the Vice-Chairman of the PAB in making his decision applied an incorrect test and placed too heavy a

> burden on the appellant when assessing the application for leave to appeal. In our view there is at least an arguable case as to the proper interpretation of subparagraph 42(2)(a)(i) of the *Canada Pension Plan* which requires that for a disability to be severe the claimant must be "incapable regularly of pursuing any substantially gainful occupation". The Review Tribunal, however, assumed that the appellant had to show that he is "incapable of doing any type of work".

[15] In the present application, the key paragraph of the Board's reasons is reproduced below:

> The Tribunal issued reasons which allow everyone to know why they reached their conclusion; they put considerable faith in the evidence of Mr. Lewis which was their right. *Giannaros v. Minister of Social Development*, 2005 FCA 187 at page 4 reviews a similar situation and finds in that case the Board was entitled to deal with the evidence. Leave to appeal is refused.

[16] It is obvious from the above paragraph that the Board applied the *Giannaros* decision in coming to its decision to refuse leave to appeal. The difficulty with applying this decision flows from the fact that the *Giannaros* decision was a judicial review of a decision on the merits of the case. It was not a decision dealing with leave to appeal as in the present case.

[17] I am of the view that the Board assessed this present case on the merits of the application when it applied the *Giannaros* decision. That is not the proper test to apply when determining whether to grant leave to appeal. In leave applications, the Board only has to determine whether the applicant has raised an arguable issue without otherwise assessing the merits of the case. As a result of applying the wrong test, the Board has committed an error of law. The Board's decision must be set aside.

[18] The applicant’s application for judicial review is therefore allowed without costs and the matter is referred to a different member designate of the Board for re-determination.

JUDGMENT

[19] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the matter is referred to a different member designate of the Board for re-determination.

2. There shall be no order as to costs.

"John A. O'Keefe"
Judge

ANNEX

Relevant Legislation

A person is entitled to receive a disability pension if he or she is disabled within the meaning of section 42 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

(2) For the purposes of this Act,	(2) Pour l'application de la présente loi:
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa:
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;
(b) a person shall be deemed to have become or to have ceased to be	b) une personne est réputée être devenue ou avoir cessé d'être

disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.	invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été établie.

Section 83 of the *Canada Pension Plan* provides that a party may apply to the Board for leave to appeal a decision of the Review Tribunal.

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the Old Age Security Act, or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow,	83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la Loi sur la sécurité de la vieillesse — ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le vice-président de

apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.

(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.

(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.

(2.1) The Chairman or Vice-Chairman of the Pension Appeals Board may designate any member or temporary member of the Pension Appeals Board to exercise the powers or perform the duties referred to in subsection (1) or (2).

(2.1) Le président ou le vice-président de la Commission d'appel des pensions peut désigner un membre ou membre suppléant de celle-ci pour l'exercice des pouvoirs et fonctions visés aux paragraphes (1) ou (2).

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.

(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

(4) Where leave to appeal is granted, the application for leave to appeal thereupon becomes the notice of appeal, and shall be

(4) Dans les cas où l'autorisation d'interjeter appel est accordée, la demande d'autorisation d'interjeter appel est assimilée à un avis

deemed to have been filed at the time the application for leave to appeal was filed.

d'appel et celui-ci est réputé avoir été déposé au moment où la demande d'autorisation a été déposée.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1345-05
STYLE OF CAUSE:	MINISTER OF HUMAN RESOURCES DEVELOPMENT - and – NOEL P. LEWIS
PLACE OF HEARING:	St. John's, Newfoundland and Labrador
DATE OF HEARING:	February 22, 2006
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	March 14, 2006

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No One Appearing	FOR THE RESPONDENT

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