Date: 20070705

Docket: T-1805-06

Citation: 2007 FC 699

OTTAWA, Ontario, July 5, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

NHON TROUNG VUONG

Applicant

and

THE 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) denying the Applicant's request for leave to appeal on the grounds that the Applicant's appeal was *res judicata.*

[2] The Applicant is a self-represented litigant and had difficulty, I believe, in understanding both the English language and the judicial terms used in the present proceeding, such as understanding the meaning of *res judicata*.

FACTS

[3] This is the Applicant's fourth application for disability benefits under the *Canada Pension Plan*, R.S.C. 1985 c. C-8 (CPP Act). His main medical condition is ankylosing spondylitis, which was diagnosed in 1991. He initially applied for disability benefits in March 1993 after being laid off as a pressman. However, the Respondent concluded the Applicant was able to return to work. By letter dated June 4, 1993, the Respondent informed the Applicant that his first application was being denied because he was capable of performing work suitable to his condition.

[4] In his second application, dated January 26, 1995, the Applicant indicated he worked as a printer between May 1993 and February 1994 and had been unable to work since November 1994. The conclusion of the Respondent, the Review Tribunal and finally the decision of the Pension Appeals Board (PAB) rendered on November 18, 1999, was that the Applicant was not disabled to such an extent as to meet the definition of disability as provided for in paragraph 42(2)(a) of the CPP Act. The PAB, in agreement with the decisions of the Review Tribunal and the Respondent, held that the Applicant was not prevented from working in all fields by his condition, even if he was no longer able to perform some tasks.

[5] At that time, the PAB also noted that the Applicant's minimum qualifying period (MQP), the date upon which the Applicant last met the contributory requirements of the CPP Act, was December 31, 1997. Thus, the PAB concluded that the Applicant had to show he was disabled on or before that date, and the evidence provided did not satisfy this requirement.

[6] The Applicant failed to judicially review the PAB's decision.

[7] The Applicant's third application was filed on December 29, 2000. By letters dated March 15, 2001 and May 17, 2001 the Respondent denied the Applicant's application at the initial level on the grounds of *res judicata.* The Respondent concluded that the PAB's decision of November 1999 was final and binding. The Respondent informed the Applicant that the only way the PAB's decision could be reopened would be if the Applicant could provide new fact evidence regarding his condition at the time he last qualified for benefits (his MQP as established in his second application) and request the PAB reconsider its decision pursuant to subsection 84(2) of the CPP Act. By the Applicant's request, the Respondent reconsidered its decision and denied the application again on October 3, 2001.

[8] It appears that the Applicant subsequently filed a request under subsection 84(2) to the PAB requesting the decision be reconsidered on the grounds of new evidence. The PAB concluded on January 9, 2003 that there were no new facts in support of the application and the application to reconsider was denied (see page 3 of the Certified Tribunal Record (CTR)). However, there is no mention of this fact at this stage of the proceedings in either the Applicant or Respondent's submissions, or in the synopsis of proceedings provided by the Review Tribunal. The letter of refusal dated January 9, 2003 appears to be the only document in the CTR relating to the reconsideration.

[9] The Applicant filed a fourth application, the subject of this judicial review, on August 9, 2004. He again cited ankylosing spondylitis as his main disabling condition. While the Applicant had CPP earnings and contributions in 2003 and 2004, the Respondent concluded that these were not sufficient to extend his MQP past December 1997, when calculated in accordance with the legislation.

[10] The Respondent also noted that the Applicant had been considered in accordance with the "late applicant provisions" which allowed the Respondent to consider whether or not an applicant was disabled at the time the applicant last met the contributory requirements. However, the Respondent noted that the issue of disability at the last time the Applicant met the contributory requirements, December 1997, had been conclusively decided by PAB in its November 1999 decision, a decision that was final and binding. The Respondent informed the Applicant that reconsideration of the PAB's decision required presenting the PAB with new information as to his disability condition before his MQP under subsection 84(2) of the CPP Act.

[11] The Applicant requested reconsideration by the Respondent, which was denied, appealed the decision to the Review Tribunal, who also concluded the decision was *res judicata,* and finally requested leave to appeal the decision to the PAB on September 16, 2006.

Decision of the PAB

[12] The PAB denied the Applicant leave on the ground that his application was *res judicata.* It restated the finding of the lower tribunals that the applicable MQP was still December 1997. As a result, it affirmed the finding of the Review Tribunal that the decision of the PAB's previous decision of November 1999 was final and binding and that the appropriate route for the Applicant, if he had new evidence going to his disability at that time, would have been to request reconsideration under subsection 84(2) of the CPP Act. The PAB concluded that there was no arguable case.

ISSUES

[13] There are two issues raised by this judicial review:

a. Did the PAB err in upholding the finding of the Review Tribunal that the MQP remained December 1997?

b. Did the PAB err by dismissing leave to appeal on the grounds that the Applicant's appeal was *res judicata*?

ANALYSIS

Standard of review

[14] The Respondent argues that Justice MacKay provided the test for standard of review of a decision of the PAB regarding leave in *Callihoo v. Canada (Attorney General)* (2000), 190 F.T.R.

114 (T.D.). In that decision, Justice MacKay stated at paragraph 15 that reviewing a decision regarding leave to appeal to the Board involves two issues:

> (1) Whether the decision maker has applied the right test - that is, whether the application raises an arguable case without otherwise assessing the merits of the application, and
>
> (2) Whether the decision maker has erred in law or in appreciation of the facts in determining whether an arguable case is raised. If new evidence is adduced with the application, if the application raises an issue of law or of relevant significant facts not appropriately considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the grant of leave.

[15] Justice MacKay reached this conclusion after reviewing my decision of pragmatic and functional approaches in *Davies v. Canada (Minister of Human Resources Development)* (1999), 177 F.T.R. 88 (T.D.) and Justice Reed in *Kerth v. Canada (Minister of Human Resources Development)* (1999), 173 F.T.R. 102 (T.D.). In those decisions, despite disagreeing as to the degree of expertise of the PAB, I and Madam Justice Reed concluded that the appropriate standard is less deferential, and closer to the correctness standard (The principal difference between myself and Justice Reed is that I am of the view there should be slightly more deference because of my perspective on relative expertise).

[16] Justice MacKay expands on his decision in *Leskiw v. Canada (Attorney General)* at 2004 FC 100 at para.11:

> In Callihoo v. Canada (Attorney General), [2000] F.C.J. No. 612 at para. 15, a similar case involving a denial of CPP disability benefits, I considered case law regarding standard of review, and concluded that in reviewing a decision concerning an application for leave to appeal to the PAB, the Court considers whether the decision

> maker has applied the right test - that is, whether the application raises an arguable case in the sense that the decision maker has erred in law or unreasonably in his or her appreciation of the facts. If new evidence is adduced with the application, if the application raises an issue of law or relevant significant facts not appropriately considered by the Review Tribunal in its decision, an arguable issue is raised for consideration and it warrants the granting of leave.

[17] Justice de Montigny confirmed that this is the appropriate test in *Canada (Attorney General) v. Causey,* 2007 FC 422 at paragraph 16.

[18] In *Kerth,* Justice Reed discussed how to approach a decision of the PAB to deny leave where new evidence is adduced. She held at paragraph 27 that

> When the ground of an application for leave to appeal is primarily the existence of additional evidence the question to be asked, in my view, is whether the new evidence filed in support of the leave application is such that it raises a genuine doubt as to whether the Tribunal would have reached the decision it did, if the additional evidence had been before it.

[19] In the present case, there was new evidence adduced with the PAB application so this jurisprudence will have to be considered.

The Minimum Qualifying Period (MQP)

[20] The Applicant seems to be arguing, in his memorandum of fact and law dated December 14, 2006, that the interpretation of the MQP in the CPP Act has changed so that his overall contributions combine to alter the date that was applied by the Review Tribunal and the PAB. He

includes in his Application Record a copy of his CPP contributions, which include recent contributions in 2003 and 2004. He states that "the CPP decision says that I have not made sufficient contribution after December 1997. However, that is not the case. I have made sufficient contributions." He states that the applicable legislation is provided in paragraphs 44(3)(a) and 44(3)(b) of the CPP Act, which I have reproduced:

44(3) For the purposes of paragraphs (1)(c), (d) and (f), a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if he has made contributions	44(3) Pour l'application des alinéas (1)c), d) et f), un cotisant n'est réputé avoir versé des cotisations pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations :
(a) for at least one third of the total number of years included either wholly or partly within his contributory period, excluding from the calculation of that contributory period any month in a year after the year in which he reaches sixty-five years of age and for which his unadjusted pensionable earnings were equal to or less than his basic exemption for that year, but in no case for less than three years; or	a) soit pendant au moins trois années, représentant au moins le tiers du nombre total d'années entièrement ou partiellement comprises dans sa période cotisable, celle-ci ne comprenant pas tout mois dans une année qui suit l'année où il atteint l'âge de soixante-cinq ans et à l'égard de laquelle ses gains non ajustés ouvrant droit à pension étaient égaux ou inférieurs à son exemption de base pour cette année;
(b) for at least ten years.	b) soit pendant au moins dix années.

[21] This provision, however, does not apply to disability benefits. It applies to supplementary benefits, including death benefits (paragraph 44(1)(c)), survivor's pension (paragraph 44(1)(d)) and orphan's benefits (paragraph 44(1)(f)). Disability pensions are covered by paragraph 44(1)(b):

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,
(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or	(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;

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

[22] Thus, it is paragraph 44(2)(a) that applies when calculating the MQP for a disability pension. It provides as follows:

44(2) For the purposes of paragraphs (1)(b) and (e),	44(2) Pour l'application des alinéas (1)b) et e) :
(a) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions on earnings that are not less than the basic exemption of that contributor, calculated without regard to subsection 20(2),	a) un cotisant n'est réputé avoir versé des cotisations pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations sur des gains qui sont au moins égaux à son exemption de base, compte non tenu du paragraphe 20(2), selon le cas :
(i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period, for at least four years, or	(i) soit, pendant au moins quatre des six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable, soit, lorsqu'il y a moins de six années civiles entièrement ou partiellement comprises dans sa période cotisable, pendant au moins quatre années,
(ii) for each year after the month of cessation of the contributor's previous disability benefit;	(ii) pour chaque année subséquente au mois de la cessation de la pension d'invalidité;

[23] When assessed in light of this provision, it is clear that the Applicant's most recent CPP contributions did not apply to change his MQP. Quite simply, he does not have earnings in at least four of the last six calendar years. The decision of the Respondent, as affirmed by the Review Tribunal and the PAB, is correct on this point.

[24] The Applicant's interpretation seems to have arisen out of a misunderstanding with respect to a policy document published by the Office of the Commissioner of Review Tribunals. The Applicant cites the document, entitled *A: Report of the Panel Member Task Force on Core Policy Issues*, part of the *Report of the Panel Member Task Forces*, Canada Pension Plan/Old Age Security Review Tribunals, published March 12, 2003, in his first memorandum of fact and law. The Applicant filed a copy of this document at the hearing before me and read Recommendation A4 (the specific recommendation he cited). Recommendation A4 is entitled "Broaden Definition of Minimum Qualifying Period" and recommends adding alternative approaches to calculating MQP for disability, as a supplement to the four out of six year requirement currently in the legislation. The report highlights subsections 44(3)(a) and 44(3)(b) of the CPP Act, the provisions applicable to supplementary benefits that the Applicant relies on, as examples of potential alternative calculations. However, it does not state that these provisions apply at this time to disability pensions.

[25] Thus, the only remaining substantive issue is one of *res judicata*.

The PAB's *Res Judicata* Decision

[26] With respect to the first prong of the test, the PAB clearly applied the correct test. In the final sentence of the decision the PAB concluded that "there is no arguable case".

[27] The PAB upheld the finding of the Review Tribunal that this application concerns the same request for a disability pension as that submitted by the Applicant in 1995 and heard on its merits before the PAB in 1999. Thus, the PAB concluded, as did the Review Tribunal, that this application is *res judicata* by virtue of subsection 84(1) of the CPP Act, which provides as follows:

84(1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to	84 (1) Un tribunal de révision et la Commission d'appel des pensions ont autorité pour décider des questions de droit ou de fait concernant :
(a) whether any benefit is payable to a person,	a) la question de savoir si une prestation est payable à une personne;
(b) the amount of any such benefit,	b) le montant de cette prestation;
(c) whether any person is eligible for a division of unadjusted pensionable earnings,	c) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension;

(d) the amount of that division,	d) le montant de ce partage;
(e) whether any person is eligible for an assignment of a contributor's retirement pension, or	e) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant;
(f) the amount of that assignment,	f) le montant de cette cession.
and the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.	La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf contrôle judiciaire dont elle peut faire l'objet aux termes de la *Loi sur les Cours fédérales*, est définitive et obligatoire pour l'application de la présente loi.

(emphasis added)

[28] The jurisprudence is clear that *res judicata* applies to decisions of the Minister, Review Tribunal, and PAB, subject to statutory provisions to the contrary, including subsection 84(2) of the CPP Act, which provides for the Minister, the Review Tribunal or the PAB to reconsider a previous decision based on new facts: see *Canada (Minister of Human Resources Development) v. Macdonald*, 2002 FCA 48, a decision cited by the Respondent.

[29] Thus, the PAB concluded that the appropriate remedy, if new evidence existed as to the disability condition at that time, would be to reopen the matter pursuant to subsection 84(2) of the CPP Act, which provides as follows:

84 (2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.	84(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

[30] From reading this provision, it would appear that the Applicant would have had to request the PAB to reopen its own decision. According to Justice Sharlow of the Federal Court of Appeal in *Kent v. Canada (Attorney General)*, 2004 FCA 420 at paragraph 26, a lower level tribunal (such as the Review Tribunal) can only reopen its own decisions, not those of a higher level tribunal like the PAB:

> [Subsection 84(2)] is an exception to subsection 84(1), which states that a decision of the Minister, the Review Tribunal or the Pension Appeals Board is final and binding, or in legal terminology, "res judicata". Subsection 84(2) must be read as containing three independent exceptions, one applying to each of the three statutory decision makers under the scheme of the Canada Pension Plan relating to the payment of benefits (the Minister, the Review Tribunal, and the Pension Appeals Board). Thus, the Minister must determine whether there are new facts that would justify a reconsideration of a prior decision of the Minister. The Review Tribunal must determine whether there are new facts that would justify a reconsideration of a prior

> Review Tribunal decision. The Pension Appeals Board must determine whether there are new facts that would justify a reconsideration of a prior Pension Appeals Board decision.

[31] This was not an application under subsection 84(2) to the PAB to reopen its decision. The PAB made no finding as to new facts, although there was one new letter from Dr. Mok submitted before the PAB dated May 1, 2006 (RR at page 8). The letter provides that the Applicant was under Dr. Mok's care in 1997. However, Dr. Mok merely states that the Applicant has a disorder and is unable to work. Dr. Mok notes that the Applicant's condition has deteriorated and that the Applicant did not work since 1995 because of this condition (RR at page 8). The new facts in the letter would have had to establish a disability as of the MQP, December 31, 1997.

[32] When the decision is assessed against the second branch of the test outlined by Justice MacKay, there is some concern raised with respect to the letter by Dr. Mok submitted to the PAB, because of the portion of the test which states, "if new evidence is adduced with the application […] an arguable issue is raised for consideration and it warrants the grant of leave." However, it seems that that statement has to be read in light of the middle portion of the statement which asks the Court to also consider whether there had been a question of law or fact. The test should also be interpreted in light of the review of the jurisprudence that led to Justice MacKay's development of the test. He was relying in part on the decision of Justice Reed in *Kerth.* In that case, the application for leave raised new and additional evidence not considered by the Review Tribunal. In Justice Reed's view, as outlined by Justice MacKay in *Callihoo* at paragraph 10,

> […] where the ground for leave is primarily the existence of additional evidence, the issue to be considered in relation to the leave application is whether it raises a genuine doubt as to whether the Tribunal would have reached the decision it did if the additional evidence had been before it.

[33] Thus, the existence of additional evidence is not sufficient. The evidence must raise a "genuine doubt" as to whether the Tribunal would have reached the decision it did if the evidence was before it.

[34] In this case, the PAB's decision with respect to *res judicata* was entirely reasonable. This was not an application pursuant to subsection 84(2) to reopen the PAB's position. PAB was being asked to review a decision of the Review Tribunal with respect to a *res judicata* finding. Thus, it is not unreasonable for the PAB to conclude to decline leave of the finding of the Review Tribunal with respect to *res judicata.* Even if it is considered new evidence, and considered in light of subsection 84(2) of the CPP Act, it is not evidence that adds anything additional to the conclusions already present regarding the Applicant's disability as of 1997.

[35] Furthermore, while the Review Tribunal made a decision that there were no new facts sufficient to reopen the Review Tribunal decision, this finding is not subject to the appeal before the PAB by virtue of Federal Court jurisprudence. As a result of the decision of the Federal Court of Appeal in *Oliveira v. Canada (Minister of Human Resources Development)*, 2004 FCA 136, the PAB has no jurisdiction to entertain an appeal from a finding that there were no new facts. Such a decision could only be challenged by an application for judicial review before the Federal Court of

the Review Tribunal's decision. Thus, there is no need for the PAB to consider whether the new facts decision of the Review Tribunal was correct.

[36] Finally, although the Respondent made several submissions as to whether the Applicant met the requirements of the CPP Act that his disability be "severe" and "prolonged" these issues were not part of the decision of the PAB, because they were conclusively determined as of 1999. Thus, there is no need to go into the merits of the application, since the decision not to grant leave was based on the issue of *res judicata* only.

[37] The respondent did not ask for costs and thus, no costs are allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed without costs.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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