

Date: 20081126

Docket: A-146-08

Citation: 2008 FCA 366

**CORAM: LINDEN J.A.
RYER J.A.
TRUDEL J.A.**

BETWEEN:

DEBORAH LITKE

Applicant

and

**MINISTER OF HUMAN RESOURCES AND
SOCIAL DEVELOPMENT CANADA**

Respondent

Heard at Edmonton, Alberta, on November 25, 2008.

Judgment delivered at Edmonton, Alberta, on November 26, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

LINDEN J.A.

CONCURRED IN BY:

RYER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT

LINDEN J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (PAB), finding that the applicant was not entitled to a disability pension under the Canada Pension Plan.

The Board held that Ms. Litke was not suffering from a “severe and prolonged” disability within the meaning of the Plan.

[2] From 1992 until 2003, the Ms. Litke was self-employed as a sales representative and buyer. She stopped working on January 1, 2003, due to a number of health problems including leg pain,

fatigue, migraines, and gynaecological symptoms. In the autumn of 2003, after she had stopped working, the applicant discovered a lump in her leg, which was subsequently diagnosed as cancerous. Fortunately, her cancer treatment has been successful. However, the applicant claims she has continued to suffer from thyroid problems, psychological distress, and gynaecological symptoms.

[3] Ms. Litke applied for a disability pension in 2004. Her application was denied by the Minister, and that decision was affirmed upon reconsideration. The Review Tribunal and the PAB also dismissed the applicant's appeals. In this application, she seeks judicial review of the PAB's decision on two grounds: that the Board erred in determining that her condition was not "severe" because it did not consider all of the evidence, and that it further erred in holding that a disability is not "prolonged" unless it is expected to be permanent.

[4] It is well-settled that the standard of review for a determination of disability by the PAB is the new reasonableness standard enunciated by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (see *Canada (Attorney General) v. Ryall*, 2008 FCA 164 at paras. 10-11; *Janzen v. Canada (Attorney General)*, 2008 FCA 150 at para. 5). It is unnecessary to engage in a full standard of review analysis when the appropriate standard has been established by the jurisprudence. (*Dunsmuir* at para. 57).

[5] In order to qualify for a disability pension under the Plan, a claimant must meet two conditions: she must suffer from a "severe and prolonged" disability, and must have made

contributions to the Plan for not less than the minimum qualifying period (MQP). A disability is “severe” within the meaning of the plan if it renders the claimant “incapable of regularly pursuing any substantially gainful occupation”. It is “prolonged” if it is “likely to be long continued and of indefinite duration or is likely to result in death”. (See s.42(2)(a)(ii), C.P.P.) It is not necessary for a disability to be permanent.

[6] The parties were agreed that Ms. Litke’s MQP was December 31, 2002. The applicant submits that in light of amendments to the Plan that came into force in March 2008, (S.C. 2007, c.11, s.2, s.36) her MQP should be December 2003. However, the amendments stated that they would only apply to pension applications made after they came into force, and thus do not change Ms. Litke’s MQP. She therefore had the burden of establishing before the PAB that she suffered from a severe and prolonged mental or physical disability on or before December 31, 2002.

[7] The applicant argues that the Board’s decision was unreasonable because it failed to mention certain evidence supportive of her claim in its reasons. While a decision will be unreasonable if the Board ignores relevant evidence (*Gould v. Attorney General of Canada*, 2004 FCA 246), it is clear that it does not have to mention and discuss every piece of evidence placed before it in its decision (*Dossa v. Canada (Pension Appeals Board)*, 2005 FCA 387). Viewing the record as a whole, we find that the Board did not err in this regard, as it engaged in a full and meaningful review of the material before it. Reweighing the evidence is not the province of this Court.

[8] Further, the Board found that Ms. Litke's disability was not "prolonged", because it was clearly of a definite duration. The evidence before the Board suggested that she was capable of returning to work following her cancer treatment, notwithstanding her other health issues. The applicant does not seem to take issue with this finding, but rather argues that disability pensions should be available in cases of temporary disability. In this regard, she is asking this Court to revisit its decision in *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309, in which Justice Evans stated that the purpose of the Plan is to provide a pension where a disability forces a claimant to leave the workforce on a long-term basis, and "not to tide claimants over a temporary period where a medical condition prevents them from working" (at para. 11).

[9] There are no circumstances here that would justify this court reversing its own precedent. The use of the word "indefinite" in subparagraph 42(2)(a)(ii) of the Plan makes clear that Parliament did not intend that disability pensions would be available in cases of temporary disability. The fact that a House of Commons Standing Committee recommended changes to this rule is not of great weight, unless of course, their suggestions are enacted. Similarly, a Physician's Guide distributed by the government department is of little value in offsetting the statutory language and the jurisprudence of this Court.

[10] While we are not without sympathy for the applicant's plight, the change in the law she is requesting must come from Parliament, not this Court.

[11] For the foregoing reasons, this application is dismissed, without costs.

“A.M. Linden”

J.A.

“I agree.

C. Michael Ryer, J.A. ”

“I agree.

Johanne Trudel, J.A. ”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-146-08

(APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE PENSION APPEALS BOARD DATED FEBRUARY 20, 2008 IN P.A.B. FILE NO. 23978)

STYLE OF CAUSE: DEBORAH LITKE v.
THE MINISTER OF HUMAN
RESOURCES AND SOCIAL
DEVELOPMENT CANADA

PLACE OF HEARING: Edmonton, AB

DATE OF HEARING: November 25, 2008

REASONS FOR JUDGMENT BY: Linden, J.A.

CONCURRED IN BY: Ryer, Trudel, JJ.A.

DATED: November 26, 2008

APPEARANCES:

Ms. Deborah Litke ON HER OWN BEHALF

Mr. John Wodak FOR THE APPLICANT

Ms. Tania Nolet FOR THE RESPONDENT

SOLICITORS OF RECORD:

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