Federal Court  Cour fédérale

Date: 20100122

Docket: T-1099-09

Citation: 2010 FC 74

Ottawa, Ontario, January 22, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

TRAVIS HARVEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a decision of a member of the Canada Pension Plan Pension Appeals Board (the Board) dated June 9, 2009, which denies the Applicant's application for leave to appeal a decision of the Canada Pension Plan Review Tribunal.

Factual Background

[2] Mr. Travis Harvey (the Applicant) was injured in June 2006 in the course of his employment as a construction labourer and suffers from a resulting back injury. He left work definitively in August 2006 and claims that he has not been able to work since due to his back

problems and the ensuing pain. He is said to still be unable to sit or stand for long periods of time and unable to lift any weight. Furthermore, he alleges that his sleep is curtailed due to his back pain and he is unable to accomplish basic household tasks.

[3] The Applicant is 44 years old, has a grade 7 education and has spent most of his working life as a labourer.

[4] The Applicant applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP) in September 2007. His application was denied and he applied for a reconsideration which was also denied. Subsequently, in April 2008, he applied to the Canada Pension Plan Review Tribunal (the Review Tribunal).

[5] The Review Tribunal held a hearing where both the Applicant and his wife testified. It issued written reasons in April 2009, where it denied the appeal and held that the Applicant's disability did not meet the definition found under subsection 42(2) of the CPP in that "his disability is not as severe and prolonged so as to render him incapable regularly of pursuing substantially gainful employment" (Review Tribunal Decision at paragraph 32).

[6] He then made an application for leave to appeal of the Review Tribunal's decision to the Board. Included in that application, along with a brief letter of appeal was a document titled "Permanent Impairment and Extended Earnings Replacement Benefit Decision" issued by the

Worker's Compensation Board of Nova Scotia (the W.C.B. decision). On June 9, 2009, the Board refused the application for leave to appeal and that decision is now subject to this judicial review.

Impugned Decision

[7] The Board's decision, in its entirety, reads as follows:

> [1] The Review Tribunal's decision is based on a reasonable interpretation of the medical evidence presented. In his application for leave to appeal the Appellant files a copy of a W.C.B. decision and nothing else.
>
> [2] The W.C.B. decision indicates, if anything, that the Appellant does not suffer from a disability as defined in the *Canada Pension Plan* and there is no arguable case left to be presented on appeal from the Review [T]ribunal's decision.
>
> [3] Leave is refused.

Issues

[8] The questions at issues are as follows:

a. Were the reasons provided by the Board adequate?

b. Did the Board apply the correct test in determining whether to grant the leave to appeal?

c. Did the Board err in law or in its appreciation of the facts in determining whether an arguable case was raised?

[9] The application for judicial review shall be dismissed for the following reasons.

Relevant Legislation

[10] *Canada Pension Plan*, R.S.C. 1985, c. C-8.

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the Old Age Security Act, or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.	83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la Loi sur la sécurité de la vieillesse — ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.
(…)	(…)
(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.	(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

Applicant's Submissions

Sufficiency of reasons

[11] The Applicant submits that the written reason provided by the Board, as required under subsection 83(3) of the CPP, are insufficient and the decision should be quashed as a result.

[12] The Applicant alleges that the Board's decision is completely insufficient to enable the Court to determine whether the Board's decision to deny leave to appeal was correct as there is no explanation of how the Board came to its conclusion.

[13] The Applicant urges that the Board's statement that the Review Tribunal's decision was based on a "reasonable interpretation" of the medical evidence is unhelpful. The Board also states that the W.C.B. decision indicates that the Applicant does not suffer a disability as defined in the CPP, but provides no analysis as to why of how it comes to this conclusion. Furthermore, the Applicant characterizes the reasons, due to the lack of explanation, as being "so general as to be meaningless" and submits that the use by the Board of the phrase "there is no arguable case left to be presented on appeal" amounts to a repetition of the appropriate test but there is no explanation or rationale for that conclusion.

[14] In support of his arguments, the Applicant relies on Supreme Court of Canada's decision in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 at paragraphs 25 to 32 where it was held that reasons must be sufficient to enable meaningful appellate review of a decision. Along with the decisions of the Federal Court of Appeal and the Federal Court in *Marrone v. Canada (Attorney*

General), 2008 FCA 216, [2008] F.C.J. No. 1007 (QL) and *Canada (Attorney General) v. Kermenides*, 2009 FC 429, [2009] F.C.J. No. 973 at paragraph 9 (QL)).

The test for granting leave

[15] On the standard of review, the Applicant submits that the question as to whether or not the Board applied the correct test in refusing the leave to appeal is a decision that should be held to correctness (*Canada (Attorney General) v. Landry*, 2008 FC 810, 334 F.T.R. 157 (QL)).

[16] The Applicant contends that there are two issues to be determined when reviewing a Board's decision on an application for leave to appeal as set out in *Callihoo v. Canada (Attorney General)* (2000), 190 F.T.R. 114 at paragraph 15 (F.C.T.D.) (QL), where Justice Mackay stated:

> … [I]n my view the review of a decision concerning an application for leave to appeal to the PAB involves two issues,
>
> 1. whether the decision maker has applied the right test - that is, whether the application raises an arguable case without otherwise assessing the merits of the application, and
>
> 2. whether the decision maker has erred in law or in appreciation of the facts in determining whether an arguable case is raised. 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.

[17] As for the issue of the appropriate test, the Applicant submits that the Board must determine if there is an "arguable case" on the application for leave and that this is a lower hurdle to meet than determining the appeal on the merits (*Kerth v. Canada (Minister of Human Resources*

Development) (1999), 173 F.T.R. 102 (F.C.T.D.) (QL)); *Callihoo* at paragraph 15). The Applicant emphasizes that the Board must not otherwise assess the merits of the application.

[18] The Applicant argues that the Board applied the test incorrectly although it stated that there was “no arguable case left to be presented on appeal”. He urges that the reasons suggest that the Board actually based its decision on its assessment of the merits of the case. This approach is clear from the Board’s statement that the Review Tribunal’s decision is based on a reasonable interpretation of the medical evidence. Also, the comment on the W.C.B. decision would suggest that the Board did not look at whether the information in the decision raised an arguable case, but instead came to a conclusion on the interpretation of the evidence.

[19] Therefore, the Applicant advances that the Board’s use of the phrase "no arguable case" cannot save its decision in light of the balance of the reasons that would suggest that the Board decided the application on its merits.

Errors in determining whether there is an arguable case

[20] The Applicant submits that this issue is the second question to be determined according to the approach set out in *Callihoo* and that there are numerous errors in the case at bar.

[21] The first alleged error is that the Board failed to appreciate the new evidence (the W.C.B. decision) provided by the Applicant with his application for leave. Relying on *Samson v. Canada (Attorney General),* 2008 FC 461, [2008] F.C.J. No. 588 (QL), the Applicant outlines that the

review Court must ask itself whether the leave application raises a genuine doubt whether the Review Tribunal would have reached the same decision if the new evidence had been presented to it.

[22] The Applicant submits that an analysis of the W.C.B. decision does not support the Board's conclusion that the he does not suffer from a disability as defined in the CPP. He points to the conclusions reached on the medical evidence and the discussion with respect to the availability of suitable work in the W.C.B. decision along with the fact that the decision concluded to his entitlement to a long term earnings replacement benefit due to his injury.

[23] He emphasizes that the W.C.B. decision reached the conclusion that he is only capable of four to five hours of sedentary work according based on a Functional Assessment dated February 9, 2009, which contrasts the information on his functional capacity relied upon by the Review Tribunal in its decision. The Applicant acknowledges that the W.C.B. decision is not conclusive evidence that he is disabled within the meaning of the CPP but urges that the Review Tribunal would have reached a different decision if this document had been before them.

[24] The second alleged error is that the Board failed to recognize that there was an arguable case that the Review Tribunal misapplied the "real world" test for determining whether the Applicant suffers from a severe disability under subsection 42(2) of the CPP.

[25] The Applicant alleges that the Review Tribunal misapplied the test set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C. 130 (QL) as it did not look at the question of his ability to regularly pursue any substantially gainful occupation in the context not only of his injury, but also his particular circumstances, especially his past work experience and education level. He also adds that the Review Tribunal engaged in exactly the sort of analysis that was determined in *Villani* to be inappropriate by coming to the conclusion that the barrier to his obtaining employment is not his physical disability but his low academic function and lack of education.

[26] The third alleged error is that the Board erred in failing to recognize that there was an arguable case that the Review Tribunal misinterpreted the medical evidence regarding the nature and severity of the Applicant's disability.

[27] The Applicant points to evidence before the Review Tribunal and submits that the Review Tribunal erred by understating the severity of his condition and the impact on him by concluding that he "experienced certain physical discomfort and limitation due to a back complaint, which was not medically assessed as severe or due to a severe condition" (Review Tribunal's decision at paragraph 32).

[28] The fourth alleged error is that the Board failed to recognize that the Review Tribunal gave insufficient or no weight to the oral evidence presented at the hearing.

[29] The Applicant urges that the Review Tribunal placed undue weight on the medical reports, focused on whether or not there was an objective basis for his disability and did not assess the subjective impact of his condition on him. He submits that the Review Tribunal had an obligation to consider all of the evidence, including the oral evidence presented by himself and his wife, in assessing whether he is disabled. He also argues that the Board had the same obligation in determining whether there is an arguable case on appeal and erred when it referred to the Review Tribunal's decision being based on a reasonable interpretation of the medical evidence without reference to the oral evidence.

Respondent's Submissions

[30] The Respondent submits that no reviewable error was committed in refusing the leave application and that the decision is reasonable. Furthermore, the Respondent argues that in light of the decisions in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (QL) and *Samson* at paragraph 14, the standard of review of a decision of the Board granting leave to appeal is reasonableness.

[31] In written submissions, the Respondent did not argue directly on the issues raised by the Applicant, including the sufficiency of the reasons, but did put forward arguments that go to the reasonableness of the decision.

Disability under the CPP

[32] The Respondent makes the following general submissions as to the requirements under the CPP - in order to be entitled to a disability pension a person must satisfy three requirements: meet the contributory requirements; be disabled within the meaning on the CPP when the contributory requirements are met; and be so disabled continuously and indefinitely (subsections 42(2) and 44(2) and paragraph 44(1)(b)). Subsection 42(2) of the CPP provides that a person shall be considered to be disabled only if he is determined to have a severe and prolonged mental or physical disability. A disability is not based upon the applicant's incapacity to perform his usual job, but rather any substantially gainful occupation and that where there is evidence of work capacity, must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition (*Villani* at paragraph 50; *Inclima v. Canada (Attorney General)*, 2003 FCA 117, [2003] F.C.J. No. 378 at paragraphs 3 and 4 (QL)).

[33] Not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension under CPP. An applicant must demonstrate that he suffers from a serious and prolonged disability that renders him incapable regularly of pursuing and substantially gainful occupation. Thus medical evidence is required, as is evidence of employment efforts and possibilities (*Villani* at paragraphs 44-46 and 50).

The test for granting leave

[34] The Respondent also outlines that an application for leave to appeal to the Board must demonstrate an arguable case or put in another way, some arguable ground on which the proposed

appeal might succeed (*Kerth* at paragraph 24; *Callihoo* at paragraph 15). Like the Applicant, the Respondent submits that there are two issues that must be determined in reviewing the decision of the Board concerning an application for leave to appeal as set out in *Callihoo* at paragraph 15.

[35] The Respondent contends that the Applicant did not present an arguable case as the application for leave to appeal does not allege an error of law or an error in the appreciation of the evidence, nor did it raise relevant significant facts not appropriately considered by the Review Tribunal. The Respondent points to the application for leave to appeal where the Applicant simply indicated that he was seeking leave to appeal on the basis that he had "been pensioned off on WCB" after the Review Tribunal's decision (Application for Leave to Appeal to the Pension Appeals Board (May 22, 2009), Respondent's Record, Volume 1, page 12).

[36] As to the new evidence submitted, the Respondent alleges that the W.C.B. decision is irrelevant since the test used pursuant to the provincial statute is different from that under the CPP (*Callihoo* at paragraphs 18 and 20). Furthermore, the document cannot be said to be significant simply because it refers to the functional assessment dated February 9, 2009. Finally, the Respondent underlines that the W.C.B. decision does not raise an arguable case as it indicates that the Applicant retains a capacity to work and a person with a residual capacity to work does not suffer from a disability as defined in the CPP (some examples are cited in *Janzen v. Canada (Attorney General)*, 2008 FCA 150, [2008] F.C.J. No. 667 (QL); *Warren v. Canada (Attorney General)*, 2008 FCA 377, [2008] F.C.J. No. 1802 (QL)). Thus it was reasonable to refuse leave.

Analysis

Standard of review

[37] In *Dunsmuir*, the Supreme Court of Canada clearly identified two standards – correctness and reasonableness, and that different issues will attract a different standard. Questions of fact and questions of mixed fact and law are held to a standard of reasonableness; whereas questions of law can attract either a standard of reasonableness or correctness depending on certain factors. Guidance with regards to the appropriate factors can be found in existing case law and an extensive review need not be conducted every time.

[38] Turning now to the questions at issue in this case, the first question is one of procedural fairness and thus attracts a standard of correctness (*Sonier v. Canada (Attorney General)*, 2007 FC 1278, 332 F.T.R. 127 (QL)). The second question is a determination as to whether the Board applied the right test and is held to a standard of correctness (*Mcdonald v. Canada (Minister of Human Resources and Skills Development)*, 2009 FC 1074, [2009] F.C.J. No. 1330 at paragraph 6 (QL)). The third involves questions of fact and questions of mixed fact and law. Accordingly, it will be reviewed on a standard of reasonableness (*Landry* at paragraph 18).

[39] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The Court will also look to whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47).

Were the reasons provided by the Board adequate?

[40] The Applicant claims that the reasons provided by the Board are so deficient that they breach the principles of natural justice. I do not agree. Admittedly, the reasons are brief but they are acceptable considering the circumstances of this case.

[41] In the present case, the sole new piece of evidence put forward on the application for leave was the W.C.B. report and no other ground of appeal was raised.

[42] In the reasons, the Board does address that W.C.B. report and concludes that it does not meet the test to grant the leave to appeal. The reasons under review must be fairly considered and should examine the record on which the decision is based (*Doucette v. (Minister of Human Resources Development)*, 2004 FCA 292, [2005] 2 F.C.R. 44 (QL)). There was very little contradictory evidence in the record before the Review Tribunal as detailed in its reasons and one can understand from the reasons given by the Board that the new document did not, in its opinion, provide new information that was different than that was already on the record. This is not a case where the Applicant submitted new or complex evidence that might have led the Board to grant the application. I am satisfied that, in the face of the sole document put before the Board, the reasons are adequate and show a sufficient analysis.

[43] As Justice Binnie stated in *Sheppard* and the Federal Court of Appeal reiterated in *Doucette*, the courts must not intervene simply because the reasons are not expressed in a way that is

acceptable to them (*Doucette* at paragraph 12). The reasons given by the Board, although brief, cannot be said to breach natural justice and the Court will not intervene.

Did the Board apply the correct test in determining whether to grant the leave to appeal?

[44] Both parties agree, and rightly so, that the Board must determine if there is an "arguable case" on the application for leave and that this is a lower hurdle to meet than determining the appeal on the merits. In *Kerth*, the Court granted judicial review where the Board had used language such as "the medical reports establish the Tribunal's findings as a reasonable one" and "the application offers no new evidence that would shift the balance in favour of a different result" as it appeared that the Board made a decision on the merits (at paragraph 25). The Applicant likens this case to that in *Kerth* and, similarly, argues that the language used by the Board indicates that it decided the case on the merits rather than the correct test of an arguable case.

[45] As Justice Reed said in *Kerth* at paragraph 27:

> … when the ground of an application for leave to appeal is primarily the existence of additional evidence, the question to be asked, in my view, is whether the new evidence filed in support of the leave application is such that it raises a genuine doubt as to whether the Tribunal would have reached the decision it did, if the additional evidence had been before it.

[46] Accordingly, one must expect that in applying the test to grant leave, the Board will comment on the merits of the evidence to some extent in explaining its reasoning in answering this question. Therefore, commenting on the evidence and its value cannot be conclusive in deciding whether or not the Board applied the correct test.

[47] In the case at bar, the application for leave was based solely on the W.C.B. decision which was not before the Review Tribunal. The Board clearly was not of the opinion that this additional piece of evidence raised even an arguable case as to the Review Tribunal's decision or that it might have been different. I acknowledge, as the Court did in *Callihoo*, that it can be difficult to draw the line as to whether or not the Board applied the correct test, particularly where the Board uses the type of language that it did here. Although the language used is similar to that in *Kerth*, I am persuaded that the Board did apply the test correctly in deciding whether or not to grant the application and the Applicant was not held to a heavier burden than he should have been. The information contained in the W.C.B. decision was not very different from that already submitted to the Review Tribunal and did not provide any new information that would meet the arguable case test threshold.

Did the Board err in law or in its appreciation of the facts in determining whether an arguable case is raised?

[48] With regard to the second issue set out in *Callihoo*, the Applicant has brought forward four issues that, in his view, meet the threshold of an arguable case. While it is well established that it is not the mandate of this Court to assess the merits of these issues, I will comment on them briefly in explaining the reasons why I have found that there was no error.

[49] On the first issue of the appreciation of the evidence by the Board, it is important to note that the provincial pension regime does not set out the same requirements as the federal legislation that is before me, thus the W.C.B. decision is not determinative in this case.

[50] In the W.C.B. decision, the Applicant was given a pension for a permanent impairment of 5% and an extended earnings replacement benefit based on the conclusion that there was no suitable alternative employment available to him in his area. However, the W.C.B. decision does not provide any new information that would reasonably lead one to conclude that the Review Tribunal decision might have been different.

[51] The record does not indicate clearly if the functional assessment dated February 9, 2009 included in the W.C.B. decision (page 14, Applicant's record) was before the Review Tribunal but the mention in the Transferable Skills Analysis and CAAT Report (page 42, Respondent's record, volume 1, dated February 13, 2009) that has been considered by the Review Tribunal shows the following "FCE (Functional Capacity Evaluation): Revealed that he was functioning at the sedentary to light level". Even if the Court would assume that the document dated February 9, 2009 was not in front of the Review Tribunal, the Court does not see any significant differences between the two conclusions reached.

[52] The Review Tribunal's decision as a whole clearly demonstrates that the tribunal was aware of the Applicant's claim that he could not do more than sedentary work. I am satisfied that the

Board reached a reasonable conclusion and that the information in the W.C.B. decision does not raise an arguable case.

[53] As for the second, third and fourth issues raised before this Court, it bears noting that the Applicant did not raise these issues before the Board. There is an authority that indicates that the burden is on the Applicant to set out grounds in the application for leave (*Barcellona v. Canada (Attorney General)*, 2007 FC 324, [2007] F.C.J. No. 443 at paragraph 31 (QL)). However, I am concerned by the fact that the Applicant was self-represented in all proceedings except the one before this Court. As a result, I have reviewed these alleged errors and am satisfied that none of them would have met the arguable case threshold even if they had been raised before the Board.

[54] A reading of the Review Tribunal decision, particularly paragraphs 26 to 31, shows that the Applicant's particular circumstances were taken into consideration. The Review Tribunal explicitly references the test set out in *Villani* and then goes on to apply it and balances the medical evidence with the "real world factors" in reaching its conclusion. Furthermore, the third and fourth alleged errors essentially amount to asking this Court to reevaluate and reweigh the evidence that was put before the Review Tribunal. The Review Tribunal provided an extensive review of the medical evidence and drew upon it in reaching its conclusions. It also referred to the oral testimony of both the Applicant and his wife and clearly took into account the Applicant's own opinion of his condition. There is nothing on the record to indicate that there was an arguable case that there was an error of fact committed by the Review Tribunal.

[55] In light of the above analysis, the Court considers that its intervention is not warranted.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. The Respondent did not seek costs.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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