

Date: 20081229

Docket: T-425-08

Citation: 2008 FC 1414

Ottawa, Ontario, December 29, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

LARRY MITCHELL FANCY

Applicant

and

**MINISTER OF SOCIAL DEVELOPMENT CANADA (S.D.C.)
formerly Human Resources Development Canada**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Larry Mitchell Fancy seeking a review of a decision by a designated member of the Pension Appeals Board (Board) denying leave to appeal to the Board from an earlier unfavourable decision by a Canada Pension Plan Review Tribunal (Review Tribunal).

I. Background

[2] Larry Fancy applied for Canada Pension Plan (CPP) disability benefits on June 7, 2006. His application was based on a work-related shoulder injury sustained on May 13, 2004. Although

Mr. Fancy's injury was surgically repaired he has been left with a painful, weak and restricted right shoulder which prevents him from working in labour intensive occupations. He has been assessed by the Nova Scotia Worker's Compensation Board with a whole body disability rating of 2.4 % and he receives, from that source, an earnings replacement benefit of \$1,521.97 per month. The Worker's Compensation Board decision clearly recognized Mr. Fancy's limitations but it also noted his ability to work in relatively sedentary positions.

[3] Notwithstanding his disability, the Record also indicates that since applying for a CPP disability benefit, Mr. Fancy had been employed on a part-time basis as a school custodian. His duties included garbage removal and wet mopping and buffing of floors. He had also done some work as a painter.

The Decisions Below

[4] Mr. Fancy's initial application for a CPP disability benefit was denied by the Minister because his condition was found not to be sufficiently disabling to meet the statutory test for a severe and prolonged disability. That decision is reflected in the following passage from the Minister's decision letter of August 23, 2006:

To qualify, you must be under the age of 65 and meet **2 rules**:

1. You must have sufficient **earnings** and **contributions** to qualify for CPP disability benefits. This means that you must have paid into the CPP for at least **4** of the last **6** years. We can then review your medical information to see if you meet rule number 2.
2. You must have a disability that is **both severe** and **prolonged**. **Severe** means that you have a mental or physical

disability that regularly stops you from doing any type of work (full-time, part-time or seasonal), not just the work you usually do. **Prolonged** means that your disability is likely to be long term **and** of indefinite duration, **or** likely to result in death.

Note: The definition of **disability** under the CPP legislation is provided in the attached information sheet *How to Ask Canada Pension Plan (CPP) Disability to Reconsider Its Decision*.

In your case, you have enough contributions until December 2006. However, you do not have a disability that is **both severe and prolonged** as defined under the CPP legislation.

Reasons for the decision

We reviewed all the information and documents in your file including all the reports you sent. These are the reports we have on file:

- your application and your questionnaire
- your family doctor's report dated June 4, 2006
- your orthopedic specialist's reports dating from October 26, 2004 to March 24, 2005
- a copy of your file from the Workers Compensation Board (WCB)

We recognize that you have identified limitations resulting from your shoulder problems. However, the following factors were also considered.

- According to your family doctor's report, although he is supportive of your application, this does not correlate with the objective medical evidence on file.
- According to your orthopedic specialist's reports sedentary work activity was recommended.
- According to the information we received from WCB you have limitations with regards to right shoulder. However, they have provided a list of jobs that are available in you

home area that suits your condition and limitations. This would not support that you are disabled from all forms of work as per CPP criteria.

While you may not be able to do your usual work, we concluded that you should still be able to do some type of work.

[5] On September 18, 2006 Mr. Fancy asked the Minister to reconsider the denial of benefits but the initial decision was upheld.

[6] Mr. Fancy appealed the Minister's decision to a Review Tribunal under ss. 82(1) of the CPP. Following a hearing on July 17, 2007 at Bridgewater, Nova Scotia the Review Tribunal dismissed Mr. Fancy's appeal for the following reasons:

[19] While the Tribunal understands that certain movements of the Appellant's affected shoulder will cause sharp pain, his stated need of pain relieving medications has been averaging up to three times per week of non-prescription Tylenol only.

[20] The Tribunal found Mr. Fancy to be a credible witness with a strong life long work ethic. His desire to be productive within his limitations, which are beyond dispute, has resulted in a new career as school custodian. The Tribunal was impressed that he was able to perform a full time stint for an absent worker in 2006. That raised his 2006 earnings as school custodian to \$11,245 from a predicted part time earning of \$6692. As well, Mr. Fancy has accepted a full time painting job this summer.

[21] In response to the criteria of 'substantially gainful', the Tribunal found the earnings of his job with Eisener's Transport at \$11.50 per hour comparable with his earnings painting the school this summer full time for six to eight weeks at \$12.00 per hour.

[22] While the initial injury, followed by surgery, a complicated post operative course and subsequent therapy was temporarily disabling, Mr. Fancy has recovered to the point where he is able to perform modified remunerative work full time. Full time work is

contrary to the purpose of the CPP disability program. The Tribunal feels that as he is able to perform in a full-time job satisfactorily, his disability cannot be classified as severe and prolonged as defined by the CPP.

CONCLUSION:

[23] The Tribunal accepts Mr. Fancy's claim that he does experience a degree of disability following his accident of May 13, 2004 and subsequent complicated treatment but that disability does not meet the criteria found in the CPP at paragraph 42(2)(a) where the disability must be severe and prolonged.

[24] The Tribunal has therefore dismissed the Appellant's appeal.

[7] Mr. Fancy was dissatisfied with the Review Tribunal decision and sought leave to appeal to the Pension Appeals Board under s. 83(1) of the CPP. His application for leave offered the following grounds for the proposed appeal:

- The Review Tribunal erred in law in finding that Mr. Fancy does not suffer from a severe disability such that he is incapable of regularly pursuing any substantially gainful occupation;
- The Review Tribunal erred in law in finding that Mr. Fancy does not suffer from a disability that is prolonged and of indefinite duration;
- The Review Tribunal erred in law in failing to consider Mr. Fancy's age, education, work history and training in determining his ability to work, contrary to the decision of *Villani v. Canada (Attorney General)*, 2001 F.C.A. 248;
- The Review Tribunal erred in law in failing to consider the medical evidence which exists to support Mr. Fancy's disability as falling within the definition in s. 42(2) of the Canada Pension Plan;
- Such other grounds as may appear.

No additional supporting medical information was submitted with the application for leave beyond what was previously available to Mr. Fancy. That medical information confirmed that he was able to work albeit in a job that involved only “light duties”. The report of the treating specialist, Dr. Gregory Clarke, indicated that Mr. Fancy needed to find “more sedentary work”.

[8] In a decision dated February 14, 2008 the Board denied Mr. Fancy’s application for leave to appeal by way of the following endorsement:

The Review Tribunal’s decision indicates a correct and complete consideration of the evidence.

The fact is that the Appellant was working as late as the summer of 2007 at a pay rate that can be considered “substantially gainful.” The documentation sent with the Application for Leave does not change this. There is no reasonable chance of success on appeal.

Leave is refused.

[9] It is from this decision that Mr. Fancy brings this application for judicial review.

II. Issues

[10] Did the Board err in refusing Mr. Fancy’s application for leave to appeal?

III. Analysis

[11] Mr. Fancy relies upon the decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C. 130, to support his argument that the standard of review on this application is

correctness. *Villani* was, however, a judicial review of a decision by the Board on the merits involving a point of statutory interpretation. The question resolved in that case concerned the meaning of the word “severe”. Because it was an issue that had been effectively isolated from its factual surroundings, it was appropriately assessed on the standard of correctness.

[12] The issue presented on this application is one of mixed fact and law. In considering whether to grant leave to appeal the Board was required to assess the factual evidence (mainly medical) against the legal test for disability under the CPP and to decide if there was an arguable case. I adopt the following reasoning of Justice Elizabeth Heneghan in *Pannu v. Canada (Human Resources Development)*, 2007 FC 1348, [2007] F.C.J. No. 1738, for the proposition that the appropriate standard is reasonableness:

[18] The issue before the Board was whether the Applicant had raised an arguable case in his application for leave to appeal. This involved consideration of the evidence that had been presented to the Review Tribunal and any new evidence that had been submitted with the application for leave, as well as the relevant provisions of the Canada Pension Plan. In my opinion, his application for leave to appeal raises a question of mixed fact and law. Generally, a question of mixed fact and law will be reviewed on the standard of reasonableness.

[13] I accept Mr. Power’s point that the question of whether Mr. Fancy met the definition of disability under the CPP was required to be answered in the context of his personal circumstances, including his limited education, his age and the prevailing commercial realities: see *Villani*, above, at para. 45. Nevertheless, the foundation for a person’s disentitlement to CPP disability benefits is employability in any substantially gainful occupation. I do not agree that this involves a

comparative analysis of one's current income to that of the past and the authorities do not support such a proposition. It may well be that Mr. Fancy is not now capable of earning as much as he did before his injury, but the medical evidence and his actual employment history belie any argument that he is not capable of maintaining gainful employment. That medical evidence and employment history was before the Board when it was asked to consider Mr. Fancy's application for leave to appeal. On the record that was presented to the Review Tribunal and having regard to its findings, the Board's conclusion that there was no arguable case to be made was not only reasonable, it was incontrovertible.

[14] This application for judicial review is dismissed without costs.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed without costs.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-425-08

STYLE OF CAUSE: Fancy
v.
MSDC

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 9, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: December 29, 2008

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