

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111117

Docket: A-156-11

Citation: 2011 FCA 316

**CORAM: NADON J.A.
SHARLOW J.A.
DAWSON J.A.**

BETWEEN:

HARALAMBOS KIRIAKIDIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 17, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on November 17, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on November 17, 2011)

DAWSON J.A.

[1] The Pension Appeals Board denied Mr. Kiriakidis' claim for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan). The Board was not satisfied that Mr. Kiriakidis' disability was severe within the meaning of subparagraph 42(2)(a)(i) of the Plan as at December 31, 2001, the end of his minimum qualifying period for benefits.

[2] Subparagraph 42(2)(a)(i) of the Plan provides:

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 [emphasis added]

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, [Non souligné dans l'original.]

[3] On this application for judicial review of that decision, Mr. Kiriakidis argues that the Board erred in law in failing to apply the principles established by this Court in *Villani v. Canada (Attorney General)*, [2002] 1 F.C. 130.

[4] In *Villani*, this Court held that, when applying subparagraph 42(2)(a)(i) of the Plan, the Board is required to take a “real world” approach. This requires the Board to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing any substantially gainful occupation.

[5] In our respectful view, the Board did not err as asserted by Mr. Kiriakidis. Mr. Kiriakidis bore the burden of establishing that he suffered from a severe and prolonged mental or physical disability on or before December 31, 2001. For the disability to be severe, Mr. Kiriakidis had to be incapable of “regularly of pursuing any substantially gainful occupation.” However, the evidence before the Board included the following:

1. In the Questionnaire for Disability Benefits completed by Mr. Kiriakidis, he reported that his last day on the job was in 2003 (page 101, applicant's record) and it was only in 2004 that he could no longer work because of his medical condition (page 103, applicant's record).

2. In a report dated December 3, 2001, his orthopaedic specialist, Dr. Tile, advised that:

This man returned for review. He is expanding his business now to include renovations and luckily he has two guys working with him.

He says it is mostly his lower back that bothers him. He is having very little pain in his hip and doesn't require analgesics or Ansaids. He walks with virtually no limp.

Surprisingly therefore his x-ray shows progression. The osteoarthritis in his right hip is showing more joint narrowing than in March. His spinal portion of the pelvic x-ray looks quite good. He could bend over and virtually touch the floor today. His hip is stiff and painful.

At this time, he wishes to just carry on. He is obviously coping very well. We did discuss the future and will wait and see what happens.

Return in 6 mos., assessment, x-ray.

[emphasis added]

3. In a report dated January 21, 2003 Dr. Tile stated that:

Mr. Kiriakidis is doing reasonably well. He is doing his renovation business with two other workmen, but he is actually doing the work himself. He is an electrician by trade.

He walks well. He gets up out of the chair well. He has a good range of motion.

His x-rays show progression of the osteoarthritic right hip, but minimally so.

At this time he is coping reasonably well and should not proceed to hip arthroplasty. He takes occasional medication.

We should follow him along. I have told him to call me should something suddenly happen, otherwise we will see him in a year's time, x-ray right hip and pelvis.

[emphasis added]

[6] On this evidence it was reasonable for the Board to conclude that Mr. Kiriakidis “not only had the capacity to work as of December 2001, but did work.” (Reasons of the Board at paragraph 54).

[7] Mr. Kiriakidis argues that this conclusion fails to consider his testimony that his medical condition was such that he was unable to devote enough time to his business to make it successful, with the result that he was forced to declare bankruptcy. It follows, he says, that the severity of his medical condition was such that he was unable to engage in truly remunerative work with consistent frequency. The difficulty with the submission is that the profitability of Mr. Kiriakidis' business venture is not necessarily an indicator of his capacity to do work. This leaves only the evidence cited above which does support the conclusion of the Board that he did not meet the statutory test at the relevant time.

[8] For these reasons, the application for judicial review will be dismissed. The respondent did not seek costs, no costs are awarded against the applicant.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-156-11

(AN APPEAL FOR JUDICIAL REVIEW OF A DECISION OF THE PENSION APPEALS BOARD, DATED MARCH 14, 2011, DOCKET NO. PAB NO: CP26893)

STYLE OF CAUSE: HARALAMBOS KIRIAKIDIS v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 17, 2011

REASONS FOR JUDGMENT OF THE COURT BY: (NADON, SHARLOW AND
DAWSON JJ.A.)

DELIVERED FROM THE BENCH BY: DAWSON J.A.

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