Date: 20070803

Docket: T-1492-06

Citation: 2007 FC 821

Vancouver, British Columbia, August 3, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

LEANNA KAPITANCHUK (STEWART)

Applicant

and

MINISTER OF HUMAN RESOURCES DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant, a self-represented litigant, seeks judicial review of a decision by a Review Tribunal under the "new facts" provisions of s. 84(2) of the *Canada Pension Plan* (Act).

II. FACTUAL BACKGROUND

[2] The Applicant applied for CPP disability pension in 1993 after she shattered her L5 vertebrae in a May 1991 accident. The Minister denied her request initially and upon reconsideration on June 30, 1993 and July 7, 1994 respectively.

[3] The Applicant then appealed to a Review Tribunal. That Tribunal granted her a long adjournment because of conflicting expert evidence on her ability to work. The adjournment was permitted to allow her to undergo further testing and physical and vocational rehabilitation. Her complaint was that she could not sit at a secretarial position for more than 10 minutes (she was a trained legal secretary), stand for more than five minutes or walk without pain. She also had problems speaking, remembering or concentrating.

[4] One of the letters which the Applicant relied upon was that of Dr. Bailey in which he described her symptoms and expressed the hope that she might be able to engage in part-time work.

[5] The Applicant's medical evidence was consistent with respect to her complaints including her headaches, pains and sleep problems.

[6] At the time of the hearing, the Applicant had seen a Dr. Kertesz but his report was not available.

[7] On January 7, 1997, a Review Tribunal determined that Ms. Kapitanchuk was not disabled as of that date. The Tribunal, having considered Dr. Bailey's report, concluded that Ms. Kapitanchuk was not disabled. Her request for leave to appeal was refused by the Pension Appeals Board (PAB). No further appeals or judicial reviews were filed.

[8] In December 2000, the Applicant applied to reopen the Tribunal decision pursuant to s. 84(2) of the Act which allows a Tribunal to rescind or amend their previous decision on new facts. Section 84(2) reads:

84. (2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.	84. (2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

[9] The new evidence relied upon included the Dr. Kertesz report of November 26, 1996 and a new report from Dr. Bailey.

[10] On April 18, 2000, the Review Tribunal dismissed the application to reopen. It found the evidence, even if new, not to be material. The PAB denied the appeal of this second decision on the basis that the PAB lacked jurisdiction to consider the Tribunal decision where there were no new facts under the s. 84(2) criterion.

[11] In July 2006 Justice Campbell granted an extension of time to seek judicial review of the April 2000 Review Tribunal decision.

[12] The second Review Tribunal decision came to the following key conclusions:

- that the new evidence test under s. 84(2) requires that the evidence must not have been discoverable before the original hearing by the exercise of reasonable diligence and that the evidence would have to be practically conclusive or at least would probably have had an important influence on the decision;
- that the Dr. Kertesz 1997 report was not produced at the hearing but was available from the Applicant's lawyer; and
- that the Kertesz report (to the extent it is even admissible) and that of Dr. Bailey were not conclusive and would not have had an important influence on the decision.

III. ANALYSIS

[13] The standard of review on the facts is patent unreasonableness (see *Canada (Minister of Human Resources Development) v. Patricio*, 2004 FCA 409. However, the standard of review on whether the new facts fit with s. 84(2) is a question of mixed law and fact for which the standard is usually reasonableness *simpliciter*. The legal interpretation of s. 84(2) is an issue of law for which correctness is the applicable standard.

[14] With respect to the scope of s. 84, it is clear that pursuant to s. 84(1), a Review Tribunal decision is final and binding. Section 84(2) operates as an exception to this provision and to the usual principle of *functus officio*.

[15] Justice Blanchard in *Vaillancourt v. Canada (Ministry of Human Resources)*, 2007 FC 663 has summarized the state of the law in respect of s. 84(2) and its application. I adopt his reasoning, particularly the following:

> 25. Decisions made under the CPP are subject to the appeal process set out the legislation, which is generally considered binding and final. Subsection 84(2) of the CPP provides that the Minister, the Review Tribunal or the Pension Appeals Board may rescind or amend a decision made under the CPP on the basis of new facts.
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> 26. Subsection 84(2) of the CPP has been narrowly interpreted by the courts. The intrinsic limitation of the provision was acknowledged by the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Landry,* [2005] F.C.J. No. 778, 2005 FCA 167, at paragraph 7. The provision is applicable in exceptional circumstances where, despite due diligence, relevant material becomes available to a current application outside the expiration of the appeal limitation.
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> 27. Review of a subsection 84(2) determination engages a two-step process: first, a determination on whether the information submitted constitutes new facts; second, a decision on entitlement takes place if there are new facts. *Peplinski v. Canada*, [1993] 1 F.C. 222 (T.D.) (QL), at paragraph 11. If there are no new facts, then the prior decision stands. As will become evident below, I need only address the first part of this process.
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> 28. To be considered new facts for the purposes of subsection 84(2) of CPP, new information must not have been previously discoverable with reasonable diligence at the time of the original hearing *(Canada (Minister of Human Resources Development) v. MacDonald*, [2002] F.C.J. No. 197 (C.A.) (QL)). This implies that the information must have existed at that time. Further, to be considered new facts, the information must also be material. The

> Federal Court of Appeal in *Leskiw v. Canada (Attorney General)*, [2003] F.C.J. No. 1374, 2003 FCA 345, at paragraph 5 of its reasons for decision held that, to be material, the new evidence must be "practically conclusive". The Federal Court of Appeal in *BC Tel v. Seabird Island Indian Band* (C.A.), 2002 FCA 288, [2003] 1 F.C. 475, elaborated on this test by finding that new evidence has been held to be practically conclusive if it could reasonably be expected to affect the result of the prior hearing.

[16] The Federal Court of Appeal concluded in *Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293 that a question of whether a fact was discoverable is one of fact and governed by the standard of patent unreasonableness. The Review Tribunal's finding that the Dr. Kertesz report, being in the hands of the Applicant's counsel, was discoverable and hence not new, is one of fact for which there is no grounds to overturn.

[17] As to the other reports, in particular Dr. Bailey's report, the Review Tribunal concluded that the reports were not material in that they would not have changed the result. This conclusion was based on the fact that the reports refer largely to the same symptoms as previously existed.

[18] The Review Tribunal articulated the correct legal test as set forth in *Dormuth v. Untereiner*, [1964] S.C.R. 122; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983; and *Kent v. Canada (Attorney General)*, 2004 FCA 420.

[19] The application of the test of whether the evidence may reasonably be expected to affect the outcome, while potentially one of mixed law and fact, in these circumstances, is one principally of fact. The Tribunal asked itself whether this information would likely have affected their conclusion,

a conclusion about which the Tribunal is most expert. I find nothing unreasonable, much less patently unreasonable, in its conclusion.

[20] Most particularly, Dr. Bailey's second report, heavily relied upon by the Applicant, outlines only what symptoms the Applicant reports. The report does not express an opinion as to the Applicant's ability to work. It was reasonable to conclude that this evidence was not material.

[21] The Applicant is in the process of again attempting to obtain a pension and had attempted to again re-open the first Review Tribunal decision. She also, so the Respondent says, has the right to show that she was disabled between January 8, 1997 (post the first Review Tribunal decision) and December 31, 1997 (the end of her contribution period). Whatever the merits may be and the legitimacy of the Respondent's concerns for collateral attacks (see *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, these are not matters for this Court on this judicial review.

[22] For these reasons, this application for judicial review will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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