Federal Court  Cour fédérale

Date: 20120928

Docket: T-1914-11

Citation: 2012 FC 1150

Ottawa, Ontario, September 28, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

CHERYLL A. BEST

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Pension Appeals Board (PAB) dated October 5, 2011, in which a designated member (the member) denied the applicant leave to appeal the decision of the Review Tribunal (RT) rendered on July 28, 2011. The dispute concerns disability benefits conferred under the *Canada Pension Plan*, RSC 1985, c C-8 (CPP).

[2] The applicant was self-represented at hearing before this Court.

Factual Background

[3] Ms. Cheryll A. Best (the applicant) was employed as a kitchen worker until September 3, 2007, when she stopped working, stating retirement as the reason for work cessation (Respondent's Record, Volume I, pp 59 and 179). The applicant underwent surgery for carpal tunnel release in September 2007. In a report dated October 22, 2007, her surgeon stated that she was healing well and could return to work the following week wearing a brace (Review Tribunal's decision, para 20).

[4] The applicant applied for a CPP retirement pension on February 4, 2008 and received her first payment on February 2, 2009.

[5] The applicant was training on the job at Aramark from July 7, 2008 until July 14, 2008, when she lifted a deep-fryer full of fries and injured herself. The applicant claims not to have had pain in her left wrist prior to that injury. She had to discontinue work and seek out physiotherapy, which she alleges did not help (Respondent's Record, Volume I, p 104). The applicant has not returned to work since the injury (Respondent's Record, Volume I, p 108).

[6] The applicant applied for disability pension on February 17, 2010, claiming her left hand rendered her disabled. The applicant's disability application was initially refused by letter dated May 17, 2010, because the medical adjudicator did not believe that the applicant had a disability that was both severe and prolonged, as required by subsection 42(2) of the CPP (Respondent's Record, Volume I, pp 46-47). Pursuant to subsection 81(1) of the CPP, the applicant asked for reconsideration of this original decision by letter dated May 21, 2010, in which she reiterated that she only has 23% of use of her left hand and must wear a brace at all times (Respondent's Record,

Volume I, p 48). The applicant was denied CPP disability again in a letter dated September 16, 2010 (Respondent's Record, Volume I, p 52) because the medical adjudicator found that the applicant, although having limitations, did not have a disability that is severe and prolonged. Pursuant to subsection 82(1) of the CPP, the applicant requested an appeal of this reconsideration to the RT by letter dated September 24, 2010. The hearing was held on June 14, 2011, before three tribunal members.

[7] The RT indicated that, in order to cancel a retirement pension in favour of a disability pension, one must be disabled prior to the month when the early retirement pension was received. In the present case, this requirement would be fulfilled by determining that the applicant was disabled by January 31, 2009, since her first early retirement payment was made on February 2, 2009. In order to qualify for the disability pension, an applicant must meet the requirements set out in paragraph 44(1)(*b*) of the CPP, namely: be under sixty-five, not have retirement pension payable, be disabled and have made sufficient valid contributions to the CPP. As required by subsection 42(2) of the CPP, a person is "disabled" if he or she has a severe (incapable of pursuing any substantially gainful occupation) and prolonged (likely to be long, continued and of indefinite duration or to result in death) mental or physical disability.

[8] The RT considered several medical reports pertaining to the applicant, including an October 13, 2009 report from her former family physician, Dr. Maidment, stating that she was unable to return to any gainful employment; several X-rays and bone scans; documentation pertaining to her carpal tunnel syndrome before and after her surgery (RT's decision, paras 16-20); and a report from the Workers' Compensation Board of Nova Scotia (WCB) summarizing an examination by Dr.

Koshi on December 4, 2008, and concluding that she could return to work immediately (Respondent's Record, Volume I, pp 101-16). The RT also referred to a November 14, 2008 report from Dr. Maidment stating that the applicant is only capable of sedentary duties and cannot lift more than 10 pounds (Respondent's Record, Volume I, pp 132-35).

[9] During the RT hearing, the applicant gave oral evidence to the fact that her main problem is her left wrist as a result of the injury on July 14, 2008. She stated that she is able to do household chores, but cannot lift without her brace. She reported that she could work if she wore her brace, but feels that no one will hire her because of the brace. She gave a demonstration that she could lift a full pitcher of water with her left hand when wearing her brace. The RT found the applicant to be forthcoming and credible; however, it was ultimately not convinced, on a balance of probabilities, that the applicant's disability was severe and prolonged in such a way to prevent her from all types of employment as of January 31, 2009.

[10] The RT's decision dismissing the applicant's appeal was made on July 28, 2011 and was communicated to the applicant on August 2, 2011. Finally, pursuant to subsection 83(1) of the CPP, the applicant applied for leave to appeal to the PAB on August 2, 2011 (Respondent's Record, Volume I, p 11). Leave to appeal was denied by the PAB member in a decision dated October 5, 2011. This last decision is the one under review before this Court.

The Issues

[11] The issue in this case is whether the PAB member's decision refusing leave to appeal to the PAB was reasonable.

[12] The review of a decision to grant or deny leave to appeal to the PAB involves the assessment of two issues: (1) whether the correct test of arguable case was applied by the PAB member and (2) whether an error was committed in determining whether an arguable case arose (*Callihoo v Canada (Attorney General)*, [2000] FCJ No 612 (QL) at para 15, 97 ACWS (3d) 159 [*Callihoo*]).

Standard of Review

[13] The respondent claims that both these issues are reviewable on a standard of reasonableness (citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39, [2011] 3 SCR 654 and *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 24, [2011] 3 SCR 471). The Court agrees that when a decision-maker is interpreting and applying its own statute, or has developed a particular expertise in applying a general common law principle in a specific context, a decision-maker should be allowed deference by applying the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]). The question of which test was applied is purely a question of law that remains reviewable on a standard of correctness (*Dunsmuir*, above). Its application, however, is reviewable on a standard of reasonableness.

[14] Hence, the first issue of whether the correct test was applied is therefore reviewable on a standard of correctness, while the proper application of this test is reviewable on a standard of reasonableness (*Canada (Attorney General) v Zakaria*, 2011 FC 136 at para 15, [2011] FCJ No 189 (QL) [*Zakaria*]).

[15] Pursuant to *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 20-22, [2011] 3 SCR 708 [*NL Nurses*], the adequacy of reasons must not be evaluated as a potential breach of procedural fairness, but rather be subsumed under the reasonableness analysis. Indeed, the Supreme Court of Canada has stated that "[w]here there are no reasons in circumstances where they are required, there is nothing to review. But where … there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis." (*NL Nurses*, above, at para 22).

Statutory Provisions

[16] Several statutory provisions are relevant in this case. They are presented in the Annex to this judgment.

Analysis

[17] As a preliminary note, the Court agrees with the respondent that the applicant's Exhibit "H", a letter from Dr. Maidment dated July 15, 2009, does not appear to have been before the RT nor the PAB. In the context of judicial review, this new evidence cannot be considered by the Court (*Davies v Canada (Minister of Human Resources Development)*, [1999] FCJ no 1514 (QL) at para 39, 92 ACWS (3d) 162 [*Davies*]) and will be struck from the record.

[18] The legislative scheme, as it pertains to benefits under the CPP, grants applicants a reconsideration of the initial medical adjudicator's decision as of right (subsection 81(1) of the CPP), as well as an appeal of that reconsideration to the RT, also as of right (subsection 82(1) of the CPP).

[19] In order to move on to the next step, appealing the RT's decision to the PAB, the legislator has determined that it is necessary to first obtain leave to appeal by applying in writing (ss 83(1) of the CPP). The specific content of this written application are set out in section 4 of the *PAB Rules*.

[20] In the present case, the applicant's application for leave to appeal is deficient and does not meet the requirements set out in section 4 of the *PAB Rules* (Respondent's Record, Volume I, p 11). Although the applicant used the correct form (Schedule 1 of the *PAB Rules*), she failed to indicate the grounds upon which she would rely to obtain leave to appeal as required by paragraph 4(*d*) of the *PAB Rules*. She also failed to include a statement of allegations of fact, statutory provisions and reasons in support of her appeal as requires paragraph 4(*e*) of the *PAB Rules*.

[21] An application for leave to appeal must demonstrate an arguable case (*Kerth v Canada (Minister of Human Resources Development)*, [1999] FCJ no 1252 at para 24 (QL), 173 FTR 102; *Callihoo*, above, at para 15).

[22] When assessing whether or not to grant leave to appeal, the PAB member must evaluate if there is an arguable case (*Zakaria*, above; *Callihoo*, above). The Court agrees with the observations made by Justice de Montigny in *Zakaria* at para 39:

> Although a leave to appeal application is a first, and lower, hurdle to meet than that which must be met at the hearing of the appeal on the merits, the application must still raise some arguable ground upon which the proposed appeal might succeed. …

[23] In this case, there is no arguable case that can be identified on the face of the application for leave to appeal. The applicant raises no grounds for appeal before the PAB. She identified no errors

of relevant significant fact or errors of law and adduced no new evidence. It follows that the only conclusion the PAB member could have drawn is that the applicant does not raise an arguable case since she does not raise any case whatsoever, arguable or not. The Court is satisfied that the PAB member applied the correct test in this case.

[24] Subsection 83(3) of the CPP expressly provides for written reasons when leave is denied. In the case at bar, the Court is satisfied that the PAB member did provide some reasons and more specifically referred to paragraph 42 of the RT decision. The RT reviewed the evidence, considered the oral testimony and made factual findings (RT's decision at paras 2, 3, 10, 11, 20 and 39). There is no error in the RT's decision that would raise an arguable case warranting the grant for leave.

[25] On the basis of the evidence in the case at bar, the conclusion that no arguable case was raised is thus a "result (that) falls within a range of possible outcomes" (*NL Nurses*, above, at para 14).

[26] As much as the Court sympathizes with the applicant, it nevertheless finds that the PAB member did not err in dismissing leave to appeal in light of the record before him. The Court's intervention is not warranted and the application for judicial review is dismissed.

[27] The Attorney General of Canada did not ask for costs. The Court will therefore not grant costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review be dismissed.

2. Exhibit "H" to the applicant's affidavit is to be struck from the record.

3. No costs.

"Richard Boivin"

Judge

Annex

Canada Pension Plan, RSC 1985, c C-8 (CPP)

PART II

PENSIONS AND SUPPLEMENTARY BENEFITS

INTERPRETATION

When person deemed disabled

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;

…

DIVISION C

PAYMENT OF BENEFITS: GENERAL PROVISIONS

Application for benefit

60. (1) No benefit is payable to any person under this Act unless an application therefor

PARTIE II

PENSIONS ET PRESTATIONS SUPPLEMENTAIRES

DEFINITIONS ET INTERPRETATION

Personne déclarée invalide

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;

[…]

SECTION C

PAIEMENT DES PRESTATIONS : DISPOSITIONS GENERALES

Demande de prestation

60. (1) Aucune prestation n'est payable à une personne sous le régime de la présente loi,

has been made by him or on his behalf and payment of the benefit has been approved under this Act.

…

How application to be made

(6) An application for a benefit shall be made to the Minister in prescribed manner and at the prescribed location.

Consideration of application and approval by Minister

(7) The Minister shall forthwith on receiving an application for a benefit consider it and may approve payment of the benefit and determine the amount thereof payable under this Act or may determine that no benefit is payable, and he shall thereupon in writing notify the applicant of his decision.

…

DIVISION F

RECONSIDERATIONS AND APPEALS

Appeal to Minister

81. (1) Where

…

(*b*) an applicant is dissatisfied with any decision made under section 60,

…

the dissatisfied party or, subject to the regulations, any person on behalf thereof may, within ninety days after the day on which the dissatisfied party was notified in the prescribed manner of the decision or determination, or within such longer period as

sauf si demande en a été faite par elle ou en son nom et que le paiement en ait été approuvé selon la présente loi.

[…]

Présentation de la demande

(6) Une demande de prestation doit être présentée au ministre en la manière et à l'endroit prescrits.

Examen de la demande et approbation du ministre

(7) Le ministre examine, dès qu'il la reçoit, toute demande de prestation; il peut en approuver le paiement et en déterminer le montant payable aux termes de la présente loi, ou il peut arrêter qu'aucune prestation n'est payable et avise dès lors par écrit le requérant de sa décision.

[…]

SECTION F

RÉVISIONS ET APPELS

Appel au ministre

81. (1) Dans les cas où :

[…]

b) un requérant n'est pas satisfait d'une décision rendue en application de l'article 60,

[…]

ceux-ci peuvent, ou, sous réserve des règlements, quiconque de leur part, peut, dans les quatre-vingt-dix jours suivant le jour où ils sont, de la manière prescrite, avisés de la décision ou de l'arrêt, ou dans tel délai plus long qu'autorise le ministre avant ou après

the Minister may either before or after the expiration of those ninety days allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

…

Reconsideration by Minister and decision

(2) The Minister shall reconsider without delay any decision or determination referred to in subsection (1) or (1.1) and may confirm or vary it, and may approve payment of a benefit, determine the amount of a benefit or determine that no benefit is payable, and shall notify in writing the party who made the request under subsection (1) or (1.1) of the Minister's decision and of the reasons for it.

Appeal to Review Tribunal

82. (1) A party who is dissatisfied with a decision of the Minister made under section 81 or subsection 84(2), … or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow, after the day on which the party was notified in the prescribed manner of the decision or the person was notified in writing of the Minister's decision and of the reasons for it.

…

Appeal to Pension Appeals Board

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

l'expiration de ces quatre-vingt-dix jours, demander par écrit à celui-ci, selon les modalités prescrites, de réviser la décision ou l'arrêt.

[…]

Décision et reconsidération par le ministre

(2) Le ministre reconsidère sans délai toute décision ou tout arrêt visé au paragraphe (1) ou (1.1) et il peut confirmer ou modifier cette décision ou arrêt; il peut approuver le paiement d'une prestation et en fixer le montant, de même qu'il peut arrêter qu'aucune prestation n'est payable et il doit dès lors aviser par écrit de sa décision motivée la personne qui a fait la demande en vertu des paragraphes (1) ou (1.1).

Appel au tribunal de révision

82. (1) La personne qui se croit lésée par une décision du ministre rendue en application de l'article 81 ou du paragraphe 84(2) […] ou, sous réserve des règlements, quiconque de sa part, peut interjeter appel par écrit auprès d'un tribunal de révision de la décision du ministre soit dans les quatre-vingt-dix jours suivant le jour où la première personne est, de la manière prescrite, avisée de cette décision, ou, selon le cas, suivant le jour où le ministre notifie à la deuxième personne sa décision et ses motifs, soit dans le délai plus long autorisé par le commissaire des tribunaux de révision avant ou après l'expiration des quatre-vingt-dix jours.

[…]

Appel à la Commission d'appel des pensions

83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 […] ou du

Tribunal made under section 82, … 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.

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.

Decision of Chairman or Vice-Chairman

(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.

Décision du président ou du vice-président

(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.

Designation

(2.1) The Chairman or Vice-Chairman of the Pension Appeals Board may designate any member or temporary member of the Pension Appeals Board to exercise the powers or perform the duties referred to in subsection (1) or (2).

Désignation

(2.1) Le président ou le vice-président de la Commission d'appel des pensions peut désigner un membre ou membre suppléant de celle-ci pour l'exercice des pouvoirs et fonctions visés aux paragraphes (1) ou (2).

Where leave refused

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.

Permission refusée

(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

[…]

…

Pension Appeals Board Rules of Procedure (Benefits), CRC, c 390

APPLICATION FOR LEAVE TO APPEAL	DEMANDE D'AUTORISATION D'INTERJETER APPEL
4. An appeal from a decision of a Review Tribunal shall be commenced by serving on the Chairman or Vice-Chairman an application for leave to appeal, which shall be substantially in the form set out in Schedule I and shall contain	**4.** L'appel de la décision d'un tribunal de révision est interjeté par la signification au président ou au vice-président d'une demande d'autorisation d'interjeter appel, conforme en substance à l'annexe I, qui indique :
(*a*) the date of the decision of the Review Tribunal, the name of the place at which the decision was rendered and the date on which the decision was communicated to the appellant;	*a*) la date de la décision du tribunal de révision, le nom de l'endroit où cette décision a été rendue et la date à laquelle la décision a été transmise à l'appelant;
(*b*) the full name and postal address of the appellant;	*b*) les nom et prénoms ainsi que l'adresse postale complète de l'appelant;
(*c*) the name of an agent or representative, if any, on whom service of documents may be made, and his full postal address;	*c*) le cas échéant, le nom et l'adresse postale complète d'un mandataire ou d'un représentant auquel des documents peuvent être signifiés;
(*d*) the grounds upon which the appellant relies to obtain leave to appeal; and	*d*) les motifs invoqués pour obtenir l'autorisation d'interjeter appel; et
(*e*) a statement of the allegations of fact, including any reference to the statutory provisions and constitutional provisions, reasons the appellant intends to submit and documentary evidence the appellant intends to rely on in support of the appeal.	*e*) un exposé des faits allégués, y compris tout renvoi aux dispositions législatives et constitutionnelles, les motifs que l'appelant entend invoquer ainsi que les preuves documentaires qu'il entend présenter à l'appui de l'appel.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1914-11
STYLE OF CAUSE:	Cheryll A. Best v AGC
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	September 12, 2012
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	September 28, 2012

APPEARANCES:

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Vanessa Luna	FOR THE RESPONDENT

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