Date: 20090105

Docket: T-856-07

Citation: 2009 FC 2

Ottawa, Ontario, January 5, 2009

PRESENT: THE CHIEF JUSTICE

BETWEEN:

FERENC SABO

Applicant

and

MINISTER OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In 1987, the respondent Minister of Human Resources and Social Development (the Minister), denied the applicant's application for disability benefits under the Canada Pension Plan (the Plan). The application was related principally to a back injury. The applicant did not ask for reconsideration of the Minister's negative decision, although he was advised that he could do so.

[2] In 1995, the applicant's second application for disability benefits was denied. The Minister confirmed his refusal in response to the applicant's request for reconsideration.

[3] In 1997, the Review Tribunal concluded that the applicant was not disabled within the meaning of the Plan and dismissed his appeal from the Minister's refusal of his second application. The applicant was represented by counsel and his appeal was supported with the testimony of his wife and doctor and substantial documentary evidence. Leave to appeal this decision was refused.

[4] In 2002, the Minister refused the applicant's third application for disability benefits. In response to the applicant's request for reconsideration, the Minister confirmed his refusal of this third application. In 2004, some eighteen months later, the Review Tribunal dismissed the applicant's appeal of the Minister's third denial. The same panel also found that there were no "new facts", as asserted by the applicant, and dismissed his application to reopen the earlier Review Tribunal's 1997 negative decision.

[5] In September 2004, the applicant sought the exercise of ministerial discretion to extend the time for filing his request for reconsideration of the first refusal in 1987. Between 2004 and 2006, some four responses to the applicant stated that the Minister had no statutory authority to undertake a review of his refusal of the first application for disability benefits. The responses relied principally on the binding nature of the Review Tribunal's determination in 1997 that the applicant was not disabled within the meaning of the legislation.

[6] This application for judicial review seeks *mandamus* relief forcing the Minister to make "a decision" concerning his discretion to grant an extension of time to reconsider the first ministerial refusal in 1987.

[7] In my opinion, the decision of the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41, supports the Minister's arguments for the dismissal of this proceeding.

[8] First, any decision to grant the extension of time sought by the applicant would be characterized as a collateral attack against the Review Tribunal decision in 1997: *Hogervorst*, ¶¶ 21 and 42. Second, if the extension were granted, a favourable reconsideration of the 1987 refusal would lead to inconsistent decisions: *Hogervost*, ¶ 22. Third, a favourable decision now would violate the principle of finality concerning the various negative decisions that have intervened since 1987: *Hogervorst*, ¶¶27 and 42. Finally, even if the statutory authority to do so existed, an extension of some seventeen years would be characterized as an improper exercise of discretion by the Minister: *Hogervost*, ¶ 30. See also: *Dillon v. Canada (Attorney General)*, 2007 FC 900, ¶ 24; and *Kabatoff v. Canada (Minister of Human Resources and Development)*, 2007 FC 820, ¶¶ 7 and 8.

[9] *Hogervost* provides ample support for the Minister's earlier responses that the Review Tribunal's determination in 1997 was binding and that it removed any statutory authority or

jurisdiction to consider the application for an extension of time. The absence of any legal duty to act is fatal to the *mandamus* relief being sought by the applicant.

[10] In *Villani v. Canada (Attorney General)*, 2001 FCA 248, a more liberal, “real world” approach to the assessment of a disability was approved. For the applicant, the *Villani* test is “a new question” which should be put to the Minister in the context of his unchanged medical record. Even if the applicant had raised this issue in his written submissions, it is one that I reject in principle as it would require retroactive application of caselaw to earlier final decisions.

[11] In any event, in the particular circumstances of this case, the impact of *Villani* on the applicant’s situation was considered by the Review Tribunal in 2004:

> The Tribunal felt that there was and that there are no new facts nothwithstanding the *Villani* decision to persuade this Tribunal that the previous decision should be reopened under Section 84(2) of the legislation.

[12] Accordingly, this application for judicial review must be dismissed. As I indicated during the hearing, I was not inclined to award costs if the applicant did not succeed in this proceeding.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

2. There will be no order as to costs.

"Allan Lutfy"

FEDERAL COURT

SOLICITORS OF RECORD

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