

Date: 20080501

Docket: A-293-07

Citation: 2008 FCA 164

**CORAM: RICHARD C.J.
NOËL J.A.
RYER J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BERNICE RYALL

Respondent

Heard at Ottawa, Ontario, on April 30, 2008.

Judgment delivered at Ottawa, Ontario, on May 1, 2008.

REASONS FOR JUDGMENT BY:

RYER J.A.

CONCURRED IN BY:

**RICHARD C.J.
NOEL J.A.**

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an application for judicial review by the Attorney General of Canada acting on behalf of the Minister of Social Development (the "Minister") in respect of the Pension Appeals Board (the "Board") decision (CP 23620) dated May 15, 2007, in which the majority of the Board determined that Mrs. Bernice Ryall is entitled to a disability pension pursuant to paragraph 44(1)(b) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "Plan").

[2] A disability pension cannot be awarded to a person unless that person is determined in the manner prescribed in the *Canada Pension Plan Regulations*, C.R.C., c. 385 (the “Regulations”), to have a severe and prolonged mental or physical disability within the meaning of subparagraphs 42(2)(a)(i) and (ii) of the Plan. Those provisions of the Plan read as follows:

42. (2) For the purposes of this Act,

(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,

(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

(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

42. (2) Pour l’application de la présente loi:

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) 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) 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;

[3] A person who claims to be disabled within the meaning of subsection 42(2) of the Plan must provide the Minister with the information that is specified in subsection 68(1) of the Regulations.

That provision reads as follows:

68. (1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:

- (a) a report of any physical or mental impairment including
 - (i) the nature, extent and prognosis of the impairment,
 - (ii) the findings upon which the diagnosis and prognosis were made,
 - (iii) any limitation resulting from the impairment, and
 - (iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant;
- (b) a statement of that person's occupation and earnings for the period commencing on the date upon which the applicant alleges that the disability commenced; and
- (c) a statement of that person's education, employment experience and activities of daily life.

68. (1) Quand un requérant allègue que lui-même ou une autre personne est invalide au sens de la Loi, il doit fournir au ministre les renseignements suivants sur la personne dont l'invalidité est à déterminer:

- a) un rapport sur toute détérioration physique ou mentale indiquant
 - (i) la nature, l'étendue et le pronostic de la détérioration,
 - (ii) les constatations sur lesquelles se fondent le diagnostic et le pronostic,
 - (iii) toute incapacité résultant de la détérioration, et
 - (iv) tout autre renseignement qui pourrait être approprié, y compris les recommandations concernant le traitement ou les examens additionnels;
- b) une déclaration indiquant l'emploi et les gains de cette personne pendant la période commençant à la date à partir de laquelle le requérant allègue que l'invalidité a commencé; et
- c) une déclaration indiquant la formation scolaire, l'expérience acquise au travail et les activités habituelles de la personne.

Paragraphs (b) and (c) of that provision refer to information that is readily provided by the applicant. Paragraph (a) of that provision requires the applicant to provide a report containing medical evidence with respect to the alleged physical or mental impairment.

[4] An applicant for a disability pension must establish that he or she has made contributions for not less than the minimum qualifying period (the “MQP”), as determined in accordance with subsection 44(2) of the Plan. In the circumstances under consideration, it is undisputed that Mrs. Ryall’s MQP ended on December 31, 1999. Accordingly, to be entitled to disability benefits, Mrs. Ryall had to persuade the Board, on a balance of probabilities, that she has suffered from a disability of the type contemplated by paragraph 42(2)(a) of the Plan at the end of her MQP and continuously thereafter.

[5] The inquiry into whether a claimant suffers from a “severe disability” focuses on the capacity of the claimant to regularly pursue any substantially gainful occupation. As stated in *Villani v. Canada (Attorney General)*, 2001 FCA 248, and reiterated in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, to establish that a disability is “severe”, a claimant must provide medical evidence that demonstrates a serious health problem. In addition, when there is evidence of capacity to work, the claimant must establish that he or she has made efforts to obtain and maintain employment but those efforts were stymied by the claimant’s health problem.

[6] The majority of the Board determined that Mrs. Ryall is unemployable in the “real world” because of her aorta problems and impaired memory. Accordingly, the majority found that Mrs.

Ryall met the test for a “severe” disability. This determination was based on a review of the testimony of Mrs. Ryall, her husband and certain medical evidence.

[7] In making its determination that Mrs. Ryall has been suffering from a severe disability, the majority of the Board did not address the fact that in her application for disability benefits in 2002, Mrs. Ryall indicated that she was last employed in a clerical position and stopped working on August 29, 1997 because she was “unable to handle the workload”. Mrs. Ryall did not mention memory loss or any other health problem as the cause of her cessation of employment. Furthermore, the majority of the Board did not acknowledge that in her testimony to the Board, Mrs. Ryall admitted that she had voluntarily left her clerical position and since that time she had not looked for work or undertaken any retraining.

[8] To assess the medical condition of Mrs. Ryall, the Board had before it substantial medical evidence from her family physician, an internist and a vascular surgeon. The majority of the Board relied on the opinion of the family physician, who supported Mrs. Ryall’s application for disability benefits and stated that she would never be able to return to work.

[9] The evidence of the family physician was contradicted by the opinions of the two specialists. In its reasons, the majority of the Board did not address the medical evidence from the specialists to the effect that Mrs. Ryall was capable of some form of gainful occupation at the end of her MQP. For example, the internist had Mrs. Ryall perform three stress tests between 1998 and 2004 to evaluate the condition of her heart. Each of those tests indicated that her heart condition was

stable. Additionally, the vascular surgeon stated in a report dated February 20, 2003, that Mrs. Ryall had been entirely asymptomatic and that she had noted no change in, *inter alia*, her memory.

[10] In my view, the majority of the Board reached its conclusion that Mrs. Ryall has a “severe” disability without regard to substantial medical evidence that was before the Board and did not provide a sufficient explanation for that conclusion. In particular, the majority of the Board provided no meaningful explanation for its apparent preference for the evidence of Mrs. Ryall’s family physician over the evidence provided by her specialists. In addition, I note that the majority of the Board appeared to focus on evidence with respect to Mrs. Ryall’s condition subsequent to December 31, 1999, the last day of her MQP, rather than her condition as of that date. Accordingly, I conclude that the decision of the majority of the Board is unreasonable.

[11] Moreover, correspondence from the internist, dated April 15, 2003, stated that Mrs. Ryall would likely be able to perform a job that did not require physical activity, such as walking or lifting. In light of this evidence of capacity to work, it was incumbent upon Mrs. Ryall to demonstrate that she made efforts to obtain and maintain employment. She provided no evidence of any such efforts. Instead, her evidence was to the effect that she voluntarily left her employment and did not attempt to seek alternate employment or retraining. The failure of the majority of the Board to consider this evidence supports my conclusion that their decision is unreasonable.

[12] For the foregoing reasons, I would allow this application for judicial review, set aside the decision of the Board and remit the matter to the Board for reconsideration by a differently constituted panel.

“C. Michael Ryer”

J.A.

“I agree.
J. Richard C.J.”

“I agree.
Marc Noël J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-293-07

**(APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF THE PENSION
APPEALS BOARD DECISION (CP 23620) DATED MAY 15, 2007)**

STYLE OF CAUSE: Attorney General of Canada
Applicant

and

Bernice Ryall
Respondent

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 30, 2008

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: RICHARD C.J.
NOËL J.A.

DATED: MAY 1, 2008

APPEARANCES:

Allan Matte

FOR THE APPLICANT

No one appeared on behalf of the respondent

FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE APPLICANT

FOR THE RESPONDENT