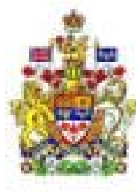
Federal Court of Appeal



Cour d'appel fédérale

Date: 20100708

Docket: A-221-09

Citation: 2010 FCA 181

CORAM: SHARLOW J.A.
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

JOHN P. FARRELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

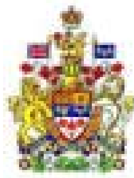
Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on July 8, 2010.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SHARLOW J.A.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is a judicial review of a decision of the Pension Appeals Board, dated December 1, 2008. The Board dismissed the appellant's claim for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "Plan").

[2] Under the Plan, the applicant is entitled to disability benefits only if his disability is "severe" and "prolonged" at a particular date, namely the last day of the "minimum qualifying period."

Parliament has chosen to define "severe" in a narrow way, rather than allowing it to have a broader dictionary definition.

[3] Under any dictionary definition, the applicant has experienced severe health problems and pain, to be sure. But both the Board and this Court are obligated to consider Parliament's words in the Plan, not dictionary definitions. By virtue of subparagraph 42(2)(*a*)(i) of the Plan, Parliament provides that a disability is severe only if "by reason thereof the [applicant] is incapable regularly of pursuing any substantially gainful occupation" as of the end of the "minimum qualifying period."

[4] The Board found that the applicant's disability did not fall within the words chosen by Parliament. In this application, this Court is obligated to defer: it is restricted to an examination of whether the Board's decision is reasonable in the sense that it falls within a range of outcomes that are possible and acceptable, given Parliament's words in subparagraph 42(2)(*a*)(ii), and that are defensible in respect of the facts and the law.

[5] I find that the Board's decision is reasonable and would dismiss the application.

A. Facts

(1) The accident and injury

[6] In 1994, the applicant began work at the Eskay Creek Mine as a crusher operator. On his first day of work at the mine, he slipped on a wet cement floor, fell backwards and put his right hand behind him to try to brace his fall. He fell awkwardly: he landed with his right forearm in an upward position, with his right wrist, thumb and index finger in extension. As an unfortunate result, he tore the ulnar collateral ligament of his right thumb, forcibly hyperextending it.

(2) The procedural history in summary

[7] The applicant sought disability benefits under the Plan for this injury in January 1996 and October 1999. Both times, his application was rejected. Both times, he appealed to a review tribunal and his appeals were denied. He applied to reopen the later of the two appeals. A series of proceedings then followed, including two reviews by the Federal Court. This culminated in the decision of the Board dated December 1, 2008, which is the subject of the application for judicial review before this Court. The Board conducted a full rehearing on the applicant's disability claim based on all of the available evidence and dismissed his claim. I discuss the Board's decision in further detail in paragraphs 11 to 20, below.

(3) The minimum qualifying period

[8] Under subsection 42(2) of the Plan, claimants must establish that they have a “disability” that is “severe,” *i.e.* “incapable regularly of pursuing any substantially gainful occupation” as of the end of the “minimum qualifying period.”

[9] In the administrative proceedings below, it was determined that the applicant’s “minimum qualifying period” ended on December 31, 1997. This determination has not been placed in issue in this Court. Accordingly, in order to receive disability benefits under the Plan, the applicant had to establish that, as of December 31, 1997, he had a “disability” that was “severe,” *i.e.* that rendered him “incapable regularly of pursuing any substantially gainful occupation.” This was the focus of most of the administrative proceedings below, including the Board’s decision, which is the subject of this application.

(4) The evidentiary record

[10] The large number of administrative proceedings in this matter has created a sizeable evidentiary record on the issue whether, as of December 31, 1997, the applicant had a “disability” that was “severe,” *i.e.* one that rendered him “incapable regularly of pursuing any substantially gainful occupation”:

(a) On January 10, 1996, the applicant submitted his first application for disability benefits. He wrote that he could no longer work because his thumb on his right hand was "very sore when moved." He denied other health-related impairments. At the time, he was taking Tylenol #3, twice daily. His application for disability benefits was denied.

(b) The applicant appealed to a Review Tribunal. In his testimony, he stated that he could not return to his job as a rock crusher and could not operate or maintain equipment. However, he conceded that there were other types of jobs he could do, such as delivering pizzas, doing light cleaning, or night security. At this time, August 7, 1997, the applicant was looking after his own personal care, he could cut his grass, and he was walking 3-4 hours a day to keep fit. From this evidence, the Review Tribunal concluded that he did have the ability to do some type of work. Therefore, in the words of Parliament in subparagraph 42(2)(*a*)(i) of the Plan, he was not "incapable regularly of pursuing any substantially gainful occupation." He did not have a disability that was "severe" under that narrow definition.

(c) On January 29, 1998, just four weeks after the end of his "minimum qualifying period," the applicant returned to work at the mine. He was to resume twelve hour shifts, with two weeks on duty and two weeks off duty. By letter dated July 28, 1998, the mine reported that shovelling, hammering and tasks involving vibration were a problem, so he was required to moderate the work he was doing. He was able

to work a forklift, but he could not be promoted beyond the position of surface operator. In 1998, the applicant earned employment income of $40,090. All of this tends to show that he was experiencing much discomfort – but not that he was "incapable regularly of pursuing any substantially gainful occupation" as of December 31, 1997.

(d) Early in 1999, the applicant continued to work at the mine as a forklift operator. He would also drive fellow workers to the hospital and help clear snow. However, he stopped working on April 25, 1999 because of the pain in his hand, which would swell up. This cessation of work happened about sixteen months after the end of the minimum qualifying period under the Plan.

(e) On October 8, 1999, the applicant applied again for disability benefits under the Plan. He stated that he could no longer work because of his medical condition, as of March 25, 1999, which was 15 months after the end of the minimum qualifying period under the Plan. The applicant's application was denied and he appealed again to the Review Tribunal.

(f) The Review Tribunal dismissed the appeal on May 19, 2000. It noted the previous decision that the applicant had not suffered any disability within the meaning of the Plan. It found that there were no new facts suggesting that the applicant was "incapable regularly of pursuing any substantially gainful occupation" as of the end

of the minimum qualifying period. It is important to note that Review Tribunal was not saying that the applicant was healthy and experiencing no pain in 2000. Far from it. Rather, it was simply saying that Parliament's definition of severe disability in subparagraph 42(2)(*a*)(i) of the Plan was not met.

(g) The applicant applied for leave to appeal to the Board. The Board dismissed the application for leave to appeal, noting that the applicant worked after the end of the minimum qualifying period. The applicant then applied to re-open his case, based on new facts, in a complicated and long series of proceedings. These culminated in a Review Tribunal decision on February 16, 2005.

(h) The Review Tribunal found that there was a new fact: the applicant suffered from severe depression during the minimum qualifying period. However, the evidence still showed that the applicant was working as of the end of that period and shortly afterward, earning income. Indeed, the applicant testified that during this time, he was required to drive eight hours in one shift driving injured workers to the hospital and sometimes would make two trips, back-to-back. In the view of the Review Tribunal, Parliament's definition of severe disability in subparagraph 42(2)(*a*)(i) of the Plan was not met.

(i) The Board granted the applicant leave to appeal from that decision and, after a hearing, rejected the applicant's claim, but a later judicial review set aside that

decision. The matter came back to the Board for redetermination. By decision dated December 1, 2008, the Board rejected the applicant's claim. This is the decision that the applicant has brought before this Court for review.

(5) The Board's decision

[11] The Board conducted a full rehearing of the applicant's disability claim based on all of the available evidence, much of which I have summarized above. The Board's reasons for decision are 76 pages long and contain an encyclopedic review of the appellant's background, his injury, and all of the evidence, especially medical evidence, accumulated in the various administrative hearings, including the hearing before it.

[12] The Board found that the applicant worked at the mine in 1998 and 1999 and so in the two year period after the minimum qualifying period, he remained capable of work. The Board also found that there was no evidence of any genuine attempt by the applicant to find other, less demanding work, which he was capable of doing.

[13] The Board then reviewed the relevant law. It began its analysis with an important observation (at paragraph 69): "[t]he provisions of other public and private plans for disability pensions or other similar periodic payments vary from those involved here." This is true: while some other private and public plans grant benefits for conditions that make it difficult to work, or difficult to work in some occupations, the Plan is quite different, and more restrictive.

[14] The Board then reviewed Parliament's rules that determine eligibility for a disability pension under the Plan (at paragraph 69). It correctly called them "strict and inflexible." It added that the threshold for a disability pension under the Plan is a "high and stringent" one.

[15] Next (also in paragraph 69), the Board considered paragraph 42(2)(*a*) of the Plan. Paragraph 42(2)(*a*) of the Plan reads as follows:

42. (2) For the purposes of this Act,	**42.** (2) Pour l'application de la présente loi:
(*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,	*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) 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	(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) 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;	(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;

Looking at this statutory language, the Board noted that the appellant would have to show that his disability was "severe" (see subparagraph 42(2)(*a*)(i)) and "prolonged" (see subparagraph

42(2)(*a*)(ii)). In particular, it noted that Parliament has defined "severe" (in subparagraph 42(2)(*a*)(i)) as meaning "incapable regularly of pursuing any substantially gainful occupation."

[16] The Board found that the appellant had made valid contributions to the Plan for the minimum qualifying period. So the only significant issue for the Board to determine was whether the appellant was "incapable regularly of pursuing any substantially gainful occupation."

[17] Having set out this legal framework for its analysis, the Board next turned to the jurisprudence of this Court. This Court has interpreted Parliament's words in paragraph 42(2)(*a*) of the Plan on several occasions.

[18] The Board began (at paragraph 71) with this Court's leading decision on paragraph 42(2)(*a*) of the Plan: *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C. 130. This Court held (at paragraph 38) that paragraph 42(2)(*a*) requires a consideration of occupations that a claimant might be able to pursue "with consistent frequency," bearing in mind "the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience." However, the words of paragraph 42(2)(*a*) are clear: they do not entitle "everyone with a health problem who has some difficulty finding and keeping a job" to a disability pension (at paragraph 50). Rather, a disability pension under the Plan can only be given to those who, through "medical evidence" and "evidence of employment efforts and possibilities," show that they suffer a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation" (at paragraph 50).

[19] Later decisions of this Court, cited by the Board, have reconfirmed and amplified upon these tough requirements. In *Minister of Human Resources Development v. Scott*, 2003 FCA 34, 300 NR 136, this Court emphasized that if claimants can pursue "any substantially gainful occupation," they are ineligible (at paragraph 7). In *Inclima v. Attorney General of Canada*, 2003 FCA 117, 121 A.C.W.S. (3d) 363 this Court (at paragraph 3) reiterated that where there is "evidence of work capacity," claimants must show that "efforts at obtaining and maintaining employment have been unsuccessful" because of a serious health problem." The Board cited both of these decisions for these propositions.

[20] Finally, the Board applied Parliament's wording in paragraph 42(2)(*a*) and the judgments of this Court, mentioned above, to the voluminous evidentiary record before it. It made the following findings:

(a) During 1998-1999, the appellant did work, and "was doing a substantial percentage of the work his position called for" (at paragraph 88). The Board properly acknowledged that there was evidence before it that suggested the contrary. However, it looked at all of the evidence, weighed it, and came to its conclusion.

(b) The appellant did have "the physical capacity to do the type of work that would recognize his physical and educational limitations" and so he did not meet the

requirement, in paragraph 42(2)(*a*), of being "incapable regularly of pursuing any substantially gainful occupation" (at paragraph 88).

(c) During 1998-1999, when the appellant was at work at the mine, he had physical and psychological problems. However, these problems did not prevent the appellant from performing work such as light cleaning, light deliveries or night security (at paragraph 99).

(d) There was "virtually no evidence" of any attempt by the appellant to find "other, less demanding work which he was capable of doing" (at paragraph 100).

(e) Accordingly, the appellant "did not have a disability as defined in s. 42(2)(*a*) of the Plan" at the end of the minimum qualifying period and "for some time after that."

[21] As mentioned above, the applicant has brought a judicial review of the Board's decision to this Court.

(6) Proceedings in this Court

[22] The applicant asked that this Court consider his application for judicial review on the basis of written submissions only. This Court has the jurisdiction to consider a judicial review on the basis of written submissions only.

[23] All of the members of this panel of the Court have reviewed, studied and considered carefully the written submissions of the parties, the legal authorities offered by the parties, all of the administrative proceedings below, the large volume of evidence that was before the Board when it made its decision, and the Board's decision.

B. Analysis

[24] As mentioned at the outset of these reasons for judgment (at paragraphs 3 and 4), this Court's power has definite limits. It is restricted in three very important ways.

[25] First, unless a constitutional objection is present (and none has been raised here), this Court must follow the laws that Parliament has written, as they have been written. In subparagraph 42(2)(*a*)(i) of the Plan, Parliament provides that a disability is severe only if "by reason thereof the [applicant] is incapable regularly of pursuing any substantially gainful occupation" as of the end of the "minimum qualifying period." The Court, and all of the administrative bodies and the Board, below, for that matter, cannot change that language. All must apply it as written.

[26] Second, this Court's earlier decisions are binding on this Court and cannot be changed, unless they are "manifestly wrong": *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. The Board stated and applied those decisions. This Court must apply them too.

[27] Third, and most importantly, in cases like this, the Supreme Court of Canada, which binds us, has said that this Court is not allowed to act like the Board, with all of the fact-finding and other powers that the Board has. Rather, in cases like this, this Court has the power only to review – not redo – the Board's decision in light of the factual findings it made. The Supreme Court tells us that in reviewing the decision, we are to ask ourselves this question: did the Board's decision fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law? (See *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at paragraph 47).

[28] Quite simply, this Court can only apply Parliament's law (in paragraph 42(2)(*a*) of the Plan), look at all of the evidence available to the Board, and consider whether the decision that the Board made was one that was within the range of possibilities available to it.

[29] Specifically, in this case, this Court is to look at the Board's findings and conclusions in paragraphs 11 to 20, above, and ask whether, based on the law in paragraph 42(2)(*a*) of the Plan and this Court's decisions, and based on the evidence before the Board, the Board could have made the legal findings, the factual findings, and the conclusions that it did.

[30] I conclude that the Board did make legal findings that were consistent with Parliament's law and this Court's earlier decisions. It made factual findings that were open to it, based on the evidence before it. With this law and these facts before it, the Board could reasonably conclude that the appellant was not "incapable regularly of pursuing any substantially gainful occupation" under

paragraph 42(2)(*a*) of the Plan at the end of the minimum qualifying period and for some time after that.

[31] Therefore, this Court has no ground upon which it can set aside the Board's decision, and so I would dismiss the application. Costs should follow the event. The respondent seeks $500 in costs and, given the size of the record in this case, this is a nominal amount.

C. Proposed disposition

[32] Accordingly, I would dismiss the application, with costs to the respondent in the amount of $500.

"David Stratas"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-221-09
STYLE OF CAUSE:	John P. Farrell v. Attorney General of Canada

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Sharlow J.A. Layden-Stevenson J.A.
DATED:	July 8, 2010

WRITTEN REPRESENTATIONS BY:

John P. Farrell	ON HIS OWN BEHALF
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT