Date: 20071115

Docket: T-789-07

Citation: 2007 FC 1185

Ottawa, Ontario, November 15, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ANGELA WRIGHT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Angela Wright has suffered, since the early 1990s, with lower back pain. In 2004, she applied to the Department of Social Development for Canada Pension Plan (CPP) Disability Benefits. After her application was refused, she appealed to the Review Tribunal. In a decision dated September 13, 2006, her appeal was dismissed. Ms. Wright then applied for Leave to Appeal the decision of the Review Tribunal to the Pension Appeals Board. In a decision dated February 15, 2007, a panel of the Pension Appeals Board (the PAB) refused her Application for Leave to Appeal. Ms. Wright seeks judicial review of this decision of the PAB.

[2] The issues in this case can be stated as follows:

1. Did the Board err by considering the merits of the Applicant's application, thereby applying the wrong test for leave?
2. Did the Board err in law or in appreciation of the facts in determining whether an arguable case is raised in refusing to grant leave to appeal the Review Tribunal decision?

[3] As both of these questions are answered in the negative, this application for judicial review will fail.

I. Background

[4] To obtain a CPP Disability Pension, Ms. Wright must meet the legislated requirements of s. 42(2) of the *Canada Pension Plan,* R.S.C. 1985, c. C-8. The relevant portions of the provision are as follows:

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,	42.2(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,

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 . . .

(*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.

(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;

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.

[5] In other words, to qualify for CPP Disability Benefits, the disability must be both severe and prolonged. In addition, based on her history of payments into the CPP, the assessment of her right to benefits was assessed as of December 1997. This date, which is not in dispute, is referred to as the "minimum qualifying period" (MQP). As cited in the Department's initial letter decision, dated January 14, 2005, Ms. Wright was required to demonstrate that she had a disability in 1997 that: (a) stopped her from doing any type of work on a regular basis (full-time, part-time, or seasonal); (b) was long term and of unknown duration; and (c) has stopped her from working since December 1997 and will continue to do so.

[6] Ms. Wright was provided with an oral hearing before the Review Tribunal. For purposes of that hearing, she submitted substantial medical evidence and testified orally. The Review Tribunal concluded that:

> The Tribunal finds that Mrs. Wright suffers from a prolonged disability, having suffered from lower back pain since approximately the early 1990's. The Tribunal was not, however, able to find that Mrs. Wright's disability is severe on or before December 31, 1997. In particular, the Tribunal notes the lack of any medical evidence noting the severity of Mrs. Wright's condition prior to 2004. The only real report we have of Mrs. Wright's condition prior to her MQP was the report of Dr. Howatt dated February 11, 1993, where he in effect indicates that her back pain at that is mechanical and she only requires extensive physiotherapy to strengthen her back.
>
> The Tribunal also noted that Mrs. Wright worked seasonal jobs in both 2000 and 2001. The reason she left these jobs during those times was because the job ended, not as a result of her back pain. In fact, it is noted that after her job at the amusement park ended in September of 2001, she drew employment insurance benefits until March of 2002, holding herself out that she was willing and able to work for that time frame.

[7] The PAB decision not to allow leave was short:

> A thorough review of this file indicates the Appellant has suffered back pain for many years. There can be no dispute on the fact that as of the minimum qualifying period (MQP) and thereafter she continued to work from time to time and upon being laid off, applied for and received employment insurance benefits. The file discloses no arguable case to support her proposed appeal.

II. Analysis

[8] The parties are in agreement that the proper test on an application for leave to the PAB is whether or not an arguable case has been raised (*Burley v. Canada (Minister of Human Resources Development)*, 2001 FCT 127 at para. 19). In deciding whether an arguable case has been raised, the PAB should not consider whether the application could succeed on the merits

(*Martin v. Canada (Minister of Human Resources Development)*, [1999] F.C.J. No. 1972 at para. 6 (C.A.) (QL)).

[9] Furthermore, a leave to appeal proceeding is a preliminary step to a hearing on the merits. As such it is a first and lower hurdle for the applicant to meet than that which must be met on the hearing of the appeal on the merits (*Kerth v. Canada (Minister of Human Resources Development)*, [1999] F.C.J. No. 1252 at para. 24 (T.D.) (QL)).

[10] This application turns on whether Ms. Wright's application for leave disclosed any grounds of review. In *Callihoo v. Canada (Attorney General)*, [2000] F.C.J. No. 612 (T.D.) at para. 15 (QL), Justice MacKay described when the PAB should grant leave:

> If new evidence is adduced with the application, if the application raises an issue of law or of relevant significant facts not appropriately considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the grant of leave.

[11] The first issue raised is whether the PAB erred by examining the merits of the arguable issues raised by the Applicant. In its reasons, the PAB stated the correct test of granting leave; that is, the PAB explicitly recognized that its task was to determine if there was an arguable case to support the appeal. Whether the PAB went beyond that responsibility requires that I review the opening words of the decision. Do the references to Ms. Wright's work in 2000 and 2001 and her collection of Employment Insurance indicate that the PAB considered the merits of her appeal rather than just assessing whether there was an arguable case? The answer to this

question, in my view, is no. The PAB was simply restating the determinative finding of the Review Tribunal that Ms. Wright had worked and collected Employment Insurance benefits beyond her MQP. Moreover, as discussed below in more detail, Ms. Wright did not raise an arguable issue with respect to this finding by the Review Tribunal. In short, the PAB could not have examined the merits of the arguable issues raised by Ms. Wright for the simple reason that she raised none.

[12] The second issue raised is whether the PAB erred by failing to apprehend the arguable issues in this case. Before this Court, Ms. Wright argues that the PAB ought to have recognized a number of arguable issues. One such issue is whether the Review Tribunal misinterpreted s. 42(2) of the CPP. In effect, she argues now that the seasonal work that she did in 2000 and 2001 was not “substantially gainful” in that it was short-term and that she earned very little income. Ms Wright also submits that another arguable issue is whether the Tribunal erred by inferring, from her receipt of Employment Insurance, that she was capable of work.

[13] The problem with these submissions is that they were not made to the PAB. Ms. Wright’s Application for Leave consisted of nothing other than the same evidence and submissions that were made to the Review Tribunal and a dispute on some minor details.

[14] Most importantly, in her submissions to the PAB, Ms. Wright does not dispute that she was employed on a seasonal basis in 2000 and 2001. Further, although she explained that she could not do other work offered to her (in a bakery or cleaning cabins), Ms. Wright did not refute the statement by the Review Tribunal that she left those particular seasonal jobs because the

season was finished. Nor did she raise the question of the interpretation of the words "substantially gainful employment" or even indirectly argue that her employment in 2000 and 2001 was not really employment that should be held against her. The only assertion that I can see in her submissions to the PAB is that she had to turn down other work that was available. This does not raise the question of whether the work she actually did do in that period meets the definition of "substantially gainful employment".

[15] Ms. Wright also acknowledged, in her submissions to the PAB, that she collected Employment Insurance Benefits. Specifically, she stated, "Why Not? I was always told that there was nothing wrong with me." This statement does nothing to address the inference drawn by the Review Tribunal that, to collect such benefits, she had to be able to work. Again, Ms. Wright raised no arguable issue in her submissions to the PAB.

[16] When the PAB reviewed the entire file, it had nothing before it that addressed the key finding of the Review Tribunal that she worked beyond the 1997 MQP or that raised any legal issue. To use a variation of the words of Justice MacKay in *Callihoo*, above, the application did not raise an issue of law or of relevant significant facts not appropriately considered by the Review Tribunal in its decision. Accordingly, the PAB's conclusion that no arguable issue had been raised was reasonably open to it.

[17] This application will be dismissed. The Respondent seeks costs. However, in the circumstances, I decline to award costs.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed; and

2. No costs are awarded.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-789-07
STYLE OF CAUSE:	ANGELA WRIGHT v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Halifax, NS
DATE OF HEARING:	November 6, 2007
REASONS FOR ORDER AND ORDER:	Snider J.
DATED:	November 15, 2007

APPEARANCES:

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