Date: 20080409

Docket: T-1360-07

Citation: 2008 FC 461

Vancouver, British Columbia, April 9, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

JERRY SAMSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Mr. Jerry Samson (the "Applicant") seeks judicial review of the decision of a designated member of the Pension Appeals Board (the "Pension Appeals Board" or "the Board") granting the Minister of Social Development (the "Minister") leave to appeal respecting a decision made on February 12, 2007 by a Review Tribunal constituted under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "CPP"). The decision to grant leave to appeal by the Pension Appeals Board was made on June 1, 2007 and received by the Applicant on or about July 9, 2007.

II. Background

[2] The Applicant applied for disability benefits pursuant to the CPP on or about July 3, 2005. In the questionnaire that formed part of his application, he described his most recent job position as a Quartermaster with the Canadian Coast Guard. He indicated that his last day at work was December 3, 2004 and the reason for his cessation of working was stress.

[3] By letter dated August 11, 2005, a representative of the Minister advised the Applicant that he was ineligible for disability benefits "because you should still be able to work." The Applicant was advised that if dissatisfied with the decision, he had the right to request that it be reconsidered.

[4] By letter dated August 22, 2005, the Applicant asked for reconsideration of the decision. By letter dated December 13, 2005, Human Resources Development Canada ("HRDC") informed the Applicant that following a review of all information and documents, including a medical report dated November 22, 2005 and reports requested from SunLife in October 2005, the original decision to deny disability benefits was being maintained.

[5] By letter dated January 24, 2006, counsel for the Applicant wrote to the Office of the Commissioner of Review Tribunals to advise that the Applicant was appealing the decision denying him disability benefits. By letter dated January 30, 2006, the Commissioner of Review Tribunals advised that the letter would be accepted as a Notice of Appeal.

[6] A hearing before the Review Tribunal was held at St. John's, Newfoundland and Labrador on December 21, 2006. In a decision dated February 12, 2007, the Review Tribunal allowed the

Applicant's appeal. It found the Applicant to be disabled as of December 2004 and said that his disability benefits commence payment in April 2005.

[7] On or about May 11, 2007, the Minister filed an Application for Leave to Appeal and Notice of Appeal relative to the decision of the Review Tribunal. That Application set forth the following ground of appeal:

> The Review Tribunal erred in fact and in law in deciding the Respondent was entitled to a disability pension since the Respondent was not suffering from a severe and prolonged disability within the meaning of paragraph 42(2)(a) of the *Canada Pension Plan*.

[8] The Application for leave to Appeal alleged that the Applicant "had earnings in the amount of $41,100.00 for the year 2005 after the date in which he stopped working" and referred to a Record of Earnings included at pages 2 to 12 of the documentary evidence that was submitted with the Application for leave to Appeal and Notice of Appeal as Appendix "A". The documentary evidence in Appendix "A" also included medical reports that were before the Review Tribunal.

[9] By letter dated June 8, 2007, the Applicant was informed that the Minister was granted leave to appeal the decision of the Review Tribunal, pursuant to section 83 of the CPP. The Applicant filed his Notice of Application for judicial review on July 25, 2007, seeking an order to quash the decision granting leave to appeal to the Minister.

III. Submissions

[10] The Applicant submits that correctness is the applicable standard of review to the decision of the member of the Pension Appeals Board who decided to grant leave to appeal. He relies in this regard upon the decision in *Kerth v. Canada (Minister of Human Resources Development)* (1999), 173 F.T.R. 102, where Madam Justice Reed said the following at paragraph 23:

> I conclude, based on the above assessment of the relevant factors, that the standard of review in this case is closer to the non-deferential end of the spectrum, rather than to the deferential end.

[11] The Applicant argues that the test for granting leave was stated in *Callihoo v. Canada*, 190 F.T.R. 114, by Justice MacKay at paragraph 15 as follows:

> On the basis of this recent jurisprudence, in my view the review of a decision concerning an application for leave to appeal to the PAB involves 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.

[12] The Respondent submits that the Board committed no error in granting leave to appeal.

[13] Following the hearing on March 20, 2008, the parties were given the opportunity to make further submissions, if they wished, on the question of the applicable standard of review, in light of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Applicant made no further representations. The Respondent filed a brief submission, arguing that since the question in issue is one of mixed fact and law, the appropriate standard of review is reasonableness.

IV. Discussion and Disposition

[14] I agree with the Respondent that the standard of reasonableness applies here. The Board had to determine whether the application for leave to appeal and Notice of Appeal raised an arguable case, without otherwise assessing the merits of the decision under appeal, that is, the test stated in *Callihoo*.

[15] The Application for Leave to Appeal contains new evidence, that is, a Record of Employment as of March 5, 2007. This document was apparently generated on March 12, 2007 but it specifically refers to information "as of 05 MAR 2007". This document, in my opinion, is clearly new evidence, that is, evidence that came into existence after the hearing before the Review Tribunal in December 2006 and after the decision of that Tribunal was delivered on February 12, 2007.

[16] In *Kerth*, Madam Justice Reed commented on the relevance of new evidence upon an application for leave to appeal to the Pension Appeals Board at paragraph 27 as follows:

> In any event, regardless of the accuracy of the above description of the procedure, when the ground of an application for leave to appeal is primarily the existence of additional evidence, the question to be asked, in my view, is whether the new evidence filed in support of the leave application is such that it raises a genuine doubt as to whether the Tribunal would have reached the decision it did, if the additional evidence had been before it.

[17] The critical question is whether the leave application raises a genuine doubt whether the Review Tribunal would have reached the same decision if the new evidence had been presented to it.

[18] The issue for determination when a person seeks the award of a disability under the CPP is the existence of a disability pursuant to subsection 42(2). That provision requires that a disability be both severe and prolonged. Pursuant to sub-paragraph 42(2)(a)(i), "severity" is described in terms of ability to work. In *Villani v. Canada (Attorney General)* (2001), 205 D.L.R. (4th) 58 (F.C.A.) at para. 38, the Federal Court of Appeal defined a substantially gainful occupation as "any truly remunerative occupation."

[19] I agree with the Respondent's submissions that the new evidence about the Applicant's reported earnings for 2005 raises a genuine doubt as to whether the Review Tribunal would have reached the same conclusion if this record of earnings had been before it. I also agree with the Respondent's arguments that the decision of the Review Tribunal arguably demonstrates a lack of analysis relative to the medical reports that were before it.

[20] In *Canada (Attorney General) v. Fink*, [2006] F.C.J. No. 1655 (F.C.A.), the Federal Court of Appeal said that a selective summary of evidence without explanation why a Review Tribunal prefers some medical or opinion evidence over other such evidence establishes a reviewable error.

[21] In this case, the member of the Pension Appeals Board gave no reasons for his decision to grant the Minister leave to appeal from the Review Tribunal. There is no statutory requirement that reasons be given when leave to appeal is granted; see *Mrak v. Canada (Minister of Human Resources and Social Development)*, 2007 FC 672 at para. 6.

[22] The test for obtaining leave to appeal is that an appellant demonstrate that an arguable case arises from an application for leave to appeal and the Notice of Appeal. I am satisfied that the application for leave to appeal and the Notice of Appeal raise an arguable case, on the basis of the new evidence submitted by the Minister and the arguments advanced about the lack of analysis of the medical evidence by the Review Tribunal. There is no basis for judicial intervention and this application for judicial review is dismissed.

[23] In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, I make no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed; no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1360-07
STYLE OF CAUSE:	**JERRY SAMSON v. AGC**
PLACE OF HEARING:	St. John's, Newfoundland
DATE OF HEARING:	March 20, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	HENEGHAN J.
DATED:	April 9, 2008

APPEARANCES:

E. Mark Rogers	FOR THE APPLICANT
Daniel Willis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rogers Bussey Lawyers St. John's, NL	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT