Federal Court of Appeal | Cour d'appel fédérale

Date: 20140410

Docket: A-47-13

Citation: 2014 FCA 95

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

BETWEEN:

BIANCA TERESA D'ERRICO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on April 9, 2014.

Judgment delivered at Vancouver, British Columbia, on April 10, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BLAIS C.J.
SHARLOW J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Ms. D'Errico applies for judicial review of the Pension Appeals Board's decision no.CP27842 dated November 14, 2012.

A. The basic facts

[2] On August 12, 2004, Ms. D'Errico was in a motor vehicle accident that caused her soft tissue injuries, depression and myofascial pain syndrome. In 2008, she applied for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. The Minister of Human Resources and Skills Development denied her application and her request for reconsideration. On December 14, 2010, a Review Tribunal dismissed her appeal, as did the Board on further appeal.

B. The Board's decision

[3] The question before the Board was whether Ms. D'Errico had a severe and prolonged disability on or before her minimum qualifying period, which was December 31, 2009. In cursory reasons, the Board appears to have held that Ms. D'Errico's disability was not "severe" as she was "capable of substantially gainful employment" (at paragraph 10). As I understand the Board's reasons, it based its decision on the fact that Ms. D'Errico had been taking yoga for several years to deal with her symptoms and, near the time of the Board's decision but well after her minimum qualifying period, she had been employed on a minimal part-time basis as a yoga instructor (at paragraph 9).

C. Disability benefits under the *Plan*: a brief review of the law

[4] Under subparagraph 42(2)(*a*)(i) of the *Plan*, a person has a "severe" disability if she is "incapable regularly of pursuing any substantially gainful occupation." This Court has interpreted this requirement as meaning an inability to pursue "with consistent frequency" or "regularly" any "truly remunerative occupation": *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C. 130 at paragraphs 38 and 42. This legal test for severity must be "applied with some degree of reference to the 'real world'," with a view to considering the claimant's employability based on education, employment background and daily activities: *Villani* at paragraphs 38 and 39. Where there is evidence of a capacity to work, the claimant must establish she has tried to obtain and maintain employment but has been thwarted by her health problems: *Canada (Attorney General) v. Ryall*, 2008 FCA 164 at paragraph 5.

[5] Under subparagraph 42(2)(*a*)(ii), a person's disability is "prolonged" if it is "likely to be long continued and of indefinite duration or is likely to result in death."

D. How this Court is to review the Board's decision

[6] In this Court, we are to review the Board's decision on the basis of "reasonableness," *i.e.*, whether the outcome the Board reached is acceptable and defensible on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[7] Given the wording of subparagraphs 42(2)(*a*)(i) and (ii) and the case law summarized in my review of the law, the range of outcomes that the Board can reach is somewhat constrained: if the Board does not apply these legal standards, its decision cannot be acceptable or defensible on the law.

E. Conducting reasonableness review of the Board's decision

[8] In my view, the Board's decision is unreasonable.

[9] First, in several respects, the Board did not apply the applicable legal standards:

- The Board (at paragraph 7) appears to have latched onto the Review Tribunal's reasons rather than conducting its own *de novo* analysis, as it was required to do.

- The Board (at paragraph 10) held that Ms. D'Errico is "capable of substantially gainful employment." It did not ask itself whether she was capable of "regularly" pursuing substantially gainful employment.

- The Board did not assess whether Ms. D'Errico had a "severe" and "prolonged" disability. Instead, the Board fastened upon one main consideration – the fact that she had been doing yoga – and seems to have assumed this alone meant that she did not satisfy the applicable legal standards for disability benefits (at paragraph 9).

- The Board failed to examine her condition at the time of her minimum qualifying period and afterward. Indeed, it looked only at her more recent condition, noting (at paragraph 9) that she has been recently employed as a yoga instructor. It did not note, however, that this was only for a very limited time per week at $75 per week.

- The Board did not assess whether $75 a week was "substantially gainful" employment or Ms. D'Errico could obtain other "substantially gainful" employment.

[10] I acknowledge *Dunsmuir, supra* at paragraph 48 and the need for this Court to uphold an outcome on the basis of the reasons that could have been given. But I also acknowledge the later holding in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 54 to the effect that the power to uphold an outcome is "not a '*carte blanche*' to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result." In any event, as will be seen, I doubt whether the Board could have reached the outcome it did on the basis of this record.

[11] *Dunsmuir, supra* also makes it clear that an administrative decision is liable to be quashed if it lacks justification. The Board's reasons do not show that it grappled with the medical evidence to see if the legal test was met. Indeed, aside from fastening onto

Ms. D'Errico's yoga activities, the Board's reasons do not allow this Court to understand why the Board made the decision it did on the basis of the medical evidence before it.

[12] In support of her submission that the reasons of the Board showed adequate justification, counsel for the Attorney General cited *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. In that case, a labour arbitrator simply offered a conclusion with little, if any, analysis on the basis of a limited record.

[13] In my view, in these circumstances *Newfoundland Nurses* is distinguishable. It is one thing for an administrative decision-maker to issue sparse reasons to sophisticated parties who regularly engage in labour arbitration and, thus, are familiar with the legal and factual landscape. It is quite another to issue adverse reasons of this sort to a person like Ms. D'Errico, on a record that calls for explanation.

F. Remedy

[14] Ms. D'Errico asks this Court to quash the Board's decision and grant her disability benefits. In effect, this is the remedy of *certiorari* and *mandamus*.

[15] Normally, in situations such as these, the Court grants *certiorari* and remits the matter to the Board for reconsideration. It is for the Board to decide the merits of cases, not this Court.

[16] Normally, this Court awards *mandamus* only where the outcome of the case on the merits is a foregone conclusion – in other words the evidence can lead only to one result. However, there are exceptions in the authorities: *LeBon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 and the so-called "directed verdict" cases referred to; see also *Wihksne v. Canada (Attorney General)*, 2002 FCA 356, *Canada (Attorney General) v. Richard*, 2008 FCA 69 and *Canada (Minister of Human Resources Development) v. Tait*, 2006 FCA 380 where this Court has issued directions on particular issues in conjunction with a remittal for re-decision. One recognized exception is where there has been substantial delay and the additional delay caused by remitting the matter to the administrative decision-maker for re-decision threatens to bring the administration of justice into disrepute: *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516; *Norgard v. Anmore (Village)*, 2009 BCSC 823 at paragraph 46; *LeBon, supra* at paragraph 14. In such circumstances, the Court exceptionally may direct that a certain result be reached.

[17] The word "exceptionally" recognizes that administrative tribunals should be allowed another chance to decide the merits of the matter and not have the reviewing court do it for them. But in certain cases, the circumstances support resort to the latter option.

[18] Here, the threshold of exceptionality is met. The delay is substantial – despite the fact that this is an administrative regime intended to provide rapid determinations, Ms. D'Errico applied for benefits some six years ago. If we remit this matter for re-decision and if a party then applies for judicial review, a further two years could pass, bringing the total to eight years. As we shall see, the record shows the prejudice that would be caused by further delay and there is

sparse evidence in support of the outcome reached by the Board. Finally, Ms. D'Errico is not guilty of any unreasonable delay.

[19] In my view, the nature of the benefits within this regulatory scheme also factors into our discretion. These are benefits meant to address a very serious condition, one that prevents the earning of meaningful income to sustain oneself. Parliament could not have intended the final disposition of disability benefits in these circumstances to take eight years.

[20] Overall, as a majority of the Supreme Court recognized in a different context, "remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers' Association, supra* at paragraph 55.

[21] In light of these considerations and the circumstances of this case, it is appropriate that this Court make its own assessment on the record before it in this case and direct the result that should follow on the facts and the law.

[22] Here, the record shows that Ms. D'Errico's disability was "severe" at the time of the minimum qualifying period. An earlier medical diagnosis shows that her extremely painful neck problem was "chronic" and "easily aggravated" by sedentary work such as deskwork, and later reports do not rebut this (see appeal book at page 133). Other reports include the following comments and observations: "considerable distress and persistent pain," ongoing severe limitations in efforts to return to work or school, "not fit to work," no further improvement

anticipated, difficulty in doing even limited hours of work per week, and "a significant [negative] influence on her job prospects and ability to partake in desk work" (see appeal book, pages 141, 149, 154, 158, 163 and 166).

[23] In my view, one medical report in 2012 sheds some light on her condition at the end of the minimum qualifying period. After repeating many of the observations made by others near the time of the minimum qualifying period, the report describes her overall abilities as "less than sedentary."

[24] On balance, the medical reports also support a finding that the disability is "prolonged" within the meaning of the legal test. Given the minimum qualifying period of December 31, 2009, the most relevant evidence is that of Dr. Barss in his medical report dated July 26, 2008. Dr. Barss opined that he did not anticipate any further improvement to Ms. D'Errico's already severe disability. While other reports before the end of the minimum qualifying period guardedly suggest the possibility of her condition improving, they have a speculative tone.

[25] The record shows that despite numerous attempts to pursue work before the minimum qualifying period, Ms. D'Errico's disability prevented her from pursuing on a regular basis sedentary part-time work. The work she was able to pursue only recently – part-time yoga instruction at $75 a week – was neither regular nor substantially gainful. Some other work she tried to do intermittently in the year leading up to her minimum qualifying period paid her $50-$160 per week for between 2-8 hours of work per week. The record also shows that when she tries to work, her condition worsens from its already poor state.

[26] Applying a real world perspective to the evidence around the time of her minimum qualifying period (December 31, 2009) – *i.e.*, Ms. D'Errico's employability based on education, employment background, daily activities, and, importantly in this case, her actual real world attempts to work – Ms. D'Errico was unable to pursue "with consistent frequency" or "regularly" any "truly remunerative occupation." Overall, she meets the test for disability benefits under the *Plan*. In my view, especially given Dr. Barss' July 26, 2008 medical report, Mr. D'Errico was "disabled" within the meaning of the *Plan* as of her application date, April 30, 2008.

G. Proposed disposition

[27] The Board no longer exists. Its successor is the Social Security Tribunal. Therefore, in light of the foregoing reasons, I would allow the application for judicial review, set aside the decision of the Board and direct the appropriate division of the Social Security Tribunal to grant Ms. D'Errico's appeal of the decision of the Review Tribunal and make an order granting her application for disability benefits dated April 30, 2008 on the basis that she was disabled at that time. Ms. D'Errico shall have her costs of the application.

"David Stratas"

J.A.

"I agree

Pierre Blais C.J."

"I agree

K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-47-13
AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE PENSION APPEALS BOARD DATED NOVEMBER 14, 2012.	
STYLE OF CAUSE:	BIANCA TERESA D'ERRICO v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 9, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BLAIS C.J. SHARLOW J.A.
DATED:	APRIL 10, 2014

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