Federal Court  Cour fédérale

Date: 20140711

Docket: T-2237-12

Citation: 2014 FC 689

Ottawa, Ontario, July 11, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

WAYNE ROBBINS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Robbins (the applicant) says that he disclosed the existence of his two children on June 21, 1997 so that they could receive Disabled Contributor's Child Benefits (DCCB), but that the application was lost, hidden or ignored by the Department of Human Resources and Skills Development (the Department). A legislation officer in the Department investigated that claim but decided on November 13, 2012, that no such application was ever submitted in 1997.

[2] The applicant now seeks judicial review of the legislation officer's decision pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7. The applicant did not identify the relief sought in his notice of application, but he states in his memorandum that he wants the decision set aside or else varied to provide for benefits back to the birth dates of each of his children.

I. Background

[3] The applicant has been diagnosed with certain medical conditions. As a result, he has been unable to work since March 1992.

[4] The applicant originally applied for disability benefits from the Canada Pension Plan (being under the *Canada Pension Plan*, RSC 1985, c C-8 [CPP]) in June 1993, but his application was refused on August 30, 1993. He appealed the refusal but the Department misplaced his letter, causing substantial delays yet still ending in a second denial on August 30, 1996. He appealed again and this time was partially successful. On September 12, 1997, the review tribunal found that he was disabled at least since November 1996. However, the review tribunal held that there was not enough evidence to support a date of disability earlier than that and so the applicant challenged that decision as well.

[5] This time, the Department agreed that the applicant was disabled as of March 1992 and therefore, entitled to retroactive benefits from July 1992 forward. The Department consented to a judgment to that effect on May 27, 1999 and it was approved by the Pension Appeals Board on June 16, 1999.

[6] However, that consent judgment did not award any interest, nor did it expressly grant any benefits for the applicant's two children, John, born February 7, 1992 and Bridget, born December 19, 1994. The applicant originally fought about the interest issue, but the applicant withdrew his appeal to the Pension Appeals Board on September 14, 2006 on advice that the Board lacked jurisdiction to deal with it. That issue is not before the Court.

[7] However, the issue regarding the applicant's children is still alive. On October 27, 1999, the applicant sent a letter to Human Resources Development saying that "… it is now understood that the Appellant did not receive, yet qualified for, an amount of $171.00 per month for each of his children …". He asked when he would receive these payments. On November 2, 1999, he filled out an application for benefits for his children, which was received by the Department on November 4, 1999.

[8] This engaged paragraph 74(2)(a) of the CPP, which provides that DCCB payments normally begin on either the month that the disability payments became payable or the month after the child is born, whichever is later. However, that is immediately followed by a command that they must not be granted for any time period "earlier than the twelfth month preceding the month following the month in which the application was received." In other words, retroactive DCCB payments can only be granted for a maximum of eleven months prior to receipt of the application.

[9] In the applicant's case, the Department processed his application as if it had been received in October 1999 and so the Department paid him DCCB for both of his children retroactive to November 1998.

[10] The applicant challenged that start date on the basis that the Department had known about his children much earlier and at various times throughout the administrative process, had claimed that he had included them on applications in 1993, 1995 and 1997. However, he lost at every step of the way until he reached the Federal Court of Appeal.

[11] There, on March 29, 2010, the Federal Court of Appeal allowed his application for judicial review of the decision of the Pension Appeals Board. However, in its reasons, cited as 2010 FCA 85, the Federal Court of Appeal first approved many of the findings of the Board. Of particular importance, it said the following:

1. The Board correctly decided that, although subsection 60(8) allows for an earlier deemed start date for some benefits, if the applicant was incapable of making an earlier application, that did not apply to DCCB applications (at paragraph 14);
2. The Board correctly said that section 74 prescribes the maximum retroactivity available to the applicant's children (at paragraph 15); and
3. The Board had already issued a subpoena for production of the 1993 and 1995 applications and on August 29, 2007, had declared it satisfied by the production of the original 1993 application and a sworn statement that no application from 1995 could be found. The applicant's continued insistence that the 1993

application was altered and that he had made another application in 1995, was unproven and a collateral attack on that order (at paragraphs 18 to 21).

[12] Despite those points of agreement, the decision of the Board had to be set aside because it did not deal in any way with the applicant's submissions about an alleged 1997 application. The applicant had said that he discussed his children with the members of the review tribunal during the hearing on June 19, 1997 and that they had asked him to submit a new application. He claimed that he complied on June 21, 1997 and he provided to the Pension Appeals Board a copy of that application. This claim is potentially relevant since subsection 66(4) of the CPP gives the Minister both the power and the duty to fix any denials of benefits that occur because of erroneous advice or administrative error. It could therefore avoid the time limit in subsection 74(2). However, the Board did not mention or consider those submissions in any way and the Court of Appeal decided that such a failure was unreasonable. It thus returned the matter to the Pension Appeals Board for determination in accordance with its reasons.

[13] Upon returning to the Pension Appeals Board, the matter was adjourned at the request of the applicant and no new hearing has been scheduled.

[14] Meanwhile, the Department assigned a legislation officer to investigate whether it had lost the 1997 application through administrative error. His conclusion that Mr. Robbins did not submit any application in 1997 is the decision now under review.

II. Decision under Review

[15] The legislation officer communicated the reasons for his decision to the applicant by a letter dated November 13, 2012. He began by summarizing the history of the applicant's pension claims. When he got to the decision of the Federal Court of Appeal, he noted that it had disposed of the claims about the allegedly altered 1993 application and the alleged 1995 application. As such, he determined that the only issue was whether the Department ever received the June 21, 1997 application.

[16] According to the legislation officer, he began his investigation by twice asking the applicant for any submissions or evidence that he could provide. However, he received no response and so he made do with the Department's file on Mr. Robbins, which included all the material relating to the 1993 pension application and all of the reviews and appeals that followed. He also examined the record prepared for the Federal Court of Appeal, as well as the Department's policies and procedures that were effective around the time the application was allegedly submitted.

[17] He combed through the file but could not find an original 1997 application. Instead, the only applications dated June 21, 1997, that were in the file were copies that were both received after 1999; the first was an exhibit to the application for leave to appeal to the Pension Appeals Board filed on January 8, 2001 and the second was an exhibit to the application for judicial review to the Federal Court of Appeal in 2008. Neither copy was date-stamped. Since the invariable practice is to stamp all applications with the date they are received, the officer concluded that neither was a copy of an application that had been received by the Department.

He also checked the electronic database and nothing in it indicated receipt of the 1997 application.

[18] The officer then noted that the form number of the copies was "ISP1151E (05/97)." and he looked into the time period those forms would have been available. The date, "05/97" meant that it was put into use in May 1997 and he was advised by the Forms Management Group that it was only replaced in May 2002. Thus, that form with that number would have been available to the public at any time between those two dates.

[19] Next, the officer reviewed operational procedures and observed that, upon receipt of an application, the process at the time would have involved checking that no other applications from the same person had been received. If one had been, the Department would advise the person of that. In this case, such a letter would have been sent if the Department had received the 1997 application because the 1993 application was still outstanding. However, the legislation officer found no communication to that effect in the file and this also indicated to him that the 1997 application was never received.

[20] The officer then explored the possibility that the application might have been affected by a postal strike that began on November 19, 1997. However, he discarded that theory because the application was dated four months earlier and would have been received well before the postal disruption if it had been sent.

[21] He then examined the circumstances surrounding the 1999 application and he gave importance to two facts. First, in the October 27, 1999 letter, the applicant said "it is now understood" that he was entitled to benefits for his children, which the legislation officer took to unequivocally mean that the applicant only recently came to that revelation. Second, the applicant spoke to Val Ashbey by telephone on November 29, 1999 and the applicant was asked at that time why he did not apply earlier. Her notes of the conversation say that he responded that it was a "matter of paranoia." The legislation officer drew two conclusions from this: (1) the applicant probably would have told Ms. Ashbey of any earlier application in response to this question if any such application had been made; and (2) the applicant told the truth that paranoia prevented him from mentioning his children earlier.

[22] Finally, the officer said that the Department had a policy in place to verify all information about children if an applicant indicates that he or she has any. However, no inquiries were made, which again suggests that the applicant had not disclosed the existence of his children before November 1999.

[23] The officer concluded that there was probably never any "application for disability benefits submitted by you [the applicant] or received by the department dated June 21, 1997". Consequently, the Department did not commit any administrative error in regard to it and subsection 66(4) of the CPP was not engaged.

III. Issues

[24] The applicant listed a number of issues. To paraphrase, he accuses the legislation officer of ignoring or hiding documents in the Department's possession and making self-serving conclusions based on conjecture and hearsay. He also says that the officer was not duly diligent because he did not consider the many errors made by the Department which prejudiced the applicant throughout the process. Among others, these alleged errors include the following: refusing to process the applicant's legitimate claims in a timely fashion; hiding an appeal notice; intentionally delaying an appeal; refusing the applicant's attempts to correct documentation; perniciously failing to disclose evidence or strategy; and providing prejudicial misinformation. Further, he says the Department used legal trickery to get its way.

[25] For its part, the respondent said that there was only one issue: "Was the decision of the Legislation Officer that no administrative error occurred in connection with the alleged June 1997 CPP application reasonable?"

[26] The respondent has correctly identified the main issue, but for the sake of analytical convenience, I will address the issues in the following order:

A. What is the standard of review?

B. Did the officer err by only investigating whether the 1997 application was received by the Department?

C. Was the legislation officer's decision reasonable?

D. What remedy is appropriate, if any?

IV. Applicant's Submissions

[27] The applicant emphasizes that the Department misplaced his original appeal notice in 1993 and then gave him erroneous advice when they told him that he had never appealed it to begin with. In this, they were not duly diligent and they confirmed that when they apologized for the error on January 19, 1996. He argues that the legislation officer's failure to consider this meant that his investigation was neither duly diligent nor reasonable.

[28] The applicant also argues that the Department was guilty of erroneous advice when it first denied his application, as he eventually proved that he was entitled to the benefits and it had access to his medical records which also proved it. Thus, their communications denying his application was erroneous advice. Further, on February 21, 1997, they sent him a statement of contributions saying that he would not receive any money even if he was disabled and neither would his children since he had not made enough contributions to the CPP to entitle him to it. He says this too was erroneous advice.

[29] The applicant also repeated his claims about the 1997 application, namely, he says that the members of the review tribunal informed him at a hearing that he should apply for benefits for the children and told him they would postpone their decision until he did so. He ended up completing a new application and sending it to the CPP at that time.

[30] The applicant goes on to say that the review tribunal's decision reversing the earlier decisions also supports his view that the Department had not been duly diligent with respect to the earlier decisions. Even after his entitlements were recognized, the applicant criticizes the

Department for sending him a letter addressed to Wayne Roberts, which he says was misleading and erroneous advice. He eventually sought disclosure of any materials the Department had on Wayne Roberts, with no success.

[31] Following that, the applicant eventually made his request regarding the children on October 27, 1999. The Department soon informed him that the consent to judgment did not include the children because the Department had never been made aware of their existence. The applicant submits that this is outrageous trickery and that there were discussions about the children preceding the signing of the consent.

[32] The applicant then goes on to criticize various aspects of the legislation officer's investigation. First, he says the legislation officer was wrong when he said that he had never seen the document the applicant has attached as exhibit 9 to his current affidavit, since a copy of the same document was in the record before the Federal Court of Appeal.

[33] Second, he challenges the legislation officer's finding that the form "ISP 1151E (05/97)" was available to the public from May 1997 to May 2002. The applicant claims the date for those forms changes yearly for the public and that only the Department has access to old forms. He references a number of forms in the record and notes that only ones sent to him by the Department had a date earlier than the year in which it was retrieved. Further, the applicant submits that the advice from the Forms Management Group was hearsay and anyway, only meant that the wording of the form changed in 2002; the date would have changed every year.

[34] Third, the applicant finds the officer's reasoning about operational procedures baffling. In his view, the fact that he was sent a letter on October 21, 1997, saying that the Department would not appeal the review tribunal decision says nothing about whether he submitted an application in 1997.

[35] Fourth, the applicant considers one of the legislation officer's sentences at page 7 of the decision as an admission that the Department had received a copy of the application in 1997.

[36] Fifth, the applicant challenges the officer's deduction that the applicant only came to understand he was eligible for DCCB benefits in October 1999 and he questions the relevance of that in any case.

[37] Sixth, he reiterates his evidence that he has referred to his children many times and he says the officer lacks common sense and is misguided "as he desperately grasps at bits of information for which he does not know the half-truth, but desires them to be the truth for convenience."

[38] Seventh, the applicant criticizes the officer for relying on the notes of Ms. Ashbey. They are clearly a summary and her observation that his failure to mention the children was a "matter of paranoia" could be out of context. Further, the applicant says that the Department records all conversations for training purposes and that the officer should have listened to the recording if he was going to assign any significance to the conversation.

[39] Eighth, the applicant criticizes the officer's conclusion that the Department's policies would make it likely that there would be some record if the applicant had ever indicated he had children. In the applicant's view, the officer failed to consider all the erroneous advice and administrative errors leading up to this point.

[40] Altogether, the applicant submits that the legislation officer was biased and engaged in pure conjecture targeted to reach a predetermined conclusion. Further, he says that the officer contradicted himself and admitted that they had the application by December, 1997.

[41] For these reasons, the applicant asks this Court to order that his children get benefits retroactive to their dates of birth and also that he and his children receive interest on the sums due to them.

V. Respondent's Submissions

[42] The respondent relies on several previous decisions of this Court for the proposition that the standard of review for subsection 66(4) decisions is reasonableness (see *Manning v Canada (Human Resources Development)*, 2009 FC 523 at paragraph 23, [2009] FCJ No 646 (QL) [*Manning*]; and *Jones v Canada (Attorney General)*, 2010 FC 740 at paragraph 32, 373 FTR 142 [*Jones*]).

[43] The respondent emphasizes that to engage subsection 66(4) relief, the Minister must be satisfied that an administrative error or erroneous advice has caused the denial of a benefit (see *Manning* at paragraph 38; and *Jones* at paragraph 35). The respondent says that the applicant has

the burden of proof (see *Manning* at paragraph 37; and *Lee v Canada (Attorney General)*, 2011 FC 689 at paragraph 81, 391 FTR 164 [*Lee*]).

[44] Further, the respondent says that the Minister has a wide discretion to choose a procedure for an informal determination of the facts (see *Leskiw v Canada (Attorney General)*, 2003 FCT 582 at paragraphs 17 to 20, 233 FTR 182 [*Leskiw (FC)]*, aff'd 2004 FCA 177 at paragraph 7 [*Leskiw (FCA)])*. In this case, the officer chose to investigate only the 1997 application because the Federal Court of Appeal already disposed of the applicant's other complaints.

[45] Further, the respondent opposes the applicant's arguments that the legislation officer was not duly diligent. The officer thoroughly reviewed all relevant documents and his decision letter was detailed. He applied the law correctly but found no evidence whatsoever to support the applicant's claim that he submitted another application in 1997, nor did the applicant produce any evidence for that claim. To the contrary, the applicant's conversation with Ms. Ashbey confirmed that the applicant had not mentioned his children prior to 1999. The applicant may challenge some of the officer's inferences, but the respondent says the officer was entitled to make them and they were reasonable. It is not the Court's role to reweigh the evidence (see *Raivitch v Canada (Minister of Human Resources and Development)*, 2006 FC 1279 at paragraph 18, 300 FTR 307).

[46] The respondent then goes on to dismiss the applicant's other allegations as irrelevant and beyond the scope of the investigation. It acknowledges the delay between 1993 and 1996, but says that delay alone is insufficient; the Minister's duty to take remedial action only arises where

the error has resulted in the denial of a benefit (see *Manning* at paragraph 38; and *Jones* at paragraph 35). Here, the applicant's claim relies on his false assertion that he had submitted a corrected application in 1993 that mentioned his son, though the copy of this "corrected" page is not even the same as the one the applicant had submitted in earlier proceedings and neither is it date-stamped. The respondent says that allegation is not supported by the evidence and has already been dismissed by the Federal Court of Appeal.

[47] For the same reason, the respondent dismisses the applicant's references to the alleged 1995 application.

[48] The respondent also says that the applicant's arguments about medical records are wrong. The 1993 report of Dr. Segal does say that the applicant had children, but the record does not support the applicant's claim that the Department had it by 1996. Anyway, the onus is on an applicant to supply all the prescribed information about his or her children and the Department has no obligation to seek out more information or to inform the applicant of deficiencies (see *Canada Pension Plan Regulations*, CRC, c 385, sections 43 and 52; *Dossa v Canada (Pension Appeals Board)*, 2005 FCA 387 at paragraph 6, 344 NR 167; and *Jones* at paragraph 58). Even if the Department had the medical report, the Department made no error by failing to invite further information.

[49] Finally, the respondent notes that there is no evidence that the applicant mentioned his children at the review tribunal hearing on June 19, 1997 or that the report from Dr. Segal was in evidence. Neither the decision nor the notes of the tribunal members mention either.

[50] The respondent asks that the application be dismissed without costs.

VI. Analysis and Decision

A. *Issue 1 – What is the standard of review?*

[51] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court noted at paragraph 53 that, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically." Here, the second issue is discretionary and the third is factual; both attract deference.

[52] Further, the Supreme Court of Canada went on to say at paragraph 57 of *Dunsmuir* that, where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard. As the respondent points out, several decisions of this Court have said that questions of fact and of discretion should be reviewed on the standard of reasonableness for subsection 66(4) decisions (see *Manning* at paragraph 23; and *Jones* at paragraph 32). Therefore, I will apply the reasonableness standard.

[53] This means that I should not intervene if the officer's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339 [*Khosa*]). Put another way, I will set aside the officer's decision only if his reasons, read in the context of the record, fail to intelligibly explain why he reached his

conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the officer err by only investigating whether the 1997 application was received by the Department?*

[54] Some of the applicant's arguments raise the question of whether the officer erred by limiting the scope of his investigation to the alleged 1997 application. The officer said he did this because the Federal Court of Appeal disposed of the applicant's claims that he had submitted a revised application in 1993 that mentioned his son and an application for DCCB in 1995. Technically, it was actually a 2007 order from the Pension Appeals Board that disposed of those claims and the Federal Court of Appeal merely confirmed it, but either way, it is true that those claims were no longer in issue. Therefore, I agree with the respondent that the officer did not commit any error by ignoring the earlier claims.

[55] Construing the applicant's complaints more broadly, however, it is true that the Department made some administrative errors in relation to the applicant's original application. Although some were just clerical errors (such as substituting "Roberts" for "Robbins"), some were more significant. As one example, the Department admits that it misplaced the applicant's original notice of appeal in 1993, causing a two and a half year delay. However, as the respondent correctly noted, for an administrative error to justify the Minister's intervention

pursuant to subsection 66(4), it must cause the denial of a benefit (see *King v Canada (Attorney General)*, 2010 FCA 122 at paragraph 11, [2010] FCJ No 634 (QL); and *Jones* at paragraph 35). The mislaid appeal document related to an application that never revealed that the applicant had any children and it therefore did not cause the denial of the retroactive DCCB.

[56] Further, the applicant argues that since the review tribunal eventually found in his favour and the Department later agreed, the Department's denials of his original application were erroneous advice. However, that is not the type of erroneous advice contemplated by subsection 66(4) (see *Canada (Attorney General) v King*, 2009 FCA 105 at paragraphs 31 and 32, [2010] 2 FCR 294). Incorrect decisions can be challenged through an ample appeal process, which the applicant has already taken advantage of to secure retroactive benefits for himself back to the date of his disability. In any event, here too there is no causal link between the so-called erroneous advice and the denial of the retroactive DCCB.

[57] The most that could be said is that, had it not been for early administrative errors such as the misplaced appeal document, the applicant might have found out that his children would be entitled to DCCB sooner and applied sooner. However, that is purely speculative.

[58] Further, it appears that the Department started this investigation of its own initiative. When submissions were invited from the applicant, he declined to participate. The legislation officer merely confined his investigation to the areas that were of concern to the Federal Court of Appeal. It was within his discretion to do so, especially since the applicant had not raised any other concerns. That was reasonable.

C. *Issue 3 - Was the legislation officer's decision reasonable?*

[59] Since the legislation officer was entitled to only investigate whether the alleged 1997 application was received by the Department, the question becomes whether it was reasonable for him to conclude that it did not.

[60] The respondent contends that applicants bear the onus to prove that a benefit was denied because an administrative error occurred or because erroneous advice was given. That proposition is supported in the case law (see *Manning* at paragraph 37; and *Lee* at paragraph 81). However, I must confess that I do not think it very helpful to speak of onuses for this type of decision. Generally speaking, a contributor can give his own version of what he did or what advice he was given, but the best evidence of an administrative error or erroneous advice will often either be in the Department's file or gathered by consultation with the Department's employees. In both cases, the Department can access the evidence much more easily than the contributor can.

[61] Further, talk of onuses suggests that subsection 66(4) creates some adversarial process. It does not. Ultimately, the CPP was enacted to benefit contributors. If errors in how the Act is administered are impeding that objective, then the Department has an interest in uncovering and correcting those errors. Thus, once a contributor has said that he or she was given erroneous advice or that an administrative error occurred, it may indeed be unfair or unreasonable for the Department not to collect evidence from its own files and about its own procedures. Indeed, that much is demanded by its policy guidelines (Affidavit of Matthew Potts, Exhibit DD: "Erroneous Advice/Administrative Error for Applicants/Beneficiaries who may have been Denied Benefits

(subsection 66(4) of the CPP and section 32 of the OAS Act)" (April 2009), s 5.2 [EA/AE Policy])). Therefore, while it may be technically true that the onus is on the applicant to prove an administrative error or erroneous advice, it is analytically unhelpful to the extent that it suggests that the Department can simply do nothing.

[62] That said, those comments should not be taken as criticism of the Department's conduct in this case. To the contrary, I agree with the respondent that the legislation officer was very thorough. Even in the absence of submissions, he reviewed everything that the Department had that was related to the applicant's case. The officer did not find any direct evidence of the application, nor did he find any of the corroborating evidence that would have been expected had an error been made. Moreover, he concluded that the applicant's behaviour surrounding his 1999 application was inconsistent with his later claim that he had applied earlier in 1997. Taken altogether, that was reasonable, but I will address each of the applicant's specific concerns in turn.

[63] First, the applicant said that his exhibit 9, the excerpt from his allegedly corrected 1993 application, was in the record. It was not. The respondent is correct that the document the applicant submitted to the Court of Appeal is different in many respects, the most obvious being that the first one did not have his son's birth date filled in, while this new one does. Anyway, the 1993 application was irrelevant for the reasons already given and the legislation officer was not required to consider it.

[64] Second, the applicant challenged the officer's conclusion that the application form used for the 1997 application was available from May 1997 to May 2002. However, his argument that the version number is changed every year is based only on supposition and coincidence and it would be strange if true. From an administrative perspective, it is logical to include the date of last amendment on the form, since it alerts people of when the form changed and provides an easy way to distinguish between different versions of the same form. It makes much less sense to include in the version number the year in which that particular form was printed, since then there is no way to quickly tell whether forms with different version numbers are actually different. Further, it would be wasteful to require someone to update the version number of the forms every month or year, reprint them and discard all the old ones.

[65] As well, the complaint that the advice from the Forms Management Group was hearsay has no foundation. This was an informal investigation and the rules of evidence for a court proceeding do not apply. Anyway, it was not hearsay; it was communicated directly to the decision-maker by a person with personal knowledge of the facts. As well, the applicant had declined the officer's invitations to participate in the process, so he was not entitled to an opportunity to respond. It was reasonable for the legislation officer to rely on the Forms Management Group's representations and to conclude that the forms would have been available anytime between May 1997 and May 2002.

[66] Third, I agree with the applicant that the Department's decision not to appeal the review tribunal's decision is unconnected to the alleged 1997 application, but that is not what the officer was saying. The officer's reasoning was this:

- Operational procedures require the Department to contact applicants when they receive duplicate applications;
- The first time the Department contacted the applicant after the date of the alleged application was by a letter on October 21, 1997;
- That letter did not mention any application but would have if a duplicate application had been received;
- Therefore, the Department did not likely receive a duplicate application in late June 1997.

[67] In essence, all the officer was saying was that corroborating evidence that would be expected had the application been received did not exist and that made it more likely that the application was not received. That is reasonable.

[68] Fourth, the applicant pointed out that the officer said the following:

> I find that, on a balance of probabilities, there was no application on your file between the time your original application was received in 1993 to January 2001, when the department received a photocopy of the June 1997 application form that you submitted with your application for leave to appeal to the Pension Appeals Board.

[69] The applicant says that since he applied for leave to appeal to the Pension Appeals Board between December 19, 1997 and February 26, 1998, the officer admitted in this sentence that the Department had the application well before 1999.

[70] However, although the applicant's first appeal to the Pension Appeals Board was in early 1998, the officer was referring to the applicant's second appeal to the Pension Appeals Board,

which was filed on January 8, 2001. That is obvious from the sentence itself, which explicitly says January 2001 and it is obvious from the fact that the officer earlier identifies the application to which he is referring near the bottom of page five of his decision letter. There is no contradiction here.

[71] Also, part of the applicant's argument was that he could not see how that conclusion could be derived from the October 21, 1997 letter alone. However, as I read that sentence, that conclusion was based on all of the analysis preceding it, not just the operational procedures section.

[72] Fifth, the applicant asked how the officer could conclude that the applicant only discovered that his children were entitled to DCCB in October 1999. In the paragraph where the officer made that observation, he quoted from a letter the applicant sent on October 27, 1999, which said that "… it is now understood that the Appellant did not receive, yet qualified for, an amount of $171.00 per month for each of his children …" The officer bolded the words "it is now understood" so it is clear that he based his conclusion on the applicant's use of the word "now". That is a reasonable inference and it is not for me to reweigh that evidence.

[73] As for its relevance, I agree with the applicant that an admission that he did not realize his children were entitled to DCCB until 1999 is not alone an admission that he did not submit an application disclosing their existence in 1997. However, the officer did not say it was. In fact, the officer does not explicitly connect his observation to anything, so its relevance or irrelevance does not affect the reasonableness of the decision. Anyway, it could be relevant in that a person

who knows about the child benefits would have been more likely to disclose the existence of his children than someone who does not. It also tends to cast doubt on the applicant's story that the members of the review tribunal told him to apply again and include his children on the application, since they would have likely disclosed possible entitlements.

[74] Sixth, the applicant said the officer was biased and lacked common sense. He is wrong on both counts. The officer conducted his investigation thoroughly and professionally. He came to a conclusion that the applicant does not like, but that does not mean that he was biased. The officer was required to base his decision on the evidence, and there was absolutely no supporting evidence for the applicant's claim. Further, the fact that the Department made administrative errors in relation to the applicant's file in the past does not make it any more or less likely to make an administrative error in the future. It was irrelevant, and the officer did not "fail the test of common sense" (applicant's record at 76, paragraph 133) by failing to accord those earlier errors any weight.

[75] That said, the applicant's story itself was evidence and I do have one concern about the EA/AE Policy. At section 4.2.3, the policy says:

> The applicant/beneficiary's unsupported evidence cannot be accepted as the only means of determining if erroneous advice was provided or an administrative error was made. There must be supporting evidence.

[76] I am skeptical of the guidance that a beneficiary's version of events can never alone prove that an error likely occurred. The testimony of a single, credible witness can be enough to convict people of crimes beyond a reasonable doubt (see *R v MAD*, [1997] AJ No 287 (QL) at

paragraph 19, 196 AR 189 (CA)), so why can it never be enough to prove that someone in the Department probably made an honest mistake? Further, it is easy to imagine situations where the provision of erroneous advice or an administrative error will not leave a paper trail. Therefore, it could be an error for an officer to dismiss claims that he believes solely because there is no corroborating evidence, especially where no corroborating evidence could reasonably be expected.

[77] Here, however, I do not think it makes the decision unreasonable. Although the officer never actually said whether or not he believed the applicant, it is implicit in his reasons that he did not. More than just a lack of corroborating evidence, he also viewed the notes of Ms. Ashbey as positive evidence that the 1997 application was not submitted before 1999. Therefore, the policy did not lead to error in this case, but I caution that it could in future cases.

[78] Seventh, the applicant also challenges the officer's reliance on Ms. Ashbey's notes. Ms. Ashbey asked the applicant why he did not mention the children earlier and her notes say that the applicant responded that it was a "matter of paranoia." The applicant says that comment could be out of context and it is true that a recording would have been better. However, there is no evidence that that conversation was recorded, nor that it would have been kept for so long. Anyway, though it is possible that the notes are inaccurate, they were made at the time of the conversation and there is no evidence to suggest that they were incorrect. It was reasonable for the officer to attach weight to them and it is not for me to reweigh that evidence now. Anyway, the officer's conclusion was based as much on what the applicant did not say as what he did. He reasoned that the applicant would likely have said that he had disclosed the existence of his

children in response to Ms. Ashbey's question if he had actually submitted the 1997 application. The officer drew an adverse inference from the fact that he did not. That was reasonable.

[79] As for the applicant's eighth complaint, the officer was not negligent. He reviewed all the relevant evidence and his decision letter was comprehensive and explains his reasoning well. His conclusions are supported by the evidence and the law and I understand how he reached them. The decision was reasonable.

[80] Finally, though it is not directly relevant since it did not feature in the officer's reasons, I agree with the respondent's arguments about Dr. Segal's report, which is the only one which mentions that the applicant had children. There is no evidence that the Department had it in 1997 and the only copies of it in the record show it as having been printed on January 29, 1999 or July 8, 2008. Further, the review tribunal, in its decision on September 12, 1997, specifically commented that they would have liked to set an earlier start date, but they had no medical evidence to support it. That suggests that they did not have Dr. Segal's report, which also casts doubt on the applicant's story that his references to it inspired the review tribunal to recommend he submit a new application. Neither do the tribunal members' notes mention Dr. Segal's report or the applicant's children. Anyway, the allusion to the children in Dr. Segal's report is brief and it does not meet the requirements in the *Canada Pension Plan Regulations* in sections 43 and 52.

[81] As well, the statement of contributions dated February 21, 1997 mentions that each of his dependent children will not receive any payments, but it is a form letter. It does not prove that the Department knew that the applicant had dependent children.

[82] Ultimately, the officer reasonably found that the applicant did not disclose the existence of his children because of his medical conditions. Sadly, this means that the children did not receive the support they deserved from the CPP because of the very disability which should have entitled them to it. However, those issues already went to the Federal Court of Appeal and it has confirmed that the distribution of further retroactive benefits is time-barred by subsection 74(2), regardless of any incapacity on the part of the applicant.

[83] The only issue before me was whether the legislation officer reasonably decided that no application was made in 1997 and I am satisfied that he did. I therefore dismiss this application for judicial review.

[84] Because of my conclusion, I need not deal with Issue 4.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Acts

***Canada Pension Plan*, RSC 1985, c C-8**

60. (1) No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act.	60. (1) Aucune prestation n'est payable à une personne sous le régime de la présente loi, sauf si demande en a été faite par elle ou en son nom et que le paiement en ait été approuvé selon la présente loi.
…	…
66. (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied	66. (4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(a) a benefit, or portion thereof, to which that person would have been entitled under this Act,	a) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(b) a division of unadjusted pensionable earnings under section 55 or 55.1, or	b) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(c) an assignment of a retirement pension under section 65.1,	c) la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur

made.

…

74. (2) Subject to section 62, where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,

(a) in the case of a disabled contributor's child's benefit, the later of

(i) the month commencing with which a disability pension is payable to the contributor under this Act or under a provincial pension plan, and

(ii) the month next following the month in which the child was born or otherwise became a child of the contributor, and

(b) in the case of an orphan's benefit, the later of

(i) the month following the month in which the contributor died, and

(ii) the month next following the month in which the child was born,

but in no case earlier than the twelfth month preceding the month following the month in which the application was received.

administrative.

…

74. (2) Sous réserve de l'article 62, lorsque le paiement d'une prestation d'enfant de cotisant invalide ou d'une prestation d'orphelin est approuvé, relativement à un cotisant, la prestation est payable pour chaque mois à compter :

a) dans le cas d'une prestation d'enfant de cotisant invalide, du dernier en date des mois suivants :

(i) le mois à compter duquel une pension d'invalidité est payable au cotisant en vertu de la présente loi ou selon un régime provincial de pensions,

(ii) le mois qui suit celui où l'enfant est né ou est devenu de quelque autre manière l'enfant du cotisant;

b) dans le cas d'une prestation d'orphelin, du dernier en date des mois suivants :

(i) le mois qui suit celui où le cotisant est décédé,

(ii) le mois qui suit celui où l'enfant est né.

Toutefois, ce mois ne peut en aucun cas être antérieur au douzième précédant le mois suivant celui où la demande a été reçue.

Relevant Regulations

***Canada Pension Plan Regulations*, CRC, c 385**

43. (1) An application for a benefit, for a division of unadjusted pensionable earnings under section 55 or 55.1 of the Act or for an assignment of a portion of a retirement pension under section 65.1 of the Act shall be made in writing at any office of the Department of Human Resources Development or the Department of Employment and Social Development.	43. (1) La demande de prestations, la demande de partage des gains non ajustés ouvrant droit à pension en application des articles 55 ou 55.1 de la Loi ou la demande de cession d'une partie de la pension de retraite visée à l'article 65.1 de la Loi doit être présentée par écrit à tout bureau du ministère du Développement des ressources humaines ou du ministère de l'Emploi et du Développement social.
…	…
52. For the purposes of determining the eligibility of an applicant for a benefit, the amount that an applicant or beneficiary is entitled to receive as a benefit or the eligibility of a beneficiary to continue to receive a benefit, the applicant, the person applying on his behalf, or the beneficiary, as the case may be, shall, in the application, or thereafter in writing when requested to do so by the Minister, set out or furnish the Minister with the following applicable information or evidence:	52. Afin de déterminer l'admissibilité du requérant à une prestation, le montant de la prestation que le requérant ou le bénéficiaire est en droit de recevoir, ou l'admissibilité d'un bénéficiaire à continuer de recevoir une prestation, le requérant ou la personne faisant la demande en son nom ou le bénéficiaire, selon le cas, doit, lors de sa demande, ou par la suite, lorsque le ministre le lui demande, donner par écrit les renseignements ou produire les preuves qui suivent :
(a) the name at birth and present name, sex, address and Social Insurance Number of	a) le nom, à la naissance, et le nom actuel, le sexe, l'adresse et le numéro d'assurance-sociale

…	…
(iv) each dependent child of the disabled or deceased contributor, and	(iv) de chaque enfant à la charge du cotisant invalide ou décédé,
…	…
(b) the date and place of birth of	b) la date et le lieu de naissance
…	…
(iv) each dependent child of the disabled or deceased contributor;	(iv) de chaque enfant à la charge du cotisant invalide ou décédé;
…	…
(i) whether a dependent child of the disabled or deceased contributor	i) si un enfant à la charge du cotisant invalide ou décédé
(i) is his child,	(i) est son enfant,
(ii) is his legally adopted child or was adopted in fact by him or is a legally adopted child of another person,	(ii) est son enfant adopté légalement ou était de fait, adopté par lui, ou encore est l'enfant adopté légalement par une autre personne,
(iii) was legally or in fact in his custody and control,	(iii) était légalement ou de fait sous sa garde et sa surveillance,
(iv) is in the custody and control of the disabled contributor, the survivor of the contributor or another person or agency,	(iv) est sous la garde et la surveillance du cotisant invalide, du survivant du cotisant ou d'une autre personne ou organisme,
(v) is living apart from the disabled contributor or the survivor, or	(v) vit ailleurs que chez le cotisant invalide ou le survivant, ou
(vi) is or was maintained by the disabled contributor;	(vi) est ou était entretenu par le cotisant invalide;

(j) where a dependent child of the disabled or deceased contributor is 18 or more years of age, whether that child is and has been in full-time attendance at a school or university;

…

(n) such additional documents, statements or records that are in the possession of the applicant or beneficiary or are obtainable by him that will assist the Minister in ascertaining the accuracy of the information and evidence referred to in paragraphs (a) to (m).

j) dans les cas où un enfant à la charge du cotisant invalide ou décédé est âgé de 18 ans ou plus, si cet enfant fréquente ou a fréquenté à plein temps une école ou une université;

…

n) tout document, déclaration ou pièce supplémentaire que possède ou pourrait obtenir le requérant ou le bénéficiaire pour aider le ministre à vérifier l'exactitude des renseignements et des preuves mentionnés aux alinéas a) à m).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2237-12
STYLE OF CAUSE:	WAYNE ROBBINS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	JANUARY 14, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
DATED:	JULY 11, 2014

APPEARANCES:

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