

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110208

Docket: A-127-09

Citation: 2011 FCA 47

**CORAM: BLAIS C.J.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

EMILY JANE BUNGAY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by video-conference between Ottawa, Ontario and Grand Bank,
Newfoundland and Labrador on November 5, 2010.

Judgment delivered at Ottawa, Ontario, on February 8, 2011.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**BLAIS C.J.
DAWSON J.A.**

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an application for judicial review from the decision of the Pension Appeals Board, dated January 20, 2009. For the reasons below, I would quash the decision of the Board and remit this matter to a differently constituted panel of the Board.

A. The Board's decision

[2] The Board dismissed the applicant's claim for disability benefits under section 42 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8. It found that the applicant's disability was not "severe," as section 42 requires.

[3] The Board's decision was a split decision. Justice Platana, with Justice Riordon concurring, wrote for the majority. One member of the three person panel, Justice Chapnik, dissented, finding that the applicant's disability was severe.

B. Standard of review

[4] In this Court, the parties agree that this Court is to review the Board's decision under the deferential standard of "reasonableness."

[5] Under this standard, I am not to fact-find, weigh evidence or substitute my decision for the Board. Rather, my task is to ask myself this question: did the Board's decision fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law? (See *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at paragraph 47).

[6] Specifically in this case, my task is to focus on the majority's determination that the applicant's disability was not "severe." The question is whether the majority adopted a definition of

“severe” that was defensible on the law, whether it applied that definition to the evidence before it, and whether, overall, it made findings and conclusions that were within a range of rational outcomes available to it.

C. The definition of “severe” disability in the Act

[7] Paragraph 42(2)(a) of the Act defines disability as “severe” when it affects the claimant’s employability: the claimant must be “incapable regularly of pursuing any substantially gainful occupation.”

[8] The leading case on the interpretation of “severe” is *Villani v. Canada (AG)*, 2001 FCA 248, [2002] 1 F.C. 130. *Villani*, at paragraphs 32 and 38, stands for the proposition that in assessing whether a disability is severe, the Board must adopt a “real world” approach. This “real world” approach requires it to determine whether an applicant, in the circumstances of his or her background and medical condition, is employable, *i.e.*, capable regularly of pursuing any substantially gainful occupation. Employability is not to be assessed in the abstract, but rather in light of “all of the circumstances.” The circumstances fall into two categories:

- (a) *The claimant’s “background.”* Matters such as “age, education level, language proficiency and past work and life experience” are relevant here (*Villani, supra* at paragraph 38).

- (b) *The claimant's "medical condition."* This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment. The approach of assessing the claimant's condition in its totality is consistent with section 68(1) of the Regulations, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

D. Analysis of the decision of the majority of the Board

[9] In my view, in considering the applicant's claim for disability benefits, the decision of the majority of the Board was not defensible on the law as set out above. The applicant's condition was not assessed using the "real world" approach. All of her various impairments were not taken into account.

[10] The majority decision focused on the applicants' condition of severe osteoporosis (see paragraph 37 of its reasons): "[t]he severe and prolonged disability relied upon in this case is severe osteoporosis." Having identified that as *the* impairment for analysis, the reasons go on to ask whether, in light of that impairment "she was disabled to the extent necessary within section 42 of the Act" (at paragraph 37).

[11] Four paragraphs follow, analyzing various diagnoses of her osteoporosis, but only her osteoporosis and no other medical conditions. There is an indication in the reasons that other medical conditions are left unmentioned because they had no relationship to her job loss (at paragraph 39). Further, aside from brief mention of the applicant's work history, there is no mention of her age, education level, language proficiency and past life experience at all or in any detail as required by *Villani, supra*.

[12] Further, at a key part of the analysis in the reasons, an issue of credibility is left unaddressed. The reasons mention that the applicant filled out an application for employment insurance benefits, stating that she was available to work. This becomes a very significant part of the analysis of the majority (at paragraph 41) – her statement suggests that in fact she was capable of working and, therefore, not seriously disabled. In this context, there is brief mention of the applicant's testimony explaining her statement as something counseled by a nurse practitioner. However, her explanation is rejected only because the nurse practitioner was not called as a witness. In my view, in these circumstances, the weight, if any, to be given to the applicant's testimony should have been assessed, including making any necessary observations about the applicant's credibility. In any event, even if the applicant's explanation about her statement in her application were disbelieved, the applicant's disability must still be assessed in accordance with the standards set out in *Villani*.

[13] The dissenting member of the panel found that the applicant suffered from a broader array of medical conditions, including hyperparathyroidism, multiple endocrine neoplasia, polydipsia and

depression (see paragraph 2 of her reasons). A review of the record shows that this finding of multiple medical conditions is amply supported.

[14] The dissenting member charged herself properly as to the law as set out in *Villani* (at paragraph 14):

The *Villani* ([2002] 1 F.C. 130) test and the case law requires the Tribunal and this Board to examine an individual's entire physical condition, age, level of education, employability and so on.

The dissenting member then applied this approach and examined the applicant's entire "real world" condition in detail, with frequent reference to the evidence.

[15] On the issue of the applicant's statement on the application form, the dissenting member found that the applicant's testimony about why she filled out the form in the way she did was credible. Overall, she found that the applicant "gave her evidence in a forthright, yet understated manner" (at paragraph 14). She added that "[t]he fact that the applicant may have filled out unemployment forms indicating a willingness to work does not, in itself, change the fact of her disability" (at paragraph 15). The focus of her analysis was the "real world" condition of the applicant, taking into account her entire condition, and not just severe osteoporosis. Based on that analysis, she concluded that the applicant "has satisfied the onus to show that her condition was severe and prolonged such as to render her incapable of regularly pursuing any type of employment, prior to December 2004 and continuing." As a result, she found her disability to be severe and prolonged within the meaning of paragraph 42(2)(a) of the Act.

[16] It is not for this Court to determine the applicant's entitlement to benefits under paragraph 42(2)(a) of the Act. It is not for this Court to choose between the result reached by the majority members and the dissenting member of the Board. Rather, this Court is restricted to reviewing what the Board has done on the deferential standard of reasonableness.

[17] In reviewing what the Board has done on the basis of the deferential standard of reasonableness, for the foregoing reasons I conclude that the majority decision is unreasonable and should be quashed. A new panel of the Board must reconsider this matter applying the *Villani* test. In particular, that new panel of the Board must examine the "real world" condition of the applicant, taking into account her entire condition, and not just severe osteoporosis.

[18] Therefore, I would grant the applicant's application for judicial review, quash the decision of the Board, and remit the matter to a newly constituted panel of the Board. The applicant shall be entitled to her costs.

"David Stratas"

J.A.

"I concur
Pierre Blais C.J."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-127-09

**AN APPLICATION FOR JUDICIAL REVIEW OF THE PENSION APPEALS BOARD
DATED JANUARY 20, 2009**

STYLE OF CAUSE: Emily Jane Bungay v. The
Attorney General of Canada

HEARING BY VIDEO-CONFERENCE BETWEEN: Ottawa, Ontario and Grand Bank,
Newfoundland and Labrador

DATE OF HEARING: October 5, 2010

REASONS FOR JUDGMENT BY: Stratas J.A.

CONCURRED IN BY: Blais C.J.
Dawson J.A.

DATED: February 8, 2011

APPEARANCES:

Glen W. Picco FOR THE APPLICANT

Allan Matte FOR THE RESPONDENT

SOLICITORS OF RECORD:

Picco & White Law Office FOR THE APPLICANT
Marystone, Newfoundland and Labrador

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada