Date: 20090424

Docket: T-1147-08

Citation: 2009 FC 413

Toronto, Ontario, April 24, 09

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

GUIDA BELO-ALVES

Applicant

and

MINISTER OF SOCIAL DEVELOPMENT AND ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] The present Application is a step in Ms. Belo-Alves' ten-year struggle to obtain a disability pension under the *Canada Pension Plan,* R.S.C. 1985, c.C-8 as amended (the *CPP*).

[2] Ms. Belo-Alves first applied for disability benefits on October 10, 1995. A Review Tribunal dismissed the application on February 25, 1999 (RT-1), and leave to appeal to the Pension Appeals Board was denied on October 27, 1999. Ms. Belo-Alves applied for disability benefits a second time on May 9, 2003 but a Review Tribunal denied the application on April 12, 2005 (RT-2) because

there were no "new facts" that had not been before the previous Tribunal. When RT-2 was decided, the existing jurisprudence held that where a Review Tribunal had found that there were no "new facts" warranting a re-opening of a decision rejecting a pension application, the only available means to challenge the decision was through judicial review to this Court. Ms. Belo-Alves was advised on April 12, 2005 that she could challenge RT-2 in that way; although she was dissatisfied with the decision, she did not bring a judicial review application.

[3] However, in September 2007, the Federal Court of Appeal decided in *Mazzotta v. Canada (Attorney General)* [2007] F.C.J. No. 1209 that a challenge to a decision of the RT-2 kind could be brought by way of appeal to the Pension Appeals Board. On December 19, 2007, Ms. Belo-Alves filed an application with the Pension Appeals Board for an extension of time to appeal RT-2 as required by s. 83 (1) and (2) of the *CPP* in which she provided the information and grounds for doing so in accordance with Rule 5 of the *Pension Appeals Board Rules of Procedure (Benefits)* C.R.C. 1978, c. 390 as amended. At that point her application was out of time by two years and five months. The *CPP* extension and leave provision reads as follows:

Appeal to Pensions Appeal Board	Appel à la Commission d'appel des pensions
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),	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,

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

Decision of Chairman or Vice-Chairman

(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.

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 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.

Décision du président ou du vice-président

(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.

[4] Presently under review is the May 1, 2008 decision of the Pension Appeals Board (Board) which denied Ms. Belo-Alves an extension of time to apply to argue leave to appeal RT-2. Thus, the decision under review presents a bar to Ms. Belo-Alves' attempt to gain access to justice at a very

preliminary level in the available dispute resolution process. The standard of review of this decision is reasonableness as defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47 as follows:

> …reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The question for determination in the present Application is whether the rejection of the extension request is reasonable. For the reasons which follow, I find that it is not because it is not defensible on the facts.

[5] In the decision under review, I find that the Board correctly applied the standard to be met in determining an extension request as that stated by Justice Snider in *Human Resources Development v. Gattellaro*, 2005 FC 883 (*Gattellaro*). Four factual criteria must be met: a continuing intention to pursue the application or appeal; the matter discloses an arguable case; there is a reasonable explanation for the delay; and there is no prejudice to the other party in allowing the extension.

[6] The Board's analysis of whether Ms. Belo-Alves met the four criteria is as follows:

> I am not persuaded that she had a continuing intention to appeal. There is nothing in the material that mentions any steps taken by the Appellant to pursue an appeal. The completion of a third application does not demonstrate a continuing intention to appeal in my mind, rather to the contrary, it strengthens the view that this was the preferred procedure to follow rather than appeal.

In my view, <u>there is nothing that provides an explanation</u> for the delay in filing during the entire period of time between the receipt of the decision of the Review Tribunal and the filing of this application.

It is necessary on an application of this nature that the Appellant raise an arguable case without otherwise assessing the merits of the application.

In *Callihoo v. Canada (Attorney General),* (2000) FC T-859-99 (Fed. T.D.) paragraph 22 states:

> In the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision maker finds the application raises a question of an error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence.

<u>I can find nothing in the material before me</u>, including the complete file, that persuades me that the Appellant has an arguable case.

Also, I am not persuaded that the Minister would not be prejudiced in preparing his response to the appeal, after the passage of some two years and five months since the expiry of the appeal period. The memory of witnesses would be diminished and their power of recollection would be decreased.

It is also desirable that there be finality to proceedings under the *Plan.* To grant this application would not further that objective.

The test for considering a request for an extension of time is conjunctive: a party seeking an extension must demonstrate all four criteria. See *Clayton v. Canada (The Minister of Citizenship and Immigration)* [2005] FCJ 1855 (T.D.) (Q.L.) at paragraph 9.

If I should be wrong in the above conclusions, in addition I would accept the principles of law set out in *Jhajj* and *Gallant (supra)* and conclude that new jurisprudence cannot serve as a basis to disturb final and binding decisions, such as the decision of the Review Tribunal rendered April 12, 2005.

[Emphasis added]

(Decision, p. 7-9)

[7] The criteria of continuing intention and reasonable explanation are focussed on Ms. Belo-Alves' personal conduct. In my opinion, the Board's analysis does not exhibit a contextual understanding of Ms. Belo-Alves' evidence in this respect and, thus, this failure constitutes a fundamental factual error.

[8] An understanding of Ms. Belo-Alves' life situation is important when attempting to understand her actions in failing to appeal RT-2. The following sworn evidence with respect to the foundation of her claim for a pension was before the Board:

> I was involved in a motor vehicle accident on September 22, 1988 in which the vehicle in which I was riding as a front-seat passenger was hit from behind. In that accident, I was rendered unconscious but, after several months, I was making a good recovery.
>
> I was involved in a second, and more serious, motor vehicle accident on May 14, 1989. In this second accident, I was again riding as a front-seat passenger on the 401 when the vehicle blew a tire, rolled over, and came to rest in a ditch. I was hospitalized for two weeks following this accident, the first of which was spent in critical care. I was 15 weeks pregnant at the time of this second accident.
>
> As a result of the second motor vehicle accident, I sustained a number of severe injuries including extensive scalp lacerations in which portions of my skull were exposed, fractured ribs, a fractured right thumb, soft tissue injuries, small bone dislocations involving my left foot, and a neck injury. I also underwent several surgeries.
>
> Following my second motor vehicle accident, I continued to experience pain and limitation. I underwent surgery for a posterior cervical fusion on April 29, 1991, which was supposed to achieve a C6-7 fusion to deal with a 25% anterolisthesis of C6-7. I later discovered that the physician who performed the procedure, Dr. Esses, operated on the wrong level and, instead, fused C7-T1.

> After this surgery on my neck, I continued to experience neck pain and limitation. When it was discovered that my neck was fused at the wrong level, I retained Mr. Ken Gerry of the law firm Malach & Fidler to represent me in a claim against Dr. Esses, the surgeon who performed the surgery.
>
> Since at least 1991, I have dealt with several difficulties including severe neck pain and limitation, depression and anxiety, cognitive impairments, posttraumatic stress disorder, widespread pain, fibromyalgia, insomnia, and sleep apnea.
>
> I have attempted a number of different treatment programs including physiotherapy, psychotherapy, acupuncture, prescription medication, work hardening, and surgery. I am still unable to work, and I have been unable to work since my second motor vehicle accident.
>
> (Affidavit of Guida Belo-Alves, December 3, 2007, contained in Affidavit of Kathleen Gates, August 12, 2008, Vol. 1, pp. 53 – 54, paras. 3 - 9)

Regardless of whether this evidence is capable of supporting Ms. Belo-Alves' ultimate claim for a pension, it is very relevant background to understanding her failure to meet the statutory time limit.

[9] With respect to the factor of continuing intention, it is very obvious that, on the evidence before the Board, Ms. Belo-Alves has never given up on her pursuit of a disability pension; indeed in 2003 and 2007 she made applications to keep her pension quest alive. This latter attempt is cited by the Board as a preference which proves a lack of intention in fostering an appeal of RT-2. I find the evidence runs contrary to this conclusion.

[10] In the present case, against the background described, the Board had Ms. Belo-Alves' evidence explaining poverty, fear, continuing poor health, and serious life burdens as the reasons she did not take up the judicial review option:

> I did not seek a judicial review of the second Review Tribunal's decision to dismiss the new facts claim because I could not afford to hire a lawyer to act on my behalf. Without a lawyer, I did not feel that I would be able to represent myself at the Federal Court of Canada as I did not know how to process the paper work or even how to conduct myself in that Court. I was fatigued from various medical conditions from which I suffer, and I did not feel capable of proceeding any further. My 15-year-old daughter had also testified at the second Review Tribunal hearing, a process she found incredibly stressful; she actually attempted suicide shortly thereafter. Finally, I was also trying to care for a small child.
>
> (Affidavit of Guida Belo-Alves, December 3, 2007, contained in Affidavit of Kathleen Gates, August 12, 2008, Vol. 1, p. 55, para. 16)

I find there is ample evidence contained in this statement that is capable of meeting the tests of continuing intention and reasonable explanation for delay. In view of this evidence, I find that the Board's conclusion that there is "nothing" on the record to meet these criteria is unsupportable.

[11] With respect to the issue of arguable case, the argument placed before the Board by Counsel for Ms. Belo-Alves has two components: an evidentiary argument that new evidence exists within the medical evidence produced by Ms. Belo-Alves (Affidavit of Kathleen Gates, August 12, 2008, Vol. 1, p. 76, para. 15); and a legal argument that an improper test for new facts was applied in RT-2 (Affidavit of Kathleen Gates, August 12, 2008, Vol. 1, pp. 77 - 79, paras. 19 – 26). On the evidentiary point, what more can she say, and what more is necessary to say to meet this criterion? In my opinion, it is not possible to evaluate the quality of such evidence on an extension application;

I find that it is enough to show that there is an argument with evidence to substantiate it to meet this particular factor. This Ms. Belo-Alves did do. With respect to the legal argument, in my opinion it has a reasonable chance of success. As a result, I find that the Board's "nothing" evidentiary finding on this factor is unsupportable.

[12] With respect to the Board's finding of prejudice to the Minister, it is important to keep in mind that Ms. Belo-Alves only requested an extension of time for a chance to apply for leave to appeal. The "new fact" evidence and legal argument on the record is in document form, and it would be the basis upon which the Pension Appeals Board would decide whether to grant or deny leave to appeal. In the decision under review, the Board supported the finding of prejudice by concluding on factors which would be in play on the leave to appeal application itself. In my opinion, these factors are matters only within the discretion of the Pension Appeals Board on the leave application, and, as a result, I find that the Board was in error to apply them on the extension application.

[13] With respect to the Board's failsafe statement that if it wrongly applied all the factual *Gattellaro* criteria, a legal *res judicata* bar to reconsideration nevertheless exists which produces the same outcome, I find that this is not for the Board to decide on the extension application; it is a question that would be properly before the Pension Appeals Board on leave if the extension is granted.

[14] As a result of the foregoing analysis, I find that the Board's decision is unreasonable.

ORDER

Accordingly, I set aside the decision under review and refer the matter back to a differently constituted panel for redetermination.

I award costs of the present Application to Ms. Belo-Alves in the sum of $1,500 payable forthwith.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1147-08
STYLE OF CAUSE:	GUIDA BELO-ALVES v. MINISTER OF SOCIAL DEVELOPMENT AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 22, 2009
REASONS FOR ORDER AND ORDER BY:	CAMPBELL J.
DATED:	APRIL 24, 2009

APPEARANCES:

Ms. Guida Belo- Alves	FOR THE APPLICANT (Self-Represented)
Ms. Sandra Gruescu	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Not Applicable	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS