Date: 20080304

Docket: A-8-07

Citation: 2008 FCA 82

CORAM: **DESJARDINS J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GORDON MacRAE

Respondent

Heard at Fredericton, New Brunswick, on February 20, 2008.

Judgment delivered at Ottawa, Ontario, on March 4, 2008.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DESJARDINS J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for Judicial Review by the Attorney General of Canada acting on behalf of the Minister of Human and Social Resource Development (the "Minister") in respect of a Pension Appeals Board (the "PAB") decision, which found that the evidence that Mr. MacRae submitted for consideration as "new facts" under subsection 84(2) of the *Canada Pension Plan*, R.S. 1985, c. C-8 (the "CPP") came within that description and that he was disabled for purposes of the CPP. The Minister requests an order that the decision of the PAB dated December 8, 2006 be set aside and that the matter be referred back to a differently constituted PAB.

RELEVANT FACTS

[2] Mr. MacRae applied for disability benefits under the CPP in February 1996, at which time he stated that he was last employed as a truck driver and furniture delivery person and stopped working on November 8, 1994 due to a work-related injury to his back. The application was initially denied and upon reconsideration by the Minister. Mr. MacRae appealed the denial to the Review Tribunal.

[3] On August 13, 1997, a Review Tribunal held that Mr. MacRae was not disabled within the meaning of the CPP (with Reasons dated October 1, 1997). Mr. MacRae applied for leave to appeal this decision to the PAB but leave was refused. There was no judicial review of this decision.

[4] Mr. MacRae then applied for disability benefits a second time in March 2004. He again stated that he was last employed as a delivery man for a furniture company and stopped working on November 8, 1994 due to a back injury.

[5] Mr. MacRae's second application was denied initially and upon the Minister's reconsideration, by letter dated May 21, 2004. Mr. MacRae's minimum qualifying period (MQP) – the latest date upon which he must be found to have been suffering from a severe and prolonged disability within the meaning of the CPP – was considered to be December 1997. Mr. MacRae appealed the denial of his second application to a Review Tribunal.

[6] While this appeal was pending, Mr. MacRae brought an application to re-open the Review Tribunal's decision of August 1997 based on the discovery of "new facts" pursuant to subsection 84(2) of the CPP. The second application had not contained these "new facts". Eleven documents were submitted for consideration as "new facts".

[7] A Review Tribunal was convened and a hearing was held on September 7, 2005 for the purposes of both the application under subsection 84(2) of the CPP and the hearing of the appeal of the decision of the second application denying him disability benefits under subsection 81(2) of the CPP.

[8] The Review Tribunal found that Mr. MacRae's MQP was December 31, 1997, that the eleven documents submitted by Mr. MacRae constituted "new facts" within the meaning of subsection 84(2) of the CPP and that this evidence would have an impact on the initial Review Tribunal decision regarding Mr. MacRae's disability. Consequently, the Review Tribunal rescinded its decision of October 1, 1997 and proceeded to deem Mr. MacRae disabled as of November 21, 1994, with benefits payable from March 1995. Having so concluded, the Review Tribunal did not deal with the appeal of the second application and it was adjourned.

[9] In March 2006, leave to appeal the decision of the Review Tribunal to the PAB was granted. The PAB ultimately found that three of the eleven documents accepted by the Review Tribunal as "new facts" met that qualification. These are a report by Dr. Moore, a psychiatrist, dated August 1, 2005, a letter from Dr. Slysz, dated September 1, 2005 and a letter from Dr. Ling dated

August 17, 2005. On this basis, the PAB held that the Mr. MacRae was disabled within the meaning of the CPP on or before December 31, 1997 and dismissed the Minister's appeal. It is this decision that is the subject of judicial review.

PENSION APPEALS BOARD DECISION

[10] As the decision of the Review Tribunal was rendered pursuant to subsection 84(2) of the CPP, the PAB first addressed the question of whether the Review Tribunal was presented with "new facts" within the meaning of that provision (PAB's decision, paras. 1, 3).

[11] The PAB concludes that of the eleven documents submitted for consideration under subsection 84(2) of the CPP, three met the standard for "new facts". It first holds, at paragraph 7 of its decision, that the report of Dr. Moore reveals "new facts" as it is the first report by a psychiatrist attesting to Mr. MacRae's anxiety condition. The PAB also concludes at paragraph 11 of its decision, that the letter from Dr. Slysz also reveals "new facts" and is "extremely material" as it establishes that Mr. MacRae was disabled and unable to work since 1996. Finally, at paragraph 12 of its reasons, the PAB finds that a letter from Dr. Ling, dated August 17, 2005, also qualifies as it reports on Mr. MacRae's current condition and supports Mr. MacRae's contention that the symptoms are severe and prolonged.

[12] The PAB then goes on to hold that the Review Tribunal correctly found that Mr. MacRae was disabled for purposes of the CPP as of the MQP of December 31, 1997. The PAB reviews Mr. MacRae's history (PAB's decision, paras. 14-16) and finds him to be a credible and honest witness

(PAB's decision, para. 15). It also refers to the testimony of Mr. MacRae's wife and sister, Dr. Heung – an expert in the field of general practice medicine – and the medical evidence in order to support its conclusion that Mr. MacRae is disabled for purposes of the CPP (PAB's decision, para. 24).

ALLEGED ERRORS IN THE DECISION UNDER APPEAL

[13] In support of the appeal, the Attorney General alleges that the PAB committed a series of palpable and overriding errors in reaching the decision under review. The thrust of the attack is that the PAB failed to apply the correct test in determining whether Mr. MacRae had presented "new facts". Specifically, it had not been shown that the so called "new facts" were in existence at the time of the original hearing but could not have been discovered with due diligence (the discoverability test) and that had these "new facts" been made available to the Tribunal, it would probably have changed the result (the materiality test).

[14] The Attorney General also submits, relying on the decision of this Court in *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, [2007] F.C.J. No. 37 and the decisions of the Federal Court in *Kabatoff v. Canada (Minister of Human Resources and Development)*, 2007 FC 820, [2007] F.C.J. No. 1078 and in *Dillon v. Canada (Attorney General)*, 2007 FC 900, [2007] F.C.J. No. 1180 that the application under subsection 84(2) of the CPP based on "new facts" amounts to a collateral attack on the Minister's second decision, and that the PAB should have rejected Mr. MacRae's appeal on that ground alone.

ANALYSIS AND DECISION

[15] This last contention can be disposed of quickly as it was not raised before the PAB. In my respectful view, the PAB cannot be faulted for not addressing an argument that was not raised before it.

[16] I now turn to the question of whether the PAB committed an overriding and palpable error in holding that three of the eleven documents presented to the Review Tribunal qualified as "new facts". In order for evidence to be admissible as a "new fact," the evidence must meet a two-part test: 1) it must establish a fact (usually a medical condition in the context of the CPP) that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence (the "discoverability test") and 2) the evidence must reasonably be expected to affect the result of the prior hearing (the "materiality test") (see *Kent v. Canada (Attorney General),* 2004 FCA 420, [2004] F.C.J. No. 2083, paras. 33-35 ("*Kent*"); *Canada (Minister of Human Resources Development) v. Macdonald*, 2002 FCA 48, [2002] F.C.J. No. 197, para. 2 ("*Macdonald*"), *Mazzotta v. Canada (Attorney General),* 2007 FCA 297, [2007] F.C.J. No. 1209, para. 45).

[17] Consequently, Courts have considered medical reports written after the original hearing of the application to be admissible pursuant to subsection 84(2) of the CPP where, for example, the condition which they attest to exists at the time of the original hearing but could not have been diagnosed or known to the applicant through the exercise of due diligence by the applicant (see e.g.

Kent, supra; Macdonald, supra). However, in cases where the medical reports reiterate what is already known or has been diagnosed, the reports will not be considered as evidencing "new facts" (*Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293, [2005] F.C.J. No. 1532).

[18] I now turn to the three documents which the PAB admitted. With respect to Dr. Moore's report, the Attorney General submits that the report neither meets the discoverability nor the materiality test as it does not provide any objective findings upon which a diagnosis or prognosis can be made as section 68 of the *Canada Pension Plan Regulations*, C.R.C., c.385 ("CPP Regulations") requires. Furthermore, Mr. MacRae's mental illness was known to him and his wife at the time of the original Review Tribunal hearing and Mr. MacRae's mental health was not in issue before the original Review Tribunal, as the claim was only based on a back injury and related physical disabilities.

[19] In my view, the PAB committed no error of the type alleged when it held that Dr. Moore's report discloses "new facts". While earlier medical documents contained references to his mental state in 1996, he was only diagnosed with a mental condition, by Dr. Moore, in 2004. Dr. Moore's report contains this diagnosis and notes that the condition existed as of 1994. The admissibility of Dr. Moore's report is consistent with this Court's decision in *Kent, supra* which held that a mental disability may exist prior to a claimant's MQP date but may not have been diagnosed prior to that time.

[20] With respect to the materiality test, the PAB found that Dr. Moore's report was the first clear diagnosis of Mr. MacRae's condition by a psychiatrist (PAB's decision, para 7). While the Attorney General argues that the disability application only related to Mr. MacRae's back injury, as the Review Tribunal notes, mentions of anxiety are scattered throughout reports and so, formed part of the disability application; however, there was no formal diagnosis at the time. Instead, the focus was on Mr. MacRae's back injury and the mental illness provoked by the injury was effectively ignored (Review Tribunal's decision, Appeal Book, p. 125).

[21] Finally, with respect to the Attorney General's allegation that the opinion of Dr. Moore does not meet the requirements of section 68 of the CPP Regulations, I stress that the diagnosis of mental illness must generally be based on some degree of subjectivity as few objective clinical methods to make such a diagnosis exist.

[22] Similarly, I am of the view that the PAB made no reviewable error when it held that Dr. Slysz' letter dated September 1, 2005 discloses facts which were previously unknown. In this letter, Dr. Slysz' reports on Mr. MacRae's back pain and mental problems and indicates attendances in January 1996 when Mr. MacRae was mentally ill, anxious and paranoid and not fit for work. The Attorney General argues that the letter does not meet the discoverability test as the symptoms that Dr. Slysz reports on in December 2005 existed prior to the initial Review Tribunal decision and were thus discoverable. However, the evidence is clear that, although Mr. MacRae showed distinct signs of an anxiety disorder immediately after his accident, at the time, Dr. Slysz's focused on his back problem. The fact that the medical practitioners attending to Mr. MacRae should have paid

more attention to his mental health is now apparent. However, Mr. MacRae cannot be faulted for their failure to diagnose the impact of the accident on his mental health at the time. Further, as the respondent notes, "new facts" will only meet the "discoverability test" if the claimant has knowledge or would have had the knowledge had he or she exercised due diligence. The fact that Dr. Slysz might have been aware of Mr. MacRae's mental condition, yet did not report it or treat it, cannot operate against Mr. MacRae.

[23] The third document submitted as "new facts" is Dr. Ling's letter, which includes a report on the injury in 1994, Dr. Ling's initial assessment of Mr. MacRae in 1995, a CT scan taken at that time, Dr. Emerson Brooks assessment of Mr. MacRae in December 1996, Dr. Ling's assessment of Mr. MacRae in 1997 and his assessment of Mr. MacRae in 2005. Insofar as Dr. Ling's letter is concerned, I agree with the submissions made by the Attorney General that the information which it conveys does not meet the discoverability test. The facts revealed by the letter – i.e., Mr. MacRae's back condition at the time – had already been discovered.

[24] However, I do not believe that the disqualification of Dr. Ling's letter impacts on the PAB's conclusion that Mr. MacRae was disabled within the meaning of the CPP at the time of the original hearing when regard is had to the reasons of the PAB. With respect to Dr. Moore, the PAB writes:

> [7] Item 2 – Report of Dr. Moore, Psychiatrist dated August 1, 2005
>
> What is extremely important in this matter is that the first time we see evidence of a report from a psychiatrist is from a Dr. D.R. Moore, whose report is at pages 165-166 and pages 186-187 of Exhibit No. 1, and this report is definitely in the realm of "new facts," and we see from this report that Dr. Moore first saw the Respondent on "09/12/2004."

> [8] There is an abundance of evidence on file in this matter which clearly shows the Respondent in 1996 was treated for anxiety. (See p.163 of Exhibit No. 1 and also the report of Dr. Moore in 2005.)
>
> (My emphasis.)

[25] With respect to Dr. Slysz' letter, the PAB writes:

> [11] Item 9 – Letter from Dr. Slysz, dated September 1, 2005 (see p.175 of Exhibit No. 1)
>
> This letter does meet the test of "new facts" and is extremely material in a diagnosis of the Respondent being disabled and unable to work definitely since 1996. Dr. Slysz states the following in this letter:
>
> > This man has been suffering from both chronic back pain and mental problems since an accident in 1994. His back pain has certainly been well-established as a chronic problem write by Dr. Ling. I saw him two times in January 1996. At that time he was mentally ill. He was extremely anxious and paranoid. He was clearly not fit for work at that time. He has had persistent anxiety problems since then. As well, his back pain is chronic. He has difficulty walking distances. He cannot bend or lift any weight.
> >
> > I feel both problems were clearly present in the time after the accident and have persisted since then. He will never be able to work.

[26] In contrast Dr. Ling's letter is not referred to as being important or essential. When regard is had to its contents, and the evidentiary record, I am satisfied that the PAB would have reached the same conclusion without regard to Dr. Ling's report.

[27] I would therefore dismiss the application for judicial review with costs.

"Marc Noël"

J.A.

"I concur,
Alice Desjardins J.A."

"I concur,
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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