Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *H. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 533

Tribunal File Number: AD-17-103

BETWEEN:

H. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: October 13, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant, through his powers of attorney, seeks greater retroactivity of payment of a survivor's pension to April 2010, on the basis of his alleged incapacity.

[2] In its decision of November 22, 2016, the General Division rejected any notion that the Appellant had been incapacitated between April 2010 and July 2012. The Appellant sought leave to appeal the General Division's decision, and I granted leave to appeal, as I was satisfied that the appeal had a reasonable chance of success.

LEAVE TO APPEAL

[3] The Appellant argues that the General Division failed to appropriately consider that he was incapacitated, in that it had failed to consider some of the documentary evidence, including a continuing power of attorney and power of personal care, as well as notes from X Hospital and X Community Care Access Centre. The notes from X Hospital and X Community Care Access Centre records may have had some probative value, yet it was unclear whether the General Division had copies of these records and whether they had therefore considered them. On this basis, I granted leave to appeal.

[4] I indicated that, even if the General Division had been provided with these records, they would not necessarily have been determinative of the Appellant's incapacity, and that it might have been necessary for the General Division to have examined the Appellant's activities. I noted that, in *Slater v. Canada (Attorney General)*, 2008 FCA 375, the Federal Court of Appeal stated that it was necessary to examine not only the medical evidence, but an applicant's relevant activities as well.

[5] I also granted leave to appeal on a second issue, as it was not readily apparent whether the General Division had in fact determined whether the Appellant was incapacitated for the purposes of the *Canada Pension Plan*, i.e. that he had been incapable of forming or expressing an intention to make an application on his own behalf on the day on which the application had actually been made. In determining whether the Appellant was

incapacitated, the General Division did not refer to nor identify the legal test that it might have applied.

[6] And, finally, I granted leave to appeal on a third issue: namely, that the General Division may have provided insufficient reasons in failing to explain why it had accepted or preferred a social worker's opinion that the Appellant "retain[s] the capacity to make decisions regarding his will and appointing power of attorney," over his family physician's opinion that he was unconvinced that the Appellant was capable of making informed decisions with regards to his own legal or financial affairs. The General Division acknowledged the two contradictory opinions and stated that it had to determine which was the most reasonable, though it did not provide reasons why it chose the social worker's opinion.

PARTIES' SUBMISSIONS

[7] The Appellant's power of attorney provided a copy of a letter from an insurer, which, she argues, provides evidence of the Appellant's level of capacity for day-to-day management of his affairs. However, as I indicated in my leave to appeal decision, new evidence is generally not admissible on an appeal, unless it falls within any of the exceptions, such as whether it addresses any of the grounds of appeal. I see no basis whereby I can consider this new evidence.

[8] In recent submissions, the Respondent accepts that the General Division may not have employed the correct test for capacity in omitting to refer to subsections 60(8) to (11) of the *Canada Pension Plan*, as well as in omitting to consider Federal Court of Appeal jurisprudence such as *Slater, supra*, and that, accordingly, the General Division may have erred in law, pursuant to paragraph 58(1)(*b*) of the DESDA.

[9] The Respondent argues that this is not an appropriate case for the Appeal Division to make a decision on the merits of the file, as the determination of capacity is a fact-specific inquiry that involves weighing and assessing contradictory evidence, a task that is within the General Division's purview. The Respondent submits that it is more appropriate

for the matter to be returned to the General Division for a hearing *de novo* before a different member.

DISPOSITION

[10] I concur with the Respondent's submissions and, accordingly, I am allowing the appeal and ordering that this matter be returned to the General Division for a re-hearing before a different member.

[11] As a footnote, the Respondent indicates that it is unclear whether the notes from X Hospital and X Community Care Access Centre had in fact formed part of the record before the General Division. I agree and can see no indication that these particular records formed part of the hearing file before the General Division. However, given that this matter is being returned to the General Division for a redetermination, these records, along with any new records, such as the insurer's letter, will form part of the record in the re-hearing before the General Division.

Janet Lew
Member, Appeal Division