Federal Court  Cour fédérale

Date: 20220929

Docket: T-1700-21

Citation: 2022 FC 1363

Ottawa, Ontario, September 29, 2022

PRESENT: Madam Justice Pallotta

BETWEEN:

HERBERT WATKINS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Herbert Watkins, brings this application for judicial review of an October 6, 2021 decision (Decision) that refused his request for remedial relief under subsection 66(4) of the *Canada Pension Plan*, RSC 1985, c C-8 [*Act*]. Mr. Watkins requested remedial relief to recover about three years of Canada Pension Plan (CPP) disability benefits. He alleges he was entitled to these benefits and they were denied as a result of receiving erroneous advice from a CPP medical adjudicator.

[2] Mr. Watkins alleges the decision maker refused the request for remedial relief without reading his submissions, and the Decision was procedurally unfair because he was denied an opportunity to fully and fairly present his case. Alternatively, he submits the Decision was unreasonable. If the decision maker did read his submissions, they were considered perfunctorily and not given serious weight. Finally, Mr. Watkins alleges his submissions were disregarded as a result of a discriminatory attitude about his disability, in contravention of section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982, c 11 [*Charter*].

[3] The respondent submits the Decision resulted from a fair process, and was reasonable.

[4] While I am not persuaded that Mr. Watkins' *Charter* rights were contravened, I find he has established a denial of procedural fairness, and that the Decision was unreasonable for failing to address his central submissions. For the reasons below, this application is allowed.

II. **Background**

[5] Mr. Watkins has been unable to work since December 2004. He suffers from chronic pain disorder and fibromyalgia as a result of a workplace injury in 2003. Mr. Watkins applied for CPP disability benefits in August 2005 and a medical adjudicator refused his application. He states the medical adjudicator provided erroneous advice in a telephone conversation that took place in January 2006, by advising him not to request reconsideration of the refusal because his condition would likely improve with physiotherapy and a reconsideration request would be unsuccessful.

[6] Mr. Watkins filed a second application years later, in August 2009, after receiving advice from staff at the Ontario Office of the Worker Advisor. The second application was allowed and Mr. Watkins was deemed to have become disabled in May 2008, fifteen months prior to the application. This is the maximum period of retroactivity permitted under the *Act*.

[7] Mr. Watkins claims he is entitled to CPP benefits, for himself and his underage dependents, retroactive to January 2005 when he first became unable to work, and that he was denied these benefits as a result of the first medical adjudicator's erroneous advice. He requested remedial action under subsection 66(4) of the *Act*, which provides authority for the Minister or a delegate to correct a loss of benefits due to erroneous advice:

Where person denied benefit due to departmental error, etc.	**Refus d'une prestation en raison d'une erreur administrative**
66(4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied	(4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(a) a benefit, or portion thereof, to which that person would have been entitled under this Act,	a) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(b) a division of unadjusted pensionable earnings under section 55 or 55.1, or	b) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(c) an assignment of a retirement pension under section 65.1,	c) la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that	

the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

III. **Issues and Standards of Review**

[8] Mr. Watkins' allegation that he was denied procedural fairness is reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*], citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 22-23 [*Baker*], among other cases. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54. Here, the issue is whether Mr. Watkins had a meaningful opportunity to present his case and have it fully and fairly considered: *Baker* at para 32.

[9] The reasonableness of the Decision is reviewed according to the Supreme Court of Canada's guidance in *Vavilov*. The reasonableness standard of review is a deferential but robust standard of review: *Vavilov* at paras 12-13, 75 and 85. In applying the reasonableness standard, the reviewing court determines whether a decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts

and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

[10] When reviewing an administrative decision for compliance with the *Charter*, the Court is to apply a two-step approach following the *Doré*/*Loyola*/*TWU* framework: *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*TWU*]. The first step requires the Court to determine whether the decision under review affected or engaged a *Charter* protection: *Loyola* at para 39. If it did, the second step requires an examination of whether the decision demonstrates a proportionate balance between the Charter protection and the statutory objectives at play: *Doré* at para 57.

IV. **Analysis**

A. *Preliminary Issue: Admissibility of Mr. Watkins' Affidavit*

[11] The respondent argues that parts of Mr. Watkins' affidavit in support of this application are inadmissible, and should be struck out. To address the admissibility objections raised in the respondent's memorandum, Mr. Watkins sought leave to file reply submissions. The respondent did not oppose the motion and I granted leave to file the reply.

[12] The impugned paragraphs and exhibits, and the bases for the respondent's objections, are as follows:

i. paragraphs 29-34 and exhibits N and O are inadmissible because they seek to introduce evidence that was not before the decision maker, and are therefore not relevant: *Bernard v Canada*, 2015 FCA 263 at paras 13-17 [*Bernard*]; and

ii. paragraphs 35-37 and exhibit P are inadmissible because they seek to introduce information and correspondence protected by settlement privilege: *Buck v Canada (Attorney General)*, 2022 CanLII 19523 (FC) [*Buck*].

[13] In response to the objections, Mr. Watkins argues that paragraphs 29-34 and exhibits N and O provide evidence on an issue of procedural fairness that could not have been placed before the administrative decision maker (the communications took place after the Decision was made) and its introduction does not interfere with the role of the administrative decision maker as merits-decider: *Bernard* at paras 25-27. As such, he contends that the evidence falls within an exception to the general rule that the record on judicial review is confined to the record before the decision maker.

[14] I agree. Paragraphs 29-34 and exhibits N and O describe communications between Mr. Watkins' counsel and Service Canada about whether Mr. Watkins' submissions had been received and reviewed. The evidence is relevant to the procedural fairness arguments raised in this application, and Mr. Watkins only relies on it to support such arguments. The evidence could not have been placed before the decision maker because counsel's concerns arose from the Decision and the communications post-date it.

[15] At the hearing of this matter, the respondent raised an additional objection, stating that the evidence is inadmissible hearsay and constitutes indirect evidence from the same counsel who argued the application. The respondent did not explain why this objection was raised for the first time at the hearing. Mr. Watkins did not have an opportunity to address the point in his written reply or take other steps to address it, such as having different counsel at the hearing. He was not cross-examined on his affidavit, and the respondent did not introduce evidence that would contradict paragraphs 29-34 or exhibits N and O. In the circumstances, and in view of the prejudice to Mr. Watkins, I decline to strike out these parts of his affidavit based on the additional objection.

[16] Turning to the objection based on settlement privilege, there is a *prima facie* presumption that settlement privileged communications are inadmissible, subject to an exception "when the justice of the case requires it": *Buck* at para 20, citing *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paras 2 and 12. The three conditions for settlement privilege are: (i) a litigious dispute must be in existence or within contemplation; (ii) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and (iii) the purpose of the communication must be to effect a settlement: *Buck* at para 23, citing *Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)*, 2013 FC 669 at para 34.

[17] Exhibit P to Mr. Watkins' affidavit is a letter from respondent's counsel dated November 25, 2021, and paragraphs 35-37 of the affidavit describe the content of the letter. The respondent asserts that the letter meets the conditions for settlement privilege: (i) the letter was sent after Mr.

Watkins filed the notice of application in this proceeding; (ii) there was an implied intention that, as correspondence between counsel, it would be on a without prejudice basis and therefore not form part of the evidentiary record; and (iii) the correspondence was demonstrably made with an intent towards settlement as it invited new evidence from the applicant for review, and was accompanied by a draft letter to the Court requesting an abeyance as the parties pursued resolution.

[18] Mr. Watkins submits that the letter was not marked "without prejudice" and did not refer to terms that could have constituted a settlement of this proceeding. It simply proposed that the parties seek an order on consent placing the matter in abeyance, in order to give the respondent an opportunity to review Mr. Watkins' submissions and material.

[19] I agree with Mr. Watkins. The letter does not disclose an offer or negotiation. Furthermore, there was no express or implied intention that the content of the letter would not be disclosed to the Court in the event negotiations failed. Finally, the respondent's memorandum of fact and law filed in this proceeding discloses certain facts set out in the November 25, 2021 letter. The respondent has not established that the letter is presumptively privileged.

B. *Was there a breach of procedural fairness?*

[20] Mr. Watkins submits that a basic principle underlying the duty of procedural fairness is that an affected individual should have the opportunity to present their case fully and fairly: *Baker* at para 28. He alleges the decision maker did not review or consider his written submissions of October 2020, which totalled 98 pages of argument and documents supporting his subsection 66(4) request.

[21] When he commenced this application for judicial review, Mr. Watkins believed that Service Canada had not even received his submissions, because:

i. Mr. Watkins' counsel had made multiple attempts to get confirmation from Service Canada that the October 2020 submissions were received, but Service Canada did not respond;

ii. Mr. Watkins then received a March 3, 2021 letter from Service Canada that acknowledged receipt of a "letter of May 4, 2017, claiming erroneous advice in respect to provide reconsideration on your 2005 Disability application" [*sic*], and inviting him to submit additional evidence in support of his claim;

iii. Mr. Watkins forwarded the March 2021 letter to his counsel, who called and wrote to Service Canada to inform them of the incorrect date of the request for remedial relief, and to remind them of counsel's request that communications be directed to counsel's office, not to Mr. Watkins; counsel re-sent the October 2020 submissions, by courier on April 15, 2020, and by email on April 16, 2020;

iv. despite follow up, counsel did not receive a response from Service Canada;

v. the October 6, 2021 Decision was sent to Mr. Watkins, instead of counsel as requested;

vi. moreover, the Decision did not refer to the October 2020 submissions, instead stating it was made in response to "correspondence received May 4, 2017" despite the efforts to ensure that the correct submissions would be considered; after a number of calls and emails, Mr. Watkins' counsel spoke with Ms. Humphrey of Service Canada on October 20, 2021, who informed him that the October 2020

> submissions appeared not to have been reviewed or even received by Service Canada in arriving at the October 6, 2021 Decision.

[22] Despite Ms. Humphrey's statement, Mr. Watkins now knows that Service Canada did receive his October 2020 submissions. The certified tribunal record (CTR) that was produced in response to this proceeding includes a copy of the submissions as well as two documents that refer to them. The two documents, titled "Erroneous Advice/Administrative Error Underpayment Submission" (collectively, EA/AE Submissions) were prepared by Service Canada in June 2021 (June 2021 EA/AE Submission) and September 2021 (September 2021 EA/AE Submission) to summarize the background of Mr. Watkins' claim for remedial relief and provide a recommendation regarding whether the department was satisfied, on a balance of probabilities, that he had been given erroneous advice.

[23] Nonetheless, Mr. Watkins maintains that the decision maker did not read his submissions or consider their content before making the Decision.

[24] The respondent submits there was no unfairness because Service Canada did, in fact, conduct an erroneous advice review in response to Mr. Watkins' October 2020 request. Alleged deficiencies or flaws in the reasons, such as the failure to refer to the submissions in the Decision, does not amount to a breach of procedural fairness and should not be subject to a procedural fairness review: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 21 [*Newfoundland Nurses*].

[25] I accept that flaws and deficiencies in a decision are typically reviewed for reasonableness. Considered in isolation, flaws and deficiencies in the Decision would not necessarily amount to a breach of procedural fairness. However, when such errors are considered in light of the procedural history, they are consistent with Mr. Watkins' position that the decision maker did not read his October 2020 submissions.

[26] First, it was not only the failure to refer to the October 2020 submissions in the Decision that is problematic. It is also problematic that the Decision did not address the central arguments that Mr. Watkins advanced. The Decision only addressed whether the adjudicator informed Mr. Watkins of his right to seek reconsideration. Mr. Watkins had not alleged that the adjudicator failed to inform him of his right to seek reconsideration, and he did not argue that he was unaware of that right. These points are discussed in more detail below, as they are also relevant to a reasonableness review, but from a procedural fairness perspective, the discrepancy between the points that were made in Mr. Watkins' submissions and the points that were addressed in the Decision supports his position that the decision maker did not read the October 2020 submissions.

[27] Second, multiple people at Service Canada were involved in the investigation, but the respondent did not file evidence to explain their roles, and what each of them reviewed. While the decision maker—that is, the Minister's delegate—signed the September 2021 EA/AE Submission, it is unclear whether they read the October 2020 submissions. The delegate did not sign the Decision or prepare either of the EA/AE Submissions. And while the September 2021 EA/AE Submission that was approved by the delegate includes a summary of Mr. Watkins'

October 2020 submissions, the summary is not comprehensive, and omits a number of his arguments.

[28] Third, the confusion about communicating with Mr. Watkins directly instead of with his counsel, and referring to the May 2017 correspondence instead of the October 2020 submissions, which persisted even after counsel's calls and emails, supports Mr. Watkins' allegation that his October 2020 submissions were effectively ignored.

[29] The respondent concedes that Service Canada made "minor clerical errors" but argues they did not result in procedural unfairness: communicating with Mr. Watkins directly instead of with his counsel did not affect the outcome, and referring to the wrong correspondence did not give rise to procedural unfairness because Mr. Watkins did not lose an opportunity to provide submissions. According to the respondent, the May 2017 correspondence was a notice of appeal that Mr. Watkins' previous counsel had filed with the Social Security Tribunal of Canada (SST Notice of Appeal). Since it alleged that the first medical adjudicator gave erroneous advice, the respondent contends that referencing the May 2017 SST Notice of Appeal in the Decision, while incorrect, was simply referring to the document that Service Canada considered to be the "origin" of Mr. Watkins' request for remedial relief. I disagree. The SST Notice of Appeal was not a request for remedial relief under subsection 66(4) and Mr. Watkins did not rely on that document to support his subsection 66(4) request.

[30] The respondent's arguments would have been more convincing if there were other indications that Mr. Watkins' October 2020 submissions were thoroughly considered. Instead,

the mistakes of communicating directly with Mr. Watkins and referring to the wrong correspondence, which were repeated after counsel tried to correct them, and caused Mr. Watkins to doubt that his submissions were received, demonstrate a lack of attention to communications from Mr. Watkins and his counsel.

[31] In conclusion, Mr. Watkins has made out his allegation of procedural fairness. He has established that he was denied the opportunity to present his case fully and fairly, because the decision maker did not read and adequately consider his submissions.

C. *Was the Decision unreasonable?*

[32] Mr. Watkins submits the Decision was also unreasonable, because it was made without regard to his October 2020 submissions. If the decision maker read his submissions, they were considered perfunctorily and not given serious weight.

[33] The respondent submits that, under a reasonableness review, the fact that reasons do not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred is not a basis to set a decision aside: *Vavilov* at para 91.

[34] I find the Decision was unreasonable because it did not address Mr. Watkins' central submissions.

[35] As noted above, Mr. Watkins' submissions had alleged that he did not request a reconsideration of the first medical adjudicator's decision because the medical adjudicator

advised him that the request would be unsuccessful. More specifically, he alleged that the medical adjudicator told him it was highly unlikely that a reconsideration request would succeed because he was scheduled to start physiotherapy and there was every indication his condition would improve as a result. Mr. Watkins alleged that he followed that advice to his detriment—his condition did not improve with the recommended course of physiotherapy, and by the time he completed the treatments, the period for filing a reconsideration request had expired. The submissions included arguments to support these allegations. For example, Mr. Watkins argued that comments in the medical adjudicator's summary were consistent with his recollection of the medical adjudicator's advice and reflected a negative attitude about chronic pain that the Supreme Court of Canada noted with disapproval in *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 SCR 504, and he argued that a second medical adjudicator allowed his claim based on largely the same medical evidence that was presented in the first application.

[36] The Decision and the EA/AE Submissions did not address Mr. Watkins' arguments. There were no findings about whether the medical adjudicator made the alleged statements, whether they amounted to erroneous advice, and if so, whether Mr. Watkins was denied a benefit as a result. The conclusion that Mr. Watkins did not receive erroneous advice turned on findings about whether he was informed of his right to request reconsideration. However, Mr. Watkins did not allege that he was unaware of the possibility of requesting reconsideration, and the Decision did not explain how these findings were responsive to his submissions.

[37] The respondent correctly notes that the Decision did not have to address Mr. Watkins' arguments in detail, nor address all of the arguments: *Newfoundland Nurses* at paras 16,

18. However, the principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties: *Vavilov* at para 127. In my view, for the reasons explained above, the Decision was not reasonably responsive to the central issues and concerns raised in Mr. Watkins' submissions.

D. *Was there a* Charter *breach?*

[38] Mr. Watkins asserts that the decision maker consciously disregarded and ignored his submissions based on negative assumptions about chronic pain sufferers. He states that the decision maker's dismissive attitude and approach to his request for remedial relief amounts to a violation of the right to equal treatment and equal benefit of the law, without discrimination on the basis of disability.

[39] There is no support for Mr. Watkins' assertions that the decision maker consciously disregarded his submissions for discriminatory reasons. Mr. Watkins has not established that his section 15 *Charter* rights have been engaged.

V. **Remedy**

[40] Mr. Watkins asks the Court to substitute its own decision for that of the administrative decision maker, by directing the Minister to pay CPP benefits and interest for the period from January 2005 to May 2008. He submits that his dispute has been pending for over a decade, and since Service Canada "is either incapable or unwilling" to resolve his request under subsection 66(4) of the *Act*, the Court should not remit the matter back to them. Alternatively, Mr. Watkins asks that his request be evaluated by individuals who were not previously involved with his file.

The respondent does not oppose either request, noting that Mr. Watkins has been litigating this issue for years and he is looking for finality.

[41] While Mr. Watkins has pursued this matter for years, he has pursued different avenues of redress—the SST proceeding being one of them. This proceeding is Mr. Watkins' first request for remedial relief under section 66(4) of the *Act*. Therefore, I disagree that the history of the proceeding warrants a substituted decision. In addition, it is not apparent to me that remitting the case for redetermination would serve no useful purpose, or that a particular outcome is inevitable: *Vavilov* at paras 141-142. Service Canada would be in a better position to decide if the medical adjudicator gave erroneous advice. An order setting aside a decision and referring the matter back for redetermination is generally the appropriate remedy (*Vavilov* at para 141), and in my view it is appropriate in this case.

[42] I will therefore remit the matter for redetermination by a different Minister's delegate. I note that the September 2021 EA/AE Submission indicates that the delegate who signed it has decision-making authority when a potential underpayment is less than $25,000. The June 2021 EA/AE Submission calculated a potential underpayment of over $65,000 in Mr. Watkins' case. Without explanation, the potential underpayment was changed to "unknown" in the September 2021 EA/AE Submission. Mr. Watkins did not question the decision maker's authority and my decision does not turn on this point; however, the Minister's delegate who reconsiders Mr. Watkins' request should be satisfied that they have the requisite authority. Furthermore, Mr. Watkins' section 66(4) request shall be evaluated by individuals who were not previously involved with his case.

VI. **Costs**

[43] The parties asked to provide cost submissions following my decision. If the parties are unable to agree on the issue of costs, Mr. Watkins may serve and file cost submissions within 20 days of the date of this decision and the respondent may serve and file cost submissions within 15 days thereafter. Each parties' cost submissions shall not exceed two pages, not including any bill of costs.

JUDGMENT in T-1700-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the Decision is set aside.

2. The matter is remitted for redetermination. Mr. Watkins' section 66(4) request shall be evaluated by individuals who were not previously involved with his case, including a different Minister's delegate.

3. In the event the parties are unable to agree on costs, costs remain to be determined.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1700-21
STYLE OF CAUSE:	HERBERT WATKINS v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	JUNE 14, 2022
JUDGMENT AND REASONS:	PALLOTTA J.
DATED:	SEPTEMBER 29, 2022

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