Federal Court of Appeal

Cour d'appel fédérale

Date: 20120203

Docket: A-228-11

Citation: 2012 FCA 39

CORAM: **PELLETIER J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

DARLENE TAKER

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Halifax, Nova Scotia, on January 30, 2012.

Judgment delivered at Ottawa, Ontario, on February 3, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Darlene Taker, the appellant, applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan). After her initial application was denied, she reapplied for benefits. Ms. Taker's second application was initially denied and then denied again upon reconsideration. Ms. Taker then appealed this denial to the Office of the Commissioner of Review Tribunals (OCRT).

[2] Before the Review Tribunal Ms. Taker argued that, as at her minimum qualifying period, she suffered from chronic pain, fibromyalgia, and a combination of both physical and psychiatric

ailments of sufficient severity as to be disabled within the requirements of the Plan (appeal book page 418). The Review Tribunal heard Ms. Taker's appeal on March 6, 2001, and dismissed the appeal (March 6, 2001 decision). No application for leave to appeal this decision was made.

[3] On December 22, 2008, Ms. Taker advised the OCRT that, pursuant to subsection 84(2) of the Plan, she wished to reopen the March 6, 2001 decision on the basis of new facts not available at the time of the hearing. A Review Tribunal was convened to hear Ms. Taker's application to reopen. The Review Tribunal dismissed the application on June 14, 2010. Ms. Taker then submitted an application for leave to appeal the June 14, 2010, decision to the Pension Appeals Board (Board).

[4] On September 28, 2010, a designated member of the Board refused the application for leave to appeal the decision of the Review Tribunal.

[5] Ms. Taker then brought an application for judicial review in the Federal Court in respect of the decision of the designated member of the Board refusing leave to appeal.

[6] In reasons cited as 2011 FC 561, a judge of the Federal Court dismissed the application for judicial review. This is an appeal from that decision of the Federal Court.

[7] In oral argument before us Ms. Taker reviewed the extensive medical evidence tendered before the Board. She conceded that as of March 6, 2001, she had been diagnosed with fibromyalgia. However, she pointed out that it was not until 2004 that Dr. Ouellette diagnosed her

as suffering from “secondary Fibromyalgia Syndrome” (appeal book pages 68-70). Ms. Taker submitted that the diagnosis in 2004 of secondary fibromyalgia was a new fact which justified reopening the March 6, 2001 decision, and that neither the designated member of the Board nor the judge of the Federal Court gave sufficient consideration or weight to this new fact.

[8] Subsection 84(2) of the Plan is an exceptional provision which allows a decision of a Review Tribunal to be rescinded or amended “on new facts.” The test to establish the existence of a new fact is stringent and well-established in the jurisprudence. The new fact must not have been previously discoverable with reasonable diligence and the new fact must be material. The requirement that the fact be material means that it must be relevant to an applicant’s ability to work as at the minimum qualifying period. In Ms. Taker’s case any new fact must be related to her ability to work as of December 31, 1998.

[9] As explained below, I have not been persuaded that the diagnosis of secondary fibromyalgia in 2004 was a new fact that would permit the March 6, 2001 decision to be reopened.

[10] Ms. Taker acknowledges that while primary and secondary fibromyalgia have different causes, their symptoms are identical. Because the 2004 diagnosis did not change Ms. Taker’s symptoms it did not impact upon Ms. Taker’s capacity to work as at the minimum qualifying period.

[11] It follows that the 2004 diagnosis could not affect the March 6, 2001 decision and so was not material. As such the 2004 diagnosis is not a new fact that would warrant reopening the March 6, 2001 decision.

[12] For these reasons, I would dismiss the appeal. In the circumstances I would not award costs against Ms. Taker.

"Eleanor R. Dawson"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-228-11
STYLE OF CAUSE:	DARLENE TAKER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	January 30, 2012
REASONS FOR JUDGMENT BY:	Dawson J.A.
CONCURRED IN BY:	Pelletier J.A. Stratas J.A.
DATED:	February 3, 2012

APPEARANCES:

Ms. Darlene Taker Self-represented	FOR THE APPELLANT
Mr. Martin Kreuser	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ms. Darlene Taker Self-represented	FOR THE APPELLANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT