Federal Court  Cour fédérale

Date: 20150831

Docket: T-2311-14

Citation: 2015 FC 1032

Ottawa, Ontario, August 31, 2015

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

FAZIER MOHAMED MACKEEN

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an Application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 of a decision dated October 10, 2014 made by a delegate of the Minister of Human Resources and Skills Development Canada, (Minister's delegate/Department) as it was then called.

[2] For the reasons that follow, this application for judicial review is dismissed.

I. THE DECISION UNDER REVIEW

[3] In 2012, the Applicant was granted a CPP disability pension retroactive to April, 2010, which was the maximum period permitted under the legislation. However the Applicant claims he was entitled to have the pension retroactive to either September or October 2004 as he alleges he received erroneous advice in 2004 with respect to whether he could apply for the pension. It is the decision of the Minister's delegate denying him this retroactivity to 2004 which is under review in this case.

[4] The decision was rendered pursuant to subsection 66 (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C – 8 (CPP) which states that:

66. (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied:	66. (4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(a) a benefit, or portion thereof, to which that person would have been entitled under this Act,	a) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(b) a division of unadjusted pensionable earnings under section 55 or 55.1, or	b) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(c) an assignment of a retirement pension under section 65.1,	c) la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de

> la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

[5] The Minister's delegate concluded that the Applicant was not denied a benefit as a result of erroneous advice or administrative error committed by the Department. As a result, the Applicant's request pursuant to subsection 66 (4) for remedial action to place the Applicant in the position he would have been had the erroneous advice not been given or the administrative error not been made was refused.

[6] After reviewing the materials on file (as detailed below) the Minister's delegate concluded that it could not be confirmed that the Applicant had the conversations in question and, in the case of an allegation that the decision-maker used wrong information, the Minister's delegate was satisfied that the information did not result in denial of a benefit.

[7] Put differently, the Minister's delegate's findings were that the Applicant did not meet the onus of proving his allegations on a balance of probabilities.

II. PROCEDURAL & INVESTIGATIVE HISTORY

[8] On July 25, 2011 the Applicant applied for CPP disability benefits.

[9] His application was approved by the Department on February 23, 2012. He received payments retroactive to April 2010 which was 15 months before the receipt of his application. That is the maximum amount permitted under the Plan.

[10] The Department telephoned the Applicant on February 23, 2012 to advise him of the decision. In that conversation the Applicant indicated he had contacted the Department in 2004

about making an application for CPP disability benefits but was told he would not qualify as, at that time, he was receiving Worker's Compensation Benefits.

[11] On March 13, 2012 the Applicant sent a letter to Service Canada stating that in 2004 his psychiatrist advised him to apply for CPP disability benefits and between September and October 2004 he called O Canada to obtain the contact information for CPP disability.

[12] He stated that he called the number provided to him and a female employee spoke with him. He says she asked if he was receiving any other benefits and, upon learning that he was receiving WSIB payments, she said he would not be entitled to CPP disability benefits.

[13] His letter also stated that in 2005 his psychiatrist asked him if he had applied for CPP disability benefits. The Applicant said he was already getting WSIB benefits. Finally, the letter says that in 2011 when visiting his family doctor he asked her if he would be eligible for CPP disability benefits and she told him to bring in the forms which she would sign. This was done and he mailed the forms.

[14] As a result of the Applicant's letter the Department conducted an investigation and on May 8, 2013 sent the Applicant a short letter saying after careful review of the information it had been determined that he had not been denied the benefit as a result of erroneous advice.

[15] After receiving the denial letter the Applicant commenced, on June 3, 2013, an application for judicial review of the decision. When he filed his affidavit material an additional allegation was made saying that on May 8, 2012 the Applicant called the Department and "spoke with a person named Debra" who said he would not qualify for a "retro payment" because he had not contributed enough to CPP.

[16] The Department filed submissions with the Court on September 17, 2013 requesting an Order issue remitting the matter back to a new Minister's delegate for redetermination.

[17] Although the Applicant objected to the Department's request, the matter was referred back to a different Minister's delegate on October 17, 2013.

[18] On November 19, 2013 the new delegate wrote to the Applicant inviting him to send to her any additional information, evidence, or submissions that he believed would support his claim. No such submissions were filed so the investigation was conducted using the documents and evidence already on file.

[19] In the decision dated October 10, 2014 the Minister indicated she had taken the following steps as part of her investigation:

> (1) reviewed the chronological background beginning with receipt of the application July 25, 2011;
>
> (2) considered the legislative provisions in subsection 66(4);
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> (3) identified there were three separate instances of alleged erroneous advice or administrative error raised by the Applicant being (i) erroneous advice in 2004 (telephone call), and (ii) 2012 (telephone call) and (iii) administrative error by the investigator relying upon wrong information by assuming the Applicant had spoken to an agent from O Canada and not an agent from the CPP disability program;
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> (4) spoke with a senior manager of CPP and OAS program delivery in the Call Centre Directorate at Service Canada;
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> (5) corresponded with "Debra" with whom the Applicant spoke on May 8, 2012 and,
>
> (6) verified the operations manuals and procedures which were in use during the time of the Applicant's alleged phone call in 2004.

[20] As set out in the decision letter the reasons for denying the subsection 66(4) claim were:

> Based on the evidence I reviewed, I am satisfied that you have not

> met the burden of proof to show that on a balance of probabilities you were denied a benefit or a portion of a benefit as a result of erroneous advice provided by the Department, or an administrative error committed by the Department.

III. STANDARD OF REVIEW

[21] Counsel were in agreement that the appropriate standard of review in this matter is reasonableness.

[22] I agree that applicable standard of review of the decision is reasonableness and, if there is an error, the question of whether the error resulted in a deprivation of benefits which would otherwise have been payable is also reviewable on the standard of reasonableness. *Canada (Attorney General) v Torrance*, 2013 FCA 227.

IV. THE ISSUES

[23] There is no issue as to whether or not the Applicant is disabled. The general issue from the Applicant's point of view is whether the disability benefit should be retroactive to 2004.

[24] The parties agree that the issue before the Court is not whether erroneous advice was given but rather upon a review of the Minister's delegate's decision whether there was an error which would trigger the provisions of subsection 66(4).

[25] Subsection 66(4) of the *Canada Pension Plan* enables the Minister to take remedial action that would place a person in the position that the person would be in had the erroneous advice not been given or administrative error not been made.

[26] The Minister must be satisfied that the person was denied a benefit due to the administrative error or as a result of the erroneous advice.

[27] The role of the Court in these circumstances is not to reweigh the evidence, but rather to assess whether the proper factors and appropriate procedures were followed by the Minister. *Lee v. Canada (Attorney General)*, 2011 FC 689.

V. THE APPLICANT'S POSITION

[28] Counsel for the Applicant framed this as a simple, straightforward case which is very fact specific.

[29] Counsel urged that the Applicant was an innocent person who in 2004 made a telephone call and, in his innocence, had no idea that he was walking into what was characterized by counsel as a potential legal quagmire.

[30] It was conceded that the only evidence before the Court were two letters. One was written by the Applicant on March 13, 2012. It is one typed-page long. The other letter, which appears to have been dictated on February 10, 2012 by the Applicant's psychiatrist, confirms he first saw the Applicant on September 28, 2004.

[31] I am urged by the Applicant's counsel to find the psychiatrist's letter is corroborative of the fact that he saw the Applicant in 2004 and also corroborative of the general condition of disability of the Applicant. Neither of those facts were disputed and I find the letter to be corroborative of them. My finding does not extend as far as to say the letter corroborates the Applicant's claim. It is a medical report and does not address in any way though matters in the issue here.

[32] The other evidence before the Court is the decision of the Minister's delegate. Counsel for the Applicant urges me to find that is the only other evidence before the Court.

[33] Prior to now the Applicant has represented himself throughout the proceedings. As a result, there is no sworn evidence by way of statutory declarations or affidavits and also no confirmatory letters from the psychiatrist or others. We simply have the letter written by the Applicant outlining his plight and a letter confirming he was under psychiatric care in 2004.

[34] The Applicant points to the inability of the Minister's delegate, as expressed in the decision, to verify that the Applicant had any interactions in 2004 with the Department. He alleges this shows there was no evidence before the Minister's delegate other than the evidence of the Applicant. Counsel submitted that the Minister's delegate then speculated what would have happened given the Call Centre protocols in place at the time and disregarded the evidence of the Applicant.

[35] The Applicant's submission was there was *som*e evidence from the Applicant before the court but there was *no* evidence from the Respondent - there was just an investigation.

VI. THE RESPONDENT'S POSITION

[36] Counsel for the Respondent made the following unchallenged submissions with respect to the applicable law when reviewing a decision made under subsection 66(4) and I agree they apply in this case:

(1) there are no procedures prescribed for an investigation under subsection 66(4); *Leskiw v Canada (AG),* 2003 FCT 582 aff'd at 2004 FCA177

(2) the duty to take remedial action arises only if the Minister is satisfied erroneous advice was given; *Kissoon v Canada,* 2004 FC 24 aff'd by 2004 FCA 384

(3) the Minister has wide discretion under subsection 66 (4) as to remedial action and to an informal determination of the facts; *Graceffa v Canada (Minister of Social Development),* 2006 FC 1513

(4) on judicial review of a decision of the Minister the finding should not be disturbed on the basis that the court would have come to a different conclusion; *Kissoon v Canada*, 2004 FC 24 at par. 5 aff'd by 2004 FCA 384

(5) the issue is not whether it was possible that erroneous advice had been given but rather, did the facts satisfy the Minister that erroneous advice had been given; (My emphasis) *Manning v Canada (Human Resources Development*, 2009 FC 523

(6) the burden of proof is on the Applicant to show on a balance of probabilities that erroneous advice was received and that such erroneous advice denied the Applicant a benefit under the *Plan*. *Manning v Canada (Human Resources Development)*, 2009 FC 523

[37] The Respondent submits the decision by the Minister fell within the range of possible, acceptable outcomes. Counsel relies on the decision in *Lee*, above, at paragraph 99 which states:

> The law governing CPP benefits says that, if the applicants are to receive benefits back to 1998, they must prove – with witnesses or documents – that they were given incorrect advice or that there was an administrative error with respect to their application. The applicants must convince the decision-maker that such an error has occurred. …The Applicants must show that their version of events is the more likely one. (Emphasis in original)

[38] The Respondent points to the thorough analysis done by the investigator which included a review and consideration of all of the documentation in the physical and electronic files of the Applicant as well as a review of the computer system used by the department in 2004 to manage CPP benefits and the computer system which replaced in May 2009. The searches proved futile and uncovered no notes in either system or any handwritten notes from 2004 on file. As result of the lack of physical evidence, the investigator also spoke with the Senior Manager of CPP and OAS program delivery within the Call Centre Directorate at Service Canada and received from her a summary of the procedures in place in 2004 with respect to the *Canada Pension Plan Act* and Regulations. This evidence indicated if a client declared they were in receipt of a private or

provincial disability benefit, the call centre agent would have been expected to advise that this would not automatically render an Applicant inadmissible for the CPP disability benefit.

VII. ANALYSIS

[39] The essential facts, basic arguments and submissions in this case are virtually indistinguishable from those in *Manning*, above, in all important aspects.

[40] *Manning* involved the case of a doctor who applied for CPP disability benefits, was approved and received the maximum amount of retroactivity of 15 months in 2005. In that case Dr. Manning was also seeking greater retroactivity to the date of his disablement in 1993 because in April 1995 his spouse (Dr. Malaguti-Manning) telephoned the CPP information line and spoke to 'a mature woman' who was said to have told her there was no point applying for the CPP disability since any amounts received would have to be repaid to the Applicant's private insurance company.

[41] The Minister's delegate was unable to find any record of the phone call but did review the materials and training in place at that time and concluded it was highly unlikely the advice would have been given.

[42] In dismissing the application for judicial review Mandamin, J. found the following, which, with necessary changes for the facts of this case, I adopt as my own:

> [39] Dr. Malaguti-Manning has provided affidavit evidence that is very general evidence. There was no evidence of the telephone call; no receiving agent identified; no date of the call; no phone number called; and no specific details of the advice she received. The evidence, the telephone agent's advice, as to why the Applicant did not apply in 1995 for the disability benefits is not the most definitive although there is some support in that the

> information was relied upon since the Applicant's wife did not apply for the benefit.
>
> [40] The investigation revealed that there were no records of calls that long ago. The Minister's delegate provided evidence including: the tip sheets; counselling checklist; procedures in place at that time; and manuals that telephone agents were provided with.
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> [41] All the evidence the investigator produced was balanced against the evidence provided by Dr. Malaguti-Manning; then the Minister must determine on a balance of probabilities whether erroneous advice was given. The Minister concluded that balance weighed in the respondent's favour. The Minister found that it was more likely that no erroneous advice was given.
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> [42] I find that the Minister's decision is reasonable given that it is one of the justifiable findings based on the evidence.

[43] In this case the Applicant asks the Court to find that the letter created eight years after the events in question, the allegations therein which are not corroborated in any way, is not only "evidence" it is the *only evidence* the Court may consider because the Respondent could not disprove the negative of no erroneous advice having been given. This is because the Respondent did not have written records of a conversation with, as counsel for the Applicant put it, "a person who was never asked to identify himself".

[44] With respect, I do not accept that the Minister provided no evidence. In fact the nature and quality of the evidence produced by the Minister was more thorough, detailed and reliable than that produced by the Applicant. The Minister's delegate provided the Applicant with an opportunity to make further submissions but none were made by him. She reviewed in detail each of three allegations made by the Applicant. She interviewed two people with expertise and knowledge of the salient particulars put forward by the Applicant. She reviewed and considered the relevant written material.

[45] I find the investigative process engaged in by the Minister's delegate was thorough, transparent and complete.

[46] In coming to her decision, it would not have been reasonable for the Minister's delegate to ignore the extensively documented procedures, the call centre protocols and policies and evidence of the people with whom she spoke. It would also not be reasonable for her to ignore the balance of probabilities test which she would have had to do in order to come to the conclusion that the Applicant's letter established his case and there was no evidence from the Minister.

[47] Applying the test in *Lee*, above, it was reasonable for the Minister to conclude that the Applicant did not prove his version of events was more likely than the Minister's.

[48] I find the decision of the Minister's delegate was well within the range of possible, acceptable outcomes defensible on the facts and the law. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Therefore, this application is dismissed.

[49] The Respondent is not seeking costs. The Applicant was seeking to recover some of his costs but was not successful in the application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No costs are awarded.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

H.J. Levinson	FOR THE APPLICANT
Hasan Junaid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levinson & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT