PENSION APPEALS BOARD
Canada Pension Plan

COMMISSION D'APPEL DES PENSIONS
Régime de pensions du Canada

VEXING ISSUES

THE PRINCIPLES UNDERLYING S.42(2)(a)(i) of the *CANADA PENSION PLAN*

CASE COMMENTS

Prepared by:

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The Grand Okanagan
Kelowna, British Columbia
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THE PRINCIPLES UNDERLYING S.42(2)(a)(i) OF THE *CANADA PENSION PLAN*

1. The key statutory criteria for entitlement to a *CPP* disability pension are set out in s. 42(2)(a) and have remained unchanged since the *CPP* was proclaimed into law on January 1, 1966:

> For the purposes of this Act,
> (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
> (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death.

The combined effect of the "severe" and "prolonged" branches of the test, as defined in s. 42, is obviously intended to create a stringent threshold for entitlement but not an insuperable one.

2. Prior to the cases decided by the Federal Court of Appeal in the post-2000 period, the leading case interpreting the criteria was *Leduc v. Minister of National Health and Welfare* (1988), C.E.B. & P.G.R. 8546 (PAB), which propounded the now famous "real world" test for entitlement.

In his decision for the Board, McQuaid J.A. laid down his principled approach this way at p. 6022:

> **The Board is advised by medical authority that despite the** handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and

> theoretical world. He lives in a real world, peopled by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented **difficulties, any employer would even remotely consider** engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable. [Emphasis added.]

It must be said that this "real world" principle was not always followed by later panels of the Board, some of them arguing that it was too open-ended, indeterminate, and tended to water down the actual language of the criteria.

3. The next principles of the case-law come from the justly well-known judgment of Isaac J.A. in *Villani v. The Attorney General of Canada*, [2002] 1 F.C. (C.A.). This judgment has revolutionized the adjudicative process for disability claims under the *CPP* and is rich in ideas and principles which will evolve in future years in both the decisional law of the Board and Review Tribunal as well as in the judicial review decisions of the Federal Court and Federal Court of Appeal.

I draw the following principles or guidelines for all levels of adjudicator under the *CPP*. One should bear in mind in approaching this case, that the appellant had claimed disability based on pain in his right knee, shoulders and back, along with numbness in his lower leg and hands and some hearing loss. Mr. Villani had lost at all levels of appeal until he got to the Federal Court of Appeal:

> (1) **The Standard of Review Issue**
>
> The Court followed its earlier judgment in *Canada (Minister of Human Resources Development) v. Skoric*, [2000] 3 F.C. 265 (C.A.) in concluding that, on questions of fact, the standard should be "patent unreasonableness" whereas, on questions of law or mixed fact and

law, the standard should be correctness.

Using the multi-part criteria of the "pragmatic and functional" approach developed by the Supreme Court of Canada in *Puspanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982, Isaac J.A. said this about the interpretation question arising under s. 42(2)(a)(i) of the *Plan* (the "severity" branch) at para. 22*:*

> There is little to distinguish the decision of the Board in *Skoric* from the decision of the Board in the present case. In each case, the decision related to the application of the statutory language of the Plan. None of the factors in the pragmatic and functional analysis point to a deferential standard of review in this case. On the contrary, except as relates to questions of fact, I am of the view that the decision in this case is one which involved the interpretation and application of the definition of a "severe" disability within the meaning of subparagraph 42(2)(a)(i)of the Plan. As such, it should be reviewed on a standard of correctness, at the least deferential end of the spectrum.

(2) **Large and Liberal Construction of the *CPP***

At paras. 25-29, Isaac J.A. ruled that the *CPP* generally (and s. 42 in particular) should receive a large and liberal interpretation consistent with its purposes, following an earlier judgment of the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27.

As he said, at paras. 27 and 29:

> [27] In Canada, courts have been especially careful to apply a liberal construction to so-called "social legislation". In *Rizzo & Rizzo Shoes Ltd. (re)*, [1998] 1 S.C.R. 27, at paragraph 36, The Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from a language of such legislation ought to be resolved in favour of the claimant…

…

> [29] Accordingly, subparagraph 42(2)(a)(i) of the Plan should be given a generous construction. Of course, no interpretative approach can read out express limitations in a statute. The definition of a severe disability in the Plan is clearly a qualified one which must be contained by the actual language used in subparagraph 42(2)(a)(i). However, the meaning of the words used in that provision must be interpreted in a large and liberal manner, and any ambiguity flowing from those words should be resolved in favour of a claimant for disability benefits. [Emphasis added.]

(3) **The "Severity" Criterion**

Under this heading, Justice Isaac first dealt with the question of whether "personal characteristics" or traits of a claimant, such as age, skills, education and so on could be properly considered in deciding if a given claimant was or was not capable of pursuing any substantially gainful employment. Some prior decisions of the Board, and even a few in the Federal Court, had ruled that such personal characteristics were not relevant under the severity criterion.

Isaac J. noted at para. 40 of his judgment that s. 68(1)(c) of the *Canada Pension Plan Regulations* specifically called upon an applicant, in his application form, to provide information about such personal characteristics:

> **(c) a statement of that person's education, employment experience and activities of daily life.**

He concluded as follows:

> **…the mandatory requirement that applicants supply the Minister with information related to their education level, employment background and daily activities can only indicate <u>that such "real world" details are indeed relevant to a severity determination</u> made in accordance with the statutory definition in subparagraph 42(2)(a)(i) of the Plan. [Emphasis added.]**

Isaac J.A.'s most important conclusion on the severity standard may be found at para. 32, and following, where he approves of, and adopts the "real world" reasoning of McQuaid J.A. in *Leduc*.

He says this at para. 32:

> **However, there is another and earlier line of cases in which the Board has adopted a more liberal interpretation of the severity definition in subparagraph**

> **42(2)(a)(i)(of the Plan. In these cases, the Board chose to take what it has called a "real world" approach to the application of the severity requirement. This approach requires the Board to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing any substantially gainful occupation.**

Having expressly agreed with McQuaid J.A.'s judgment at para. 33, he moves on at para. 37, to adopt, as correct, a similar and more recent decision of the Board in *Barlow v. Minister of Human Resources Development* (1999), C.E.B. & P.G.R. 8846 (PAB) written by Kinsman J.:

> **Except for one case, none of the recent decisions of the Board has analyzed fully the text of subparagraph 42(2)(a)(i) of the Plan. That one occasion was the Board's relatively recent decision in *Barlow v. Minister Of Human Resources Development* (1999), C.E.B. & P.G.R. 8846 (P.A.B.). It is worth repeating the central passage of the Board's decision in that case [at page 6679]:**
>
> > **Is her disability sufficiently severe that it prevents her from regularly pursuing any substantially gainful occupation?**

To address this question, we deem it appropriate to analyze the above wording to ascertain the intent of the legislation.

Regular **is defined in the *Greater Oxford Dictionary* as "usual, standard or customary".**

Regularly **– "at regular intervals or times."**

Substantial **– "having substance, actually existing, not illusory, of real importance or value, practical."**

Gainful **– "lucrative, remunerative paid employment."**

Occupation **– "temporary or regular employment, security of tenure."**

Applying these definitions to Mrs. Barlow's physical condition as of December, 1997, it is difficult, if not impossible, to find that she was at age 57 in a position to qualify for any usual or customary employment, which actually exists, is not illusory, and is of real importance.

Isaac J.A. reinforces the points of principle taken in *Leduc* and *Barlow* by saying this at paras. 38-39:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be

> divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.
>
> [39] I agree with the conclusion in *Barlow*, *supra*, and the reasons therefore. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the Plan and result in an analysis that is not supportable on the plain language of the statute. [Emphasis added.]

In these passages, Isaac J.A. is adopting the "real world" principle, as he explains it, as the overarching principle to consider in any case where the severity criterion comes into play. As he says, when the decision-maker is considering hypothetical occupations which the applicant might be able to do, the decision-maker must bring into play "the particular circumstances of the applicant, such as age, education level, language proficiency and past work and experience." [Emphasis added.]

(4) Isaac J.A. next develops the principle or rule that the decision-maker must give effect to every word of the severity criterion and must not "slide over" or avoid the full effect of its language. As he says at paras. 43, in part, and para. 44:

> [43] …
>
> **It is evident, to my mind, that the Board in this case has** effectively read out of the severity definition the words "regularly", "substantially" and "gainful". In this way, the Board has reduced the legal test to the following: is the applicant incapable of pursuing any occupation? This approximates the "total" disability test eschewed by the

> drafters of the Plan. Indeed, the Board's repeated emphasis on the word "any" appears to have been a contributing factor in its misinterpretation of the statutory test for severity.
>
> [44] In my respectful view, the Board has invoked the wrong legal test for disability in so far as it relates to the requirement that such disability must be "severe". The proper test for severity is the one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of employability.

(5) The next important point in the judgment is its statement, at para. 45, that

> the federal Plan makes no provision for a finding of severity where an applicant is merely disabled from pursuing his or her ordinary occupation as at the onset of the alleged disability. Rather, the test under the Plan is in relation to <u>any substantially gainful employment.</u> (Emphasis in original.)

(6) Two other very practical points are taken by Isaac J.A., at paras. 46-47. At para. 46, he says that the test for severity requires the use of an "air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation"; for example, one cannot expect a middle-aged carpenter with a grade school education to retrain as an engineer or lawyer. And, at para. 47, he emphasizes that decision-makers should not seize on bits of evidence showing that the applicant may be able to do some household chores as a basis for finding that the applicant is capable of "sedentary" work. Here, he is plainly saying that such approaches would be mean-spirited and quite inconsistent with the purposes of the Act.

(7) Justice Isaac's final point of principle is found at para. 50 where he emphasizes that the applicant must be able to prove his or her case on the basic issue of a "serious and prolonged disability":

> This restatement of the approach to the definition of

> disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others. [Emphasis added.]

These, then, are the seven points of principle which come out of the *Villani* case and its predecessors *Leduc* and *Barlow*.

4. **Other Case Principles of Importance:**

(1) *Minister v. Rice*, 2002 FCA 47

Facts: In this case, one of the issues was as to whether the Board erred in taking into account "socio-economic conditions" in the small local community where the applicant lived.

Ruling: While the ruling of Rothstein J.A. is arguably *obiter* in context, he held unequivocally that the decision-maker could not take such factors into account:

> [8] However, as indicated, we would take this opportunity to make the point that indeed, as the Minister has argued, socio-economic factors such as labour market conditions are irrelevant in a determination of whether an individual is disabled pursuant to subsection 42(2) of the *Canada Pension Plan,* R.S.C. 1985, c. C-8. [Emphasis added.]

He adds this at para. 12 to reinforce his ruling on this important point:

> [12] While Isaac J.A. refers to the necessity of "evidence of employment efforts and possibilities"

> (paragraph 50), we read these words as referring to the capacity of an individual to be employed in any substantially gainful occupation, and not to whether, in the context of the labour market, it is possible to get a job.

The Court of Appeal dealt with the issue of labour market conditions again in the later case of *Minister v. Angheloni,* 2003 FCA 140 and did not retreat from the position stated in *Rice.* Desjardins J.A. said this at para. 14:

> The Board erred in law in adding economic conditions as a relevant consideration. In *Minister of Human Resources Development v. Rice* 2002 F.C.A. 47, [2002] F.C.J. No, 170 (F.C.A.)(Q.L.) this Court made it clear in paragraph 13 of the decision, that subparagraph 42(2)(a)(i) refers to the capability of the individual to regularly pursue any substantially gainful employment and not to labour market conditions. [Emphasis added.]

In light of the *Rice-Angheloni* holding, it is pointless for decision-makers to rely on evidence of local job conditions as a basis for finding disability under the severity criterion.

(2) **Inadequate Reasons**

The Federal Court of Appeal has been on a bit of a crusade since at least 2001 on the question of "inadequate reasons" in the decisions of Board Panels. Some would say that the Court of Appeal has been stretching its judicial review powers almost beyond the breaking point in these cases but the Court has been almost relentless in its pursuit of what it considers seriously flawed decisions.

The Court's decision in *Minister v. Angheloni,* already cited above, is a classic example of a case where the Court felt that the Board had critically failed to analyze the medical evidence and, also, failed to explain the basis for its decision.

In this case, Desjardins J.A. noted that the Board had failed to mention obviously important medical evidence and, equally, failed to justify its decision.

Other similar judgments include *Garcia v. The Attorney General of Canada*, 2001 FCA 200, *Oliveira v. Minister*, 2003 FCA 213, *O'Liari v. The Attorney General of Canada*, 2003 FCA 375, *Minister v. Quesnelle*, 2003 FCA 92, and *Toris v. Attorney General.* 2003 FCA.

In most of these cases, the Court of Appeal made a few key points:

(1) The Board must provide a reasonably complete assessment of the important evidence on both sides.

(2) The Board must not ignore obviously important medical evidence.

(3) It must make express findings of fact, one way or the other, which show why the Board decided as it did and why it rejected evidence on the other side on the issues.

(4) In virtually all of these cases, the Court of Appeal pointed to two recent decisions of the Supreme Court of Canada as the basis for overturning the Board decisions, namely, *Baker v. Minister of Citizenship and Immigration*, [1999] 2 SCR 817 and *R. v. Sheppard*, [2002] S.C.R. 869. In the *Garcia* case, Malone J.A. commented that "the Board's failure to provide a full written explanation for its decision breaches the Board's duty of procedural fairness owed to the applicant…". In the more recent case of *Walker v. Minister* 2005 FCA 230, it said that the inadequacies in the Board's decision prevented the Court from carrying out its review function and accordingly ordered a new hearing.

In *Walker*, Malone J.A. said this for the Court at para. 3:

> In the circumstances, we are simply not able to understand the rationale behind the Board's conclusion that the appellant's disability does not meet the requirements of *Canada Pension Plan*, i.e. that it be "severe" and "prolonged" and thus, we are unable to understand why the Board concluded as it did.

It seems obvious to me that the Court of Appeal has no intention of moving away from its rather expansive view of its judicial review powers and will continue to insist that our decisions be full and complete, with all appropriate findings of

fact and credibility and a clear rationale for deciding a particular case as we did. While it might be said that the Court is ordering new hearings based on appellate review standards and not judicial review criteria, we should, I believe, adjust our judgment-writing to the higher standards reflected in the Court of Appeal decisions recently.

(3) ***Inclima v. The Attorney General*, 2003 FCA 117**

Along with *Rice*, this is the most important of the Court of Appeal judgments released after *Villani.*

The significant clarifying principle which comes out of this case is found at para. 3 of the judgment written by Pelletier J.A. for the Court:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but, where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition. [Emphasis added.]

In many cases which come before the Board, there is little evidence led by the applicant to show that he or she made serious efforts to try other forms of employment or physical retraining which might enable her to obtain, say, lighter but remunerative employment. The principle of the *Inclima* line of cases is that, if the given applicant has some residual capacity to work, he or she must lead evidence to show good-faith efforts to work or retrain.

(4) ***Spears v. The Attorney General of Canada*, 2004 FCA 193**

This case deals with questions surrounding the evidence given by the Ministry medical doctors at the hearings. Some of these questions have been troubling Board members for many years and it may be that this important decision will resolve at least most of the troubling procedural and evidentiary issues which have created concerns.

In this case, the appellant had quit her work as a teacher in 2001 as a result of almost total deafness in one ear and minimal hearing loss in the other. She had

been teaching for about 31 years. Several medical specialists and an audiologist provided reports saying she was unemployable.

Dr. O'Brien, the Ministry doctor, testified at the hearing and his "Testimonial Summary" was filed at the hearing and the appellant had received a copy of it two days before the hearing. Also, the appellant received a copy of his curriculum vitae about three weeks before the hearing.

In his evidence, Dr. O'Brien not only reviewed the reports of the doctors but, also, gave opinion evidence of his own which contradicted their evidence.

His Testimonial Summary is quoted by the Court at para. 6:

> The claimant indeed has a hearing impairment ie she is "hard of hearing" but she is not deaf. She will have difficulty in noisy interactive environments or groups. She should seek employment as a tutor (quiet one on one teaching situations) or set up in business for such purpose. Alternatively the Provincial and Federal employers represent affirmative action environments which are not usually noisy or distracting bureaucratic settings. She is well educated, very experienced in her field and relatively young; education policy or programs, private teaching/tutoring are suitable alternate job settings. There are many hard of hearing people who work for themselves or such employers and indeed totally deaf people who are working.

It is clear from the decision of the Board Panel that they gave some considerable weight to Dr. O'Brien's evidence although they were also strongly influenced by the fact that the appellant seems not to have tried to seek alternative employment. Here is what the Board said in dismissing her appeal:

> [19] Dr. K. O'Brien, a specialist in occupational medicine called by the Respondent, testified that in his experience, a person with the training and experience of the Appellant, who had the impaired hearing difficulties of the Appellant would readily find employment with an "affirmative action" type employer such as the Federal Government of Canada, particularly in an occupation listed by the Public Service Commission of Canada. He considered that the

> Appellant could obtain employment in a management or research position. The evidence of the Appellant showed that she had not attempted to look for, or find employment of this type, from an affirmative action employer.
>
> [20] After considering the evidence of some doctors, particularly Doctors Cron and Hanley, that she was not able to be employed in a gainful occupation, we accept the evidence of Dr. O'Brien that the Appellant could probably find employment with an affirmative action type employer.
>
> [21] While we sympathise with the Appellant over her hearing disabilities, we are not persuaded that she is incapable regularly of pursuing any substantially gainful employment. [Emphasis added.]

The Court of Appeal ended up dismissing the application for judicial review by saying that the Board's decision on the facts was not patently unreasonable.

What is especially interesting about this case is how the Court addressed the attack made by the appellant on the evidence of Dr. O'Brien.

First, the appellant argued the Board erred in relying on Dr. O'Brien's evidence, a doctor who had not examined the appellant and who had no expertise in audiology or otolaryngology. Here, the appellant apparently relied upon s. 68(2) of the CPP Regulations which enables the Minister to require an applicant "to undergo such special examinations and to supply such reports as the Minister deems necessary for the purpose of determining the disability". It seems the appellant argued that Dr. O'Brien's evidence could not be received by the Board unless s. 68(2) was complied with.

This submission was rejected out of hand by the Court which concluded that s. 68(2) was simply not a barrier to the Crown calling expert witnesses such as Dr. O'Brien.

The second argument of the appellant was that that she had been told by the Board at the outset of the hearing that Dr. O'Brien's evidence "was to assist the

Board in the interpretation of the medical record", and that she had been thereby denied an opportunity to challenge Dr. O'Brien's opinion.

Once again, the Court rejected the appellant's submission, pointing out, in effect, that she had been told he was testifying and that his Testimonial Summary hinted at the opinion evidence he was going to give. At para. 17, the Court says this:

> …It must be noted again that the applicant was made aware as early as March 7, 2003 that Dr. O'Brien would appear at the hearing as an expert witness for the Crown. Moreover, counsel acknowledged that at least two days prior to the hearing of the appeal he was provided with a copy of Dr. O'Brien's "Testimonial Summary". The lines of Dr. O'Brien's testimony, made apparent in that document, were surely not limited in the way suggested by the applicant. In any event, the stated purpose of assisting the Board in "the interpretation of the medical record", although perhaps ambiguous, would not necessarily signify that Dr. O'Brien would be confining his testimony to that of interpreting the reports of the applicant's medical advisors or that he would not suggest for the Board's consideration possible alternative employment for the applicant in the labour market. He had already telescoped his views in this regard in his "Testimonial Summary".

For my part, I believe that the Court was rather generous in its approach to the Ministry medical evidence, especially considering three points:

(1) The Ministry expert was <u>not</u> an expert in the field of hearing problems and their treatment.

(2) The Testimonial Summary was only served on the appellant <u>two days before the hearing.</u>

(3) The Board specifically told Ms. Spears at the opening that Dr. O'Brien was being called to <u>assist</u> the Board in the interpretation of the medical reports in the record.

As it seems to me, respectfully, the appellant was arguably misled by what she was told at the hearing and, in any event, two days' notice is hardly good enough.

In any event, this judgment seems to give the Ministry carte blanche to draw opinion evidence from its medical witnesses and also appears to validate short notice of the Testimonial Summaries.

The Court also seems to "leave hanging" the question of whether the Testimonial Summary should be considered as evidence itself or whether it should simply be treated by the Board as a "handy summary" of the expected evidence of the Ministry doctor but without any free-standing evidentiary weight.

In my view, the *Spears* case tends to create more problems than it solves because it may encourage Ministry counsel to attempt to draw negative opinions from their doctors in circumstances where the applicant may have had no real notice that this was going to happen.

One thing is certain, based on this decision: The Court of Appeal seems to see nothing wrong in law in allowing the Ministry doctor to give opinion evidence on the ultimate disability issue.

CASE COMMENT: NEW FACTS ISSUES

Kent v. Canada (Attorney General), 2004 FCA480

This is an extremely important decision dealing with "new facts" issues under s. 84(2) of the *C.P.P.*

Facts: The appellant stopped work in 1994 because of illness and filed a claim for a disability pension. She lost before the Minister and then lost before the Review Tribunal in a March 22, 1999 decision.

She sought leave to appeal to the Board and leave was refused on July 28, 1999. She did not ask for Federal Court judicial review but, instead, later applied on May 23, 2002, under s. 84(2), for reconsideration by the R.T. based on alleged new facts evidence.

At the R.T. hearing on July 3, 2002, the Tribunal received two medical reports from doctors, prepared in 2000, which the Tribunal accepted as new facts, showing that she was disabled from depression and chronic fatigue going back to 1994 and accordingly allowed the application for a pension. The basic finding of the Tribunal is as follows:

> The Tribunal finds that the medical condition of the Appellant has given rise to a severe disability in the sense that she suffers from a disability such that no reasonable employer, being aware of the Appellant's functional limitations, her inability to be reliable or regularly show up for work, because of the chronic fatigue, fibromyalgia and depression, would offer her regular substantially gainful employment. As well, these conditions have not improved since she originally went off work in October 1994 and are not likely to do so, despite regular treatment.

The Minister appealed to the Board, with leave, and, at the hearing, argued that the R.T. erred in finding these were new facts or, alternatively, that it erred in finding she was disabled within s. 42(2).

The PAB heard the appeal on October 1, 2003, and set aside

the RT decision on the sole basis that the Tribunal had erred in finding that there were new facts.

Findings of Court of Appeal:

(1) The Court first concluded that the basic finding of the R.T., as quoted above, was quite consistent with *Villani v. Canada (Attorney General),* [2002] 1 F.C. (C.A.). The Court said this at para. 19:

> This conclusion reflects the "real world" approach to the severity test for disability, as set out by the leading authority on that point, *Villani v. Canada (Attorney General)* (C.A.), [2002] 1 F.C. 130, and in particular paragraph 33 of that decision, which cites with approval an influential statement from a 1988 decision of the Pension Appeals Board:
>
> > [33] The "real world" approach [to the application of the severity test] was first adopted by the [Pension Appeals] Board in *Leduc v. Minister of National Health and Welfare* (1988), C.E.B. & P.G.R. 8546 (P.A.B.). In that case, the Board found for the applicant on the following basis:
> >
> > The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, people [sic] by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which

> such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable.

(2) The Court next noted, at para. 27, that "[i]f the decision maker determines there are no new facts, then the prior decision of that decision maker must stand." If, on the other hand, the decision maker determines there are new facts, "then the second determination, pension entitlement, must be made on the merits, taking into account the new facts and the existing record."

(3) The Court next went on, at para. 28 and subsequently, to consider the powers and jurisdiction of the P.A.B. to consider new facts dispositions of the R.T.

It referred to a line of F.C.A. decisions going back to *Peplinski v. Canada*, [1993] 1 F.C. (T.D.) which held that the **PAB did not have jurisdiction to consider an appeal from a decision of the R.T. that there are no new facts. This is because the Board is limited to decisions of the R.T. on the merits, either in first instance or under a s. 84(2) reconsideration application.**

(4) At para. 29, the Court concluded that the PAB was wrong to have ruled, as it did, that the R.T. erred in holding that the evidence put before it constituted new facts. In effect, the Court held that the Board had no jurisdiction to override the R.T.'s new facts finding:

> It seems to me that, by the same reasoning, the Pension Appeals Board does not have the authority to set aside the decision of a Review Tribunal solely on the basis that the Review Tribunal was wrong to conclude that it had been presented with new facts. The only statutory decision making authority the Pension Appeals Board has, once leave to appeal a Review Tribunal decision is granted, is to consider de novo the merits of the claimant's application.

[5] The Court then went on to carefully review the nature and effect of a new facts application under s. 84(2) in an attempt to lay down some clear rules for its proper interpretation and application.

At paras. 33-34, the Court re-emphasized prior holdings of the Board and Court that there was a "two-step test" for ascertaining new facts, namely, first, that the proposed new facts must not have been discoverable, with due diligence, before the first hearing and second, the proposed new facts must be "material" in the sense of being practically conclusive.

At para. 34, the Court explained itself in this way:

> Whether a fact was discoverable with due diligence is a question of fact. The question of materiality is a question of mixed fact and law, in the sense that it requires a provisional assessment of the importance of the proposed new facts to the merits of the claim for the disability pension. The decision of the Pension Appeals Board in *Suvajac v. Minister of Human Resources Development* (Appeal CP 20069, June 17, 2002) adopts the test from *Dormuth v. Untereiner,* [1964] S.C.R. 122, that new evidence must be practically conclusive. That test is not as stringent as it may appear. New evidence has been held to be practically conclusive it if could reasonably be expected to affect the result of the prior hearing: *BC Tel v. Seabird Island Indian Band* (C.A.) [2003] 1 F.C. 475. Thus, for the purposes of subsection 84(2) of the Canada Pension Plan, the materiality test is met if the proposed new facts may reasonably be expected to affect the outcome. [Emphasis added.]

Finally, at paras. 35-36, the Court also emphasized that, because of the liberal construction which the *CPP* must be given, the test for new facts must not be applied in an unduly rigid manner which might deprive a claimant of a fair assessment on the merits. As the Court said at para. 35:

> In the context of an application to reconsider a decision relating to entitlement to benefits under the Canada Pension Plan, the test for the determination of new facts should be applied in a manner that is sufficiently flexible to balance, on the one hand, the Minister's legitimate interest in the finality of decisions and the need to encourage claimants to put all their cards on the table at the earliest reasonable opportunity, and on the other

> hand, the legitimate interest of claimants, who are usually self-represented, in having their claims assessed fairly, on the merits. In my view, these considerations generally require a broad and generous approach to the determination of due diligence and materiality. [Emphasis added.]

Comment

(1) It must be said that the "flexible" approach to the issue of new facts, advocated by the Court, is inevitably going to encourage the Review Tribunal to take a "soft" approach to s. 84(2) applications.

(2) Also, the Court has effectively told the PAB to keep its nose out of new facts determinations by the RT and only deal with the "merits" when a given RT has ruled there are new facts.

CASE COMMENTS: EXTENSION OF TIME

Minister v. Gattellaro 2005 FC 883

Facts: Board member granted leave to appeal about 7 1/2 years after time limit for leave had expired.

Applicant lost before Minister and R.T. by early 1997. She applied for leave in February, 2004. Leave was granted on October 22, 2004.

Ruling: Snider J. acknowledged that the Member's decision was "highly discretionary" but held that, whether the standard of review was reasonableness simpliciter or patent unreasonableness, the leave decision was wrong and must be set aside.

The relevant provisos were s. 83(1) of the *CPP* and Rules 4-5 of the *Rules of Procedure of the Board* reading as follows:

> 83(1) *Appeal to Pension Appeals Board*
>
> A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under Section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the *Old Age Security Act*, or under subsection 84(2), may, within ninety days after the day on which that decision is communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board. (R.S.C. 1985, c. 30 (2nd Supp.), s. 45; 1991, c. 44, s. 22(1); 1995, c. 33, s. 36(1); 2000, c. 12, s. 61) [Emphasis added.]

Application for Leave to Appeal

4. An appeal from a decision of a Review Tribunal shall be commenced by serving on the Chairman or Vice-Chairman an application for leave to appeal, which shall be substantially in the form set out in Schedule I and shall contain

a) the date of the decision of the Review Tribunal, the name of the place at which the decision was rendered and the date on which the decision was communicated to the appellant; (SOR/92-18, s. 2.)

b) the full name and postal address of the appellant;

c) the name of an agent or representative, if any, on whom service of documents may be made, and his full postal address;

d) the grounds upon which the appellant relies to obtain leave to appeal; and

e) a statement of the allegations of fact, including any reference to the statutory provisions and constitutional provisions, reasons the appellant intends to submit and documentary evidence the appellant intends to rely on in support of the appeal.
(SOR/96-524, s. 2.)

(SOR/92-18, s. 2; SOR/96-524, s. 2.)

Extension of Time

5. An application for an extension of time within which to apply for leave to appeal a decision of a Review Tribunal shall be served on the Chairman or Vice-Chairman and shall set out the information required by paragraphs 4(a) top (e) and the grounds on which the extension is sought.

At para 7 of the judgment, Snider J. held that "an extension of time was not a matter of right" and that "[t]he authority to extend the statutory limitation must not, in my view, be exercised arbitrarily or capriciously."

He analogized the leave procedure extension power to the judicial review procedure under s. 18.1(2) of the *Federal Courts Act* and said the same principles should apply.

Following earlier case law of the Federal Court of Appeal he said that the following criteria must be followed on extension-of-time applications under s. 83(1) of the *CPP*:

1. A continuing intention to pursue the application or appeal;

2. The matter discloses an arguable case;

3. There is a reasonable explanation for the delay; and

4. There is no prejudice to the other party in allowing the extension.

On the evidence in the record, Snider, J. concluded that the applicant had failed to provide a reasonable explanation for the delay and an absence of prejudice to the Minister.

Comment: This is a carefully reasoned judgment and the criteria for granting an extension are sound. The message from this judgment is that when an extension is granted, reasons must be given showing that the criteria have been honoured.

CASE COMMENT: "ADEQUATE" DECISION

***Palumbo v. Attorney General of Canada* 2005 FCA 117**

Facts: The Court of Appeal dismissed a judicial review application holding that the decision of the Board fully explained itself.

Ruling: What is interesting is the number and kind of grounds attacking the decision:

(1) No explanation why the Board found the applicant not to be credible. The Court easily rejected this ground by referring to several medical reports with evidence conflicting with the applicant's evidence.

(2) Failure to mention reports of a chiropractor and physiotherapist. Here, the Court said at para. 7 :

> We do not agree. In order to discharge its duty to give adequate reasons for its decision, the Board was not required to refer to every one of the considerable number of reports before it. In our view, the reports of the physiotherapist and chiropractor on which Ms. Palumbo relies were not of such probative significance that the Board erred in law by omitting a discussion from its reasons.

(3) The Board erred by requiring a "definite diagnosis" before finding a medical condition was severe and prolonged:

At para. 9 the Board said this:

> Ms. Palumbo had the burden of proving that, no later than December 31, 2001, she was suffering from a medical condition, which, for the foreseeable future, disabled her from pursuing any substantially gainful occupation. The Board simply decided that the reports

> and other evidence on which Ms. Palumbo relied did not discharge her burden of proof. The Board also noted that, since 1999, Ms. Palumbo had not sought other employment which, despite her medical problems, she might have been able to handle.

(4) The Board attached too much weight to some reports and not enough to others. On this point the Court said at para. 11:

> It is not the function of the Court on an application for judicial review to re-weigh the evidence. The Board stated clearly why it preferred some reports to others. [Emphasis added.]

CASE COMMENT: "ADEQUATE" DECISIONS

***Minister v. Collins* 2005 FCA 243**

Facts: The Board carefully reviewed the evidence and allowed the application.

The Minister appealed, arguing that the decision reasons were "inadequate".

Ruling: Richard C.J. dismissed the application in brief reasons, saying at para. 3:

> We are of the view that the reasons given by the Board are adequate to understand the rationale behind the Board's conclusion that the applicant's disability meets the requirements of the Plan that it be both "severe and prolonged" and therefore enabled the parties to understand why the Board concluded as it did and determine whether there are grounds to challenge the Board's decision.

CASE COMMENT: FAILURE TO CITE *VILLANI CASE*

Garrett v. Minister (2005) FCA 84

Facts: The appellant, a teacher, sustained a serious leg injury in a motor (vehicle) accident in 1998 and never returned to work afterwards. She was married and had 3 children before the accident. She had her fourth child in March, 1999. She and her husband also have a small lawn cutting business and she still helps with that business administratively as well as her father with his trucking business.

The majority decision for the Board was written by Member Quinlan who dismissed the appeal in a lengthy, carefully written decision. The dissent was written by Member Medhurst in an equally carefully written decision.

Ruling: The Court of Appeal set aside the decision of Member Quinlan on what I can only describe as a very questionable basis.

At para. 3 of the judgment of Malone J.A. one finds this statement:

> In the present case, the majority failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. This is an error of law. In particular, the majority failed to mention evidence that the applicant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the 'real world' context of the analysis by *Villani.* [Emphasis added.]

With respect, if one reads Member Qunlan's decision, it is quite obvious that he directed his mind to the correct elements of the test of severity, albeit without referring specifically to the *Villani* case.

To me, it is ridiculous for a judicial review Court to hold that the decision maker at first instance must specifically refer to a decided case, such as *Villani*, in arriving at its decision under a statutory criterion.

In this case, the Court of Appeal purports to particularize the error of Member Quinlan by diving into the evidence, which compounds the problem.

CASE COMMENT: ADJOURNMENTS

Ettinger v. Minister **2005 CAF 239**

Facts: In this case, the Board had refused, at the hearing, a request by the applicant for an adjournment for a treating orthopaedist to testify. Several reports of this doctor had been filed at the hearing and the Board commented unfavourably on his reports as smacking of advocacy. The applicant argued that he had been denied "natural justice" by the Board in its refusal to grant an adjournment. It is not clear if the adjournment was refused at the opening of the hearing or later on. The applicant had not even filed an affidavit in the Court of Appeal and the Court of Appeal relied on some kind of "admission" in the Ministry submission as a basis for what it did. The Board itself did not mention the adjournment refusal in its decision.

Ruling: Pelletier J.A., for the majority, held there was a denial of natural justice in the refusal to grant an adjournment. She said this at para. 3 of her judgment :

> On these bare facts, and preferring to err on the side of caution we find that it was a denial of natural justice to deny the applicant the right to have his expert's evidence hear *viva voce* when it was clearly material to the outcome. The Board may have had its reasons for refusing the adjournment but in the absence of an explanation we are unable to credit them. [Emphasis added.]

Nadon J.A. dissented in this case on the basis that there was no evidence before the Court as to the circumstances in which the

adjournment was refused. In effect, he said that the applicant had adduced no evidence from which a denial of natural justice could be drawn.

Comment: This judgment constitutes some sort of "highwater mark" for a finding of a denial of natural justice!

The applicant provided no evidence but the Court found a denial of natural justice anyway. Nadon, J., dissenting, is clearly right in his dissent.

The moral from this case has two aspects : First, expect no help from the Ministry counsel in the Court of Appeal. Second, if an adjournment is refused, the Panel must provide reasons for the refusal in its decision, such as pointing out that a mistrial would probably have to be granted or that the applicant had been warned to bring his witness and ignored the warning.

CASE COMMENT: OBJECTIVE MEDICAL EVIDENCE

***Read v. Minister* 2005 CAF 198**

Facts: The Board dismissed the application after a careful examination of the medical evidence, including a Functional Capacity Evaluation which said that the applicant could function at a "light to medium capacity."

Ruling : The Applicant submitted that the Board had ruled that the applicant had failed to show "objective medical evidence" or a "definitive diagnosis". In effect, it seems that the applicant was trying to argue that the Board elevated objective medical evidence and a definitive diagnosis into some sort of mandatory proof requirement.

Rothstein J. rejected the applicant's submissions, saying that the Board had fairly considered all the evidence and had obviously been very influenced by the F.C.E. in rejecting the application.

Comment: Board decisions should steer clear of saying that objective medical evidence is required to succeed on a claim.