Federal Court Cour fédérale

Date: 20240529

Docket: T-1675-23

Citation: 2024 FC 780

Ottawa, Ontario, May 29, 2024

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HERBERT WATKINS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision (the "Decision") by a decision-maker within Service Canada acting on behalf of the Minister of Families, Children and Social Development (the "Minister", "Service Canada", or the "decision-maker"). The Decision denied the Applicant's request for remedial relief, finding that the Applicant did not lose benefits as a

result of erroneous advice pursuant to section 66(4) of the *Canada Pension Plan*, RSC 1985, c C-8 (the "Act").

II. Background

[2] The Applicant suffered a workplace injury in 2003. As a result, he has been unable to work since December 2004 and has suffered from chronic pain disorder and fibromyalgia.

A. *The Applications for Disability Benefits*

[3] The Applicant applied for disability benefits under the Act in 2005. His application was denied by a medical adjudicator (the "Adjudicator"). The Applicant did not file a request for reconsideration.

[4] The Applicant alleges that his decision not to request reconsideration was due to advice given to him by the Adjudicator. He claims that, on a phone conversation in early 2006 notifying him of the negative decision (the "2006 phone conversation"), the Adjudicator advised the Applicant that a request for reconsideration would be unsuccessful because the Applicant was about to begin physiotherapy and his condition was likely to improve. The Adjudicator allegedly recommended that the Applicant focus on physiotherapy rather than make a request for reconsideration.

[5] The Applicant says he received different advice some years later from a separate source. This led him to apply for disability benefits again in August 2009. The application was successful

and included retroactive benefits. The retroactive period extended back 15 months from the date of the second application. This was the maximum retroactive period permitted, so no benefits were given for the period between January 2005 and May 2008 (the "Gap Period").

B. *The Initial Request for Remedial Relief*

[6] In October 2020, the Applicant requested remedial relief to allow him to receive benefits for the Gap Period (the "Relief Request"). He relied on Section 66(4) of the Act, which provides as follows:

> Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied
>
> (a) a benefit, or portion thereof, to which that person would have been entitled under this Act,
>
> (b) a division of unadjusted pensionable earnings under section 55 or 55.1, or
>
> (c) an assignment of a retirement pension under section 65.1,
>
> the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.

[7] In support of the Relief Request, the Applicant argued that the Adjudicator's notes support the Applicant's recollection. The Applicant points to the following portions of the notes:

> With review of the file at the initial level, it is determined the [Applicant] does not meet the criteria of severe & prolonged. Reasons for denial:
>
> […]

> 2- According to [the Applicant's] Physical Medicine Doctor, [the Applicant has] a chronic muscular strain likely associated with heating scar tissue. Treatment suggested was <u>physio & deep massage release therapy</u>. [The Applicant] would also benefit from a stretching & strengthening program. In 2005/06, [the doctor] agreed [the Applicant] had a chronic pain syndrome. Treatment suggestions remained unchanged.
>
> […]
>
> Although the [Applicant] indicates functional limitations from his fall, all objective evidence is negative & <u>treatment has not been completed to date. The client is denied disability benefits</u> at his DOA 2005/09 because the evidence on file does not support Canada Pension Plan legislation.
>
> [Emphasis in the Applicant's submission.]

[8] The Applicant also cited other portions of the Adjudicator's notes that emphasize the Applicant's mental health and his alleged problems with his employer. He argued that the Adjudicator's comments allude to stereotypes against individuals with chronic pain syndrome.

[9] The Relief Request was refused in October 2021 (the "2021 Refusal"). The refusal was supported by two internal assessments titled "Erroneous Advice/Administrative Error Underpayment Submission". The first was dated June 2021 (the "06/2021 Assessment") and the second was dated September 2021 (the "09/2021 Assessment", and together with the 06/2021 Assessment, the "2021 Assessments").

[10] The 06/2021 Assessment estimated that the Applicant would be entitled to just over $65,000 if successful. The 09/2021 Assessment changed the potential underpayment amount to "unknown". This affected the level of authorization necessary. If the potential underpayment amount is less than $25,000, then a manager or an individual with greater authority must approve

the assessment. If the amount is between $25,000 and $35,000, then a director, executive director, director general, or a person with greater authority must approve the assessment. Any amount greater than $35,000 must be approved by "ADM NHQ".

[11] The Applicant sought judicial review of the refusal and, in *Watkins v Canada (Attorney General)*, 2022 FC 1363, this Court granted that application. The Court found that the 2021 Refusal failed to acknowledge the Applicant's central arguments and was therefore both procedurally unfair and substantively unreasonable.

[12] The Court set aside the 2021 Refusal. It declined to direct the Minister to grant the Relief Request, but remitted the matter for redetermination by a different decision-maker (the "Court Judgment"). In granting this remedy, the Court instructed as follows:

> [42] I will therefore remit the matter for redetermination by a different Minister's delegate. I note that the [09/2021 Assessment] indicates that the delegate who signed it has decision-making authority when a potential underpayment is less than $25,000. The [06/2021 Assessment] calculated a potential underpayment of over $65,000 in [the Applicant's] case. Without explanation, the potential underpayment was changed to "unknown" in the [09/2021 Assessment]. [The Applicant] did not question the decision maker's authority and my decision does not turn on this point; however, <u>the Minister's delegate who reconsiders [the Applicant's] request should be satisfied that they have the requisite authority</u>. Furthermore, [the Applicant's] section 66(4) request shall be evaluated by individuals who were <u>not previously involved</u> with his case.
>
> [Emphasis added.]

C. *The Redetermination*

[13] In response to the Court Judgment, and in order to verify that the request was reconsidered by a different decision-maker, the Applicant requested that the names of those involved in either the 2021 Refusal or the subsequent redetermination be disclosed. The Applicant's request was not answered prior to the exchange of records for this application.

[14] The Applicant continued to rely on the submissions made prior to the 2021 Refusal for the purpose of the redetermination. He additionally argued that the Court's finding that the Applicant's arguments were not acknowledged and Service Canada's failure to disclose the names of the decision-makers involved in the redetermination both support the existence of a bias against the Applicant on an institutional level due to his disability. Implied in the Applicant's position is that the Adjudicator's attitude was tainted by this bias, and that this supports an inference that the Adjudicator gave erroneous advice.

[15] After preparing a new internal assessment (the "2023 Assessment"), the decision-maker denied the Relief Request. This is the Decision under review. The decision-maker's determinative finding was that the Applicant did not experience a loss of benefits due to erroneous advice. The finding cited Service Canada's records regarding the 2006 phone conversation and made the following observations:

A. nothing in the records indicates that the Applicant and the Adjudicator discussed the Applicant's chances of success on a request for reconsideration;

B. nothing in the records suggest that the Adjudicator advised the Applicant to pursue physiotherapy rather than a request for reconsideration;

C. the records indicate that the Adjudicator followed the relevant guidelines in their communication with the Application, including informing the Applicant of his right to appeal and that a letter with additional information would be forthcoming letter;

D. the letter notifying the Applicant of the Adjudicator’s decision informed the Applicant that he can request reconsideration and/or reapply at a later date; and

E. the Adjudicator did not misrepresent the Applicant, but rather summarized and referenced the key medical reports within the application.

[16] The decision-maker who prepared the 2023 Assessment was not involved in the 2021 Assessments, except that she (1) proofread a draft for grammatical and typographical errors and (2) recommended that it be confirmed whether the potential underpayment amount should be changed to “zero” or “unknown”. She also ensured that she did not approach her immediate supervisor for final approval of the new assessment, because that supervisor was the one who approved the 09/2021 Assessment. Instead, her decision was approved by a director.

[17] The Applicant submits that the Decision, as informed by the 2023 Assessment, is substantively unreasonable and procedurally unfair. He says that the decision-maker again failed to consider the Applicant’s central submissions, specifically that (1) the Adjudicator harboured stereotypical views that led to erroneous advice, and (2) Service Canada’s systemic and

institutional bias in relation to the Relief Request supports the view that the Adjudicator was tainted by such bias. He also submits that the decision-maker misattributed arguments to the Applicant. In a related but distinct submission, the Applicant also argues that Service Canada involved some decision-makers from the 2021 Assessments in the 2023 Assessment and failed to follow the Court Judgment.

[18] The Applicant seeks an order setting aside the Decision and directing the Minister to grant the Relief Request. In the alternative, the Applicant requests that the matter be remitted for redetermination.

III. Issues

[19] Did the decision-maker breach the duty of procedural fairness with respect to the Decision?

[20] Was the Decision to deny relief pursuant to section 66(4) of the Act reasonable?

IV. Analysis

A. *The Standard of Review*

[21] The standard of review with respect to the Applicant's procedural rights is correctness or a standard with the same import (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-35 and 54-55, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[22] The standard of review with respect to the substance of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25). This includes reviews of jurisdictional questions that do not involve an overlap between two or more decision-makers (*Vavilov* at paras 65-68).

B. *Procedural Fairness*

(1) Failure to Consider Arguments

[23] The Applicant submits that there was a breach of procedural fairness because the decision-maker failed to consider the Applicant's key or central submissions. The Applicant reiterates similar arguments regarding the Decision's reasonableness. The Applicant's arguments blur the line between a decision-maker who fails to review an applicant's central submissions altogether, with one who fails to adequately engage with them or explain why they have been rejected.

[24] Failure to review submissions is a form of procedural unfairness, since it denies an applicant the opportunity to be heard. However, failure to engage adequately with the merits of a submission or provide an adequate response goes to the substance of the decision. While it is true that failure to engage with the merits may be so severe as to allow an inference that the submissions were not considered at all, as was the case in the 2021 Refusal, the Court should not in the absence of such failure review the *substance* of a given decision by applying the more exacting standard that exists for *procedural* unfairness.

[25] The Applicant argues that the decision-maker did not consider his submissions regarding the Adjudicator's alleged bias and stereotyping of the Applicant's condition. The 2023 Assessment indicates otherwise. The decision-maker took note of the Applicant's argument that "erroneous emphasis was placed by the adjudicator on the notes of the family doctor in their analysis and that the [adjudicator] erroneously focused on physiotherapy treatment". The decision-maker also acknowledged this as a "claim of bias in the analysis of the medical information". However, the decision-maker concluded that this is not a relevant consideration, and the reasonableness of this conclusion is a separate issue best left for the substantive consideration in this judicial review. The Applicant's argument was evidently present in the mind of the decision-maker and was not ignored altogether.

(2) Failure to Disclose Identity of Decision-Makers

[26] The Applicant further complains that his inquiries regarding the identities of the decision-makers were not considered. He notes that he made four inquires on this issue: on November 30, 2022, and then again on February 14, March 7, and March 9, 2023. In addition to making inquiries, the March 2023 letters also briefly commented on Service Canada's lack of responsiveness, stating that it supports the Applicant's perception of systemic bias.

[27] A distinction must be drawn between the Applicant's inquiries as to the identities of the decision-makers in all four letters, and the substantive commentary that arose in the last two letters. With respect to the inquiries, Service Canada was obligated to ensure that the redetermination was performed by new decision-makers who were not involved with the 2021 Refusal. If the Applicant was not satisfied that this was the case, he is entitled to bring an application to the Court (as he

does now). That said, the Court Judgment referred to in paragraphs 11 and 12 above did not require Service Canada to disclose the names of decision-makers, nor to provide reasons for declining to do so. There was no breach of procedural fairness in Service's Canada lack of response in that regard.

[28] As for the comments regarding systemic bias and discrimination against the Applicant, those were made to support the view that the Adjudicator was tainted by bias. As discussed above, the 2023 Assessment addresses this point and concludes it is not relevant. Again, that conclusion ought to be assessed for substantive reasonableness, not procedural fairness.

(3) Reasonable Apprehension of Bias

[29] Finally, the Applicant alleges that the decision-maker who prepared the 2023 Assessment was involved in the 09/2021 Assessment, contrary to the Applicant's right to an impartial decision-maker as well as the Court Judgment. He says that this gives rise to a reasonable apprehension of bias.

[30] The test for reasonable apprehension of bias is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude (Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), 2015 SCC 25, at para 20).

[31] The Respondent admits that the decision-maker reviewed the 09/2021 Assessment while it was being prepared, but did so simply to proofread it for grammatical and typographical errors.

The Respondent also admits that the decision-maker recommended that it be confirmed whether the potential underpayment amount should be changed to “zero” or “unknown”. The Respondent stresses that at no point was the decision-maker involved in assessing the merits of the Applicant’s Relief Request until she was tasked with preparing the 2023 Assessment.

[32] I am not convinced that the decision-maker’s mere review of the 09/2021 Assessment for typographical and grammatical errors is sufficient to overcome the presumption that she acted impartially. However, the decision-maker also made a recommendation regarding the potential underpayment amount. It is not clear if it was her recommendation that led to the change in the estimated underpayment amount from $65,000 to “unknown”, or if her recommendation was in reaction to that change. In either case, this very ambiguity is sufficient to raise a reasonable apprehension of bias. That apprehension is itself a breach of procedural fairness, since “justice must be seen to be done” (*Canadian Imperial Bank of Commerce v Boisvert*, [1986] 2 FC 431 (FCA) at p 451.

[33] It is also noteworthy that the decision-maker’s involvement runs contrary to the spirit, if not the letter, of the Court’s instructions as quoted above in paragraph 12. The Court instructed that the Relief Request “be evaluated by individuals who were <u>not previously involved</u> with his case” (emphasis added).

[34] Therefore, I find that the decision-maker breached the duty of procedural fairness.

C. *Substantive Reasonableness*

[35] The Applicant submits that the Decision is unreasonable for three reasons. First, it failed to engage reasonably with his argument that the Adjudicator harboured stereotypes of the Applicant's condition and that this supports an inference that the Adjudicator erroneously advised the Applicant not to file a request for reconsideration. Second, it misattributed arguments to the Applicant. Third, the Applicant suggests that the Decision was not grounded in a reasonable exercise of authority consistent with the Court's instructions.

(1) Failure to Address Central Arguments

[36] The Applicant does not advance a constitutional challenge. His arguments in support of the Relief Request make references to the values enshrined in section 15 of the *Charter of Rights and Freedoms* as well as the Supreme Court of Canada's commentary in *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, regarding stereotypes about people with chronic pain. Ultimately, however, the Applicant makes these references to support the position that stereotypes against individuals with his disability were common in Service Canada and that the Adjudicator was tainted with this bias. The Applicant now says that the Decision's failure to engage with this submission was unreasonable. I agree.

[37] The 2023 Assessment summarily dismisses the Applicant's submission with respect to stereotyping. The assessment simply notes that such arguments challenge the substance of the Adjudicator's findings and ought to have been the subject of an appeal. While this is true, it fails to address the corollary position of the Applicant. The Applicant's position is that stereotypes do

not simply lead to faulty reasoning; they can also lead to bad advice. Demonstrating that the Adjudicator harboured stereotypes against the Applicant can support a reasonable inference that the Adjudicator gave the Applicant erroneous advice during their 2006 phone conversation. The decision-maker failed to recognize and engage with this issue, which is central to the Applicant's position. This was unreasonable.

(2) Misattributing Arguments to the Applicant

[38] The Applicant further argues that the decision-maker failed to reasonably appreciate his position. He says that the decision-maker misattributed arguments to the Applicant that he never made, namely that (1) the Applicant asked the Adjudicator for advice, (2) the Applicant alleged that the Adjudicator misrepresented his statements, and (3) the Applicant claimed he believed he could not reapply for benefits following the completion of his physiotherapy. On the last point, the Applicant says that "[n]ot knowing that one has an *entitlement* is different from believing that one is prohibited from re-applying in order to obtain an entitlement to benefits".

[39] The Applicant's argument amounts to a "treasure hunt for errors", which is not permissible on a reasonableness review (*Vavilov* at para 102). Moreover, the Applicant fails to consider the decision-maker's comments in their broader context.

[40] First, the decision-maker was not stating that the Applicant alleged that he had asked the Adjudicator for advice. Rather, the decision-maker was canvassing what possible indicators may exist within the record to support the Applicant's claim that advice was given. In doing so, the

decision-maker considered indicators on the record that the Applicant solicited advice, as well as indicators that the Adjudicator volunteered it.

[41] Second, the decision-maker's use of the term "misrepresentation" must be understood in light of the 2023 Assessment. There, the decision-maker referenced a series of letters sent by the Applicant in November and December 2014 requesting that the Adjudicator's findings be rescinded or reopened. The Applicant stated in the letters that "[i]f I was not misrepresentated [*sic*] by the Medical judicator [*sic*] […] I would of [*sic*] appealed the letter back on January 18, 2006" (emphasis added). The letters were referenced and enclosed in the Applicant's October 2020 submissions in support of the Relief Request, and were therefore part of the record before the decision-maker.

[42] Finally, and contrary to the Applicant's position, the distinction between "not knowing that one has an entitlement" and "believing that one is prohibited from re-applying" is not material. Regardless of the exact language used, the decision-maker's point was that the Applicant was advised in his decision letter in 2006 that "he could reapply for the CPP disability benefits at a future date".

[43] The decision-maker did not misattribute arguments to the Applicant.

(3) Failure to Exercise Authority Reasonably

[44] The Applicant argues that the decision-maker failed to follow the Court's instruction that "the Minister's delegate who reconsiders [the Applicant's] request should be satisfied that they

have the requisite authority". The Applicant suggests that this means that the individual who provides the final approval for the 2023 Assessment should in fact be the individual who performs that assessment. This is not what the Court instructed.

[45] Placed in its full context, the Court's direction was that the *final approval* for the assessment should be made by someone with the necessary authority to do so. The Court's concern arose out of its observation that the potential underpayment amount was changed from $65,000 in the 06/2021 Assessment to "unknown" in the 09/2021 Assessment, without explanation. This created ambiguity as to the authorization needed. The Court's comment therefore pertained to the proper exercise of authority.

[46] In that respect, the decision-maker made no reasonable effort to discern the potential underpayment amount. The amount was noted as "unknown", with the simple explanation that "no date of onset was established". Although a director approved the 2023 Assessment, it is not clear on what basis the director exercised that authority. The director's approval suggests that the potential underpayment amount is no more than $35,000. However, there are no reasons to support the decision-maker's determination that the potential underpayment amount falls in that range rather than the original $65,000 that was supported with brief reasons in the 06/2021 Assessment.

[47] The decision-maker ought to have provided reasonable explanation why the $65,000 estimate was no longer appropriate and an estimate of $35,000 or less was sufficient. This obligation was not met. The only explanation provided was that "no date of onset was established". The exercise of authority was therefore unreasonable.

V. Conclusion

[48] The Applicant requests that the Court issue a direction for the Minister to grant the Relief Request. This is not appropriate in the circumstances. While the decision-maker's engagement with the Applicant's argument may have been unreasonable and procedurally unfair, proper and fair engagement may still yield a number of possible reasonable findings. A particular outcome is therefore not inevitable, and it is not for the Court to step in the decision-maker's place.

[49] The application is granted. The Decision is set aside and the matter is remitted for redetermination by a different decision-maker, having regard to the reasons in this decision.

[50] The Applicant's bill of costs is reasonable and the affidavit following the hearing generally supports the claim for disbursements. I find that the costs should be awarded to the Applicant in the amount of $4,500.

JUDGMENT in T-1675-23

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is remitted to a different decision-maker in accordance with the reasons of this judgment.
2. Costs to the Applicant in the amount of $4,500, inclusive of all fees and disbursements.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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