

Date: 20070913

Docket: T-1599-06

Citation: 2007 FC 900

Ottawa, Ontario, September 13, 2007

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

DOUGLAS DILLON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Douglas Dillon (the Applicant), suffered a massive heart attack in December 1988, which permanently damaged his heart; thereby limiting his ability to continue to work as a mill-worker. After an initial failed attempt, he eventually received disability benefits under the Canada Pension Plan, R.S.C. 1985, c. C-8 (CPP), in June 1990. [The relevant passages of the CPP are attached to these reasons in Annex “A”].

[2] These disability payments were discontinued in January 1998, (the 1998 decision), after medical reports confirmed that the applicant had made marked improvements such that he was no longer continuously disabled, as early as December 1997. The applicant did not contest this finding or the cancellation of his disability benefits. On the contrary, Mr. Dillon got on with his life, sought retraining and lived essentially off his life savings.

[3] Six years later however, his health deteriorated to the point where he was compelled to make a second application for disability benefits on August 13, 2004. Indeed Mr. Dillon suffered a second massive heart attack requiring open heart surgery in October 2004.

[4] While this second application was initially denied, he was successful in obtaining disability benefits on September 1, 2005. In a detailed letter dated October 21, 2005, the Minister informed the applicant that he was not only entitled anew to disability benefits but that these payments would be made retroactive to the onset date in May 2003 and payments would start four months later in September 2003.

[5] The applicant was not entirely pleased with this decision and sought a reconsideration of the retroactive portion of the decision, for an extension of the retroactive period from September 2003 back to December 1997. In a letter dated August 3, 2006, [Attached as Appendix "B"], the Minister's legal Counsel informed Counsel for the applicant that this retroactive payment is in keeping with the fifteen-month statutory limitation for the retroactive payment of CPP disability benefits and the Minister had neither the discretion nor the jurisdiction to extend the retroactive payments. It is this letter that forms the basis of this judicial review.

[6] In the interim however, the applicant's appeal of the retroactive limitation was referred to the Office of the Commissioner of Review Tribunals Canada Pension Plan/Old Age Security, (Review Tribunal), under subsection 82(1) of the CPP. On January 16, 2007, the Review Tribunal heard the appeal whether the Minister had the authority to rescind the 1998 decision and extend Mr. Dillon's disability benefits beyond the statutory retroactive date.

[7] In its decision dated March 9, 2007, the Review Tribunal dismissed the appeal finding that it did not have jurisdiction to examine the Minister's 1998 decision to revoke benefits that occurred almost a decade earlier. Its jurisdiction was limited to the applicant's second application in 2004 and the Minister's reply in September 2005. The Review Tribunal held as follows:

The Minister's decision to grant Mr. Dillon fifteen months retroactivity was the maximum allowed by paragraph 42(2)(b). We cannot go beyond that.

[8] While the present judicial review application does not deal with the Review Tribunal's decision of March 9, 2007, but rather with the letter of the Minister's legal Counsel dated August 3, 2007, Mr. Dillon asks the Court to order the Minister to rescind the cease 1998 order of his disability benefits and reinstate his disability benefits as of December 1997. In the alternative, the applicant seeks an order quashing the Minister's decision of August 3, 2006, and referring it back to the Minister for proper consideration of his new facts application, in order to establish that the applicant was disabled contrary to the cease order of January 1998.

I. Issues

[9] Did the Minister err in law by not rescinding its 1998 decision to cease disability benefits payment based on new facts pursuant to subsection 84(2)?

[10] Did the Minister err in law by refusing to extend Mr. Dillon's retroactive disability payments to December 1997?

[11] The Minister also argued that the letter dated August 3, 2006 from the Minister's legal Counsel was not subject to judicial review because it was merely a courtesy letter and not a decision.

[12] In considering the two legal issues raised by Mr. Dillon, I conclude that there is no basis in law on which to order the Minister to reconsider its 1998 decision as the matter is *res judicata*. Similarly, there was no error in law in the Minister's decision to limit the retroactive payments to the statutory limitation period. Finally, while the letter by the Minister's legal Counsel can be said to have fallen short of the standard courtesy letter, it is nonetheless not a decision that is amenable to judicial review.

III. Analysis

Standard of Review

[13] The parties acknowledge that it is trite law that the determination of CPP disability benefits is a question of fact, as a result of which the applicable standard of review is patent unreasonableness. I would agree. However, the legal issues before this Court pertain to the proper exercise of jurisdiction by the Minister not only to rescind an earlier decision based on new facts but in turn to accord retroactive payments of disability benefits to the date of that earlier decision, where such an extension would be barred by the statutory limitation for retroactive payments.

[14] The parameters for this exercise of jurisdiction are set out in the four corners of the legislation and the decision of the Minister is a question of jurisdiction that traditionally can only be reviewed on a standard of correctness.

[15] In order to find in favour of Mr. Dillon, I must be satisfied that the Minister did have jurisdiction at the date of the second application in August 2004, to rescind the 1998 decision to revoke his disability benefits payments based on new facts. Furthermore, the Court must be satisfied that the Minister had jurisdiction to extend Mr. Dillon's retroactivity payments to December 1997.

[16] While I am not unmoved by the sympathetic set of circumstances that have brought Mr. Dillon before this Court, I remain unpersuaded that the Minister was at liberty to rescind its 1998 decision at this late stage of the game. The applicant has admitted that he did not seek reconsideration of the 1998 decision to revoke his disability benefits. The Medical Adjudicator, S. Boland reported as follows from her telephone conversation with the applicant, which took place on March 24, 2006:

When asked why he did not appeal the decision to stop his benefits, he stated he thought he would try to work and he understood he would be able to re-apply if he needed. [Applicant's Record, Tab 2, p. 103.]

[17] He has admitted that he did not need to as his health had improved. In response to item 18 of the Questionnaire for Disability Benefits, Canada Pension Plan, dated August 13, 2004, and which asks applicants to "State the illnesses or impairments that prevent you from working", the applicant wrote as follows:

Permanently damaged heart from heart attack in 1988. It improved from 30-35% to 43% in 1998 and this disability pension was stopped. It has now deteriorated back to 36%. [Applicant's Record, Tab 2, p. 70.]

[18] The applicant was informed of the appeal process in the letter from Paula Dunn, Account Analyst, Reassessment Overpayment Recovery Unit, Program Delivery Services, dated January 17, 1998, including the possibility of requesting a reconsideration of the cancellation decision within 90 days. [Applicant's Record p. 182.] He did not. Rather he moved on with his life in a commendable fashion, comforted by the medical reports of the noticeable improvement in his health.

[19] The applicant argues that under subsection 84(2) of the CPP, the Minister has the discretion to rescind or vary a prior decision based on new facts even if the Review Tribunal is seized with the same question. I agree with the respondent that this argument cannot succeed because it amounts to a collateral attack on a final decision taken in January 1998. The Federal Court of Appeal has warned against allowing such actions against final decisions. At paragraphs 20 and 21, in *Canada (Minister of Human Resources Development) v. Hogervorst*, [2007] F.C.J. No. 37, 2007 FCA 41 (F.C.A.), Mr. Justice Letourneau, stated in part as follows:

[. . .] These are two distinct decisions and the second decision must be attacked directly, not collaterally: see *Vidéotron Télécom Ltée v. Communications, Energy and Paperworkers Union of Canada*, [2005] F.C.J. No. 398, 2005 FCA 90, at paragraph 12.

21 The judge should not have permitted this collateral attack to go on. This Court ruled in *Her Majesty the Queen in the Right of Canada et al. v. Budisukma Puncak Sendirian Berhad et al.* (2005), 338 N.R. 75, 2005 FCA 267, at paragraphs 61 and 62 (Berhad case) that collateral attacks against decisions that are final ought to be precluded in the public interest since such attacks encourage conduct contrary to the statute's objectives and tend to undermine its effectiveness.

[20] I also rely on the decision of, Mr. Justice James O'Reilly who dealt with similar circumstances in *Kabatoff v. Canada (Minister of Human Resources and Development)*, [2007] F.C.J. No. 1078, 2007 FC 820, where he held at paragraph 8:

8 In Mr. Kabatoff's case, he is asking the Minister to reconsider a 1996 decision even though the Review Tribunal, in 2004, concluded that he was not disabled. [. . .] It must be remembered that a disability is a condition that is "severe and prolonged" and renders the person incapable of regularly pursuing any gainful occupation for a long and indefinite period of time (s. 42(2)(a)).

[21] In Mr. Dillon's case, he is asking the Minister to reconsider a 1998 decision even though he did not appeal it and the Review Tribunal has subsequently disposed of the same issue as a follow up to a second application. The applicant, as is his right filed **this** second application in 2004, whereas he could have filed a request to reopen the 1998 decision to cancel the benefits. The applicant made a decision to file a second application. By doing so, he **chose** the procedural avenue to be followed. The respondent reacted to this request. The Minister rendered a decision initially refusing this second application, then after the request was made to reconsider, the Minister granted the benefits retroactively. This decision was appealed to the Review Tribunal on the grounds that the Minister should rescind the 1998 decision and make the payments retroactive to December 1997. The Review Tribunal refused.

[22] The respondent has pleaded that the first application is *res judicata*. Having not appealed the cease decision of the first application, that matter has been finally determined and is therefore *res judicata*. Moreover, there is no authority to order the Minister to reopen any decision relating to the applicant's first application since the Minister has subsequently given a final decision on the applicant's second application, which the applicant has appealed to the Review Tribunal. Consequently, the Minister is *functus officio* with respect to the first application. The decision is *res judicata*. [Respondent's Memorandum of Fact and Law, at paragraphs 6 and 51; Respondent's letter, dated September 1, 2005, Applicant's Record, Tab 2 at pp. 48-49 and Notice of Hearing, dated September 27, 2006, Applicant's Record, Tab 2, at p. 25.]

[23] As traditionally used in Canada, the doctrine of *res judicata* implies that a matter has clearly been decided. In this instance, the argument advanced by the respondent is based on the fact that the applicant failed to appeal the first decision and the decision is therefore final.

[24] The facts in this case show that Mr. Dillon did indeed not appeal the 1998 decision. **In addition, the statutory 90-day time limit for appealing the 1998 decision has long since passed.** Moreover, the Minister was without jurisdiction to rescind this decision after having made a second favourable decision on Mr. Dillon's second application. The matter is therefore *res judicata*.

[25] Finally, Mr. Dillon knew the law particularly after having consulted with the representatives of the CPP and having dealt with them since 1988. This Court has recognized that in administrative law, everybody knows the law and is presumed to understand it. **In *Dorey v. Canada (Customs and Revenue Agency)*, [2003] F.C.J. No. 1575, 2003 FC 1241, Madam Justice Elizabeth Heneghan stated at paragraph 22:**

22 [. . .]. It is well-established that persons are deemed to have knowledge of the law. In *Pirotte v. Canada (Unemployment Insurance Commission)*, [1977] 1 F.C. 314, a case involving a claim for unemployment insurance benefits, the Court of Appeal said as follows at page 317:

- **... It is a fundamental principle that ignorance of law does not excuse failure to comply with a statutory provision. (*Mihm v. Minister of Manpower and Immigration* [1970] S.C.R. 348 at p. 353.) The principle is sometimes criticized as implying an unreasonable imputation of knowledge but it has long been recognized as essential to the maintenance and operation of the legal order. (See also: *Zündel v. Canada (Canadian Human Rights Commission)* (re Canadian Jewish Congress), [1999] F.C.J. No. 392 at paragraph 17; *McGill v. Canada (Minister of National Revenue - M.N.R.)*, [1985] F.C.J. No. 806 (F.C.A.)**

[26] In so far as the courtesy letter is concerned, I would not characterize it as such. Indeed, this curt letter from the Minister's legal Counsel is anything but courteous and could have been more complete. In spite of its shortcomings, this letter is nonetheless not a decision letter subject to judicial review. It provides the statutory reason pursuant to paragraph 42(2)(b) of the CPP, why the retroactive period must stop short at fifteen months. The final decision was the Minister's letter of October 21, 2005, granting the retroactive benefits following the request to reconsider made by the applicant.

[27] Therefore, under these circumstances, the Minister was correct to advise the applicant that he could not review the 1998 decision, given that it was not appealed and the application of subsection 84(2) was not pursued until after the granting of the second application. To do otherwise would be to allow the applicant to lob a collateral attack against the otherwise final 1998 decision.

[28] Moreover, the Minister was without jurisdiction to go beyond the statutory limits for retroactive payments and grant the applicant full retroactive compensation to the date of the cancellation of his first disability pension benefits.

[29] Insofar, as costs are concerned, the applicant is asking for them whatever the final determination is, the Minister is claiming them if he is successful. Having decided in favour of the respondent's position, I have to be mindful of the applicant's personal situation. Therefore, it shall be without costs.

JUDGMENT

THIS COURT ORDERS THAT:

- The application for judicial review of the letter of August 3, 2006 is dismissed;
- Without costs.

“Simon Noël”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1599-06

STYLE OF CAUSE: DOUGLAS DILLON and
THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: August 29, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** The Honourable Mr. Justice Simon Noël

DATED: September 13, 2007

APPEARANCES:

Michael A. McGregor FOR APPLICANT

Allan Matte FOR RESPONDENT

SOLICITORS OF RECORD:

Crease Harman & Company FOR APPLICANT
Vancouver, BC

John H. Sims, Q.C. FOR RESPONDENT
Deputy Attorney General of Canada
Vancouver, BC

ANNEXE “A”**Relevant Statutory Provisions**

1. Paragraph 42(2)(a) of the CPP gives a clear definition of when a person is deemed disabled:

When person deemed disabled

[. . .]

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

(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; and

[. . .]

Personne déclarée invalide

[. . .]

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,

(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; [. . .]

2. The statutory limitation on retroactive payments of disability benefits is defined in section 42 of the CPP. Paragraph 42(2)(b), states as follows:

When person deemed disabled

42(2)(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

Personne déclarée invalid

42(2)(b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été établie.

3. Section 69 qualifies the payment of retroactive disability benefits:

Commencement of pension

69. Subject to section 62, where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled, except that where the applicant was, at any time during the five year period next before the month in which the applicant became disabled as a result of which the payment is approved, in receipt of a disability pension payable under this Act or under a provincial pension plan,

Ouverture de la pension

69. Sous réserve de l'article 62, lorsque le versement d'une pension d'invalidité est approuvé, la pension est payable pour chaque mois à compter du quatrième mois qui suit le mois où le requérant devient invalide sauf que lorsque le requérant a bénéficié d'une pension d'invalidité prévue par la présente loi ou par un régime provincial de pensions à un moment quelconque au cours des cinq années qui ont précédé le mois où a commencé l'invalidité au titre de laquelle le versement est approuvé :

- | | |
|---|---|
| (a) the pension is payable for each month commencing with the month next following the month in which the applicant became disabled as a result of which the payment is approved; and | a) la pension est payable pour chaque mois commençant avec le mois qui suit le mois au cours duquel est survenue l'invalidité au titre de laquelle le versement est approuvé; |
| (b) the reference to "fifteen months" in paragraph 42(2)(b) shall be read as a reference to "twelve months". | b) la mention de « quinze mois » à l'alinéa 42(2)b) s'interprète comme une mention de « douze mois ». |

4. Section 81 of the CPP provides broad appeal rights to applicants. The relevant passages state as follows:

**RECONSIDERATIONS
AND APPEALS**

Appeal to Minister

81. (1) Where

[. . .]

(c) a beneficiary is dissatisfied with any determination as to the amount of a benefit payable to the beneficiary or as to the beneficiary's eligibility to receive a benefit,

**Reconsideration by Minister
and decision**

(2) The Minister shall forthwith reconsider any decision or determination referred to in subsection (1) and may confirm or vary it, and may approve payment of a benefit, determine the amount of a benefit or determine that no benefit is payable, and shall thereupon in writing notify the party who made the request under subsection (1) of the Minister's decision and of the reasons therefor.

RÉVISIONS ET APPELS

Appel au ministre

81. (1) Dans les cas où :

[. . .]

c) un bénéficiaire n'est pas satisfait d'un arrêt concernant le montant d'une prestation qui lui est payable ou son admissibilité à recevoir une telle prestation,

**Décision et reconsidération
par le ministre**

(2) Le ministre reconsidère sur-le-champ toute décision ou tout arrêt visé au paragraphe (1) et il peut confirmer ou modifier cette décision ou arrêt; il peut approuver le paiement d'une prestation et en fixer le montant, de même qu'il peut arrêter qu'aucune prestation n'est payable et il doit dès lors aviser par écrit de sa décision motivée la personne qui a présenté la demande en vertu du paragraphe (1).

5. Section 84 of the legislation permits the introduction of new evidence, which may serve to alter a previous decision made by the Minister. The relevant portion is set out in subsection 84 (2), which provides as follows:

**Authority to determine
questions of law and fact
84.**

[. . .]

**Rescission or amendment of
decision**

(2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

**Décision sur les questions de
droit et de fait
84.**

[. . .]

**Annulation ou modification
de la décision**

(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

ANNEXE "B"

Letter of August 3, 2006

See page 24 of Applicant's Record.

24

AUG 03 2006 09:40 PR

TO (258)388-4294 P. 02/02



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OUR FILE NO.: IHRD 2237-1

August 3, 2006

BY FAX TO (250) 388-4294

Michael A. McGregor
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800-1070 Douglas Street
Victoria, BC V8W 2S8

Handwritten notes and signature:
K...
Douglas Dillon
V. 258-388-4294
17 [Signature]

Dear Mr. McGregor:

Re: **Douglas Dillon**

Further to my voice mail message of July 31, 2006, please be advised that I have reviewed Mr. Dillon's file.

Mr. Dillon applied for *Canada Pension Plan* disability benefits in August 2004. The Minister determined that Mr. Dillon is disabled. Subsection 42(2) (b) of the *Canada Pension Plan* provides that "in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made." This provision limits the amount of retroactivity that may be paid under the *Plan*, in Mr. Dillon's case, to May 2003, 15 months prior to the date his application was received.

There is no statutory or discretionary authority for the Minister to "extend retroactive payments".

Yours truly,

Handwritten signature of Florence Clancy

Florence Clancy
Counsel for the Minister

PC/ah

c.c.: Sharon Boland
Nancy LePitre

Canada