**Date: 20010216**

**Docket: T-1794-99**

**Citation: 2001 FCT 86**

**BETWEEN:**

**JOSE LIMA**

**Applicant**

**- and -**

**THE MINISTER OF HUMAN RESOURCES DEVELOPMENT CANADA**

**Respondent**

**REASONS FOR ORDER**

**NADON J.**

**[1] On August 18, 1999 the Honourable K.E. Meredith, a member of the Pensions Appeals Board (the "PAB") designated under section 83(2.1) of the *Canada Pension Plan Act* (the "Act"), R.S.C. 1985, c. C-8, made an order refusing the applicant leave to appeal the December 14, 1998 decision of the Review Tribunal, which dismissed his application for a disability benefit under the Act.**

**[2] The PAB member refused to grant leave to the applicant in the following terms:**

> **Despite the very lengthy and detailed Application for Leave Appeal, I have concluded that the reasons of the Review Tribunal must be correct and for that reason, leave to appeal is refused. I believe, on the whole, the facts support the conclusion of the Review Tribunal that:**
>
> **`The objective evidence in the file and reviewed by various physicians and functional capacity assessors does not explain**

**the degree of disability which Mr. Lima reports.'**

**I am sure any panel of the Pension Appeals Board would come to the same conclusion.**

**[3] In his Memorandum, the applicant states the issue for determination as follows:**

**13. In determining whether leave to appeal to the Pension Appeals Board should have been granted, the Member asked and answered the wrong questions and therefore erred in principle.**

**[4] The first question to be answered is whether the PAB member applied the correct test. In my view, he did. Although the member does not use the words "there is no arguable case", he states, in unequivocal terms, that no panel of the PAB would disagree with the conclusion reached by the Review Tribunal. I take that assertion to mean that, in the member's view, the appeal does not raise an arguable issue. The applicant, therefore, fails on this point.**

**[5] Notwithstanding my conclusion that the PAB member applied the proper test, I am of the view that he made a reviewable error in that he does not appear to have considered the applicant's argument to the effect that he is suffering from chronic pain syndrome and that, as a result, he is no longer capable of regularly pursuing a substantially gainful occupation.**

**[6] For the sake of completeness and a better understanding, I will reproduce the Review Tribunal's decision. The reasons given by the three-member panel are as follows:**

**The Minister was represented by Ms. Julie Imada. Mr. Lima attended with his representative, Ms. Sheila Puga.**

**A person can be considered disabled only if he is determined in a prescribed manner to have a severe and prolonged mental or physical disability. A disability is considered to be severe within the meaning of the Canada Pension Plan (CPP) only if the disability makes it impossible for a person to regularly pursue any substantially gainful occupation. A disability is prolonged only if it is determined that it is likely to be long continued and of indefinite duration, or is likely to result in death.**

**The Minister denied Mr. Lima's application finding that although he may no longer be able to do his usual job he could still perform some type of work suitable to his condition on a regular basis, thus finding that the disability did not meet the criteria of "severe".**

**To satisfy the contribution requirements of the CPP, Mr. Lima**

**must have made contributions to the CPP in at least 5 of the last 10 years of his contributory period or in at least 2 of the last 3 years of his contributory period if he is deemed to be disabled before January 1998 and after September 1986. The legislative requirements changed in January 1998 under the provisions of Bill C2. If he is deemed disabled after January 1998, he must have made valid contributions to the CPP in at least 4 of the last 6 years of his contributory period. His contributory period ends in the month in which he is deemed to have become disabled. On the basis of his contributions in 1989, 1990, 1991, 1992 and 1993, Mr. Lima would last meet the minimum contributory requirements in December 1997.**

**Mr. Lima has not worked since July 14, 1993, when he suffered a back injury while working as a cement finisher. He has attended a back clinic and undergone various attempts to resolve the debilitating back and leg pain which he claims makes it impossible for h im to return to any type of employment. Mr. Lima testified that he has not seriously entertained any options for work which would take his back condition into account. He stated that such employment would require an employer who would allow him to lie down for three or four hour periods to relieve his back. The Columbia Back Pain clinic, however, reports that he should be capable of returning to work. The objective evidence in the file and reviewed by various physicians and functional capacity assessors does not explain the degree of disability which Mr. Lima reports.**

**The Tribunal reviewed the evidence in the file and as presented at the hearing and found that the evidence did not support a conclusion that Mr. Lima is incapable regularly of performing any type of gainful work. Therefore, his appeal was dismissed.**

**[7] It will be noted that the conclusion which the PAB member cites in his reasons appears at the end of the penultimate paragraph of the Review Tribunal's reasons. That conclusion does not, in my respectful view, address the issue raised by the applicant in his leave application. As counsel for the applicant states at paragraph 21 of his Memorandum, the statement made by the Review Tribunal -- to which the PAB member subscribes -- to the effect that the medical evidence does not explain the degree of disability reported by the applicant, was not the issue before the Review Tribunal, nor was it the issue raised in the leave application. As counsel states at paragraph 22 of his Memorandum, by definition, chronic pain syndrome cannot be explained by objective medical evidence. In other words, the applicant does not dispute the fact that the objective medical evidence does not support his claim.**

**[8] In support of his contention before the PAB and before me, the applicant referred to the decision of the PAB in *The***

***Minister of National Health & Welfare v. Densmore*, CCH Canadian Employment Benefits and Pension Guide Reports, No. 8508. Specifically, the applicant referred to that portion of the decision found at pages 5971-73:**

> **The issue is difficult because its resolution depends upon the view which the Board ultimately takes of the genuiness [sic] of what are strictly subjective symptoms. In effect, the judgment call made generally without the assistance of objective clinical signs, will be one of credibility on a case by case basis, as to the severity of the pain complained of.**
>
> **It is the Board's view, often expressed in the cases, that it is not sufficient for chronic pain syndrome to be found to exist. The pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation.**
>
> **We caution also that it is incumbent upon the person who applied for benefits, to show that treatment was sought and efforts were made to cope with the pain. As a result, it will be desirable although by no means essential in all cases, for an applicant and helpful to the Board that evidence of a psychiatric or psychological or psysiatric nature be adduced from the medical practitioners who by virtue of their experience and general expertise in this difficult area of medicine are able to assist the Board.**

**[9] Therefore, the question which had to be addressed by the PAB member was whether the applicant had an arguable case that he is suffering from chronic pain syndrome and that, as a result, he can no longer pursue a substantially gainful occupation. On my reading of the reasons given by the Honourable K.E. Meredith, in denying the applicant leave to appeal, I cannot conclude that he addressed nor considered that question in making his determination.**

**[10] I will therefore allow the applicant's judicial review application and send the matter back to the PAB for reconsideration. It goes without saying that I am not concluding, nor am I suggesting, that there is an arguable case. That is for the PAB member to decide on the evidence before him.**

**Marc Nadon**

**JUDGE**

**OTTAWA, Ontario**

**February 16, 2001**