

Federal Court



Cour fédérale

Date: 20100301

Docket: T-50-08

Citation: 2010 FC 236

Ottawa, Ontario, March 1, 2010

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**DONALD MACTAVISH,
BY HIS ESTATE TRUSTEE
ALEXANDRA MACTAVISH**

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Donald MacTavish was seriously injured in a car accident in May 1997. Damage to his spine was temporarily alleviated through surgery but, by the spring of 1998, it was clear that he could not return to work at the Windsor Star.

[2] In December 1997, Mr. MacTavish applied to the Minister for disability benefits under the Canada Pension Plan (CPP). A year later, he was turned down. The Minister found Mr. MacTavish

ineligible because he could still perform light work. Mr. MacTavish provided further information, but was turned down again in October 1999 for the same reason.

[3] Over the years, Mr. MacTavish's condition worsened considerably. He thought about making a fresh application for benefits, but never did. However, in the spring of 2007, he asked for a reconsideration of his application and supplied further medical evidence. Before he received an answer, Mr. MacTavish died. A negative decision on his request for reconsideration arrived in July 2007. Mr. MacTavish's widow, Alexandra, then took up the matter. She asked again for a reconsideration and filed more evidence. The Minister's delegate rendered another negative decision on December 12, 2007, on the ground that the request for reconsideration was made well past the usual 90-day statutory time limit and there was no justification for extending it in the circumstances. It is that decision that is the subject of this application for judicial review.

[4] As Mr. MacTavish's estate trustee, Mrs. MacTavish asks me to overturn the decision refusing to extend the time-frame for reconsidering the denial of benefits. However, I can find no basis for doing so and must, therefore, dismiss this application for judicial review.

[5] The sole question before me is whether the refusal to reconsider was reasonable.

II. Analysis

1. The decision

[6] The decision refusing to extend the time period for reconsideration was made by a delegate of the Minister of Human Resources and Social Development. She found that there were no exceptional or extenuating circumstances preventing Mr. MacTavish from making a timely request for reconsideration. Similarly, there was no evidence that Mr. MacTavish had an ongoing intention to seek reconsideration of his benefits claim. He had been given information about how and when to do so, but did not act until 8 years after the original decision. He was also told about the alternate recourse available to him – to apply for a review based on new facts – which is a remedy Mrs. MacTavish is pursuing in parallel with this application.

2. Was the decision reasonable?

[7] The parties agree that there are four general factors that are relevant to a decision whether to extend the normal 90-day period:

- (i) Was there a continuing intention to pursue the reconsideration?
- (ii) Does the applicant have an arguable case?
- (iii) Is there a reasonable explanation for the delay?
- (iv) Would the Minister be prejudiced by the extension?

[8] The parties also agree that the overarching purpose that these factors are meant to serve is to ensure that justice is done between the parties (*Canada (Attorney General) v. Blondahl*, 2009 FC 118). Accordingly, the factors must be applied flexibly. It may not be necessary to analyze all of them in a given case.

[9] Mrs. MacTavish argues that the delegate failed to mention that the case supporting her late husband's claim was more than arguable – it was virtually conclusive. Further, the delegate did not point to any prejudice that would be caused to the Minister by extending the time for reconsidering Mr. MacTavish's claim. In addition, while Mr. MacTavish did not request a reconsideration between 1999 and 2007, he was obviously still interested in trying to persuade officials to grant his claim. He inquired about submitting a fresh application and continued to compile medical evidence in support of it. Finally, Mrs. MacTavish urges me to note that her late husband was dealing with serious, ongoing health issues during the years after his accident. He was taking a variety of powerful pain medications. He was not in a condition to focus on realizing the CPP benefits he was due.

[10] I cannot find the delegate's decision unreasonable. I accept that Mr. MacTavish was in poor health and great pain for many years. However, as the delegate noted, this does not, in itself, suggest that he was unable to make a timely request for reconsideration. He may well have been planning to try again to obtain a positive decision, but it appears he was contemplating either a fresh application or a review based on new facts, or possibly both, not necessarily a request for reconsideration.

[11] True, the delegate does not make any reference to the merits of Mr. MacTavish's claim. But her failure to do so does not in itself render her decision unreasonable, particularly given the force of her conclusions on the other factors.

[12] It is also true that the delegate does not refer specifically refer to any prejudice to the Minister. Again, this in itself does not make her decision unreasonable. An eight-year delay, on its

face, can be assumed to be prejudicial. Further, it is for the applicant to show an absence of prejudice, which has not been done here.

III. Conclusion and Disposition

[13] Overall, therefore, I cannot conclude that the delegate's decision was unreasonable and I must dismiss this application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT IS that :

1. The style of cause in the notice of application in Court File Number T-50-08 is amended by substituting the Attorney General of Canada in place of the Minister of Human Resources and Social Development as the respondent.
2. The application for judicial review is dismissed.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-50-08

STYLE OF CAUSE: MACTAVISH v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Windsor, ON.

DATE OF HEARING: February 10, 2010

REASONS FOR JUDGMENT AND JUDGMENT: O'REILLY J.

DATED: March 1, 2010

APPEARANCES:

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