Federal Court  Cour fédérale

Date: 20100811

Docket: T-1784-09

Citation: 2010 FC 815

Ottawa, Ontario, August 11, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

GIOVANNI ZAVARELLA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Zavarella, is currently suffering from various medical conditions including a herniated disc in his upper-spine, depression and anxiety, post-traumatic stress disorder (PTSD), degenerative disc disease in his lower spine, an arthritic knee, an irritable bowel and Raynaud's Syndrome.

[2] His application for disability benefits under the Canada Pension Plan (CPP) was denied by two separate Medical Adjudicators, on behalf of the Minister of Human Resources and Skills Development, and then by the Review Tribunal established under the CPP on the ground that he had not demonstrated that he was disabled within the meaning of the CPP, as at his minimum qualifying period (MQP) of December 2000. He was subsequently denied leave to appeal by a Member of the Pension Appeals Board (PAB). He is seeking judicial review of the latter decision on the grounds that the Member:

i. applied an incorrect test in assessing whether to grant leave to appeal; and

ii. unreasonably concluded that an arguable case had not been raised as to whether he was disabled within the meaning of the CPP as at December 2000, the date of his MQP.

[3] For the reasons that follow, this application is dismissed.

I. BACKGROUND

[4] Mr. Zavarella suffered a neck injury in a serious motor vehicle accident in 1984. He subsequently suffered a work-related injury to his left lower back in 1987, a neck injury in another motor vehicle accident in 1988, and a work-related injury to his left knee in 1997. On September 21, 1998 he struck his head on a steel beam while standing on a lift with a co-worker as it was going up, in the course of his employment as an electrician with Petro Canada. He alleges that this last accident caused him to experience significant pain in his neck and lower back. He attempted to return to work for a brief period of time and has not worked since October 6, 1998. As a result of

the latter injury, he has been receiving Workplace Safety and Insurance Board (WSIB) benefits for several years.

[5] Mr. Zavarella first applied for disability benefits under the CPP on September 7, 2005. His application was stamped as received on April 6, 2006. He alleged that he stopped work on October 6, 1998 for medical reasons related to the accident that took place on September 21, 1998. He maintains that the pain that he continues to suffer from that accident, which radiates from his neck to his head and from his lower back to his legs, has rendered him incapable of regularly pursuing any substantially gainful employment, within the meaning of paragraph 42(2)(a) of the CPP.

[6] There is no dispute that Mr. Zavarella made sufficient contributions to the CPP to qualify for a disability pension. It is also common ground between the parties that his MQP is December 2000.

[7] On July 18, 2006, a Medical Adjudicator representing the Minister wrote a letter to Mr. Zavarella informing him that he did not meet the general eligibility requirement for disability benefits under the CPP because he had not paid enough into the CPP for four of the six years prior to the date of his application, as required by paragraph 44(2)(a) of the CPP. That letter proceeded to note that the late application provisions in the CPP provide for the possibility of eligibility for such benefits as at the point in time when he had in fact made sufficient contributions to the CPP to qualify for those benefits. The letter stated that he had made sufficient contributions to the CPP to so qualify until December 2000. However, the letter then concluded that he did not have a disability within the meaning of the CPP since December 2000, because the evidence did not establish that he was unable to perform some type of work. The letter stated that, considering his age, education and work experience, he should be able to perform or retrain to a job suitable to his limitations.

[8] On November 8, 2006, another Medical Adjudicator representing the Minister rejected Mr. Zavarella's request for reconsideration of the initial adverse decision on his application. In short, the reconsideration letter stated that Mr. Zavarella was not disabled within the meaning of the CPP in December 2000 or continuously since that time. That letter noted that benefits can only be extended under the CPP when it has been determined that an applicant is unable to do any type of work and is unlikely to regain the ability to do any type of work in the foreseeable future. That letter further explained that, to be eligible for CPP disability benefits, Mr. Zavarella would have to establish that he was disabled in December 2000 and that he continued to be disabled as at the date of his application. The letter stated that Mr. Zavarella had not met these requirements, because:

i. the information on file demonstrated that he was attending school and participating in vocational rehabilitation from 2000 to 2004, and that this showed "capacity for some type of work on a full or part time basis";

ii. there was no indication that he was not capable of some type of light or sedentary work; and

iii. there was no evidence on file that any comprehensive pain management program had been attempted.

[9] In a detailed decision dated May 12, 2009, a Review Tribunal dismissed Mr. Zavarella's appeal of the Minister's decision. After considering and specifically addressing a substantial amount of medical evidence adduced by Mr. Zavarella, the Review Tribunal concluded that his disabilities

were not severe, within the meaning of the CPP, as at the date of his MQP (December 2000). More specifically, the Review Tribunal found that "although Mr. Zavarella likely had ongoing physical and psychological limitations with respect to his medical problems, he was not, on a balance of probabilities, rendered incapable of all work as at the date of his MQP."

II. THE DECISION UNDER REVIEW

[10] In a short decision dated September 9, 2009, the Honourable P. Mercier, a designated Member of the PAB, dismissed Mr. Zavarella's application for leave to appeal the Review Tribunal's decision to the PAB. In his decision, the Member stated that:

i. the evidence presented at the Review Tribunal hearing clearly established that Mr. Zavarella was capable of performing some form of gainful employment as of the date of his MQP;

ii. the evidence submitted in support of the application for leave to appeal to the PAB (a) did not even attempt to establish a disability on or before the date of his MQP, and (b), if anything, indicated that Mr. Zavarella only became disabled some time after 2002; and

iii. that based on the foregoing, Mr. Zavarella had no arguable case for appeal to the PAB.

III. THE APPLICABLE LEGISLATION

[11] The eligibility requirements for disability benefits under the CPP are set forth in subsection 42(2) of that legislation, which states:

When person deemed disabled	Personne déclarée invalide
(2) For the purposes of this Act,	(2) Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;
(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.	b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été établie.

[12] With respect to the timing of an application for disability benefits, the following "late application" and "incapacity" provisions are set forth in paragraph 44(1)(b)(ii) and subsections 60(8) – 60(11) of the CPP:

Benefits payable	Prestations payables
44. (1) Subject to the Part,	44. (1) Sous réserve des autres dispositions de la présente partie :

…

(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

…

(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

…

Incapacity

60. (8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

Idem

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

…

b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :

…

(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

…

Incapacité

60. (8) Dans le cas où il est convaincu, sur preuve présentée par le demandeur ou en son nom, que celui-ci n'avait pas la capacité de former ou d'exprimer l'intention de faire une demande le jour où celle-ci a été faite, le ministre peut réputer cette demande de prestation avoir été faite le mois qui précède celui au cours duquel la prestation aurait pu commencer à être payable ou, s'il est postérieur, le mois au cours duquel, selon le ministre, la dernière période pertinente d'incapacité du demandeur a commencé.

Idem

(9) Le ministre peut réputer une demande de prestation avoir été faite le mois qui précède le premier mois au cours duquel une prestation aurait pu commencer à être payable ou, s'il est postérieur, le mois au cours duquel, selon lui, la dernière période pertinente d'incapacité du demandeur a

commencé, s’il est convaincu, sur preuve présentée par le demandeur :

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

a) que le demandeur n’avait pas la capacité de former ou d’exprimer l’intention de faire une demande avant la date à laquelle celle-ci a réellement été faite;

(b) the person had ceased to be so incapable before that day, and

b) que la période d’incapacité du demandeur a cessé avant cette date;

(c) the application was made

c) que la demande a été faite, selon le cas :

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(i) au cours de la période — égale au nombre de jours de la période d’incapacité mais ne pouvant dépasser douze mois — débutant à la date où la période d’incapacité du demandeur a cessé,

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

(ii) si la période décrite au sous-alinéa (i) est inférieure à trente jours, au cours du mois qui suit celui au cours duquel la période d’incapacité du demandeur a cessé.

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person’s last relevant period of incapacity to have commenced, whichever is the later.

Period of incapacity

Période d’incapacité

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

(10) Pour l’application des paragraphes (8) et (9), une période d’incapacité doit être continue à moins qu’il n’en soit prescrit autrement.

Application

Application

(11) Subsections (8) to (10) apply only to individuals who were incapacitated on or after January 1, 1991.

(11) Les paragraphes (8) à (10) ne s’appliquent qu’aux personnes incapables le 1er janvier 1991 dont la période

d’incapacité commence à compter de cette date.

IV. STANDARD OF REVIEW

[13] A decision of a designated Member of the PAB with respect to an application for leave to appeal to the PAB involves two issues: (i) whether the correct test was applied, and (ii) whether an error was committed in determining whether that test was satisfied (*Callihoo v. Canada (Attorney General)*, [2000] F.C.J. No. 612, at para. 15).

[14] The first of those issues is reviewable on a standard of correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 44; *Harvey v. Canada (Attorney General of Canada)*, 2010 FC 74, at para. 38; *McDonald v. Canada (Minister of Human Resources and Skills Development)*, 2009 FC 1074, at para. 6). However, the second issue is reviewable on a standard of reasonableness. That is to say, the decision will stand unless it is not “within a range of possible, acceptable outcomes which are defensible with respect to the facts and the law” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 47 and 51; *Harvey*, above; *McDonald*, above).

V. ANALYSIS

A. *Did the Member apply the correct legal test in assessing Mr. Zavarella’s application?*

[15] It is now established that test to be applied by a designated Member of the PAB in determining whether to grant leave to appeal to the PAB is whether the application raises an arguable case (*Callihoo*, above; *Harvey*, above, at para. 44; *McDonald*, above, at paras. 5 and 7; *Canada (Attorney General) v. Pelland*, 2008 FC 1164, at para. 8). This is not a strict formula, and

can be met by simply making it clear to the reader that the Member assessed whether the appellant "could make some reasonable argument challenging the merits of the decision of the Review Tribunal" (*Canada (Attorney General) v. Kermenides*, 2009 FC 429, at para. 11). A reasonable argument is one that has a meaningful, realistic chance of success.

[16] In determining whether an arguable case has been raised, a designated Member of the PAB need not otherwise assess the merits of the underlying application (*Callihoo*, above; *McDonald*, above, *Kermenides*, above; *Samson v. Canada (Attorney General)*, 2008 FC 461, at para. 14).

[17] In the case at bar, I am satisfied that the Member articulated and applied the correct test. Although the Member's decision was very short, the Member explicitly stated, after assessing the evidence presented at the Review Tribunal hearing as well as the new evidence subsequently submitted by Mr. Zavarella in support of his application for leave to appeal to the PAB, that Mr. Zavarella was left with no arguable case. In my view, this would be a logical and appropriate conclusion to reach as a matter of law after determining that (i) the evidence presented at the Review Tribunal hearing clearly established that the applicant was capable of performing some form of employment as at the date of his or her MQP, and (ii) any additional evidence that may have been submitted to the Member did not even attempt to establish a disability on or before that date.

B. *Was it reasonable for the Member to conclude that no arguable case had been raised as to whether Mr. Zavarella was disabled, within the meaning of the CPP, at the date of his MQP?*

[18] Mr. Zavarella submitted that it was unreasonable for the Member to conclude that he had not raised an arguable case that he was disabled at the date of his MQP. In support of his position, Mr. Zavarella referred to a number of doctors' reports spanning the period 1998 to 2009 which, among other things, stated that he continued to experience significant pain in his neck, back and arm, and suffered from major depression. Mr. Zavarella submitted that the Member had made his decision without regard to much of the information in those doctors' reports.

[19] Relying on *Villani v. Canada (Attorney General)*, 2001 FCA 248, at paras. 33 to 50, Mr. Zavarella submitted that the Member was required to adopt a "real world" approach to determining whether an arguable issue had been raised in respect of his claimed disability as at the date of his MQP. In this regard, he submitted that it was not realistic for the Member or the Review Tribunal to conclude that he was capable of pursuing some form of gainful occupation as at the date of his MQP, when he was constantly in pain and suffering from major depression. He added that the evidence submitted in support of his application for leave to appeal to the PAB raised at least an arguable case as to whether, given his physical and mental condition, any employer would realistically consider engaging him.

[20] In this regard, the evidence most favourable to Mr. Zavarella included:

i. A report, dated July 20, 2009, by Dr. R. Klein, a family physician, which stated that Mr. Zavarella "is totally disabled and unable to work", together with an earlier report, dated October 3, 2006, by the same doctor, which stated that the dates of the marked

restriction in Mr. Zavarella's ability to walk and mental functions were September 1998 and March 1999, respectively, as opposed to the 2003 dates previously reported by Dr. Klein;

ii. A report, dated March 1, 2006, by Dr. J. Pilowsky, a psychologist, which stated that Mr. Zavarella "is completely disabled from engaging in any form of employment … as a result of his physical and mental impairment," as well as an earlier report by the same doctor dated August 5, 2005,which sated that he did "not believe that a return to work is a realistic goal" for Mr. Zavarella;

iii. A report, dated November 26, 2003, by Dr. R.L. Cole, another psychologist, which diagnosed Mr. Zavarella with "Major Depression", "anxiety" and as exhibiting symptoms of PTSD, together with an earlier report by the same doctor, dated September 15, 2003, which noted that Mr. Zavarella states that he continues to experience significant pain in his lower back, the right side of his neck and down his right arm;

iv. A report, dated February 10, 1999, by Dr. Handelsman, a rheumatologist, which noted ongoing symptoms of pain and concluded: "He is not ready to go back to work";

v. A report, dated February 18, 1999, by Dr. M. Wills, an occupational health consultant, which noted that Mr. Zavarella continued to experience symptoms of constant neck pain;

vi. A report, dated June 30, 1999, by Dr. W.S. Tucker, a neurosurgeon, which noted that Mr. Zavarella "continues to have neck pain and some scapular pain, particularly if he attempts to be active";

vii. A report, dated September 11, 2002, by Dr. F. Gentili, another neurosurgeon, which stated that "the patient presents with a long-standing history of neck and right arm pain secondary to a work-related accident."

[21] In addition to the foregoing, Mr. Zavarella referred the Court to a report, dictated on January 31, 2001, by Dr. D. Evans, in which it was noted that he was "almost free of pain sitting in the office, and the only discomfort he gets is when he tries to work over an extended period with his arms above his head." Mr. Zavarella suggested that this was further proof that he remained in pain as at the date of the report.

[22] Mr. Zavarella also referred to a report, dated December 11, 1998, by Dr. S. Kingstone which summarized various diagnoses made by him over the period 1985 to 1995. Mr. Zavarella notes that Dr. Kingstone confirmed that he found Mr. Zavarella to be experiencing pain in his back, his neck and elsewhere at various points during that period. However, this report does not assist Mr. Zavarella to demonstrate that he was disabled as at December 2000, as Dr. Kingstone stated that he had not seen Mr. Zavarella since February 27, 1995.

[23] The two above mentioned reports by Dr. Klein were among four medical reports that were submitted in support of Mr. Zavarella's application for leave to appeal to the PAB, but were not

before the Review Tribunal. The first of those two reports by Dr. Klein, dated July 20, 2009, referred to fourteen other reports, twelve of which were before the Review Tribunal and eight of which were specifically referred to in the Review Tribunal's decision.

[24] Having reviewed each of those fourteen reports, I am satisfied that it was reasonably open to the Member to conclude that none of those reports raised an arguable case that Mr. Zavarella was disabled as at December 2000. Indeed, apart from two electromyogram (EMG) tests, one magnetic resonance imaging (MRI), and reports by doctors discussed below, those reports were all dated over the period 2002 to 2006 and mainly provided current or forward-looking assessments.

[25] As to the two reports written by Dr. Klein, it is noteworthy that he did not begin to treat Mr. Zavarella until January 22, 2002 and that neither of his reports addressed the issue of whether Mr. Zavarella was disabled as at December 2000.

[26] Likewise, Dr. Pilowsky, whose two reports were also among the fourteen identified by Dr. Klein, did not begin to treat Mr. Zavarella until March 23, 2004, over three years after the date of Mr. Zavarella's MQP; and neither of his reports addressed the issue of whether Mr. Zavarella was disabled as at December 2000.

[27] The same is true of the report by Dr. Cole, dated November 26, 2003. That one paragraph report simply diagnosed Mr. Zavarella with major depression and anxiety as at the date of the report, based on Dr. Cole's observations in July and August of 2003, and on July 24, 2000. The report added that "Mr. Zavarella gives no evidence of having had a diagnosable psychological disorder prior to the date of the injury, September 21, 1998."

[28] With respect to the reports by Drs. Handelman, Tucker and Wills, (who collectively accounted for five of the fourteen reports identified by Dr. Klein), other information in those reports, or in subsequent reports that they authored, clearly supported the conclusions reached by the Member and the Review Tribunal and did not raise an arguable case as to whether Mr. Zavarella was disabled as at December 2000.

[29] Specifically, a report dated August 12, 1999 by Dr. Handelman, who had been treating Mr. Zavarella since early 1999, concluded that "Mr. Zavarella has made an excellent recovery with respect to his right C7 radiculopathy" and suggested "that he return back to work initially putting in four hours a day and not having to reach overhead for prolonged periods of time."

[30] Similarly, a report dated June 30, 1999 by Dr. Tucker also suggested that it would be best for Mr. Zavarella to get back to work. Dr. Tucker added that he was not very anxious to operate on Mr. Zavarella.

[31] In the same vein, a report dated November 4, 1999 by Dr. Wills noted that while Mr. Zavarella still had neck pain, particularly when driving, he had made some improvement in his right arm. Dr. Wills concluded that "it would be worthwhile for Mr. Zavarella to return to some kind of work."

[32] The Member and the Review Tribunal were entitled to give the reports by Drs. Handelman, Tucker and Wills that are mentioned at paragraphs 29 to 31 above, far greater weight than the various reports mentioned by Dr. Klein or submitted by Mr. Zavarella that were written in 2002 or

later, because the reports by Drs. Handelman, Tucker and Wills reflected assessments that were much closer in time to Mr. Zavarella's MQP than the latter reports.

[33] It is noteworthy that another report, dated February 3, 1999, by Dr. Kovacs, a general practitioner, also commented that Mr. Zavarella's symptoms "appeared to have been improving."

[34] In addition to the foregoing, and as noted in the Review Tribunal's decision, WSIB Vocational Rehabilitation documentation and progress reports from July 15, 2000 to September 12, 2001 revealed a list of possible occupations for Mr. Zavarella, taking into consideration the limitations imposed by his physical condition, for example, in respect of activities such as lifting, carrying, pushing/pulling more than ten pounds, climbing ladders, repetitive or sustained bending, crouching and crawling, reaching above chest height and repetitive use of his right arm.

[35] Moreover, by August 15, 2001, Mr. Zavarella was reported to have completed the entry level requirements for the Network Administrative Computer Program. According to the Review Tribunal, his grades in the up-grading program ranged from 72% to 90%. By October 13, 2004, a WSIB Adjudicator apparently wrote to Mr. Zavarella's representative advising that he had completed his labour market re-entry program, including upgrading in his two diploma courses. This successful retraining experience is inconsistent with his submission that he was disabled within the meaning of the CPP as at December 2000.

[36] In *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33, at para. 9, Justice Nadon described the test for disability set forth in paragraph 42(2)(a) of the CPP as follows:

> […] To be entitled to a disability pension, an applicant must demonstrate that he has made valid contributions to the CPP for a minimum qualifying period and that his or her disability is "severe" and "prolonged". The term "severe" requires that the disability render the person incapable of regularly pursuing any substantially gainful occupation, while the term "prolonged" requires that the disability be either likely to be of indefinite duration or likely to result in death. […]

[37] I am satisfied that it was reasonably open to the Member to conclude, based on all of the foregoing, and his review of the other evidence that was submitted by Mr. Zavarella, that Mr. Zavarella had not raised an arguable case that he was disabled, as contemplated by paragraph 42(2)(a) and the jurisprudence there under. In my view, this conclusion was well "within a range of possible, acceptable outcomes which are defensible with respect to the facts and the law" (*Dunsmuir*, above).

[38] Indeed, in my view, this was the appropriate conclusion to draw from the Member's findings that (i) the evidence presented at the Review Tribunal hearing clearly established that Mr. Zavarella was capable of performing some form of employment as at the date of his MQP, and (ii) the new evidence did not even attempt to establish a disability on or before that date.

[39] In turn, based on the evidence before the Member, and applying the real world test mandated by *Villani*, above, those findings were entirely reasonable and appropriate.

C. *Additional Matters Raised by Mr. Zavarella*

[40] At the outset of the hearing before this Court, Mr. Zavarella stated that he would be able to supply additional evidence to support his claims if this Court ordered that his application for leave to appeal to the PAB should be remitted for reconsideration by a different designated member of the

PAB. In this regard, he noted that all or most of the medical reports that he had submitted in support of his application for leave to appeal to the PAB had been prepared with respect to his dealings with the WSIB, and as opposed to his claims under the CPP. In addition, he submitted that chronic pain has been recently recognized as a form of disability and that he believes he can demonstrate that he has had this form of disability since December 2000.

[41] Unfortunately, on a judicial review of a designated Member's decision, I can only consider the evidence that was before that Member. I cannot speculate as to the nature of the additional evidence that Mr. Zavarella may be able to adduce, let alone place any weight on that evidence, in making my decision.

[42] For the present purposes, it bears underscoring that the Member's conclusion that Mr. Zavarella had not raised an arguable case as to whether he was disabled within the meaning of the CPP as at December 2000 was entirely reasonable and appropriate given the evidence before him. It was not unreasonable for the Member and the RT to conclude that the ongoing pain experienced by Mr. Zavarella between December 2000 and the date of his application, together with his belief that he was incapable of regularly pursuing any substantially gainful occupation, did not raise an arguable case as to whether he was disabled within the meaning of the CPP as at December 2000.

[43] Mr. Zavarella attempted to raise another issue at the outset of the hearing before this Court, namely, that the representative of the union who appeared on his behalf before the Review Tribunal had not properly represented him. I agree with the respondent that Mr. Zavarella was precluded from raising this issue at "the last minute," without having provided the Respondent with an

opportunity to prepare to respond to this argument (*Mishak v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8579 (F.C.)).

[44] Finally, in a letter dated August 3, 2009, the applicant's spouse, Mrs. Ivana Zavarella, requested that her husband's application for disability benefits under the CPP be reconsidered under the late applicant and incapacity provisions in paragraph 44(1)(b)(ii) and subsections 60(8) – (11) of the CPP, respectively. The incapacity provisions protect the benefit eligibility of persons who are unable to apply for benefits on time because of incapacity. In support of this request, Mrs. Zavarella attached a Declaration of Incapacity signed by Dr. Klein and dated June 15, 2009, which stated that Mr. Zavarella had been incapacitated since September 1998. Mr. Zavarella did not raise this issue before this Court.

[45] I agree with the respondent that Mr. Zavarella's application was in fact considered in under the late applicant provisions, as was explained to him in the letter of the first Medical Adjudicator, dated July 18, 2006, discussed at paragraph 7, above. I further agree that (i) Dr. Klein, who did not begin to treat Mr. Zavarella until January 2002, provided no credible evidence that Mr. Zavarella was incapable of forming or expressing an intention to make an application in 1998, or at any period before his MQP of December 2000, (ii) none of the reports prepared by doctors who evaluated Mr. Zavarella between 1998 and the time when he began to be treated by Dr. Klein referred to any evidence of such incapacity, and (iii) numerous activities pursued by Mr. Zavarella during that period and beyond are inconsistent with such incapacity.

VI. CONCLUSION

[46] This application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT this application for judicial review is dismissed.

"Paul S. Crampton"

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1784-09
STYLE OF CAUSE:	GIOVANNI ZAVARELLA v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
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DATED:	August 11, 2010

APPEARANCES:

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John De Ponte	
Nancy Luitwieler	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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