

Docket: 2012-1659(IT)I

BETWEEN:

BRENDA WALKOWIAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on November 29, 2012 at Calgary, Alberta

Before: The Honourable Justice Patrick Boyle

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Adam Gotfried

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2010 taxation year is dismissed, without costs, in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada this 18th day of December 2012.

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 453

Date: 20121218

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BETWEEN:

BRENDA WALKOWIAK,

Appellant,

and

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REASONS FOR JUDGMENT

Boyle J.

[1] This informal appeal involves Ms. Walkowiak's entitlement to a disability tax credit for the 2010 taxation year in respect of her diagnosed Attention Deficit-Hyperactivity Disorder ("ADHD") and her diagnosed DSM-IV Learning Disability not otherwise specified. It is not disputed that Ms. Walkowiak has these two prolonged impairments in her mental functions for purposes of the disability tax credit. The only issue to be considered and determined in this case is whether the effects of the impairments to her mental functions are such that her ability to perform a basic activity of daily living is markedly restricted. Specifically, the question is whether Ms. Walkowiak is unable to, or requires an inordinate amount of time to, perform mental functions necessary for everyday life including her memory function, her problem solving, goal setting and judgment taken together, and her adaptive functioning.

[2] Her Notice of Appeal included the issue of one of her daughters' entitlement to the disability tax credit in 2010. However, at the hearing I was advised that her daughter's disability tax credit entitlement was resolved favourably by the Canada Revenue Agency ("CRA") in response to a ten year taxpayer relief application made in respect of her daughter, which included the year 2010. Accordingly, the issue relating to her daughter has been withdrawn on the understanding and agreement of

the parties that the CRA has committed to reassess on this basis under the taxpayer relief provisions of the *Income Tax Act* for a number of years including 2010.

Facts

[3] Ms. Walkowiak is a trained Health Care Aide and has worked for Alberta Health Services for more than 10 years. She has been married for more than 17 years and two of her children have disabilities. In 2010 she enrolled in college to pursue her Licenced Practical Nurse designation.

[4] Her Alberta Health Services employment has her working six – 10 hour shifts every two weeks. As a Health Care Aide she provides home care by way of taking care of sick children in order to permit their parents to sleep et cetera. She attends at clients' homes on her own for this purpose. She has a driver's licence and drives herself to the homes at which she works. She does not think that her Alberta Health Services supervisor knows she has a disability because she works so hard and repetitively to overcome it.

[5] In her own home life, Ms. Walkowiak has raised her children, including at times alone when she was not working and her husband continued to work full time. She is able to care for her children during the day alone while her husband is at work and then work night shifts. Within her home, her husband attends to the groceries and meal preparation most of the time. She is able to shop for groceries and prepare meals and does so from time to time and at times has done so over the years.

[6] Ms. Walkowiak described a difficult childhood in several respects. She has suffered from depression and anxiety throughout her adult life. She is on prescription medication for that.

[7] Given the difficulty she has, combined with her children having difficulties of their own, they attend regular family counselling sessions. When she raised in that context the fact that she found herself struggling upon her return to school in 2010, the family psychologist suggested she discuss the issues with student services available to her on campus.

[8] The initial assessment was done by a psychologist who completed the T2201 prescribed form. Under the heading Effects of Impairment he described that Ms. Walkowiak requires ongoing use of prescription medication to increase her behaviour in regard to working memory and recommends the use of assisted software

to accommodate learning and reading issues in employment and academic settings. This was based upon his assessment of her at the request of Alberta Employment and Immigration to support her academic program. In his accompanying letter he says Ms. Walkowiak requires ongoing prescription medication to address attentional concerns and acknowledges that this is in place through her family physician. He says she also requires the following: “support with study/organizational issues, a quiet work/testing environment, a reader/audio-version for exams and extra exam time. She will benefit from the assistance of a tutor to address the issues of the diagnosis, as they pertain to the more academic requirements of the program. In addition, she requires reading assistance software to accommodate her learning disability.”

[9] That is the complete discussion by that psychologist of the effects of Ms. Walkowiak’s issues of ADHD and Learning Disability. Ms. Walkowiak’s request of CRA for the disability tax credit based upon this initial form was not accepted, presumably because it largely appeared to only affect her academic environment.

[10] In response Ms. Walkowiak had another psychologist whom she was familiar with through the school for the disabled which her children attend, prepare a second T2201 certification for her. In that form, the second psychologist describes the effects of impairment as “both disorders markedly impact Brenda’s ability to engage in expected mental functions. Also significantly impacts her academic, social – emotional, and daily living functioning.”

[11] The letter accompanying the form indicates that both of the disorders “significantly interfere” with the taxpayer’s academic, daily living and social and emotional functions. It describes the taxpayer as someone who struggles with the pace of learning and reading and who has to put in excessive amounts of time to complete work with minimal results, and having difficulties with sustaining attention and processing information. Her learning disability demonstrates deficits in her verbal reasoning abilities and working memory. The verbal reasoning deficit impacts her abilities to understand verbal information presented to her and to express herself which can impact her in lectures, conversations and other everyday situations requiring use of language. Her working memory deficit impacts her ability to successfully engage in higher level thinking in everyday context causing her difficulty in environments when a lot of information is presented to her, which she will struggle with and may find processing information more time consuming and requiring more of her mental energy to focus and concentrate. The higher working memory demands will impact the speed at which she can process information and therefore requires longer time to complete certain tasks. These deficits impact her

academically, particularly in the areas of oral language, reading comprehension and mathematics and also impact her in areas requiring greater academic demands such as writing. The attached letter closes by saying Ms. Walkowiak will require support and accommodations in her education and even into the workplace as her symptoms are “significantly impacting her functioning.” She goes on to make a number of recommendations for accommodation by the school in her academic life.

[12] When CRA again turned down her request for a disability tax credit, Ms. Walkowiak had the second psychologist write a one paragraph letter to CRA Appeals Division expressing her belief that the taxpayer was “markedly restricted” in the mental functions necessary for everyday life. This letter briefly addresses difficulties her disorders “may” cause her outside her schooling environment in terms of adaptive functioning. She says that given the diagnosed disability and disorder, the taxpayer will “likely” take an inordinate amount of time to complete tasks related to daily living skills, to express herself, to remember tasks without reminders, to find solutions to problems or to make appropriate judgments without assistance and to engage in organizing and executing of plans. She expects the taxpayer will continue to struggle in these areas throughout her life and struggle to meet expected demands in academic, social and daily living environments.

[13] Neither of these psychologists testified at trial or provided any further written information expanding upon their descriptions.

[14] Ms. Walkowiak testified that as a result of her depression and anxiety issues and her ADHD and Learning Disability, for which she is also taking medication, she needs help with everyday life situations. She feels she can be taken advantage of and does not know who to trust. She chooses to stay home a lot. She confides in her husband for guidance in these areas. She acknowledges she has difficulties with social and personal relationships which she attributes to her medical conditions.

[15] Mr. Walkowiak also testified briefly. He described the taxpayer as having no concept of time management and needing his help or she is otherwise always late. He described a house full of stickers to remind her what to do and finally, he estimated that she spends perhaps four times as much time as an average person would on her studies.

The Disability Tax Credit Provisions

[16] Subsection 118.3 provides that in order for Ms. Walkowiak to be successful she must first have a “prolonged impairment in mental functions”. She has met this requirement.

[17] The second requirement is that the effects of her impairment in mental functions must be such that her ability to perform a basic activity of daily living is markedly restricted. For this purpose, the legislation provides that a basic activity of daily living which must be markedly restricted must be a basic activity of daily living in relation to mental functions necessary for everyday life. Mental functions necessary for everyday life are defined in the legislation to include i) memory, ii) problem solving, goal setting and judgment (taken together) and iii) adaptive functioning. The legislation further provides that in order to be markedly restricted in her mental functions necessary for everyday life, she must be unable or require an inordinate amount of time to perform those mental functions all or substantially all of the time.

[18] The third requirement is that a medical practitioner must have certified in prescribed form that the impairment is a severe and prolonged impairment in her mental functions the effects of which are as described above. Ms. Walkowiak has had two psychologists prepare such forms and file them as required. While neither of these forms alone clearly support the required conclusions regarding the effect of her impairment, I am prepared to assume Ms. Walkowiak has met this requirement as well. However, the filing of completed medical practitioners’ forms are not determinative of her entitlement to the disability tax credit. This Court must also be satisfied that the second requirement described above is in fact met based upon the evidence before it. Each of these psychologists supplemented their completed form with letters providing additional comments and information, none of which has been challenged.

[19] A copy of the relevant parts of the disability tax credit legislation is attached hereto as an appendix.

[20] Ms. Walkowiak is entitled to have this Court decide her particular appeal on her particular facts. In applying the law to her facts, I need have regard to the comments of the courts in earlier decisions addressing how the legal provisions are to be interpreted and applied.

[21] I find particularly instructive the comments of the Federal Court of Appeal in *Johnston v. The Queen*, 98 DTC 6169, [1998] FCJ No. 169 (including the passage quoting from *Radage v. The Queen*, 96 DTC 1615 in this Court) as follows:

Purpose and History of the Legislation

10 The purpose of sections 118.3 and 118.4 is not to indemnify a person who suffers from a severe and prolonged mental or physical impairment, but to financially assist him or her in bearing the additional costs of living and working generated by the impairment. As Bowman T.C.J. wrote in *Radage v. R.*¹ at p. 2528:

The legislative intent appears to be to provide a modest relief to persons who fall within a relatively restricted category of markedly physically or mentally impaired persons. The intent is neither to give the credit to every one who suffers from a disability nor to erect a hurdle that is impossible for virtually every disabled person to surmount. It obviously recognizes that disabled persons need such tax relief and it is intended to be of benefit to such persons. (Emphasis added)

The learned Judge went on to add, at p. 2529, and I agree with him:

If the object of Parliament, which is to give to disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved the provisions must be given a humane and compassionate construction. (Emphasis added)

11 Indeed, although the scope of these provisions is limited in their application to severely impaired persons, they must not be interpreted so restrictively as to negate or compromise the legislative intent. (Emphasis added)

43 ... It is clear that these tax credit provisions were designed with severely handicapped individuals in mind, but individuals who do not require constant care for the basic activities of daily life. (Emphasis added)

Conclusion and Reasons

[22] It is clear that Ms. Walkowiak faces challenges and struggles as a result of her conditions in many aspects of her day-to-day life. This can only be heightened by the fact that she also has two children with disabilities in their mental functions attending counselling and special schools et cetera.

[23] However, I am unable to conclude on the evidence I have seen and heard that she is markedly restricted all or substantially all of the time and unable to, or requires an inordinate amount of time to, perform mental functions necessary for everyday

life such as memory, problem solving, goal setting and judgment taken together, or adaptive functioning.

[24] The Appellant has developed strategies to compensate for her difficulty remembering things or processing information whether by way of spending greater time on her studies, working things through with her husband, or posting sticky notes or lists of things to do. Even in her school work, she is able to function with the additional accommodations and concessions made.

[25] While challenged, as many are, she has adapted in her daily functioning to the extent that she has raised her own children throughout, often quite independently and is a homecare worker with the government caring for children independently. Indeed, she believes that as a result of her additional efforts, her employer may not be aware of her disabilities.

[26] In her chosen line of studies and work, she is a qualified Health Care Aide able to hold long-term work in her area and maintain her qualifications. She is, with academic accommodation, completing college courses to become a Licensed Practical Nurse.

She follows her prescribed medication regime which minimizes the help she needs with everyday life situations.

[27] She was able to both testify and represent herself in Court. She did so in a clear, understandable manner and she was well able to answer questions directed at her by the Crown counsel and by the judge. She seemed well-prepared. Although I do not know how much time she may have spent preparing, she was clearly focused and organized with her paperwork and her thoughts. While I do not know how much assistance she may have received from her husband in preparing and whether that exceeded what might normally be expected, I note that she told almost all of her story herself and her husband's testimony was very brief and only to supplement her evidence in a very modest way.

[28] Based upon all of this, I can conclude that she is not markedly or severely restricted all or substantially all of the time, unable or requiring an inordinate amount of time to perform mental functions necessary for everyday life. It instead appears to be something she is able to manage and adapt to in her everyday life by the use of medication, strategies such as use of task lists and seeking advice and help from her husband, seeking accommodation in the academic area where she is particularly challenged and her impairments have particular effect, and in her work setting where she adapts by working hard and repetitively.

[29] This Appellant cares for her children and the children of others on her own. She drives around town alone. She can shop and complete retail transactions independently. She prepares family meals, independently. She adheres to her prescribed medication regime. She holds a job with significant responsibility for others without supervision or assistance. She is able to maintain and upgrade her nursing college qualifications. Her abilities in all of these everyday life areas taken together confirm clearly that her ADHD and Learning Disability do not cause her to be markedly restricted when performing or trying to perform mental functions necessary for everyday life. Quite the contrary, it underscores her true abilities relative to many other Canadians facing mental health issues.

[30] While there is no doubt that the challenges faced by the Appellant in her particular circumstances as a result of her ADHD and Learning Disability are not at all insignificant, they do not rise to the severity of meeting the meaning of markedly restricted required to qualify for a disability tax credit. In Ms. Walkowiak's particular facts, I am bound to apply the disability tax credit legislation as enacted by Parliament and as interpreted by the Federal Court of Appeal. I am therefore required to dismiss this appeal.

Signed at Ottawa, Canada this 18th day of December 2012.

"Patrick Boyle"

Boyle J.

APPENDIX

Credit for mental or physical impairment

118.3 (1) Where

(a) an individual has one or more severe and prolonged impairments in physical or mental functions,

[...]

(a.2) in the case of an impairment in physical or mental functions the effects of which are such that the individual's ability to perform a single basic activity of daily living is markedly restricted or ... a medical practitioner has certified in prescribed form that the impairment is a severe and prolonged impairment in physical or mental functions the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted ... where the medical practitioner is a medical doctor or, in the case of

[...]

(vi) an impairment with respect to an individual's ability in mental functions necessary for everyday life, a psychologist,

[...]

(b) the individual has filed for a taxation year with the Minister the certificate described in paragraph (a.2)[...]

[...]

there may be deducted in computing the individual's tax payable under this Part for the year the amount determined by the formula [...]

118.4 (1) For the purposes of subsection 6(16), sections 118.2 and 118.3 and this subsection,

(a) an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months;

(b) an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of

daily living;

(b.1) an individual is considered to have the equivalent of a marked restriction in a basic activity of daily living only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual's ability to perform more than one basic activity of daily living (including for this purpose, the ability to see) is significantly restricted, and the cumulative effect of those restrictions is tantamount to the individual's ability to perform a basic activity of daily living being markedly restricted;

(c) a basic activity of daily living in relation to an individual means

- (i) mental functions necessary for everyday life,
- (ii) feeding oneself or dressing oneself,
- (iii) speaking so as to be understood, in a quiet setting, by another person familiar with the individual,
- (iv) hearing so as to understand, in a quiet setting, another person familiar with the individual,
- (v) eliminating (bowel or bladder functions), or
- (vi) walking;

(c.1) mental functions necessary for everyday life include

- (i) memory,
- (ii) problem solving, goal-setting and judgement (taken together), and
- (iii) adaptive functioning;

(d) for greater certainty, no other activity, including working, housekeeping or a social or recreational activity, shall be considered as a basic activity of daily living; and

(e) feeding oneself does not include

- (i) any of the activities of identifying, finding, shopping for or otherwise procuring food, or
- (ii) the activity of preparing food to the extent that the time associated with the activity would not have been necessary in the absence of a dietary

restriction or regime; and

(f) dressing oneself does not include any of the activities of identifying, finding, shopping for or otherwise procuring clothing.

Reference to medical practitioners, etc.

(2) For the purposes of sections 63, 64, 118.2, 118.3 and 118.6, a reference to an audiologist, dentist, medical doctor, medical practitioner, nurse, occupational therapist, optometrist, pharmacist, physiotherapist, psychologist, or speech-language pathologist is a reference to a person authorized to practise as such,

(a) where the reference is used in respect of a service rendered to a taxpayer, pursuant to the laws of the jurisdiction in which the service is rendered;

(b) where the reference is used in respect of a certificate issued by the person in respect of a taxpayer, pursuant to the laws of the jurisdiction in which the taxpayer resides or of a province; and

(c) where the reference is used in respect of a prescription issued by the person for property to be provided to or for the use of a taxpayer, pursuant to the laws of the jurisdiction in which the taxpayer resides, of a province or of the jurisdiction in which the property is provided.

CITATION: 2012 TCC 453

COURT FILE NO.: 2012-1659(IT)I

STYLE OF CAUSE: BRENDA WALKOWIAK AND HER
MAJESTY THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: November 29, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

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