

Citation: 2008 TCC 382

Date: 20080626

Docket: 2007-4466(IT)I

BETWEEN:

VIRGINIA GAIL REID,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Agent for the Appellant: Jason Edward Stoke

Counsel for the Respondent: Daniel G. Segal

REASONS FOR JUDGMENT

**(Delivered orally from the bench
on May 16, 2008, in Calgary, Alberta)**

Mogan D.J.

[1] This is an appeal concerning the 2005 taxation year when, in computing her tax, the Appellant claimed a tax credit in respect of medical expenses pursuant to section 118.2 of the *Income Tax Act*. In particular, she claimed a tax credit in respect of the purchase of a Ceragem bed, which is a special device that helps people who have back pain and other ailments. The Minister of National Revenue disallowed the tax credit on the basis that it did not qualify within the broad terms of a medical expense as defined in the statute and the *Regulations*. The Appellant appealed from that assessment and elected the informal procedure. The only issue before the Court is whether the cost of the Ceragem bed could qualify as a medical expense within the legislation.

[2] The Appellant was born in March 1938 with a condition called scoliosis of the spine, which in her case is a curvature of her left hip. It did not bother her until she was in her teens and, by the age 20, she had some difficulties getting out of bed because her legs would be numb. She started consulting persons both in the medical and the health science fields. Finally, she took consultation with doctors in Toronto and the possibility of surgery was offered, but she rejected it because she regarded the risk as too high. The result is that she has accepted the discomfort and has lived most of her life with what is commonly called lower back pain.

[3] She has no trouble driving her car. She lives in a senior's condominium which she referred to as a 50's plus condo, meaning that it was intended to provide residence only for people who are 50 years of age or older. She described the condominium as a 1,200 square foot apartment on the second floor, and she lives there as any person would in a similar dwelling. I noted that while she was in the courtroom, she was able to walk around with apparent ease. She may have had lower back pain, but she walked around the courtroom like many other people.

[4] She did not apply at any time for the disability tax credit under the *Income Tax Act*, but over the years, she has sought relief for her lower back pain from chiropractors, physiotherapists, acupuncturists, and massage therapy. Around 2004, a doctor drained some fluid from her knee which gave her some relief for walking. Finally, in 2004-2005, a friend suggested she try a Ceragem bed. She went to the store in Calgary that sells them and tried one out. She described the process. Apparently, it was a 15-20 minute presentation of the bed, which I inferred was in the nature of a sales pitch. Those in attendance were offered an opportunity to try out a Ceragem bed which could be operated either automatically or manually. On the automatic system, which she tried, it was a 39-minute cycle, where different aspects of the bed such as vibration and a type of massage took place, changing from time to time through the 39-minute cycle. She found that it helped her.

[5] She first tried the Ceragem bed in the early summer of 2005, and she went back to the store from time to time to have this experience, and have these tests to see whether she might find permanent relief by using it. I do not recall from the evidence how many times she went back to the store, but she certainly went there a number of times. And finally, in late October, she decided that she would purchase the bed. The salesperson at the store told her if she got a prescription from her doctor, it might help her get a deduction or some tax relief through the purchase. So she went to her doctor, a Dr. Pandya, and asked for a prescription, which was entered as Exhibit A-2. The typical looking doctor's prescription is dated November 2, 2005, and it appears the doctor has written, as best I can read:

"She can try Ceragem bed for mechanical back pain."

[6] She took the prescription, and on the same day, entered into a sales agreement to buy the Ceragem bed, which agreement was entered as Exhibit A-3. The photocopy is poor, but one can see the price of \$3,990, which includes the goods and services tax. So, on the same day she got the prescription from Dr. Pandya, she purchased the bed. There was also entered as Exhibit A-1 a copy of a medical device license issued by Health Canada sometime in 2003 to Ceragem Company Limited, the manufacturer of this bed. So far as I can read from that document, all it does is grant a license number to the manufacturer with respect to the Ceragem bed, and identify it as a medical device for Health Canada purposes. I do not know that it has any significance under the *Income Tax Act* for income tax purposes. It may have some significance in the health science field, but I was not informed during the hearing of any way that it could be tied into the medical expense regulations under the *Act*.

[7] The last exhibit entered by the Appellant, Exhibit A-4, is a memorandum from Dr. Pandya dated May 12, 2008, which is just three days before the hearing of this appeal, simply stating as follows:

RE: PATIENT: REID, MS. GAIL

Ms. Reid has been my patient since 2001.

Her pre existing medical conditions are scoliosis, lower back, knee/hip pain.

Ms. Reid was seen on various clinic visits pertaining to her medical concerns. Several medications and treatments were prescribed.

She takes Naprosya 500mg(anti-inflammatory) twice a day and Plaquenil 200mg daily.

She was referred to Dr. J.P. Ryan, Specialist in Rheumatic-Diseases. She had consultation appointments in December 2004, November 2006 and July 2007.

...

[8] In her evidence, the Appellant said that she had rotator cuff surgery on her left shoulder in May 2007 and on her right shoulder in September 2007. Apparently, the surgeon told her at that time that she had the shoulder muscles and tone of a younger

woman, at which time she was probably 68 or 69 years of age. She attributed that compliment to the fact that she had been using the Ceragem bed since November 2005. I would not take that as a medical certainty, but she feels that way, and I believe her.

[9] As mentioned above, the question in this case is whether the cost of the Ceragem bed qualifies as a medical expense. The Respondent entered as Exhibit R-1 a brochure advertising the bed. Putting together the evidence of the Appellant which I found totally credible, and the brochure, it seems that the Ceragem bed is some kind of a vibrating facility like a massage, and indeed, the word "massage" is used more than once in the brochure. It says:

Ceragem thermal acupressure massager. The finest custom personal therapeutic full body massager. A breakthrough combining state of the art oriental medicine.

So I gather it is like a massage, but without the personal hands-on effect of the person giving massage therapy.

[10] I turn now to the legislation under the *Act*. Subsection 118.2(1) contains the formula which grants the tax credit in respect of a medical expense, and subsection (2) defines medical expense. The only definition which the Appellant relies on is paragraph (*m*), and the relevant portions of section 118.2 state:

- 118.2(1) For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted the amount determined by the formula ...
- 118.2(2) For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid
- (a) ...
 - (m) for any device or equipment for use by the patient that
 - (i) is of a prescribed kind,
 - (ii) is prescribed by a medical practitioner,
 - (iii) is not described in any other paragraph of this subsection, and

- (iv) meets such conditions as are prescribed as to its use or the reason for its acquisition;

to the extent that the amount so paid does not exceed the amount, if any, prescribed in respect of the device or equipment;

[11] Both the agent for the Appellant and counsel for the Respondent directed my attention to Regulation 5700 to the *Income Tax Act*, which is specifically related to subsection 118.2(2), and indeed ties in with paragraph (m) relating to a device or equipment. It reads:

5700 For the purposes of paragraph 118.2(2)(m) of the *Act*, a device or equipment is prescribed if it is a

(a) ...

(h) hospital bed including such attachments thereto as may have been included in a prescription therefor;

In one way or another, it seems that a Ceragem bed has to come under the umbrella of those words.

[12] Both parties also referred me to a number of cases decided by my colleagues in this Court. Most of them grant a measure of relief to the taxpayer in each of the appeals. The taxpayers are not wholly successful in these cases, but they do obtain a measure of relief. Some of the cases are easily distinguished.

[13] In *Williams v. The Queen*, [1998] 1 C.T.C. 2813, a decision rendered in 1997 by Justice Rip, Ms. Williams, at a very early age, contracted an extraordinary environmental illness where she was a physiotherapist. When she went to work in a clinic, she started to get extraordinary symptoms and her doctors concluded that she was allergic to all kinds of items that might be found in the carpets and certain types of furniture. She was told to live in a facility that had no carpets, and she had to get a special mattress that did not have the material in it that prevents it from catching fire, but that only contained cotton.

[14] She ended up appealing in this Court, claiming medical expenses of about \$7,000, which included vitamins and mineral supplements, food and cleaning, personal grouping devices, this special mattress, and hardwood floor renovations in her home. Justice Rip dismissed the appeal with respect to the vitamins and supplements and food and cleaning material, but he allowed it with respect to the

special mattress and renovation of the hardwood floor, finding they came within the definition for medical devices, since it was essential for her and recommended by a number of doctors. They told her specifically that she had to live in an environment where these substances to which she seemed to be allergic would not exist. So her appeal was allowed in part. I think the case was cited to me because it showed how far the Court could go in extending the concept of device or equipment in a particular circumstance. In *Williams*, it was absolutely important for her to make these changes to her home if she was to be able to live.

[15] The next case decided by Justice Bowie is *Crockart v. The Queen*, 1999 CanLii 326, which I find quite easily distinguished from the present case because in his judgment, he says the parties filed an Agreed Statement of Facts, and there were two important facts that stand out. Mrs. Crockart's medical condition, specifically the paralysis of her left arm and left leg, prevented her from getting into or out of a normal bed unassisted. She also had difficulty with bladder and bowel control, which meant that she often had to leave her bed at night to go to the bathroom, and she could not get out or into the bed alone. Further, in *Crockart*, the parties agreed that her physicians advised her to purchase an adjustable bed to assist her in getting out of bed, and therefore, the device constituted a prescription for the purpose of paragraph 118.2(2)(m) of the *Act*.

[16] In *Crockart*, I believe the distinguishing fact is that the medical device was, in fact, a bed, and it had to be adjusted to accommodate a physical disability since the taxpayer could not get in and out of bed on her own. On that basis, Justice Bowie allowed the appeal of Mrs. Crockart, and in doing so, he cited a passage from the decision of Chief Justice Bowman in *Radage v. The Queen*, 96 DTC 1615, as follows:

The court must, while recognizing the narrowness of the tests enumerated in sections 118.3 and 118.4, construe the provisions liberally, humanely and compassionately and not narrowly and technically.

Those words are used quite often in construing this legislation and I like to think we all attempt to do that.

[17] The next case is a decision of Justice Teskey of this Court, *Vucurevich v. The Queen*, [2000] 1 C.T.C. 3044. In that case, Mr. Vucurevich had been a paraplegic in a wheelchair for 45 years. He survived well in the sense that he had been employed for 30 of those years, but after 40 years in a wheelchair, he was having trouble, particularly with sores that develop from spending too much time sitting in one

position. He was advised that the only way he could get around his home was to rebuild certain items in the house so that they would be at exactly the same level as the seat of the wheelchair. He had been in the wheelchair so long, he had no strength at all in his legs, and the strength in his arms had declined significantly because of the use he had to make of his arms on the wheelchair getting around. He had to rebuild his bed so that the level of the mattress would be the same as his wheelchair, and he could therefore navigate from the wheelchair to the bed on his own. Further, the sofa in the living room and the chair in the dining room where he always sat were rebuilt to the same level so that by rebuilding these items in the house, he was able to move laterally without the help of a second party. The cost of rebuilding those items was challenged in his tax appeal, and Justice Teskey, applying the suggestion of Chief Justice Bowman in *Radage* of giving a liberal interpretation, found in favour of the Appellant and held that the cost of rebuilding the furniture was similar. He said:

I see no difference in purchasing a bed similar to a hospital bed or modifying an existing bed so it has the same attributes as a classic hospital bed and therefore find that those expenses are proper medical expenses.

However, in that case the taxpayer was genuinely in dire straits and to permit his survival to navigate his own home independently, without the help of a third party, the repairs had to be completed.

[18] The two other cases of this Court which were referred to me are *Pagnotta v. The Queen*, [2001] 4 C.T.C. 2613, by Justice Miller, and *Norton v. The Queen*, 2008 TCC 29, by Justice Sheridan. I do not find them helpful because they dealt primarily with medications like aspirin, and not with something that was specifically identified as a device or equipment. Therefore, I do not find the comments of the judges in those cases helpful.

[19] I come back to the facts of this case. The only item under the legislation which may give a taxpayer some relief is any device or equipment that might be a hospital bed. I believe the Appellant must lose on that point because she sleeps in her own bed and does not sleep in the Ceragem bed since it is not for sleeping during the night. It seems to be a device that a person can buy which might replace massage therapy. Also, massage therapy has been specifically rejected as a medical expense.

[20] So while in *Crockart*, it was held that the adjustment to the bed was like a hospital bed, in this case, the Ceragem bed is nothing like a hospital bed, nor is it even a bed, although it is called such in the brochure (Exhibit A-2). It is more a table with a form of vibration in it and seems to take the place of massage therapy which is

not accepted in the deduction of medical expenses. Therefore, while we are encouraged to give a liberal and compassionate interpretation to the words of subsection 118.2(2), I am not satisfied that the Ceragem bed can in any way be qualified as device or equipment set out in paragraph (m) of the *Act* or in paragraph (h) of the *Regulations*. For these reasons, I dismiss the appeal.

Signed at Ottawa, Canada, this 26th day of June, 2008.

“M.A. Mogan”

Mogan D.J.

CITATION: 2008 TCC 382

COURT FILE NO.: 2007-4466(IT)I

STYLE OF CAUSE: VIRGINIA GAIL REID and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: May 15, 2008

REASONS FOR JUDGEMENT BY: The Honourable Justice M.A. Mogan

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APPEARANCES:

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