

Docket: 2006-1406(IT)I

BETWEEN:

LEROY LEWIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on July 12, 2007, at Gander, Newfoundland

Before: The Honourable Justice E.P. Rossiter

Appearances:

Agent for the Appellant: Wayne Budgell

Counsel for the Respondent: Lindsay Holland

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2003 taxation year is dismissed.

Signed at Ottawa, Canada, this 20th day of November, 2007.

"E. P. Rossiter"

Rossiter, J.

Citation: 2007TCC416
Date: 20071120
Docket: 2006-1406(IT)I

BETWEEN:

LEROY LEWIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rossiter, J.

Introduction/Background

[1] The Appellant has received for several years, a disability tax credit because of the disability in vision suffered by his son, Derrick Lewis (“Derrick”). This credit was denied by Canada Revenue Agency (“CRA”) in 2003 and the matter was eventually appealed to this Court.

Issues

[2] Is Leroy Lewis entitled to the disability tax credit for his son, Derrick, for the 2003 taxation year pursuant to section 118.3 of the *Income Tax Act* (“Act”)? To answer this question, three sub-issues must be addressed:

- (i) Is Derrick’s impairment one that lasts or can reasonably be expected to last for a continuous period of at least twelve months as outlined in paragraph 118.4(1)(a)?

- (ii) If yes, is Derrick's ability to perform a basic activity of daily living, as outlined in paragraph 118.4(1)(c), markedly restricted?
- (iii) If not, is Derrick blind as required in paragraph 118.4(1)(b)?

Facts

[3] Leroy and Janine Lewis are the parents of Derrick Lewis born November 27, 1986. Derrick was born with a brain tumour and at five months of age he underwent surgery and radiation treatment. At nine years of age, Derrick underwent another surgery for the tumour which left him blind in the right eye and significantly impaired his vision in the left eye. At twelve years of age, Derrick underwent a further unsuccessful surgery. Today, he is completely blind in the right eye and has a visual acuity of 20/50 on the Snellen Chart in his left eye (with a visual field of 80 degrees and a visual acuity of 20/125 on a 10 feet chart). The ongoing treatment and travel was at considerable expense to the Appellant and eventually bankrupted the family.

[4] Derrick also experienced other issues.

- (1) He had no self-esteem;
- (2) He had a problem chewing his food because of the effect the radiation had on his teeth;
- (3) He was small in size and at approximately 80 pounds appeared to be significantly underweight;
- (4) He ate very lightly;
- (5) He could not be involved in any sports;
- (6) He had some problems with perception, thinking and remembering;
- (7) He could walk, speak, hear and care for his personal hygiene;
- (8) He was unable to train for a trade or really obtain any means of employment.

[5] For several years, the Appellant applied for and received a disability tax credit for Derrick. In 2003, CRA sought a new Disability Tax Credit Certificate which was

provided by the Appellant through the child's family physician, Dr. T. Ponnampalam. The Certificate was dated March 2, 2000 and it stated that Derrick had an optic chiasmatic tumour and that his vision would be permanently restricted.

[6] The following question and related explanation were contained in the form provided by CRA: "Is your patient able to see, using corrective lenses if necessary?"
(Your patient is considered blind if visual acuity in both eyes with proper refractive lenses is 20/200 (6/60) or less with Snellen Chart or equivalent, or when the greatest diameter of the field of vision in both eyes is less than 20 degrees.)

Dr. Ponnampalam answered "no".

[7] Dr. Ponnampalam responded positively to questions relating to the child's walking, speaking, mental, hearing, feeding and dressing and elimination functions. In response to the question, "Has the impairment lasted, or is it expected to last, for a continuous period of at least twelve months?", Dr. Ponnampalam ticked "yes". He also ticked "yes" and wrote in "Nothing has changed" to the question, "Is the impairment severe enough to restrict the basic activity of daily living identified above, all or almost all the time, even with therapy and the use of appropriate aids and medication?"

[8] On March 9, 2004, another Disability Tax Credit Certificate was provided by Dr. N. Hanna, the new family physician for Derrick. Dr. Hanna ticked "yes" to all the questions asking whether the patient was well enough to walk, speak, perceive, think, remember, hear, feed or dress himself, or manage bowel or bladder functions. But in response to the question "What is your patient's visual acuity after correction?" Dr. Hanna wrote "focal light perception" for the right eye and "20/25" for the left eye. He left the question "What is your patient's visual field? (if possible in degrees)" blank and he wrote "astrocytoma optic nerve" in the margin.

[9] Dr. Hanna answered "yes" to the question "Has your patient's marked restriction in a basic activity of daily living, blindness, or need for life-sustaining therapy lasted, or is it expected to last, for a continuous period of at least 12 months?" and in respect of the diagnosis, Dr. Hanna said, "Tumour of right optic nerve – blindness in the right eye. Partial decrease in vision on left eye (20/25). The tumour was handled surgically."

[10] Dr. Hanna had to complete a lengthy questionnaire for a new Disability Tax Certificate, dated June 9, 2004. He ticked as not applicable all questions relating to

walking, speaking, hearing, dressing, feeding, elimination (bowel or bladder functions), perceiving, thinking and remembering and life-sustaining therapy. He answered “yes” to the question “Is your patient blind, as described above?” and he noted that Derrick was registered with the Canadian National Institute for the Blind (CNIB).

[11] When asked, “If *yes*, when did your patient’s blindness begin?” he wrote in “1987”. And when asked “What is your patient’s visual acuity after correction?” he wrote “completely blind” for the right eye and “20/50 Snellen Chart” for the left eye. As for the question “What is your patient’s visual field after correction (in degrees if possible)?” he wrote “right eye permanently blind” and “not tested” for the left eye.

[12] He answered “yes” to the question “Has your patient’s impairment lasted, or is it expected to last for a continuous period of at least 12 months?” He answered “no” to the question “If *yes*, has the impairment improved, or is it likely to improve, such as the patient would no longer be markedly restricted, blind, or in need of life-sustaining therapy?” and he wrote “permanent” in response to the question “If *yes*, state the year that the improvement occurred, or may be expected to occur.”

[13] To answer CRA’s assertions that Derrick did not meet the visual acuity requirements to be classified as blind, Dr. Hanna stated on November 5, 2004 that:

I reviewed Derrick again on November 5, 2004 at the clinic. On examination of visual acuity right eye was completely blind, the left eye had a visual acuity v/a of 20/125 on the 10 feet chart and a visual field of approximately 80 degrees by confirmation...method.

[14] Dr. Hanna said “no” to the question “Is your patient’s ability to see likely to improve (i.e. with corrective surgery, corneal transplant, photodynamic / photocoagulation therapy)?” and he went on to state:

Derrick underwent 3 major surgeries & radiation due to optic chiasmatic tumour, which caused complete blindness in right eye due to permanent damage to optic nerve (atrophy) with partial visual loss of left eye. If more details needed, specialist referral is warranted.

The Position of the Appellant

[15] The Appellant asserts that he is entitled to the disability tax credit because his son Derrick is blind or he is unable to perform the basic activities of living as described in subsection 118.4(1) of the *Act*.

The Position of the Respondent

[16] The Respondent asserts that Derrick is able to perform the basic activities of daily living substantially all of the time as described in subsection 118.4(1) of the *Act* and that he is not blind in both eyes thereby disentitling the Appellant to the disability tax credit.

Analysis

[17] Section 118.3 of the *Act* provides for a disability tax credit. This section refers to an individual having a severe and prolonged mental and physical impairment and, for a sight impairment, it requires the production of a certificate in prescribed form from a medical doctor or optometrist.

[18] Subsection 118.4(1) states as follows:

Nature of Impairment

118.4.(1)For the purposes of subsection 6(16), sections 118.2 and 118.3 and this subsection,

(a) an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months;

(b) an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living;

(c) a basic activity of daily living in relation to an individual means

(i) perceiving, thinking and remembering,

(ii) feeding oneself or dressing oneself,

(iii) speaking so as to be understood, in a quiet setting, by another person familiar with the individual,

(iv) hearing so as to understand, in a quiet setting, another person familiar with the individual,

(v) eliminating (bowel or bladder functions), or

(vi) walking;

(d) for greater certainty, no other activity, including working, housekeeping or a social or recreational activity, shall be considered as a basic activity of daily living; and

(e) feeding oneself does not include

(i) any of the activities of identifying, finding, shopping for or otherwise procuring food, or

(ii) the activity of preparing food to the extent that the time associated with the activity would not have been necessary in the absence of a dietary restriction or regime; and

(f) dressing oneself does not include any of the activities of identifying, finding, shopping for or otherwise procuring clothing.

(2) For the purposes of sections 63, 118.2, 118.3 and 118.6, a reference to an audiologist, dentist, medical doctor, medical practitioner, nurse, occupational therapist, optometrist, pharmacist, psychologist or speech-language pathologist is a reference to a person authorized to practice as such,

(a) where the reference is used in respect of a service rendered to a taxpayer, pursuant to the laws of the jurisdiction in which the service is rendered;

(b) where the reference is used in respect of a certificate issued by the person in respect of a taxpayer, pursuant to the laws of the jurisdiction in which the taxpayer resides or of a province; and

(c) where the reference is used in respect of a prescription issued by the person for property to be provided to or for the use of a taxpayer, pursuant to the laws of the jurisdiction in which the taxpayer resides, of a province or of the jurisdiction in which the property is provided. [Emphasis Added]

[19] Subsection 118.4(1) provides that an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months. There is no question that this exists in the case at bar. This case comes down to whether or not Derrick is blind in both eyes or is unable to perform the listed basic activities of daily living.

[20] As sad, as tragic, and as heartbreaking as the case is for the parents of Derrick, I do not find the evidence sufficient to make a finding that Derrick is unable to perform the basic activities of daily living as described in paragraph 118.4(1)(c) of the *Act*. Derrick can perceive, think and remember, he can feed and dress himself, he can speak and hear, and he can walk and carry out elimination functions.

[21] This case turns on whether or not Derrick is blind and, according to the Respondent, he must be blind in both eyes.

[22] In *Johnston v. R.*, [1998] 2 C.T.C. 262 (Fed. C.A.), the Federal Court of Appeal (“FCA”) said at paragraph 10:

The purpose of sections 118.3 and 118.4 is not to indemnify a person who suffers from a severe and prolonged mental or physical impairment, but to financially assist him or her in bearing the additional costs of living and working generated by the impairment. As Bowman T.C.J. wrote in *Radage v. R.*, [[1996] 3 C.T.C. 2510 (T.C.C.)] at p. 2528:

The legislative intent appears to be to provide a modest relief to persons who fall within a relatively restricted category of markedly physically or mentally impaired persons. The intent is neither to give the credit to every one who suffers from a disability nor to erect a hurdle that is impossible for virtually every disabled person to surmount. It obviously recognizes that disabled persons need such tax relief and it is intended to be of benefit to such persons.

The learned Judge went on to add, at p. 2529, and I agree with him:

If the object of Parliament, which is to give to disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved the provisions must be given a humane and compassionate construction.

[23] The majority of the FCA in *Johnston* noted that while the provisions are limited in their application to severely impaired persons, the provisions themselves must not be interpreted so restrictively so as to negate or compromise the legislative intent.

The Meaning of the Term Blind

[24] The *Act* does not define what it is to be blind. In *Blondin v. R.*, [1996] 1 C.T.C. 2063 (T.C.C.) (Informal Procedure) at paragraph 21, Chief Justice Couture made the following comments to help guide this Court in determining whether an individual is blind for the purposes of the *Act*:

... As Parliament has not given a definition of the word "blind", the onus is on the Court to determine on the basis of the evidence whether a person is blind or not for

the purposes of eligibility for the income tax credit, while ensuring that the description of the condition of that person as described in the form is indeed that of a blind person within the meaning that must be given to that word. It would be far preferable for Parliament to define what it means by a blind person for the purposes of the *Act*, as it has done for the other conditions, rather than leave taxpayers with the impression that an appreciable reduction in their sight could render them eligible for the income tax credit.

[25] Chief Justice Couture eschewed numeric or quantifiable definitions of blindness, preferring instead to make a factual assessment on the basis of the evidence. On the facts in *Blondin*, he found the Appellant was not blind since he could read large characters in the newspapers and even drive a vehicle.

[26] In Form T2201, the CRA has attempted to define what it is to be “blind” for the purpose of the disability tax credit. Part B says that an individual will be considered blind if, even with the use of corrective lenses or medication, “visual acuity in both eyes is 20/200 (6/60) or less with the Snellen Chart (or equivalent) or the greatest diameter of the field of vision in both eyes is 20 degrees or less.” The CRA cannot legislate the definition of blindness for the purpose of the *Act*, that is the role of Parliament. Chief Justice Couture said as much in *Blondin* at paragraphs 20 and 21:

20 It should be noted that, in paragraph 4, entitled "Vision", of Part B of the prescribed form that must be completed by the medical doctor or optometrist in support of an application for the tax credit, the appellant had to answer a question whether the patient was "legally blind" and certain standards of visual acuity were indicated and leave the impression that they constitute a definition of the word "blind" for the purposes of the legislation. First, what is confusing is that the form does not state under which Act this word must be construed. It is clearly not under the *Income Tax Act*. At subsection 248(1) of the Act, the definition of the word "prescribed" reads: "'prescribed' means (a) in the case of a form or the information to be given on a form, prescribed by order of the Minister...."

21 The latter unfortunately does not have the authority to define or circumscribe in a form the meaning of the word "blind" for the purposes of the Act. This would be tantamount to legislating indirectly, a power which, except where otherwise provided, belongs exclusively to Parliament.

[27] Note that section 7.1 of the *Veterans Allowance Regulations* (C.R.C., c. 1602) under the *War Veterans Allowance Act* (R.S., 1985, c. W-3) states:

7.1 (1) For the purposes of the Act, a person is considered to be blind if the person's visual acuity in both eyes with proper refractive lenses is 20/200 (6/60) or less in

accordance with the Snellen Chart or its equivalent, or if the greatest diameter of the person's field of vision in both eyes is less than 20 degrees.

(2) The diameter of a person's field of vision is to be determined by the use of

(a) a tangent screen at a distance of one metre using a ten millimetre white test object; or

(b) a perimeter at a distance of one third of a metre using a three millimetre white test object.

[28] This shows that Parliament could have defined blindness as in the T2201 but it chose not to do so. It also shows that blindness does not necessarily mean total blindness or completely without sight. In fact, Stedman's Online Medical Dictionary, at <http://www.stedmans.com> defines blind as "unable to see; without useful sight" and blindness as:

- (1) Loss of the sense of sight; absolute blindness connotes no light perception.
- (2) Loss of visual appreciation of objects although visual acuity is normal.
- (3) Absence of the appreciation of sensation, *e.g.* taste blindness.

[29] In *Peter v. Canada*, 2004 TCC 364 (Informal Procedure), Justice McArthur had no difficulty finding that the Appellant was blind for the purpose of the *Act* after applying the humane and compassionate construction of *Radage, supra*. The Appellant in that case did not wear prescription lenses and had not been diagnosed as legally blind; nevertheless, he was entitled to the disability tax credit because of light sensitivity.

[30] Counsel for the Respondent referred this Court to several Informal Procedure cases where this Court denied the disability tax credit because the claimant was blind in only one eye: see *Hoben v. Canada*, 2003 TCC 658, *Riley v. Canada*, 2003 TCC 916 and *Marrone v. Canada*, 2004 TCC 507. However, the individuals in question, while blind in one eye, all had 20/20 or perfect vision in the other eye. In other decisions, this Court has rejected the disability tax credit claim on the basis that a proper certificate was not introduced at trial: see, for example, *Wear v. Canada*, [2003] 1 C.T.C. 2332 (T.C.C.) (Informal Procedure).

[31] In the present case, the Court has before it four Disability Tax Credit Certificates or documents, all signed by qualified medical practitioners, which state that Derrick is completely blind in his right eye with permanently diminished visual acuity in his left eye. Derrick was said to have a visual acuity of 20/50 on the Snellen Chart in his left eye (with a visual field of 80 degrees and a visual acuity of 20/125 on a 10 feet chart), but neither the Minister nor the Appellant adduced any evidence, expert or otherwise, to explain what the above numbers mean. In layman's terms, this could mean that Derrick is as blind as a bat in his left eye or it could mean that he has the vision of Superman.

[32] Despite this being a case deserving of a humane and compassionate construction, the Court is unable to find that Derrick is blind in both eyes due to a lack of evidence.

[33] The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 20th day November, 2007.

"E. P. Rossiter"

Rossiter, J.

CITATION: 2007TCC416

COURT FILE NO.: 2006-1406(IT)I

STYLE OF CAUSE: LEROY LEWIS AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Gander, Newfoundland

DATE OF HEARING: July 12, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice E.P. Rossiter

DATE OF JUDGMENT: November 20, 2007

APPEARANCES:

Agent for the Appellant:	Wayne Budgell
Counsel for the Respondent:	Lindsay Holland

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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