Federal Court  Cour fédérale

Date: 20111129

Docket: T-1684-10

Citation: 2011 FC 1387

Ottawa, Ontario, November 29, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SHERRY LAVIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of a decision of the Pensions Appeals Board (the Board) dated September 15, 2010, wherein the applicant's application for an extension of time within which to commence an appeal was refused. This conclusion was based on the Board's finding that the applicant had failed to satisfy the test for considering a request for an extension of time.

[2] The applicant requests that this Court set aside the Board's decision and remit the matter with directions to a differently constituted panel of the Pension Appeals Board.

Background

[3] The applicant, Sherry Lavin, was employed as a receptionist and bookkeeper from 1996 to 2005. In 2005, the applicant stopped working for medical reasons. She currently suffers from cognitive impairment, depression and other medical illnesses.

[4] On February 26, 2007, the applicant applied for disability pension under the *Canada Pension Plan* (CPP). Her application was denied because she did not fully meet the requirements of the CPP. After reconsideration, she was again denied for failing to meet the definition of disability under paragraph 42(2)(a) of the CPP.

[5] On March 3, 2008, the applicant filed an appeal to the Office of the Commissioner of Review Tribunals (the tribunal). A hearing was convened to hear the appeal in May 2009. On July 2, 2009, the tribunal communicated its decision to the applicant and the applicant acknowledged receipt of it later in the same month. In its decision, the tribunal found that the applicant met the contributory requirement until December 31, 2006; the minimum quantifying period (MQP). However, the tribunal found that the applicant had not shown, on a balance of probabilities, that she suffered from a severe disability as defined under paragraph 42(2)(a) of the CPP. The appeal was therefore dismissed.

[6] Pursuant to subsection 83(1) of the CPP, the applicant had 90 days, or until September 30, 2009, to appeal the tribunal's decision to the Board.

[7] On June 9, 2010, the applicant filed an extension of time, leave to appeal and notice of appeal of the tribunal's decision. In this application, the applicant explained that she had been in extremely poor health since receiving the tribunal's decision. Although she intended to appeal the decision as soon as possible, her illnesses precluded her from coping with her case and from seeking legal counsel. She therefore had to rely on her husband who also suffered from illnesses. When her husband tried to retain legal counsel for the applicant, he was allegedly unable to find anyone willing to take on an appeal to the Board. The applicant finally retained counsel after being referred to the Lawyer Referral Service of the Law Society of Upper Canada.

[8] In response to the applicant's application, the Board advised her that more information would be required as the application had been received after the 90 day period. In response, the applicant submitted a sworn affidavit and a letter from her doctor dated July 26, 2010, stating that he had changed his mind from his previous assessment about the applicant's ability to work.

Board's Decision

[9] In its decision, the Board referred to the finding in *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883, [2005] FCJ No 1106 that a Board's decision to grant leave to appeal after the expiry of a 90 day period is "highly discretionary" (at paragraph 4). The

Board also noted the factors that must be followed on extension of time applications under subsection 83(1) of the CPP (*Gattellaro* above, at paragraph 9):

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[10] Based on the evidence before it, the Board accepted that factors 1 and 3 were satisfied in this case.

[11] The Board conceded that it had some reservations on whether factor 4 was satisfied as it believed that the memory of witnesses would be diminished and their power of recollection decreased after eleven months had passed since the tribunal's hearing. Further, the Board stated that it had no knowledge of whether the Minister's files on this matter remained in existence, as stated in the applicant's affidavit.

[12] However, the Board's main concern pertained to factor 2. The Board held that the proper test for leave to appeal was whether the application raised an arguable case without otherwise assessing the application's merits. The Board cited *Callihoo v Canada (Attorney General)*, 190 FTR 114, [2000] FCJ No 612 for guidance on when an application for leave may raise an arguable case where there is a lack of significant new or additional evidence. It noted that although the applicant's doctor had appeared to change his opinion from November 2007 to July 2010, the MQP was December 31, 2006, and the tribunal had properly focused on the applicant's condition at that time.

The Board therefore found that there was nothing before it to allow it to find that the applicant had an arguable case in accordance with the principles outlined in *Callihoo* above, at paragraph 22.

[13] In conclusion, the Board held that the test for considering a request for an extension of time is conjunctive. Therefore, as the applicant had failed to demonstrate all four of the above listed factors, the Board refused the application for an extension of time to appeal.

Issues

[14] The applicant submits the following point at issue:

1. It is submitted that the Board erred in its consideration of the factors for granting an extension of time pursuant to subsection 83(1) of the CPP.

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in denying the applicant's request for an extension of time to seek leave to appeal?

Applicant's Written Submissions

[16] The applicant submits that the standard of review for the Board on issues of law is correctness, and on other issues is reasonableness.

[17] The applicant submits that the Board failed to appreciate that its decision must be reasonable on the facts of the case when it emphasized the discretionary aspect of deciding an application for an extension of time.

[18] The applicant also submits that the Board made errors in its assessment of the applicant's arguable case (i.e., factor 2 discussed above). Contrary to legal principles developed in the jurisprudence, the applicant submits that the Board's decision did not show that it considered the very low threshold for the test for an arguable case in an application for an extension of time. The applicant submits that the Board failed to note the tribunal's lack of consideration on whether a person is practically or theoretically employable in accordance with subparagraph 42(2)(a)(i) of the CPP. In addition, the applicant submits that the Board failed to properly consider the new and significant 2010 medical evidence, namely, that the improvement the applicant's doctor had originally thought would occur after the treatment of aneurysms did not actually transpire. The applicant submits that these failings separately and together meet the very low threshold of an arguable case.

[19] In summary, the applicant submits that the Board failed to give sufficient weight to all the relevant considerations, and thereby erred in its decision.

Respondent's Written Submissions

[20] The respondent submits that judicial review of discretionary decisions refusing an extension of time involves two issues that are reviewable on different standards: the question of whether the

correct test was applied is reviewable on the standard of correctness, whereas the Board's application of the test is reviewable on the standard of reasonableness.

[21] The respondent cites extensive jurisprudence in support of its submission that the applicant did not meet the necessary burden of demonstrating to the tribunal that she was suffering from a severe and prolonged disability prior to the end of the MQP and continuously thereafter.

[22] The respondent also provides a broad overview of the statutory scheme governing extensions of time and leaves to appeal. The respondent submits that there are no statutory limitations on the scope of discretion delegated to a Board on a determination of an extension of time application.

[23] The respondent submits that the Board identified the correct test for determining an extension of time application. However, it submits that the Board erred in its finding that the test for an extension of time is conjunctive. Nevertheless, the respondent submits that the Board reasonably refused the application on the basis that the applicant had failed to demonstrate that she had an arguable case.

[24] The respondent submits that an arguable case requires that some reasonable chance of success at law be established. This may be accomplished by raising an issue of law or of relevant facts not appropriately considered by the tribunal in its decision, or significant new information. In this case, the respondent submits that the Board properly applied the test for arguable case and gave a reasonable explanation for not accepting the 2010 medical evidence. The respondent also refers to

jurisprudence which it submits provides that new medical evidence dated post-MQP does not raise an arguable case.

[25] The respondent further submits that the Board is entitled to comment on the merits of an application in deciding whether it discloses an arguable case. The Board therefore did not err in commenting on the 2010 medical evidence in explaining its finding on the question of arguable case.

[26] Finally, the respondent submits that no error of law or of significant fact was evident in the Tribunal's decision.

Analysis and Decision

[27] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[28] There are two issues involved in the review of a Board's decision to grant leave to appeal: whether the right test was applied, and whether the Board committed a reviewable error in applying that test (see *Canada (Attorney General) v Graca*, 2011 FC 615, [2011] FCJ No 762 at paragraph 9; and *Samson v Canada (Attorney General)*, 2008 FC 461, [2008] FCJ No 588 at paragraph 14).

[29] The first issue is a question of law and is therefore reviewable on the correctness standard (see *Vincent v Canada (Attorney General)*, 2007 FC 724, 315 FTR 114 at paragraph 26; *Graca* above, at paragraph 10; and *Canada (Attorney General) v Landry*, 2008 FC 810, [2008] FCJ No 1034 at paragraph 17).

[30] The second issue requires the Board to apply the test to the facts and is therefore a question of mixed fact and law that is reviewable on the reasonableness standard (see *Handa v Canada (Attorney General)*, 2008 FCA 223, [2008] FCJ No 1137 at paragraphs 7 and 11; *Leblanc v Canada (Minister of Human Resources and Skills Development)*, 2010 FC 641, [2010] FCJ No 784 at paragraph 15; *Graca* above, at paragraph 10; and *Landry* above, at paragraph 18).

[31] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). As the Supreme Court held in *Khosa* above, "it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence" (at paragraph 59).

[32] **Issue 2**

Did the Board err in denying the applicant's request for an extension of time to seek leave to appeal?

Under subsection 83(1) of the CPP, a Board has broad discretion to permit a party to appeal a tribunal's decision outside the normal 90 day limitation period (see *Gattellaro* above, at paragraph 4; and *Handa* above, at paragraph 7). However, this decision only confers a benefit – it is not a matter of right (see *Gattellaro* above, at paragraph 7).

[33] The exercise of the Board's discretion under subsection 83(1) of the CPP is structured by the factors set out in *Gattellaro* above, at paragraph 9:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[34] The Board must weigh and consider these factors in making its decision (see *Graca* above, at paragraph 17). The record should clearly demonstrate that all of these factors have been addressed by the decision maker (see *Gattellaro* above, at paragraph 10). However, an extension may be granted even if one of the factors mentioned in this test is not satisfied (see *Canada (Attorney General) v Blondahl*, 2009 FC 118, [2009] FCJ No 178 at paragraph 18; and *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41, [2007] FCJ No 37 at paragraph 33).

[35] At the hearing before me, the parties agreed that the only factor in issue was whether the matter disclosed an arguable case. As well, whether or not the four factors were conjunctive was not in issue before me.

[36] With respect to arguable case, Mr. Justice W. Andrew MacKay of this Court stated in *Callihoo* above, at paragraph 22:

> In the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision maker finds the application raises a question of an error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence. …

[37] The new medical reports provided by the applicant read in part as follows:

> April 28, 2009
>
> To whom it may concern,
>
> Regarding:
>
> Sherry Lavin
> 14 SILKWOOD CRES
> MISSISSAUGA, ON L6X 4L1 CANADA
>
> Date of Birth: 08/03/1960
>
> Sherry has ongoing severe cognitive difficulties, making it hard for her to be employable. She is very lucky from a medical point of view, but for all intensive purposes I think she is unemployable, primarily due to the cognitive issue which I had hoped would have improved over time.
>
> Dr. Michael Kates, MD

And:

> Dr. Michael Kates
> 101 Queensway West, 7th Floor Mississauga, ON L6B 2P7
>
> To whom it may concern,
>
> REGARDING:
>
> Sherry Lavin
> 14 Silkwood Cres

Mississauga, On
L6X 4L1 Canada
Date of Birth: 08/03/1960

July 26th 2010

Since my report in 2007, Sherry Lavin has continued to have cognitive difficulties, specifically short-term memory impairment. She continues to be monitored for hypertension. Dr. Izukawa and Dr. Rosso see her at least annually. Most recently, Dr. Sawa last spring suggested she needs to have carpal tunnel surgery. For the time being, no further progression of her intracranial aneurysms have occurred. Despite difficulties losing weight, her blood pressure is monitored regularly.

Basically I felt there were events in Sherry's life back in 2007 including her depression, that once resolved, I felt would allow her an opportunity to seek employment on at least a part-time basis. Over the last few years her depression has resolved but her cognitive impairment has not improved. Sherry used to enjoy her clerical work, but now is afraid of doing the same work due to the imminent mistakes that would result from cognitive issues. I have changed my mind about her ability to function in a work situation because I do not think the mistakes that would result from such cognitive issues would be tolerable to anybody she worked for. I do not feel it would be fair for her to face such situations. She will most likely experience further depression, embarrassment, and possibly irreparable damage to be put in situations where she would surely fail. If one could protect her and prevent such mental anguish, I would once again be more supportive of her ability to work.

Thank you for the opportunity to support Sherry. I wish her continued good health. She is a very lucky person who has endured life threatening illness.

Sincerely

Michael Kates, M.D., C.C.F.P.

[38] The Board dealt with the new medical evidence in paragraph 17 of the decision:

> I am aware that Dr. Kates appears to change his opinion in the letter dated July 26, 2010 from that contained in the letter dated November

> 2, 2007. However, the minimum qualifying period (MQP) is December 31, 2006, and the Review Tribunal was focused on the applicant's condition at that time, and properly so.

[39] The applicant submits that Dr. Kates, in his letter of July 26, 2010, is now saying that the depression and other events in the applicant's life were not the cause of the applicant's problems, as he originally thought, as they have now improved yet the applicant still has the cognitive difficulties which he had expected to improve but did not upon the improvement of the other problems.

[40] In my view, this conclusion could impact on any finding of the applicant's medical condition at the date of the applicant's MQP. The fact that Dr. Kates appears to be saying that he was wrong in his 2007 medical letter with respect to the effect of and the extent of the applicant's cognitive difficulties should have been addressed by the Board. In my view, this evidence could effect the decision as to whether or not an arguable issue existed.

[41] For the above reasons, I believe that the decision of the Board is unreasonable and must be set aside. The matter should be referred to another panel of the Board for redetermination.

[42] The applicant has asked for her costs of the application and the respondent submits that no costs should be awarded or that each party should bear their own costs. From the material before me, I cannot see any reason to deny the applicant her costs of the application. The applicant shall have her costs of the application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

2. The applicant shall have her costs of the application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Federal Courts Act, RSC 1985, c F-7

18.1.(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1.(1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
. . .	. . .
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

Canada Pension Plan, RSC 1985, c C-8

(2) For the purposes of this Act,	(2) Pour l'application de la présente loi :
(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,	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) 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	(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) 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	(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) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled,	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

but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — 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.

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,

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

. . .

. . .

(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

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,

. . .

. . .

(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

(i) soit, pendant au moins quatre des six dernières années civiles comprises, en tout ou en partie,

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, . . .

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, . . .

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.

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1684-10
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PLACE OF HEARING:	Toronto, Ontario
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DATED:	November 29, 2011

APPEARANCES:

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