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

Citation: *J. G. v. Minister of Employment and Social Development*, 2018 SST 794

Tribunal File Number: AD-18-41

BETWEEN:

J. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 10, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, J. G., is the widow of a Canada Pension Plan (CPP) contributor who passed away in November 1987. In February 1997, the Appellant applied for a CPP survivor's benefit. The Respondent, the Minister of Employment and Social Development (Minister), approved the application, effective March 1996, the maximum period of retroactivity permitted under the law.

[3] In September 2015, the Appellant submitted an application for a CPP survivor's pension and child's benefit. She claimed a retroactive survivor's pension from November 1987, when her husband died, to March 1996, when she actually began receiving the pension. She also claimed the child's benefit on behalf of their daughter from November 1987 until June 1994.

[4] The Minister denied the applications, initially and upon reconsideration, on the basis that there was no evidence that the Appellant was incapable of applying for the benefits prior to her February 1997 application. The Appellant appealed these determinations to the General Division of the Social Security Tribunal.

[5] In October 2017, the General Division conducted a teleconference hearing on the matter but later dismissed the Appellant's appeal, finding insufficient evidence that she was incapable of forming or expressing an intention to make an application prior to February 1997.

[6] On January 12, 2018, the Appellant's daughter and authorized representative submitted an application for leave to appeal to the Tribunal's Appeal Division, alleging that the General Division had committed numerous errors in the course of rendering its decision.

[7] In my decision dated March 16, 2018, I granted leave to appeal because I saw a reasonable chance of success on appeal for the Appellant's submissions.

[8] Having reviewed the parties' oral and written submissions, I have concluded that none of the Appellant's reasons for appealing have sufficient merit to warrant overturning the General Division's decision.

PRELIMINARY MATTER

[9] At various times in this proceeding, both before and after my leave to appeal decision, the Appellant submitted medical documents, some of which were never presented to the General Division. On the day before the hearing, the Appellant faxed to the Appeal Division's attention records from a hospital in Trinidad and Tobago.

[10] For reasons that I explained at the outset of the hearing, I have declined to admit new evidence for this appeal, although I did consider the Appellant's accompanying written arguments where they were relevant to the issues at hand. According to the Federal Court's decision in *Belo-Alves v. Canada*,[1] the Appeal Division is not a forum in which new evidence can ordinarily be introduced, given the constraints of the *Department of Employment and Social Development Act* (DESDA), which does not give the Appeal Division authority to consider evidence on its merits.

ISSUES

[11] According to s. 58 of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[12] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division show the General Division?

Issue 2: Did the General Division base its decision on erroneous findings that the Appellant:

- started taking care of her daughter by the time she was 15 or 16;

[1] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100.

- regularly attended her daughter's school and met with teachers;
- returned to Canada in 1993, when her daughter was accepted into university;
- had seen enough improvement in her mental health by 1993 that "life was pretty normal";
- liked "cooking and doing laundry and the normal household activities";
- felt well enough in Canada that she no longer needed treatment or medication?

Issue 3: Did the General Division breach a principle of natural justice by repeatedly asking the Appellant leading questions and denying her opportunities to clarify her evidence?

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[13] In *Canada v. Huruglica*,[2] the Federal Court of Appeal held that administrative tribunals must look first to their home statutes for guidance in determining their role: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent…."

[14] Applying this approach to the DESDA, one notes that ss. 58(1)(*a*) and (*b*) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of s. 58(1)(*c*) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be based on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or "without regard for the material before [the General Division]." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division

[2] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

should intervene when the General Division commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record.

Issue 2: Did the General Division base its decision on erroneous findings of fact?

[15] The Appellant and her daughter have detailed numerous instances in which the General Division allegedly ignored, distorted, or misconstrued their testimony. They submit that, contrary to the General Division's decision, neither of them made the following statements. However, I have now listened to the audio recording of the hearing that took place on October 23, 2017, and I have heard nothing to substantiate their claims that the General Division misrepresented their words

Appellant's capacity to care for her daughter

[16] At paragraph 15 of its decision, the General Division wrote:

> Gradually over the years she was able to take care of her mom by herself and by the time she was 15 or 16 her mom was able to start taking care of her, for example, by being able to attend at her school and meet with her teachers.

[17] At 25:10 of the recording, there is this exchange:

> Member: You said—I think earlier—at some point that she [the Appellant] started to get better, and was there a point when she was able to do some of the household care or looking after you, those types of things?
>
> Daughter: Yeah, **gradually over the years she was able to take care of me, you know, by herself,** she was able to talk to me and take care of me. It was okay, she was able to… but she still suffered with different symptoms, but yeah, she was able to talk to me and be with me. She still suffered from depression and anxiety and panic issues but besides from that that didn't stop our relationship or anything like that.
>
> Member: I know you told me, I think, that you were just about 13 when she had the accident. Do you remember how old you were when your mom was able to start taking care of you?
>
> Daughter: I would think that **she was able to start really taking care of me, in my point of view, like when I was about like 15 or 16**, and then I felt like she was able to really help me and take

> care of me with my school and stuff like that. **She was starting to be able to come around and actually meet my teachers** for the first time and things like that.

[18] This transcript indicates that the Appellant's daughter did, in fact, say that her mother eventually recovered to the extent that she was able to "take care" of her as a child. In my view, the General Division accurately summarized the testimony on this topic and, as a result, was entitled to rely on it in coming to its decision.

Appellant's return to Canada and "normal life"

[19] At paragraph 17 of its decision, the General Division wrote:

> They came back to Canada in about 1993 when [the Appellant's daughter] was accepted into university but then she withdrew and started a few years later. She said that by 1993 her mother was much improved and stronger mentally and they lived with her brother. Life was pretty normal and her mother liked cooking and doing laundry and the normal household activities…

[20] The passage above is a summary of the following exchange, which can be heard from the 31:25 mark of the recording:

> Member: So you told me that she [the Appellant] came to Canada a number of years later. Do you remember when that was?
>
> Daughter: **She came back to Canada, it was between… I think it was, I'm not sure, 1993,** somewhere around there. **We brought her back when I went back to university**. I went to the University of X. So she came back somewhere around that time.
>
> Member: In 1993, then, what was her condition like when she came back that you observed?
>
> Daughter: **It was much improved. She was stronger mentally**, communicating, she seemed [inaudible] she was happy again, she was laughing. I remember when she first came back we brought her around our old house, and stuff like that, and places she used to go and brought back memories for her so she was really happy when we, when she, came back to Canada. My Dad and I brought her to the Church they used to

> go to and their workplaces they used to work and stuff like that and she was really happy about that.
>
> […]
>
> Member: Tell me about what you recall your Mom's day to day life when she came back to Canada then?
>
> Daughter: **It was pretty normal when we came back. She would cook food and clean up.** Like, my brother would take her shopping, take her to the grocery and let her pick out her own groceries and stuff like that. She liked cooking and baking a lot so that's what she does mostly, with supervision. **She does laundry,** taking care of the cats, stuff like that.

[21] Again, I fail to see how the General Division misrepresented the testimony of the Appellant's daughter. Indeed, it seems to me that, on the subject of her mother's activities in 1993, the General Division's decision accurately captures the essence of what the witness said at the hearing.

Appellant's need for treatment or medication

[22] At paragraph 20 of its decision, the General Division wrote:

> She said that she felt well enough in Canada that she didn't need treatment, nor did she take any medication while in Canada.

[23] At the 51:00 mark of the recording, the discussion turns to the Appellant's treatment after she returned to Canada:

> Member: When you came to Canada in 1993, I understand that you didn't have a doctor here in Canada.
>
> Appellant: No. I guess it's kind of—I don't know how to explain it—if I can't sit up [inaudible] in Trinidad, it's kind of, you know when [inaudible] to talk too much, but in here, I felt well.
>
> Member: Okay. So you felt well enough in Canada not to have the treatment while you were here?
>
> Appellant: **Yes, definitely.**

Member: When you were in Canada though, were you still taking Prozac and the other medications?

Appellant: **No, not at all.**

Member: Okay. But when you went back to Trinidad would you take them when you were there or after or you don't take medications?

Appellant Just other things I would take like off the shelf, kind of, but not really, because I am feeling very strong and very well.

Member Okay, that's good. Do you remember when you would have stopped taking the Prozac and other medications?

Appellant: **About 1992 or 1993, really.**

[24] The recording indicates that the General Division made a good-faith effort to discover the extent of the Appellant's treatment for her mental health after 1993 and then fairly summarized her oral evidence in its decision.

[25] To conclude, the Appellant and her daughter may not have understood the significance of their statements when they were making them, and they may disagree with the weight that the General Division assigned to those statements; however, there is no question that the Appellant and her daughter did, in fact, make those statements, however much they may now wish to reframe or contextualize them. The Appellant accused the General Division of "picking and choosing" "word bites" from her testimony, but I see no indication that the General Division distorted the essential meaning of what she or her daughter had to say. In short, I cannot agree that the General Division based its decision on erroneous interpretations of the oral evidence.

Issue 3: Did the General Division breach a principle of natural justice by repeatedly asking the Appellant leading questions and denying her opportunities to clarify her evidence?

[26] The Appellant alleges that the presiding General Division member engaged in behaviour that hindered or prevented her from giving evidence. In particular, she faulted the member for asking leading questions and cutting her off before she could clarify her evidence.

[27] Having reviewed the entirety of the audio recording, I do not think that this submission has any merit. Above all, there is no rule of procedural fairness that prohibits an adjudicator from

asking leading questions, provided they are intended to elicit relevant information. It is true that, in some cases, aggressively posed leading questions may indicate bias or bad faith, but I heard nothing like that here. Indeed, it seems to me that the member conducted the hearing in a genuine spirit of inquiry. At no time did the Appellant or her representative raise an objection to, or express discomfort with, the member's conduct. Throughout the proceedings, his tone was mild, and I heard nothing that might be described as undue pressure or cross-examination. The passages transcribed above provide a fair representation of the member's style of questioning, and he consistently allowed ample opportunities for the Appellant and her daughter to add to, clarify, or walk back their oral evidence.

CONCLUSION

[28] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds listed in s. 58(1) of the DESDA.

[29] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	July 12, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. G., Appellant S. G., Representative for the Appellant Viola Herbert, Representative for the Respondent