

Date: 20080228

Docket: A-368-07

Citation: 2008 FCA 78

**CORAM: DÉCARY J.A.
LÉTOURNEAU J.A.
SHARLOW J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LESLIE DANIELSON

Respondent

Heard at Winnipeg, Manitoba, on February 28, 2008.

Judgment delivered from the Bench at Winnipeg, Manitoba, on February 28, 2008.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

DÉCARY J.A.

DISSENTING REASONS BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Winnipeg, Manitoba, on February 28, 2008)

LÉTOURNEAU J.A.

[1] Mr. Justice Décary and myself are of the view that this application for judicial review must be allowed.

[2] The Pension Appeals Board (Board) ruled that the respondent had established on a balance of probabilities that he was incapable of forming or expressing an intention to make an application for a disability pension from July 1997 until the Review Tribunal hearing held on November 21, 2006.

[3] The Board came to that conclusion on the basis of medical evidence and the testimony of the respondent. However, according to the applicant, the Board misapplied the legal test in its consideration of whether the respondent was incapable of forming or expressing an intention to make an application for disability benefits within the meaning of subsections 60(8) and 60(9) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan).

[4] The alleged error of law, the applicant says, consisted in the Board's omission to consider the respondent's activities during the alleged period of incapacity which, he says, were relevant to the determination of the issue of the respondent's capacity to form or express an intention to apply for benefits.

[5] Section 60 of the Plan was considered by the Board in an earlier decision, *Morrison v. The Minister of Human Resources Development*, Appeal CP 04182, March 7, 1997. In that case, the Board wrote that section 60 "is precise and narrow". We would rather say precise and focused in that, as the *Morrison* Board appropriately said, "it does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity, quite simply, of 'forming or expressing an intention to make an application'".

[6] In determining that issue, the *Morrison* Board, at pages 5 and 6 of its decision, then expressed the need to look at the medical evidence as well as "the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of

application which cast light on the capacity of the person concerned during that period of so “forming and expressing” the intent”.

[7] We agree with the *Morrison* Board that the activities of a claimant during that period may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered.

[8] In the case at bar, after a careful reading of the Board’s decision, we agree with the applicant that the respondent’s activities which could be of assistance in determining whether the legal test in section 60 has been properly applied were not addressed by the Board.

[9] The applicant in his memorandum of fact and law, at paragraphs 63 to 75, listed a number of these activities which he claims are relevant and should have been considered.

[10] We are content to give a few examples. The respondent:

- a) entered a drug rehabilitation program in Minnesota in February 1996;
- b) liquidated and consolidated his assets in 1996;
- c) applied for private disability benefits pursuant to an accident;
- d) battled with insurance companies for those benefits for several years to obtain them;

- e) hired and instructed legal counsel to pursue his insurance claims as early as October 16, 1998;
- f) authorized the preparation of independent medical assessments in that context;
- g) from 1997 sought out medical reports on his own initiative to support his pursuit of disability benefits;
- h) entered into a franchised business venture and started that venture in 2001; and
- i) declared personal bankruptcy in September 2001.

[11] These facts were before the Board and the Review Tribunal. A few were mentioned by the Board but no analysis was made of them or of other relevant activities of the respondent by the Board in its decision. In fact, the respondent was questioned on these events that the Board mentions at paragraphs 20 to 24 of the decision. The Board concluded that the respondent had a vague or poor recollection of these events. But the questioning took place in 2007. What the Board should have looked at is whether these events at the time they occurred evidenced a capacity to form or express an intention to make an application for benefits. The omission by the Board to do that and consider other relevant activities of the respondent resulted, in our respectful view, in a misapplication of the legal test.

[12] For these reasons, the application for judicial review will be allowed, the decision of the Board dated June 28, 2007 will be set aside and the matter referred back to a differently constituted panel for re-determination.

“Gilles Létourneau”

J.A.

DISSENTING REASONS OF SHARLOW J.A.

[13] I respectfully disagree with my learned colleagues. Based on my review of the record, I cannot conclude that the Board misapplied the legal test because it failed to consider relevant evidence. Although the Board’s analysis does not deal specifically with some of the factual allegations now made by the applicant, the evidence of those factual allegations is based for the most part on inferences the applicant draws from statements in the expert reports – the same reports that the Board describes in its reasons. It seems to me improbable that the Board read those reports but failed to notice the factual elements cited by applicant.

[14] I am not persuaded that the decision of the Board discloses any error of law or any other error that warrants the intervention of this Court. I would dismiss the application with costs.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-368-07

**(JUDICIAL REVIEW OF A DECISION OF THE PENSION APPEALS BOARD DATED
JUNE 28, 2007)**

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v.
LESLIE DANIELSON

PLACE OF HEARING: Winnipeg, MB

DATE OF HEARING: February 28, 2008

**REASONS FOR JUDGMENT DELIVERED
FROM THE BENCH BY:** Létourneau J.A.

CONCURRED IN BY: Décary J.A.

DISSENTING REASONS BY: Sharlow J.A.

APPEARANCES:

James Gray FOR THE APPLICANT
Carole Vary

Madeline Low FOR THE RESPONDENT

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