Date: 20080627

Docket: A-171-07

Citation: 2008 FCA 225

CORAM: **SEXTON J.A.**
BLAIS J.A.
EVANS J.A.

BETWEEN:

JANUSZ J. KAMINSKI

Applicant

and

MINISTER OF SOCIAL DEVELOPMENT

Respondent

Heard at Toronto, Ontario, on June 12, 2008.

Judgment delivered at, Ottawa, Ontario, on June 27, 2008.

REASONS FOR JUDGMENT BY: BLAIS J.A.

CONCURRED IN BY: SEXTON J.A.
EVANS J.A.

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REASONS FOR JUDGMENT

BLAIS J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (PAB) dated March 6, 2007 (Appeal 24548) dismissing the appeal of Mr. Janusz J. Kaminski (the applicant). The PAB held that the applicant failed to substantiate his claim that he is "disabled" within the meaning of the *Canada Pension Plan*, R.S.C. 1985, c. C-8. His condition was not prolonged and severe as required by section 42.(2):

When Person Deemed Disabled:	**Personne déclarée invalide :**
42. (2) For the purposes of this Act,	42. (2) Pour l'application de la présente loi :
(a) a person shall be	a) une personne n'est considérée comme invalide que si elle est

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;

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

BACKGROUND

[2] The applicant was born in Poland in 1951. He worked in Poland for twelve years as a qualified refractory bricklayer. After a short period of time in Germany, he came to Canada in 1988, where he became a member of the bricklayers' union with whom he worked from 1990 to 2000. Not having paid his union dues, he was dropped from the union in September 2000. He explained that he was not given enough work through the union to earn money to support his family and pay the union as well. He has not been employed since 2000.

[3] The applicant was subsequently granted an Ontario Disability Support Program ("ODSP") benefit in August 2000. However this benefit was discontinued in November 2002 due to his non-compliance with the Program's guidelines and requirements. Specifically, the applicant had refused to attempt retraining by ODSP and had limited his search for employment to a field which would educate him as an artist. Going forward, the applicant's desire to become an artist became so all consuming that he refused to consider alternative modes of employment.

[4] On January 2, 2003, the applicant applied for Canada Pension Plan Disability Benefits. In doing so, he indicated that he had stopped working due to a "shortage of work", but that as of April 2001 he felt himself incapable of working due to his medical condition. To this end, the applicant described his disabling conditions as sharp pain in his arms, elbows and wrists; pain in his upper and lower back, knees and ankles; as well as cracks in every joint. His application was denied initially and upon reconsideration on February 19, 2003 and July 21, 2003 respectively. His appeal to the Review Tribunal (RT) was unsuccessful.

[5] The applicant was granted leave to appeal the RT's decision to the PAB, which, on March 6, 2007, dismissed his appeal in a unanimous decision. In disposing of the appeal, the PAB undertook a detailed review of the medical evidence, placing considerable emphasis on what it viewed as the applicant's failure to seek retraining or suitable employment, and his general disregard for the treatments recommended to him by the various medical professionals whom he visited. Ultimately, the PAB concluded that the applicant's diagnosis of fibromyalgia, either by itself or in conjunction

with osteoarthritis and/or depression, was not enough to support a finding of disability under the *Canada Pension Plan.*

ISSUE

[6] The issue raised by this application is as follows:

> Did the PAB commit a reviewable error in determining that the applicant was not "disabled" pursuant to the *Canada Pension Plan*?

STANDARD OF REVIEW

[7] As a result of the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), the two variants of reasonableness review, patent unreasonableness and reasonableness *simpliciter*, have been collapsed such that there is now only one form of "reasonableness" review. Accordingly, in determining which of the remaining standards of review, correctness or reasonableness, is applicable within a given set of circumstances, the Court proposed a two step process:

> First courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review (*Ibid*. at paragraph 62).

[8] In light of past jurisprudence indicating that it is "trite law that the applicable standard in regard to decisions of the Board determining disability is that of patent unreasonableness," (*Osborne v. Canada (Attorney General)*, 2005 FCA 412, [2005] F.C.J. No. 2043 (QL) at paragraph 3), I am of the view that, after *Dunsmuir*, the appropriate standard of review of this question of mixed fact and

law is now reasonableness. Accordingly, the intervention of this Court will only be warranted where the impugned decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, *supra* at paragraph 47).

[9] To succeed in his application, the applicant must establish on a balance of probabilities that he has suffered from a severe and prolonged mental or physical disability which renders him incapable of pursuing any substantially gainful occupation pursuant to sections 42 and 44 of the *Canada Pension Plan*.

[10] The role of this Court on judicial review is not to reweigh the evidence already assessed by the PAB but to examine if the PAB made a reviewable error in light of the evidence that was before it.

[11] The applicant's minimum qualifying period (MQP) was dated December 31, 2002. I am satisfied that on the record before it, it was not unreasonable for the PAB to conclude that the applicant had not established that, at that time, he suffered from a severe and prolonged disability pursuant to the *Canada Pension Plan*. To this end, I note that the PAB appropriately considered all the evidence before it, including the objective medical evidence provided by the applicant's treating physicians, as well as the *viva voce* evidence of the applicant and the Minister's expert witness, Dr. Laura Heung.

[12] Dr. Debra Feldman, the applicant's treating physician, noted on the medical report dated December 18, 2002 that the applicant's mental and physical conditions were osteoarthritis, fibromyalgia and depression. However, in June 2002, rheumatologist Dr. Elaine Soucy had described the applicant's osteoarthritis as "mild and not very significant". Moreover, while she confirmed that the applicant did suffer from fibromyalgia, her prescribed treatment plan was limited to exercise and a muscle relaxant; there was no mention that the applicant was incapable of work.

[13] The PAB did not refer in its reasons to the statement by Dr. Feldman in a report dated December 17, 2002, that she felt that the applicant was unable to engage in any employment because of his disability. However, when the medical record as a whole is considered, as well as the terse nature of Dr. Feldman's statement, this item of evidence is not so significant that the PAB's failure to discuss it justifies the Court's intervention.

[14] The evidence also provides that the applicant was resistant to treatment from his treating family physician and specialists. He did not want any medication.

[15] In terms of the applicant's employment prospects, the PAB acknowledged the applicant's failure to search for employment from his own testimony, which was later bolstered by the testimony of his wife, and the documentary evidence indicating his general unwillingness to participate in job placements not related to his intention of pursuing an artistic career. In fact, the applicant candidly recognized before the PAB that he would have continued working as a bricklayer in 2002, if he had not been laid off.

[16] The law requires an inquiry into whether the individual at issue is capable of pursuing any substantially gainful employment. Accordingly, the applicant must be prepared to pursue employment opportunities beyond his passion. I find the reasons of the PAB in this regard while blunt, to be determinative:

> Mr. Kaminski may be right about his potential as an artist. However, in the "real world" individuals must find the means to sustain themselves in a practical way if they do not have the financial means to "follow their dreams." One does not always have the luxury of pursuing their employment of choice (*Appeal CP 24548, supra* at paragraph 34).

[17] For these reasons, I would dismiss the application for judicial review. The respondent did not request costs, and none should be awarded.

"Pierre Blais"
J.A.

"I agree.
J. Edgar Sexton J.A."

"I agree.
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	June 27, 2008

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