Federal Court of Appeal | Cour d'appel fédérale

Date: 20100223

Docket: A-134-09

Citation: 2010 FCA 59

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

LINDA GAUDET

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Fredericton, New Brunswick, on February 22, 2010.

Judgment delivered at Fredericton, New Brunswick, on February 23, 2010.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review following a decision of the Pension Appeals Board (the Board), which found that the evidence that Ms. Gaudet submitted for consideration under subsection 84(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the Plan), did not meet the "new fact" test to establish the applicant's disability and occupational capacity as at the minimum qualifying period (MQP) date of December 31, 1997.

[2] Although I am sympathetic to Ms. Gaudet's plight, her application cannot succeed. The question here is not whether Ms. Gaudet suffers from fibromyalgia, but rather whether, as of December 31, 1997 she was suffering from a severe and prolonged medical condition of indefinite duration which precluded her from regularly pursuing any substantially gainful occupation (see paragraph 42(2)(*a*) of the Plan).

[3] This Court has often enunciated the two-part test for evidence to be admissible as a "new fact": (1) it must establish a fact (usually a medical condition in the context of the Plan) that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence (the "discoverability test"), and (2) the evidence must reasonably be expected to affect the result of the prior hearing (the "materiality test") (*Canada (Attorney General) v. MacRae*, [2008] F.C.J. No. 393 (*MacRae*), at paragraph 16; see also *Kent v. Canada (Attorney General)*, [2004] F.C.J. No. 2083, at paragraphs 33-35 [*Kent*]; *Canada (Minister of Human Resources Development) v. Macdonald*, [2002] F.C.J. No. 197, at paragraph 2; *Mazzotta v. Canada (Attorney General)*, [2007] F.C.J. No. 1209, at paragraph 45). It is not contested that the Board has correctly identified both prongs of this test. This application for judicial review concerns principally the first prong – the discoverability branch and the Board's appreciation of the evidence relating to it.

[4] The determination of whether there are "new facts" within the meaning of subsection 84(2) of the Plan is reviewable on a standard of reasonableness (*Taylor v. Canada (Minister of Human Resources Development*), 2005 FCA 293, at paragraph 12. Accordingly, this Court is "concerned

with whether the decision of the Board falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47).

[5] The facts reveal that in 1998, the applicant made an unsuccessful application for disability benefits to the Minister of Human Resources and Skills Development alleging mainly sarcoidosis as the cause of her disability. Her request for reconsideration was denied. Ensued the applicant's appeal to the Review Tribunal. On August 4, 1999, it found that the reports of the rheumatologist fell short of indicating disability as defined under the Plan. The applicant made, and subsequently withdrew an application for leave to appeal this decision. Then, in June 2004, she launched a second application, but also withdrew it in July 2006.

[6] Finally, in August of 2006, the applicant applied to re-open the 1999 Review Tribunal decision pursuant to subsection 84(2) of the Plan on the basis of "new fact" evidence that she was also suffering from fibromyalgia as of 1997. In an April 2007 decision, a newly constituted Review Tribunal accepted the application on that basis but concluded that the existence of fibromyalgia at the time of her MQP was unproven and that her disabilities were not so severe as to warrant entitlement to a pension.

[7] As stated previously, on appeal before the Board, the applicant's allegations that she was suffering from fibromyalgia at the time of her MQP were found not to constitute new fact evidence. The Board held that the existence of fibromyalgia at the time of the MQP had not been proven and

was, therefore, unlikely to affect the outcome of the case (Board's decision, at paragraph 2). As a result, the Board concluded that Ms. Gaudet's request to reopen on the basis of new fact evidence had failed on both conditions (Board's decision, at paragraph 2). Therefore, the Review Tribunal decision of 1999 remained final and binding (*ibidem*, at paragraph 3).

[8] The applicant's position can be summarized as follows: In a case like fibromyalgia, where symptoms are purely subjective, insufficient objective evidence may not necessarily be determinative (applicant's memorandum of fact and law, at paragraph 53). The applicant submits that fibromyalgia being an evolutive condition, a "change in diagnosis may be probative, and even pivotal to the determination of whether the applicant is suffering from a severe, prolonged disability or not (*ibidem*, at paragraph 56). In support of her thesis, the applicant cites *MacRae* (*supra*) and *Kent* (*supra*) where our court expressed the view that for some disability claims, such as those based on physical and mental conditions that are not well understood by medical practitioners, the new facts rules is better applied with a broad and generous approach to the determination of due diligence and materiality so as not to deprive a claimant of a fair assessment of the claim on the merits (see *Kent*, at paragraphs 32 and 36). For the applicant, it is "conceivable that [she] was either misdiagnosed with sarcoidosis in 1995, or that sarcoidosis became the focus" of the treating physicians while fibromyalgia was effectively ignored, much like the competing diagnosis of back pain and depression in *MacRae*, or fibromyalgia and depression in *Kent* (applicant's memorandum of fact and law, at paragraph 55).

[9] In that vein, the applicant is highly critical of the Board's assessment of the evidence that she produced, including medical reports from rheumatologists Dr. Ecker and Dr. Docherty and from her general practitioner, Dr. Park.

[10] I am of the view that the criticism is unwarranted. Firstly, the principle enunciated in *Kent* (*supra*) and relied upon in *MacRae* (*supra*) is not at play. In the present file, no symptoms were ignored. On the contrary, the applicant's symptoms were well canvassed and fully investigated.

[11] Secondly, the Board carefully reviewed the medical evidence and preferred that of the rheumatologists, which it was entitled to do. Dr Docherty had signed a report in December 1997 stating that "most of the [applicant's] findings were limited to the foot (…). There are no other active joints. Linda is doing well" (appeal book, volume 1, at page 43).

[12] Further reports by the rheumatologists, starting in 2000, alluded to symptoms being in the "realm of fibromyalgia" without any definite finding as to the onset of the condition (appeal book, at Tab I). In 2008, Dr. Docherty was of the opinion that the fibromyalgia had evolved over a few years prior to 2005 (appeal book, volume 1, at Tab Q-1). As stated by the Board, "the only evidence which might conceivably set a date prior to the MQP" is that of Dr. Park who first concluded to the existence of fibromyalgia as of 1999, only to move the date back to 1994, once informed of the correct MQP date. The Board did not accept Dr. Park's opinion on that point (Board's decision, paragraph 6). This was not an unreasonable conclusion. At the end of the day, identifying the medical condition as sarcoidosis or fibromyalgia in and of itself would not bring the applicant closer

to a disability pension in the absence of persuasive evidence that the applicant was disabled within the meaning of the Plan as of the MQP date.

[13] Accordingly, I find that the Board's decision is supported by the evidentiary record and that it falls within a range of acceptable outcomes which are defensible in respect of the facts and the law.

[14] Therefore, I would dismiss the application for judicial review without costs.

"Johanne Trudel"

J.A.

"I agree
Marc Noël"

"I agree
J.D. Denis Pelletier"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-134-09
(APPEAL FROM A DECISION OF PENSION APPEALS BOARD ON FEBRUARY 16, 2009)	
STYLE OF CAUSE:	LINDA GAUDET v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Fredericton, New Brunswick
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DATED:	February 23, 2010

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