Federal Court of Appeal | Cour d'appel fédérale

Date: 20161110

Docket: A-50-16

Citation: 2016 FCA 276

CORAM: **DAWSON J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

PHILIP METTE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 9, 2016.

Judgment delivered at Toronto, Ontario, on November 10, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.
CONCURRED IN BY: NEAR J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The applicant, Philip Mette, unsuccessfully applied for a disability pension under the *Canada Pension Plan*, R.S.C., 1985, c. C-8. The applicant's appeal from the denial of benefits was dismissed in 2004 by a Review Tribunal. In 2012, the applicant applied to have the decision of the Review Tribunal rescinded or amended pursuant to subsection 84(2) of the *Canada Pension Plan* on the basis of evidence said to constitute new evidence.

[2] The General Division of the Social Security Tribunal of Canada dismissed the applicant's application on the basis that any such application could not be made more than one year after the decision of the Review Tribunal was communicated to the applicant. The General Division also concluded that what was said to be new evidence did not meet the legal criteria for new evidence. They were not new material facts that could reasonably be expected to have affected the outcome reached by the Review Tribunal.

[3] The applicant was given leave to appeal from the General Division to the Appeal Division. The Appeal Division dismissed the appeal (Appeal No. AD-14-427). While the Appeal Division was persuaded that the General Division erred in law when it decided that the applicant's claim was statute-barred, the Appeal Division went on to find that the General Division did not err when it determined that the applicant had not presented "new facts". This is an application for judicial review of the decision of the Appeal Division.

[4] On this application the applicant seeks an order setting aside the decision of the Appeal Division and an order remitting the new evidence to a proper decision-maker for redetermination.

[5] The applicant submits that the decision of the Appeal Division is reviewable on the standard of reasonableness. I agree.

[6] At this point it is important to explain what review on the standard of reasonableness means.

[7] Section 68 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (Act) provides that a decision of the Social Security Tribunal is "final and, except for judicial review under the Federal Courts Act, is not subject to appeal to or review by any court."

[8] By limiting review to judicial review by this Court, Parliament has chosen to confer on the Tribunal the power to find the facts, interpret the Act and associated legislation, decide the outcome of claims and award any relief. We cannot hear cases anew, we can only judicially review decisions of the Tribunal.

[9] The Supreme Court of Canada requires that we afford tribunals substantial leeway. As the Supreme Court explained in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> (emphasis added)

[10] With respect to the application of the reasonableness standard to the decision of the Appeal Division, the Appeal Division found that the General Division had correctly set out the legal test as to what constitutes "new facts" under the *Canada Pension Plan*, that the General

Division clearly and accurately set out both the evidence that was presented to the Review Tribunal and the evidence asserted to constitute new facts and that the General Division did not err with respect to its assessment of the evidence asserted to constitute new facts.

[11] On the application record before the Appeal Division the applicant has not demonstrated any error in these findings that would justify intervention by this Court. Put another way, the decision of the Appeal Division is justified, transparent and intelligible and it falls within the range of possible, acceptable outcomes that may be defended on the basis of the facts and the law.

[12] To the extent the applicant argues that the Appeal Division erred at paragraph 37 of its reasons by stating that Dr. Hamilton's further report "speculated" about his condition existing at the Minimum Qualifying Period, the Appeal Division went on to find that the report was not properly admissible before it. The Appeal Division, as it correctly noted at paragraph 38 of its reasons, could only consider the evidence that was before the General Division.

[13] One final comment is directed to the submission of the Attorney General about the Appeal Division's decision not to grant leave to appeal on the issue of whether the General Division erred in finding that the evidence presented did not meet the test for new evidence. The Attorney General argues that the Appeal Division then erred by considering this ground of appeal when it dealt with the appeal on the merits and that, in any event, this finding rendered the appeal to the Appeal Division moot.

[14] The Appeal Division interpreted subsection 58(2) of the Act to permit it to consider all of the grounds raised because the order granting leave was not specifically restricted to the grounds that were found to have a reasonable chance of success. The decision simply stated that "[l]eave to appeal to the Appeal Division of the Social Security Tribunal is granted."

[15] In oral argument the Attorney General relied upon subsection 58(2) of the Act to argue that the Appeal Division was required to deny leave on any ground it found to be without merit. However, subsection 58(2) provides that leave to appeal "is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The provision does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave.

[16] The Attorney General has not shown the Appeal Division's interpretation of its home statute to be unreasonable. In my view the interpretation falls within the range of possible, acceptable outcomes defensible in both fact and law.

[17] This said, I agree that it is unusual for a decision-maker to grant leave to appeal a legal point, in this case whether the application to reopen on the ground of new evidence was statute-barred, in circumstances where the decision-maker was satisfied that there was no merit in the facts that give rise to the legal point. The finding on the leave application that there was no merit in the argument that the General Division erred in finding that the applicant had not presented new facts doomed the appeal to fail. The legal argument that the application to reopen on the

basis of new facts was not time-barred had no merit because it was not supported by an evidentiary foundation.

[18] For these reasons, I would dismiss the application for judicial review. As the respondent does not seek costs I would not award costs.

"Eleanor R. Dawson"
J.A.

"I agree
D.G. Near J.A."

"I agree
Judith M. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-50-16
STYLE OF CAUSE:	PHILIP METTE v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 9, 2016
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NEAR J.A. WOODS J.A.
DATED:	NOVEMBER 10, 2016

APPEARANCES:

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Hasan Junaid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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