Federal Court  Cour fédérale

Date: 20091022

Docket: T-1423-08

Citation: 2009 FC 1074

Ottawa, Ontario, October 22, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JAMES MCDONALD

Applicant

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT STYLED MINISTER OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. McDonald has been in chronic pain since he suffered a workplace injury in 2001. He applied for a disability pension in 2005 under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. The Minister first rejected his application and on reconsideration rejected it again. Mr. McDonald appealed to a Review Tribunal which, following a fresh hearing, granted his appeal and held he was entitled to disability benefits in accordance with the *Plan*.

[2] Subsection 83 of the *Plan* provides that a party dissatisfied with the decision of the Review Tribunal, in this case the Minister, may apply to the chairman or vice-chairman of the Pension Appeals Board for leave to appeal to the Pension Appeals Board. Rule 7 of the *Pension Appeals Board Rules of Procedures (Benefits)* provides that such an application shall be disposed of *ex parte* unless the chairman or vice-chairman directs otherwise.

[3] Section 83 of the *Plan* also provides that the decision may be made by a designated member, as it was in this case. It goes on to provide that where leave to appeal is refused written reasons must be given. There is no corresponding mandatory requirement for reasons when leave is granted.

[4] In this case, the Minister was granted leave without reasons. In this application for judicial review, Mr. McDonald seeks an order that the decision on the leave application be quashed.

THE STANDARD OF REVIEW

[5] The parties are in agreement that the test was set out by Mr. Justice MacKay in *Callihoo v. Canada (Attorney General)* (2000), 190 F.T.R. 114 at paragraph 15:

> **15.** 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.

[6] The first part of the analysis, a determination as to whether the decision maker has applied the right test, is a matter of characterization and is to be reviewed on a correctness standard. The second, at least as an appreciation of the facts is concerned, is reviewed on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[7] In this case no new evidence has been adduced. Since the decision maker gave no reasons, and was not obliged do so, it falls upon the Court to determine whether the application for leave raises an arguable case. The threshold is somewhat low, certainly less than a determination on the balance of probabilities that the appeal would succeed.

THE REVIEW TRIBUNAL'S DECISION

[8] The Review Tribunal correctly stated the law. The Canadian Pension Plan Disability Benefits are provided to persons who have made the minimum amount of contributions over a specified period, and who are found to have a severe and prolonged disability. Section 42(2)(a)(ii) of the Plan states that a disability is prolonged if it is long continued and of indefinite duration or is likely to result in death. Under s. 42(2)(a)(i), a disability is severe if the person is incapable regularly of pursuing any substantially gainful occupation.

[9] It also correctly stated that Mr. McDonald's minimum qualifying period ended in December 2003; meaning that the issue is whether he had a disability within the meaning of the Plan at that time. In his application he stated he was only disabled as of March 2005. That was the time of the last letter from his family doctor. However, based on earlier letters from the doctor, the Review Tribunal determined that his disability related back to January 2002.

[10] There was also evidence from Mr. McDonald's psychiatrist that he suffers from depression and panic disorder. This began about three years after his injury, that is to say in 2004.

[11] The Review Tribunal also noted that he had taken retraining courses and that although he appears to have succeeded, it was because of considerable help. He had sent out various job applications, but was not successful in finding employment.

THE MINISTER'S APPLICATION FOR LEAVE TO APPEAL

[12] The Act requires the Minister to set out the proposed grounds of appeal in considerable detail. This was done.

[13] The Minister took the position that the analysis of the doctors' evidence was somewhat one-sided in that other notes indicate his pain was in better control but "not 100% yet" and that he was doing "reasonably well."

[14] In addition, if Mr. McDonald was able to attend school from 2003 to 2005 (his application for disability benefits coincided with the end of his schooling), there is jurisprudence to suggest that he should also be able to hold down gainful employment.

[15] Finally, the date of Mr. McDonald's disability is crucial. Even if it could be said that the depression he currently suffers was a natural progression from his chronic pain and even if as a result of the depression he is unable to work, that depression may have only related back to 2004. It does not necessarily follow that he was disabled in December 2003, his qualifying date.

DECISION

[16] Although Mr. McDonald's application has the look and feel of an application to set aside an interlocutory decision, and although this Court is loath in most cases to deal with interlocutory decisions, applications of this type under the Plan have been routinely considered.

[17] If the Minister were seeking a judicial review of the decision of the Review Tribunal, she would be facing some difficulty because what would be at issue is a reweighing of the evidence. The Review Tribunal is a specialized tribunal and would be owed considerable deference by this Court. Findings of fact are not disturbed unless unreasonable.

[18] What is at issue here, however, is something quite different. An appeal to the Pension Appeals Board is yet another hearing *de novo*. The Appeals Board, on the evidence before it, is entitled to make its own findings of fact without deferring to the Review Tribunal.

[19] With that in mind, I have come to the conclusion that the Minister has raised fairly arguable issues in his application for leave, and so I must dismiss Mr. McDonald's application for judicial review. The Appeal Board may or may not come to the conclusion that Mr. McDonald is entitled to a pension. That is a matter for its expertise. An application for judicial review of whatever decision it makes on the merits may be brought before the Federal Court of Appeal in accordance with section 28(1)(d) of the *Federal Courts Act*.

[20] The Minister did not ask for costs, and none shall be granted.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. This application for judicial review is dismissed.

2. The whole without costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1423-08
STYLE OF CAUSE:	JAMES MCDONALD v. MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT STYLED MINISTER OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT
PLACE OF HEARING:	WINDSOR, ONTARIO
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