

Date: 20090428

Docket: T-427-08

Citation: 2009 FC 429

Ottawa, Ontario, April 28, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GIANNOULA KERMENIDES

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by the Attorney General of Canada in respect of a decision made on February 8, 2008 by a member of the Pension Appeal Board under the provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 refusing leave to appeal from a decision of a Review Tribunal constituted under the provisions of the *Plan*. For the reasons that follow I will allow the application and return the matter for redetermination by a different member all without costs.

[2] The underlying facts are simple and not in dispute. The Respondent Ms. Kermenides applied for benefits under the *Plan* in June 2006 on the basis of disabilities, both physical and

psychological resulting from lower back disorders. She had previously worked as a massage therapist and was unable to continue. Initially her claim was denied. She appealed to the Review Tribunal constituted for that purpose under the *Plan*. The Review Tribunal held a hearing, received evidence from three health care providers and from Ms. Kermenides common-law spouse. She herself was not in a condition fit to give evidence. The Tribunal ruled in favour of Ms. Kerminides. The Minister, under the provisions of the *Plan*, sought leave to appeal that decision to the Pension Appeal Board. A member of that Board denied leave to appeal stating in an endorsement made February 8, 2008:

The Review Tribunal evaluated the medical and other evidence presented at the hearing and its conclusions cannot be faulted.

The totality of the Respondent's medical problems made it clear she is disabled.

No other evidence being suggested or proposed there is no realistic change of success on appeal.

Leave is refused.

[3] This is the decision that is the subject of this judicial review application.

[4] The scheme of the *Plan* provides that a person who is disabled may apply initially to the Minister of Social Development, for a pension if they believe that they meet certain criteria as being “disabled” as defined in section 42(2) of the *Plan*:

<i>When person deemed disabled</i>	<i>Personne déclarée invalide</i>
<i>(2) For the purposes of this Act,</i>	<i>(2) Pour l'application de la présente loi :</i>
<i>(a) a person shall be</i>	<i>a) une personne n'est</i>

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; and

(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect

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;

b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la

of which the determination is made.

présentation d'une demande à l'égard de laquelle la détermination a été établie.

[5] If such person is dissatisfied with the Minister's decision they may seek a review by a Review Tribunal established under the *Plan*. Following a decision by the Review Tribunal either party, the Minister or the person claiming benefits, may seek leave to appeal to the Pension Appeals Board (PAB) from a member of that Board. That is the process engaged here. Such an application is provided for in section 83(1) of the *Plan*:

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 Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the Old Age Security Act, 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*

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 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la Loi sur la sécurité de la vieillesse — ou du 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-*

decision to the Pension Appeals Board.

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.

[6] Sections 83(2) and (2.1) provide that the Chairman, Vice-Chairman or a designated member of that Board may “either grant or refuse that leave”:

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.

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).

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.

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).

[7] If leave is refused, section 83(3) provides that written reasons must be given by the decision maker:

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.

[8] If leave is granted there is no requirement for reasons and the appeal proceeds. Section 83(4) says:

Where leave granted

(4) Where leave to appeal is granted, the application for leave to appeal thereupon becomes the notice of appeal, and shall be deemed to have been filed at the time the application for leave to appeal was filed.

Permission accordée

(4) Dans les cas où l'autorisation d'interjeter appel est accordée, la demande d'autorisation d'interjeter appel est assimilée à un avis d'appel et celui-ci est réputé avoir été déposé au moment où la demande d'autorisation a été déposée.

[9] The *Plan* is silent as to criteria for the granting or refusing leave except that, where leave is refused, written reasons are to be provided. It is reasonable to conclude that those written reasons must provide the parties with adequate information as to the basis upon which leave was refused.

[10] Notwithstanding that the *Plan* itself establishes no criteria for granting, or in this case, refusing leave, the jurisprudence establishes that the basis for consideration must be whether there is some arguable ground upon which the appeal “might” succeed; the member should not decide whether the application “could” succeed. The law was recently reviewed by O’Reilly J. of this

Court in *Canada (Attorney General) v. Pelland*, October 16, 2008, 2008 FC 1164 where he summarized at paragraphs 8 and 9:

8 On a leave application, the PAB must determine whether there is some arguable ground on which the appeal might succeed. It should not decide whether the applicant could actually succeed.

9 These propositions are set out in a series of cases: Kurniewicz v. Canada (Minister of Manpower and Immigration), (1974) 6 N.R. 225 (F.C.A.); Kerth v. Canada (Minister of Human Resources Development [1999] F.C.J. No. 1252; Martin v. Canada (Minister of Human Resources Development), [1999] F.C.J. No. 1972; Callihoo v. Canada (Attorney General), [2000] F.C.J. No. 612.

[11] The words set out in the reasons given for refusal to grant leave should not be reduced to a mantra. The member refusing leave should not be required to follow a strict formula or be tied strictly to words such as “some arguable ground” and not use words such as “no reasonable chance on appeal”. The reasons provided should make it clear to the reader that the member, in arriving at the decision whether to refuse leave, was not deciding the merits of the matter itself but was determining whether a party could make some reasonable argument challenging the merits of the decision of the Review Tribunal.

[12] In the present case, in reading the written reasons of the member, I am satisfied that he did not turn his mind to the criteria as to whether some reasonable argument could be made. He appears to have simply made up his mind as to the ultimate merits of the matter. This was wrong.

[13] The application will be allowed and the matter will be returned for redetermination by a different member. The Applicant did not ask for costs and none will be awarded.

JUDGMENT

FOR THE REASON PROVIDED HEREIN:

THIS COURT ADJUDGES that:

1. The application is allowed;
2. The matter as to whether leave to appeal ought to be granted is returned to the Pension Appeal Board for redetermination by a different member;
3. There are no costs awarded.

"Roger T. Hughes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-427-08

STYLE OF CAUSE: **ATTORNEY GENERAL OF CANADA v.
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PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: April 28, 2009

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AND JUDGMENT:** Hughes, J.

DATED: April 28, 2009

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