Federal Court Cour fédérale

Date: 20110427

Docket: T-679-09

Citation: 2011 FC 470

Ottawa, Ontario, April 27, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

JAMES MACDONALD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered July 28, 2008 by a designated member of the Pension Appeals Board (PAB) refusing the Applicant leave to appeal a decision of a Review Tribunal (RT).

[2] At the hearing, Ms. Parkinson who is a former lawyer (not the solicitor of record), asked the permission to make oral representations for the Applicant. Even though the Respondent filed an objection, the Court granted the permission to Ms. Parkinson so that she could explain the Applicant's main arguments in a summary manner.

[3] For the reasons outlined below, this application shall be denied.

Factual background

[4] The following facts are an adaptation of paragraphs 4 to 29 of June 10, 2008, RT's Decision.

[5] The Applicant, a self-represented litigant, applied for a disability pension under the *Canada Pension Plan,* R.S.C. 1985, c-8 (CPP) in August 2006. He was employed as a welder/radiograph operator for Trenton Works Limited from April 12, 1996 to April 22, 2005 and stopped working as a result of lower back and leg pain. Prior to this, the Applicant worked in forestry from March 20, 2002 to July 15, 2002 and prior to that, he worked in retail sales.

[6] The Applicant first hurt his back in 2001 while at work. After approximately nine months of recovery, he was in good shape again. He then hurt his back again at work bending over to pick up a piece of metal in April 2005, when he stopped working as a welder.

[7] After his injury, his former employer (Trenton Works Limited) found him another job driving a van. The Applicant started at two hours and worked his way up to eight hours a day. He was also able to lie down in the van when he needed to do so. He worked in this position for six weeks until he was allegedly told by his supervisor that he could not do the job and that he should go back to the Workers' Compensation.

[8] The Applicant's main complaint was that of lower back pain which radiates down his right leg and further, and that the bottom half of his leg was numb. He alleges that pain in his right leg is there all the time as is the pain in his lower back. He indicated on his original application that he was unable to sustain bending, sitting, or standing for any length of time. He stated that although he used to repair his car and do carpentry, he could no longer do any such work. Instead, he had to lie flat in bed for long periods in order to relieve the pain. He has tried a variety of medication and took Tylenol No. 3 for mild relief.

[9] The Applicant alleges that since the accident in April 2005, his condition has gotten progressively worse. The exercises that he did made him sore and did not help him.

[10] In June of 2007, the Workers' Compensation Board (WCB) tried to look for a job where the Applicant could work one to two hours per day but was unsuccessful in this endeavour.

[11] He contends that he would have difficulty retraining as he cannot sit in a classroom for long periods of time, and that the sleeping pills cause him memory loss.

Medical Reports

[12] A CT scan dated May 11, 2004 indicated that there was bulging disc annulus at L4-5 without evidence of nerve root compromise.

[13] Functional Capacity Evaluations (FCE) in January and July 2005 mentioned that the Applicant could do sedentary to light physical work and had a work day tolerance estimated at four to eight hours.

[14] In a medical report dated June 7, 2005, Dr. William Oxner stated that the Applicant was having mechanical back pain because of early disc degeneration and that he was not a candidate for surgery. Dr. Oxner indicated that he should be retrained for some different type of occupation or a different type of job at Trenton Works since it was unlikely that he was going to go back to the type of job that he was doing. Dr. Oxner indicated that it would be likely that he would have persistent restriction in his ability to do heavy lifting, forward bending and prolonged sitting.

[15] In the FCE of July 2005, it was noted that he had full time work tolerance at the light to medium physical demand level. It recommended a gradual return to work to a position that meets his physical tolerance.

[16] An MRI report dated October 13, 2005 indicated that the Applicant had mild to moderate right paracentral disc herniation at L4-5 with an associated annular tear in which the disc herniation is contacting and mildly effacing the thecal sac.

[17] A medical legal report dated October 5, 2005 by Dr. Robert K. Mahar indicated that the Applicant’s pain generator had not been identified and that an annular disc bulge on CT is not a pain generator. Dr. Mahar mentioned that the Applicant was disabled form his current occupation.

[18] In a medical report dated October 27, 2005, Dr. William Oxner wrote that re-education was the only route for the Applicant at that time. He wrote that it was unlikely that he was going to return to work as a welder.

[19] In a medical report dated August 2, 2006, Dr. Chee diagnosed the Applicant with (R) paracentral disc herniation and annular tear at L4-5. He stated that the Applicant had chronic lower back pain and that there was a poor prognosis as he was unable to even do activities of daily living.

[20] In a medical report dated October 11, 2006, Dr. Alexander noted that he reviewed Applicant's latest MRI and that it was not necessary to carry out a surgery.

[21] In a report dated January 29, 2007, Dr. Koshi from the Pain Management Unit noted that the Applicant had mechanical low back pain. He stated that the prognosis for complete resolution of pain was poor and that he would be left with residual pain. In relation to the prognosis for return to work, he agreed with previous medical practitioners who had seen him and advised that returning to work at a light physical demand level would not harm him. He further wrote that the Applicant had the capacity to return to gainful activity if he decided to do so. He felt that he did not seem to have any interest in getting involved in a rehabilitation program with a return to work goal in mind.

Decision by the Department of Social Development Canada

[22] The Department of Social Development Canada denied the Applicant's application because he did not fully meet the requirements of CPP. His request for reconsideration was also denied.

[23] The Applicant then appealed the matter to the RT.

Decision of the RT

[24] In a decision dated June 10, 2008, the RT denied the Applicant's application for the following reasons:

[25] It determined that the Applicant did not suffer from a severe disability. It found that the medical evidence did not support a finding that Applicant's condition was severe. In fact, the medical evidence, including the opinions of a specialists and FCEs' supported the Applicant's ability to retrain and do some lighter form of work. Two FCEs in January and July (2005) confirmed that the Applicant had a work day tolerance of between four to eight hours at a more sedentary form of work. It also found that the time period in which he last met the contributory requirements as set out in the Plan, was December 31, 2007 (his Minimum Qualifying Period, or MPQ).

[26] It also concluded that given the Applicant's age and his level of education, he should be able to retrain and be able to do some sedentary or light physical type of employment. It did not accept the evidence that the Applicant could not sit in a classroom for any length of time in order to be retrained.

Application for leave to appeal

[27] The Applicant sought leave to appeal the RT's decision in a letter to the PAB on the grounds that the RT erred in failing to consider all of the evidence, especially another FCE dated April 19, 2007 in which it was stated that the Applicant had a total workday tolerance of 1 to 2 hours. He could not therefore be considered gainfully employed.

[28] The decision of the PAB is the object of the present application.

The legislation is in the attached appendix

Analysis

[29] To be entitled to a disability pension under the *Canada Pension Plan*, R.S.C" 1985, c. C-8. (CPP), a person must satisfy three requirements under subsection 42(2), para 44(1)b) and subsection 44(2) :

i. Meet the contributory requirements
ii. Be disabled within the meaning of CPP when the contributory requirements were met; and
iii. Be so disabled continuously and indefinitely

[30] Subsection 42(2) provides that a person shall be considered to be disabled only if he or she is determined to have a "severe and prolonged mental or physical disability".

[31] A disability is "severe" if the person is incapable of regularly pursuing any gainful occupation. It is the capacity to work and not the diagnosis or the disease description that determines the severity of the disability under the plan. Disability is not based upon the Applicant's

incapacity to perform his or her usual job, but rather any substantially gainful occupation (*Inclima v Canada (Attorney General)*, 2003 FCA 117 (CA)**,** para 3, *Canada (Minister of Human Resources Development) v Scott*, 2003 FCA 34, para 7).

[32] Accordingly, an Applicant who seeks to bring him/herself within the definition of severe disability must not only show that he or she has a serious health problem, but, 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 (*Inclima*, *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33, paras 16-17). Medical evidence is required as evidence of employment efforts and possibilities (*Villani v Canada (Attorney General),* 2001 FCA 248 paras 44-46 and 50, *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33, para 16).

[33] The Applicant refers to the April 19, 2007 functional assessment in which it concluded that he could work 1 to 2 hours at a sedentary occupation (Applicant's Record, Exhibit 4). He submits that this report was among the evidence provided at the RT hearing and argued in his application to the PAB. However, neither decision refers to this assessment which the Applicant considers to be important, especially in light of it being the most recent evaluation of his functional ability.

[34] Furthermore, he contends that the decision of the PAB does not refer to the fact that following the two 2005 FCEs, he did attempt to return to work in a more sedentary occupation driving a van and was unable to keep this position, as he was told to leave by his employer. He states that this evidence has never been challenged and was not addressed by the RT or by the PAB.

[35] However, the PAB noted that the medical evidence of the specialists (Dr. William, Dr. Oxner, Dr. Alexander and Dr. Koshi) have indicated that the Applicant had the ability to retrain and do some light form of work. It also considered that the two FCEs indicated that the Applicant had work tolerance of between four to eight hours of a more sedentary form of work and that he should retrain for a lighter occupation. Although the Applicant contested that he could endure training**,** the Court considers that it was open to the PAB to prefer the medical evidence over the allegations of the Applicant.

[36] As to the April 19, 2007, Functional Assessment performed by Dr. Mark Williams, the following *caveats* state: "Please note that the estimate for workday tolerance does not specially pertain to Mr. McDonald's pre-accident work, but instead provides an estimate of activity tolerance in a general work setting. The estimate should not be interpreted as a final determination of workday tolerance for the future, but instead should be viewed as a guideline for re-entrance to the workforce. The potential for the client to improve upon his initial estimate exists, provided no medical contraindications are present." (see page 2, paras 2 and 3)

[37] The Court is convinced that the RT considered and analyzed that document (RT's decision, para 17).

[38] The Applicant relies on *Villany* and *Carvey and Minister of Human Resources Development,* a decision of a PAB, 2003 (Applicant's Book of Authorities, Tab 5) to argue that the PAB in the case at bar erred.

[39] PAB's are not bound by their own decision and the Federal Court and the Federal Court of Appeal have held that a decision made by a provincial board such as the WCB with regards to an Applicant's entitlement to benefits pursuant to a provincial statute is irrelevant since the test to apply is different from the CPP disability test (*Callihoo v Canada (Attorney General)*, [2000] FCJ No. P12, paras 18 and 20, *Harvey v Canada* (Attorney General), 2010 FC 74, paras 49-52).

[40] It is true that in the PAB's decision, the April 2007 functional assessment is not mentioned but the Court is unable to conclude that the absence of such a mention is unreasonable due to the unclear and inclusion determination of that report.

[41] The PAB relied on the last available medical reports from 3 specialists (Dr Oxner, Dr. Alexander and Dr. Koshi) and 2 complete FCE made in 2005. It was therefore in the province of the PAB to prefer that evidence.

[42] The Court's intervention is not warranted.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed.

"Michel Beaudry"
Judge

APPENDIX

Canada Pension Plan, R.S.C. 1985, c-8

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

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;

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 — notamment le cotisant visé au sous-alinéa 44(1)b)(ii) — 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 faite.

44. (1) Subject to this Part,

(a) a retirement pension shall be paid to a contributor who has reached sixty years of age;

(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

44. (1) Sous réserve des autres dispositions de la présente partie :

a) une pension de retraite doit être payée à un cotisant qui a atteint l'âge de soixante ans;

b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :

(i) has made contributions for not less than the minimum qualifying period,

(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,

(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;

(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;

(iv) [Repealed, 1997, c. 40, s. 69]

(iv) [Abrogé, 1997, ch. 40, art. 69]

…

….

(2) For the purposes of paragraphs (1)(b) and (e),

2) Pour l'application des alinéas (1)b) et e) :

(a) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions on earnings that are not less than the basic exemption of that contributor, calculated without regard to subsection 20(2),

a) un cotisant n'est réputé avoir versé des cotisations pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations sur des gains qui sont au moins égaux à son exemption de base, compte non tenu du paragraphe 20(2), selon le cas :

(i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period, for at least four years,

(i) soit, pendant au moins quatre des six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable, soit, lorsqu'il y a moins de six années civiles entièrement ou partiellement comprises dans sa période cotisable, pendant au moins quatre années,

(i.1) for at least 25 calendar years included either wholly or partly in the contributor's contributory period, of which at least three are in the last six calendar years included either wholly or partly in the contributor's contributory period, or

(i.1) pendant au moins vingt-cinq années civiles comprises, en tout ou en partie, dans sa période cotisable, dont au moins trois dans les six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable,

(ii) for each year after the month of cessation of the contributor's previous disability benefit; and

(b) the contributory period of a contributor shall be the period

(i) commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and

(ii) ending with the month in which he is determined to have become disabled for the purpose of paragraph (1)(b),

but excluding

(iii) any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability, and

(iv) in relation to any benefits payable under this Act for any month after December, 1977, any month for which the contributor was a family allowance recipient in a year for which the contributor's unadjusted pensionable earnings are less than the basic exemption of the contributor for the year, calculated without regard to subsection 20(2).

(ii) pour chaque année subséquente au mois de la cessation de la pension d'invalidité;

b) la période cotisable d'un cotisant est la période qui :

(i) commence le 1er janvier 1966 ou au moment où il atteint l'âge de dix-huit ans, en choisissant celle de ces deux dates qui est postérieure à l'autre,

(ii) se termine avec le mois au cours duquel il est déclaré invalide dans le cadre de l'alinéa (1)b),

mais ne comprend pas :

(iii) un mois qui, en raison d'une invalidité, a été exclu de la période cotisable de ce cotisant conformément à la présente loi ou à un régime provincial de pensions,

(iv) en ce qui concerne une prestation payable en application de la présente loi à l'égard d'un mois postérieur à décembre 1977, un mois relativement auquel il était bénéficiaire d'une allocation familiale dans une année à l'égard de laquelle ses gains non ajustés ouvrant droit à pension étaient inférieurs à son exemption de base pour l'année, compte non tenu du paragraphe 20(2).

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Halifax
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APPEARANCES:

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Ms. Christine Langill	FOR THE RESPONDENT

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