

**Date: 20090116**

**Docket: T-1871-07**

**Citation: 2009 FC 37**

**Ottawa, Ontario, January 16, 2009**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**JANET ZEPOTOCZNY BERGER**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] In 1999, Ms. Janet Zepotoczny Berger, a registered nurse, was travelling on a Toronto city bus. When the bus came to a sudden and unexpected stop, she was thrown from her seat and incurred a number of injuries. To this day, she experiences chronic neck and back pain, dizziness, high blood pressure and numbness in her arms and hands. These conditions affect her ability to work.

[2] In 2005, Ms. Berger applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). Her application was considered and denied by the Minister of Human Resources Development and by the Pension Review Tribunal on the basis that Ms. Berger's

circumstances did not fall within the definition of a “disability” under the CPP. Ms. Berger sought leave to appeal the Review Tribunal’s decision to the Pension Appeals Board (PAB) but, in August 2007, the PAB denied her application.

[3] Ms. Berger maintains that the PAB wrongly denied her leave and asks me to overturn its decision. However, I can find no basis for overturning the PAB’s decision and must, therefore, dismiss this application for judicial review.

[4] The sole question is whether the PAB’s decision was unreasonable.

#### I. The Legal Framework

[5] Under s. 42(2)(a) of the CPP, a person is considered disabled if he or she has “a severe and prolonged mental or physical disability”. A disability is “severe” if the person is “incapable regularly of pursuing any substantially gainful occupation”. A disability is “prolonged” if it is “likely to be long continued and of indefinite duration or is likely to result in death”.

[6] A decision of the Review Tribunal can be appealed to the Pension Appeals Board on leave. The PAB will grant leave where the applicant raises an “arguable case” in respect of the Review Tribunal’s decision - either an error of law or an unsupportable finding of fact (*Callihoo v. Canada (Attorney General)*, [2000] F.C.J. No. 612 (T.D.)). In turn, the Federal Court can overturn the PAB’s decision if it applied the wrong test or if its decision was otherwise unreasonable. Here, the

PAB clearly applied the proper test. The only question is whether its decision to deny leave was reasonable.

[7] In deciding whether the PAB's decision was unreasonable, I can only consider the evidence that was before it. Ms. Berger urged me to consider other evidence that she felt unable to compile in time to submit to the PAB (although she did submit some new evidence to the PAB). This would require me to expand my role on an application for judicial review. I have no authority to do so.

## II. Was the PAB's Decision Unreasonable?

[8] Since her accident, Ms. Berger has been working mainly on a free-lance basis in the health-care field. Her employment opportunities are somewhat limited, however, since she finds it difficult to stand for long periods of time. Still, Ms. Berger has been able to continue to work.

[9] Based on Ms. Berger's circumstances, the Review Tribunal concluded that she failed to meet the definition of a person who has a disability. In particular, the Review Tribunal found that Ms. Berger had continuously worked, notwithstanding her injuries. The Review Tribunal was sympathetic to Ms. Berger's plight and noted that she had continued to work "through the pain". Still, it could not conclude that she was "incapable regularly of pursuing any substantially gainful occupation". Therefore, she did not meet the statutory definition of a "severe" disability.

[10] After receiving and considering Ms. Berger's application for leave to appeal the Review Tribunal's decision, the PAB concluded that she had failed to present any new materials that might alter the Review Tribunal's decision. As such, she had not raised an arguable case for granting leave to appeal.

[11] Ms. Berger's principal arguments on her application for judicial review of the PAB's decision raise issues I have no authority to address. In particular, she argues that the definition of "disability" is unduly restrictive. She has injuries that limit her ability to earn a living. While she is still able to work, she cannot earn the same salary she could have earned otherwise and has had difficulty finding jobs that she can manage. Further, she has had gaps in her employment history due to her limitations. She maintains that it is unfair that the CPP only provides disability benefits to those who are "incapable regularly of pursuing any substantially gainful occupation". Many others, like her, who have chronic medical issues, are deserving of help.

[12] Ms. Berger also argues that the CPP scheme is discriminatory in that it precludes someone who has paid into the plan for many years from receiving benefits when needed.

[13] I cannot alter the definition of "disability" in the CPP; nor can I grant Ms. Berger benefits that Parliament has reserved for a certain category of applicants.

[14] My only role is to determine whether the PAB made any serious error in deciding Ms. Berger's leave application under the legislation as it now stands and on the record before it. I can

find no reviewable error in the PAB's decision and must, therefore, dismiss this application for judicial review.

[15] Ms. Berger was very concerned that a particular document, an "Authorization to Disclose Information", was omitted from the record. I agree with her that it is important that the record before the tribunals below and this Court be complete. However, I am not satisfied that there was any oblique motive for omitting this document or that it was of such significance that it would have made any difference.

[16] Prior to the hearing of her application for judicial review, Ms. Berger had requested and received from the Court a confidentiality order in relation to her medical records. Before me, she asked that the order be extended to her entire file. I am not persuaded that such an extraordinary order is appropriate in the circumstances.

### III. Conclusion and Disposition

[17] Ms. Berger has not persuaded me that the PAB's decision denying her leave to appeal was unreasonable. Therefore, I would dismiss her application for judicial review. There will be no order as to costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT IS that**

1. The application for judicial review is dismissed.
2. No order as to costs.

“James W. O’Reilly”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T- 1871-07

**STYLE OF CAUSE:** BERGER v. THE ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 8, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** January 16, 2009

**APPEARANCES:**

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