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

Citation: *M. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 53

Tribunal File Number: AD-15-250

BETWEEN:

M. V.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

HEARD ON: January 22, 2016

DATE OF DECISION: January 25, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	M. V.
Counsel for the Appellant	Basil McDonald
Counsel for the Respondent	Christine Singh
Interpreter	V. L.

INTRODUCTION

[1] The Appellant claimed that she was disabled as a result of physical injuries, depression, anxiety and other mental illness that resulted from a motor vehicle accident. She applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing and on February 6, 2015 dismissed the appeal.

[2] On May 25, 2015 the Appellant was granted leave to appeal the General Division decision to the Appeal Division of the Tribunal. At the appeal she argued that the General Division erred as it based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it and that the reasons for the decision were insufficient. The Respondent contended that the General Division decision did not contain any such errors and the appeal should be dismissed.

[3] The appeal was heard by videoconference after considering the following:

a) The complexity of the issues under appeal;

b) The fact that the credibility of the parties is not a prevailing issue;

c) The fact that the Appellant and other parties were represented;

d) The availability of videoconferencing in the area where the Appellant resides;

e) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit; and

f) The fact that an interpreter was present.

I have considered the written and oral submissions of the parties in reaching this decision.

ANALYSIS

[4] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered. Section 59 of the Act sets out the remedies that the Appeal Division can grant on an appeal (these are reproduced in the Appendix to this decision). I must decide if the General Division decision contained an error as set out in section 58 of the Act such that the appeal should be allowed. If the appeal is allowed I must also decide what remedy to grant to the Appellant.

[5] First, counsel for the Appellant argued that the legal test to be met in order to be found disabled under Ontario motor vehicle legislation was practically the same as that under the *Canada Pension Plan* (CPP). Therefore, as the Appellant had been found to be unable to work under the Ontario motor vehicle accident benefits program this should be persuasive in this proceeding.

[6] Counsel for the Respondent disagreed, and contended that in order for someone to be found disabled under the CPP she must be found to be suffering from a severe and prolonged disability such that she was incapable regularly of pursuing any substantially gainful

occupation. She referred to decisions of the Courts which have concluded that this is a very specific legal test to meet, and is different than that of other insurance and benefit plans.

[7] In a motor vehicle claim, the claimant must be found to suffer from a complete inability to engage in any employment for which she is reasonably suited by reason of education, training or experience. This is different than being incapable regularly of pursuing any substantially gainful occupation. Therefore, although I accept that evidence gathered in the course of a motor vehicle claim may assist in a disability pension claim, the motor vehicle claim finding of disability is not the same as what must be decided in this proceeding.

[8] The Appellant alleged that the General Division decision contained a number of factual errors that were contrary to section 58 of the Act such that the decision should be set aside. They are each reviewed below.

[9] First, the Appellant submitted that the General Division decision contained an error when it stated that she did not undergo any psychiatric or regular mental health treatment until 2014. Counsel pointed to evidence that in 2009 the Appellant was assessed by a psychologist, who recommended a course of therapy which she attended. Also, the Appellant tried medication prescribed for her mental health prior to 2014. The Appellant argued that the General Division erred when it found that she did not undergo this treatment, and that it placed weight on this erroneous finding of fact in making its decision. In contrast, counsel for the Respondent argued that as the General Division decision contained a summary of the medical reports filed, including specific reference to the psychologist's reports written in 20009, 2010 and 2013. Therefore, his conclusion about mental health treatment was not made without regard to the material before it, nor was it made in a perverse or capricious manner.

[10] I am satisfied that the General Division erred when it stated that the Appellant had never received any mental health counselling until 2014 when she began to see a psychiatrist. It is contrary to the clear evidence, even as it was summarized in the decision. I am also satisfied that the General Division decision was based, at least in part, on this erroneous finding of fact. The General Division decision placed weight the Appellant's apparent refusal to undergo such treatment.

[11] Second, the Appellant submitted that the General Division decision erred when, referring to his September 2013 report, it stated that Dr. Sharma reported that the Appellant's depression had moderated. The report actually said that she suffered from depression, moderately severe.
Counsel for the Appellant also referred to Dr. Sharma's 2010 report which made the same diagnosis. He contended that the General Division decision statement was clearly wrong.

[12] Counsel for the Respondent argued that the General Division decision focused on the fact that the Appellant had not undergone treatment for her mental illnesses, and that a disability pension could be denied to a claimant if she unreasonably refused to undergo treatment (*Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211). She argued that the medical reports stated over time that the Appellant's mental health was untreated, and that this refusal to undergo treatment was unreasonable. In the alternative, she contended that this reporting was perhaps not accurate, but that this error should not be fatal to the decision as the decision, as a whole, was reasonable.

[13] I agree that disability claimants are obliged to follow medical recommendations and to attend treatment, and if they do not to provide a reasonable explanation for not doing so (*Lalonde*). However, in this case, the issue argued was not the Appellant's compliance with treatment recommendations, but whether the General Division based its decision on an erroneous finding of fact made contrary to section 58 of the Act regarding her attendance at recommended treatment. On a plain reading of the relevant materials, it is clear to me that the General Division erred in this regard. The General Division based its decision, in part at least, on this erroneous finding of fact.

[14] Third, the Appellant argued that the General Division decision erred in fact when it stated that Dr. Stevens, orthopedic surgeon, based his conclusion that the Appellant was disabled only on her subjective symptoms. Counsel for the Appellant referred to Dr. Stevens' September 2010 report that set out that he had reviewed a MRI report, and other medical documents which outlined a degenerative spinal condition. In his 2013 report Dr. Stevens also referred to his physical examination of the Appellant on that occasion and concluded that her condition was much the same.

[15] The Respondent referred to Dr. Stevens' report, specifically where it stated that her testing was within normal results, and that nothing objective was found on the physical exam. Dr. Stevens concluded that the Appellant suffered from subjective pain. Accordingly, the Respondent suggested that it was not unreasonable for the General Division decision to state that Dr. Stevens' conclusion was based on the Appellant's subjective reports.

[16] While I accept that Dr. Stevens' conclusion that the Appellant was disabled for motor vehicle litigation purposes was based in part on her reporting of her symptoms, I am persuaded by the Appellant that the General Division decision contained an error when it reported that this conclusion was based only on the Appellant's reporting. This was not so, and the medical reports demonstrate that. This was an erroneous finding of fact made without regard to all of the material that was before the General Division. Again, the General Division based its decision, in part, on this.

[17] Fourth, the Appellant contended in written submissions that the General Division decision contained an error when it concluded that Dr. Sharma in 2013 diagnosed the Appellant with chronic pain, which suggested a significant mental health component. Dr. Sharma's report did not refer to any mental health component of his diagnosis. The Respondent argued that a diagnosis of chronic pain, by itself, is insufficient to find that a claimant is disabled. She relied on *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33, to support this argument. I agree that a diagnosis of chronic pain, alone, is not enough to find a claimant disabled under the CPP. However, the issue before me was not whether the Appellant just had this diagnosis, but whether the General Division correctly stated that Dr. Sharma concluded that this diagnosis included a significant mental health aspect. When Dr. Sharma's report is read, it is clear that he did not reach this conclusion. Therefore, the General Division erred when it stated that it did.

[18] Fifth, the Appellant contended that the reasons for decision in this case were insufficient as the decision did not explain why it preferred the report of Dr. Kachur over that of Dr. Carleton when both doctors examined the Appellant and reached different conclusions regarding her level of disability. The Respondent suggested that there was no contradiction between these reports as both doctors examined the same testing results, and both concluded

that the Appellant did not have any nerve root damage to explain her symptoms. The Respondent suggested that as there was no contradiction about this, there was no need for the decision to further analyse these reports.

[19] I acknowledge that Dr. Kachur and Dr. Carleton examined the same materials, and both concluded that the Appellant did not have any nerve root damage. However, Dr. Kachur, a neurosurgeon, ruled out surgery as treatment and did not conclude that the Appellant was disabled; Dr. Carleton, a neurologist, described the Appellant's range of motion quite differently and concluded that the Appellant was disabled. The decision acknowledges that these reports contrasted, but did not explain why more weight was given to one report over the other.

[20] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),*2011 SCC 62 the Supreme Court of Canada concluded that one purpose for providing written reasons for a decision is to allow the parties to understand why a decision was made. On the face of these contradictory conclusions by doctors with similar specialties, it might appear that the reasons for decision were insufficient in this regard. However, the Court also concluded that the reasons for decision are to be looked at together with the decision to determine if it falls within the range of possible outcomes. When looked at in this way, I am not persuaded that this error, alone, rendered the decision to be one that was outside the possible range of outcomes.

[21] However, I am persuaded, when the entire decision is examined as a whole, that it was based on a number of erroneous findings of fact made without regard to the material before it. The decision was based, on the erroneous factual conclusion that the Appellant had not attended any mental health treatment prior during the relevant time, and also drew an adverse inference based on her apparent refusal to do so, which was also an erroneous finding of fact. The decision was also based on erroneous findings of fact that the Appellant's mental health had improved, and that Dr. Stevens' conclusion that she was disabled was not based on any objective evidence. These errors render the decision outside the range of possible outcomes, and I am satisfied, on a balance of probabilities, that the decision is not defensible on the facts and the law.

CONCLUSION

[22] The appeal is allowed for these reasons.

[23] Section 59 of the Act sets out what remedies can be granted on an appeal. The matter is referred back to the General Division for reconsideration. To avoid any potential apprehension of bias the General Division decision is to be removed from the record and the matter assigned to a different General Division Member.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

59. (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.