Federal Court		Cour fédérale

Date: 20100615

Docket: T-1888-08

Citation: 2010 FC 641

Ottawa, Ontario, June 15, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LOUISE LEBLANC

Applicant

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision of a designated member of the Pension Appeals Board (the Board) dated October 29, 2008, denying the applicant's application for an extension of time and leave to appeal a decision of the review tribunal of the Canada Pension Plan (CPP), nine months after the time limitation had elapsed.

[2] The applicant requests that this matter be referred back to a differently constituted panel or member of the Board for redetermination.

Background

[3] The applicant had applied for CPP disability benefits several times unsuccessfully, based on back pain, depression, chronic fatigue and fibromyalgia. In 2006, she was again denied with the Minister represented by CPP officials, noting that her limitations were not severe enough to prevent her from employment. A review tribunal convened in April 2007 to hear the applicant's appeal. The review tribunal reviewed the medical evidence as well as the applicant's own evidence before concluding that the applicant was not disabled within the meaning of the CPP. The decision and reasons were issued to the applicant on June 14, 2007.

[4] Pursuant to subsection 83(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Act), the applicant had 90 days or until September 12, 2007, to appeal the review tribunal's decision to the Board. On July 20, 2007, the Registrar for the Board received a letter indicating the applicant's desire to pursue an appeal. The Registrar then notified the applicant's representative of the requirements for a leave application in a letter dated August 2, 2007. Nothing was heard from the applicant or her representative until July 10, 2008.

[5] Now, nine months beyond the limitation to request leave to appeal, the Registrar informed the applicant's representative that he would need to make a separate request for an extension of time

in which to request leave. The applicant's representative explained that the delay was caused by his falling ill, but the Registrar informed him that under Rule 5 of the Board rules of procedure, a request for an extension of time must be made that fulfills the four criteria set out by this Court in *Canada (Minister of Human Resources Development) v.Gattellaro*, 2005 FC 883, [2005] F.C.J. No. 1106 at paragraph 9:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[6] On August 21, 2008 the applicant's representative responded and addressed the four *Gattellaro* criteria. In his decision denying the request for an extension of time, the designated member of the Board concluded that although the applicant had demonstrated a continuing intension to appeal and a reasonable explanation for the delay (criteria 1 and 3), an arguable case had not been demonstrated. In addition, the Board was not satisfied that granting the extension would not prejudice the Minister.

Issue

[7] The issue is as follows :

Was the decision of the designated member reasonable?

Applicant's Written Submissions

[8] The Board's finding that the matter did not raise an arguable case was unreasonable. The applicant had submitted several new medical documents in support of her application for leave. The documents indicated a deterioration in the applicant's conditions. The applicant should only have to show that there is an argument to be made, not that it would meet with success.

[9] The Board based its conclusion that there may be prejudice to the Minister on the grounds that the memory of witnesses may be diminished after nine months and the desirability of finality in the proceedings under the CPP. The applicant asserts that evaluating witness memory is within the discretion of the Board and should not have been considered in the extension application. Further, the applicant submits that nine months is not an inordinate amount of time. Besides, the only witnesses would be the applicant and medical professionals who can refresh their memory through their notes.

Respondent's Written Submissions

[10] There are no statutory limitations on the scope of discretion conferred on the chair, vice-chair or designated member of the Board to grant an extension of time. The conclusion of the Board was reasonable on the evidence before the designated member says the respondent.

[11] There was no arguable case raised. An arguable case requires that some chance of success at law be established by either raising an issue of law or by raising relevant significant facts. An arguable case in the context of an application for disability benefits requires a decision maker to consider the legal criteria for disability under paragraph 42(2)(a) of the Act. This section requires the applicant to establish a condition that is both severe and prolonged, expressed in terms of capacity to work at any substantially gainful employment. This requires medicial evidence as well as evidence of employment efforts. The medical reports submitted by the applicant did not address the applicant's state at the relevant date of December 2004, nor did they address any treatment or employment efforts. It was within the designated member's broad discretion to conclude that the applicant had not raised an arguable case.

[12] Prejudice to the Minister was a relevant factor to consider. Witnesses' loss of memory and power of recollection are factors that prejudice. Moreover, the interests of finality and certainty of decisions of the Board are other relevant factors. There was no reviewable error in the Board concluding that prejudice to the Minister could ensue.

Analysis and Decision

Legislative Framework

[13] The 90 day time limit within which appeals to the Board must be made is encapsulated in subsection 83(1) of the Act.

[14] The *Pension Appeals Board Rules of Procedure (Benefits)*, C.R.C., c. 390 (the PAB Rules of Procedure) explain the documentation required for both seeking leave to appeal and seeking an extension of time to seek leave:

> 4. An appeal from a decision of a Review Tribunal shall be commenced by serving on the Chairman or Vice-Chairman an application for leave to appeal, which shall be substantially in the form set out in Schedule I and shall contain
>
> (a) the date of the decision of the Review Tribunal, the name of the place at which the decision was rendered and the date on which the decision was communicated to the appellant;
>
> (b) the full name and postal address of the appellant;
>
> (c) the name of an agent or representative, if any, on whom service of documents may be made, and his full postal address;
>
> (d) the grounds upon which the appellant relies to obtain leave to appeal; and
>
> (e) a statement of the allegations of fact, including any reference to the statutory provisions and constitutional provisions, reasons the appellant intends to submit and documentary evidence the appellant intends to rely on in support of the appeal.
>
> 5. An application for an extension of time within which to apply for leave to appeal a decision of a Review Tribunal shall be served on the Chairman or Vice-Chairman and shall set out the information required by paragraphs 4(a) to (e) and the grounds on which the extension is sought.

Standard of Review

[15] This Court has previously ruled and the parties agree, that the appropriate standard of review for a decision of a designated member of the Board regarding a request for an extension of time is

reasonableness (see *Handa v. Canada (Attorney General)*, 2008 FCA 223, [2008] F.C.J. No. 1137 at paragraphs 10 to 12).

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL) at paragraph 47, the Supreme Court of Canada explained the reasonableness standard is concerned mostly with the existence of justification, transparency and intelligibility in the decision making process, but is also concerned with whether the decision falls within the range of possible, acceptable outcomes.

Nature of the Decision

[17] There are no statutory limitations on the scope of discretion conferred on the chair, vice-chair or designated member of the Board by subsection 83(1) of the Act, to grant an extension of time (see *Handa* above, at paragraph 11).

[18] In *Gattellaro* above, at paragraph 4, Madam Justice Snider explained that a decision under subsection 83(1) is highly discretionary. At paragraph 7, she also held:

> 7 The intent of Parliament as expressed in s. 83(1) of the CPP is to limit the time period for extending the appeal period to 90 days. While a designated member may extend the time period beyond 90 days, it must be presumed that an extension of time is not a matter of right….

[19] Despite the highly discretionary nature of this decision which confers a benefit and does not determine a right, the jurisprudence has imposed the following list of criteria which must be considered and weighed:

> 1. A continuing intention to pursue the application or appeal;
> 2. The matter discloses an arguable case;
> 3. There is a reasonable explanation for the delay; and
> 4. There is no prejudice to the other party in allowing the extension.
>
> [*Gattellaro* above, at paragraph 9]

[20] The *Gattellaro* factors are mandatory considerations to ensure decision makers do not exercise the discretion in an arbitrary or capricious way. The factors, however, do not constitute a legal test conferring a right to an extension for some. A decision maker need only consider the factors before coming to his or her own conclusion. In some cases, a decision maker may determine that one factor, or even an additional factor, outweigh all others. That would be within the decision maker's discretion.

[21] The jurisprudence of this Court has come to regard the *Gattellaro* above factors as a legal test which must be met by any applicant seeking an extension (see *Belo-Alves v. Canada (Minister of Social Development)*, 2009 FC 413, [2009] F.C.J. No. 523 (QL) and *Canada v. Small*, 2007 FC 678, [2007] F.C.J. No. 915 (QL) at paragraph 22). I would respectfully disagree. Decisions under subsection 83(1) take place within the administrative regime, not the judiciary, and operate under an unqualified statutory grant of discretion (see *Handa* above). A legal test would turn an unstructured

discretionary decision into a determination of mixed fact and law, contrary to Parliament's intention.

[22] Nevertheless, I acknowledge that the Board has adopted the *Gattellaro* factors. By requesting that applications for an extension of time include submissions which address each factor, the Board undertakes to adjudicate such applications in accordance with those factors.

[23] In the present case, when the Board received a proper submission from the applicant, it concluded that the applicant had failed to demonstrate an arguable case or that prejudice would not result to the Minister and based its denial on those factors. I now turn to those factors.

The Existence of an Arguable Case

[24] The Federal Court of Appeal has held that an arguable case in the context of a request for an extension of time requires that some reasonable chance of success at law be established (see *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, [2007] F.C.J. No. 37 (QL) at paragraph 37).

[25] In *Callihoo v. Canada (Attorney General)*, [2000] F.C.J. No. 612 (QL) at paragraph 22, Mr. Justice MacKay stated:

> 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. The decision maker here found no such error is raised by the application for leave. That decision on the leave application does not contain an error that would be a basis for the Court to intervene.

Thus, one of the ways to establish an arguable case is to present significant new or additional evidence that was not before the review tribunal.

[26] There were three new medical reports before the Pension Appeals Board that were not before the review tribunal.

[27] In *Belo-Alves v. Canada (Minister of Social Development)*, [2009] F.C.J. No. 523, Mr. Justice Campbell stated at paragraph 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.

[28] The report of Dr. W. J. Reynolds dated April 3, 2008 states in part:

> She had to stop work in 2003 because of her symptom severity (i.e. her degree of pain and fatigue as well as her difficulties with concentration). She lives in a one-floor home, but has difficulties doing chores in her home because of her symptom severity. Her symptoms have gradually intensified over the last few years.
>
> On examination, she is a 45-year-old lady whose general assessment was fairly unremarkable. Blood pressure 140/95. She has mild generalized osteoarthritis involving the small joints in her hands. All of her tender points were painful. Grip strength is 30% of normal, consistent with her degree of pain.
>
> I agree with the diagnosis of fibromyalgia. Ms. Leblanc has had experiences in the past that may have conditioned her to have more severe and intense symptoms. She is experiencing a significant severity of symptoms and of course, has a significant disability.

[29] Dr. Reynolds' report of April 21, 2008 states:

> Ms. LeBlanc was seen in consultation on April 3, 2008. She has the disorder of fibromyalgia and has had this since about 1985. Her pain was precipitated by work activities and incidents.
>
> She has characteristic widespread pain and severe myofascial pains particularly severe with repetitive activities and prolonged postures. She also has the characteristic nonrestorative sleep pattern seen in this disorder and this causes significant fatigue and difficulty with concentration. All of her tender points are painful.
>
> Ms. LeBlanc has not been able to work since 2003 due to the intensity of her pain and fatigue and also her difficulty with concentration. She has a significant disability.

[30] Dr. Reynolds' report dated May 17, 2008 stated in part as follows:

> As you know, she has the disorder of fibromyalgia and has had her symptoms of fibromyalgia since about 1985. Prior to that, she had experienced knee pain since childhood. She had accidents as a child (i.e. a fall on the ice on one occasion, striking her head). She has

> lived with knee pain until it became widespread in 1985. She has worked since the age of 16 in various capacities, but had to stop in 2003 because of the increasing intensity of her symptoms, specifically her degree of pain, her fatigue, and her difficulties with concentration. She is limited in doing any repetitive activities, and limited in prolonged sitting and prolonged standing activities.

[31] I am of the view that this new medical evidence is clearly sufficient to ground an argument that an arguable case is disclosed. It was unreasonable for the Board to determine that there was nothing which could demonstrate that there was an arguable case. The designated member did not give even the most basic explanation for why the new medical documents submitted did not raise an arguable case.

Prejudice to the Minister

[32] The Board found that the Minister would be prejudiced in preparing her response to the appeal due to the passage of nine months. The Board stated that witnesses' memory would be diminished and that their power of recollection would decrease. The Board was also concerned that there be finality to proceedings under the Canada Pension Plan. I would note that the witnesses in this case will likely be the applicant and her medical witnesses. In my opinion, a nine month delay would not effect the applicant's memory with respect to her medical condition as I believe a person is quite capable of remembering her medical condition. As to the medical witnesses, they would have notes and reports on which they could rely. In my view, the Board's determination that there was prejudice to the Minister falls outside the range of possible acceptable outcomes and was unreasonable.

[33] As a result of my finding, the application for judicial review is allowed and the matter is referred back to a differently constituted panel or member of the Pension Appeals Board for redetermination.

[34] The applicant shall have her costs of the application.

JUDGMENT

[35] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the matter is referred back to a differently constituted panel or member of the Pension Appeals Board for redetermination.

2. The applicant shall have her costs of the application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Canada Pension Plan, R.S.C. 1985, c. C-8

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), 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.	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, 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.

FEDERAL COURT

SOLICITORS OF RECORD

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