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

Citation: *M. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 55

Tribunal File Number: AD-15-937

BETWEEN:

M. K.

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 21, 2016

DATE OF DECISION: January 25, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	M. K.
Counsel for the Respondent	Michael Stevenson
Observer	Laura Penney
Observer	Tiffany Santos

INTRODUCTION

[1] The Applicant claimed that she was disabled by migraine headaches, back pain, other physical limitations and depression when she applied for a *Canada Pension Plan* disability pension. The Respondent denied her claim initially and after 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 in April 2013 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a videoconference hearing and on May 27, 2015 dismissed the appeal.

[2] On September 4, 2015 the Appellant was granted leave to appeal the General Division decision to the Appeal Division.

[3] This appeal was heard by teleconference on January 21, 2016 after considering the following:

a) The complexity of the issues under appeal;

b) The fact that the Appellant may not be the only party in attendance;

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

d) the nature of the submissions filed by the Respondent and that the Appellant did not file any submissions; and

e) The Appellant does not reside near any Service Canada Centre and would not have easy access to videoconference or in person hearing facilities.

ANALYSIS

[4] The *Department of Employment and Social Development Act* governs the operation of the Tribunal. According to subsection 58(1) of Act 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.

I must decide if the General Division contained an error as set out in section 58 of the Act, and if so what remedy should be granted. I considered the written material in the appeal file and the submissions of the parties in reaching the decision in this case.

[5] Leave to appeal was granted on the basis that the General Division may have made an erroneous finding of fact with respect to the Appellant's credibility as this finding was based, in part, on its conclusion that what the Appellant reported regarding her ability to sit, stand and perform other tasks in the questionnaire she completed when she applied for the disability pension was different than her testimony on this subject at the hearing. In particular, the General Division decision stated that the Appellant reported in the questionnaire that her sitting was unlimited, standing restricted to five minutes, walking was restricted to 60+ minutes and slow walking was restricted to 10 minutes. In contrast, the Appellant testified that she was unable to sit or stand for more than five minutes. The General Division found as fact that this was contradictory, and relied on this apparent contradiction, in part, to conclude that the Appellant was not a credible witness.

[6] The Appellant contended that this was an erroneous finding of fact. She argued that at the General Division hearing she was still influenced by medication that she was taking which affected her ability to express her thoughts and her cognition. She stated that she relied on counsel who represented her at that time to file documents and present her case, and was unhappy with how this was done. In addition, she submitted that she completed the questionnaire when she initially applied for the *Canada Pension Plan* disability pension, in 2012. The General Division hearing was held in 2015, and her conditions and abilities had changed during that time such that they would be reported differently, but without contradiction.

[7] In contrast, the Respondent argued, first, that I should not consider the Appellant's contention that her testimony may have been impaired by medication as that was not raised as a ground of appeal until the appeal hearing. Counsel for the Respondent acknowledged that the General Division did not accurately report the limitations as they were actually set out in the questionnaire completed by the Appellant. However, counsel contended that when the accurate reporting of limitations is examined, a lesser contradiction appears. Further, counsel contended that if the General Division erred, it was not an error that undermined the basis for the decision that was made, especially as the accurate facts supported the conclusion that the Appellant's physical restrictions still permitted her to sit for long periods of time and use a computer. This, he argued, buttressed the ultimate decision that the Appellant was not disabled.

[8] I am persuaded by the Appellant that the General Division erred when it found as fact that the physical restrictions reported in the questionnaire and in the Appellant's testimony were contradictory. I accept that these restrictions could have changed over time. I also note that the General Division decision did not accurately report what was set out in the questionnaire. However, I am not satisfied that this error was such that the Appeal Division should intervene under the Act. The General Division considered this evidence as well as the Appellant's testimony and the other medical evidence, weighed the evidence, and based on all of the evidence, found that she was not credible. I am satisfied that the finding of credibility was not made erroneously in a perverse or capricious manner or without regard to all of the material that was before it. The appeal cannot succeed on this basis.

[9] While it is unfortunate that the Appellant was not happy with her representation at the General Division hearing, this is not something that can be considered for the appeal to succeed. This does not point to any error made by the General Division.

[10] Leave to appeal was also granted on the basis that the General Division decision may have contained an erroneous finding of fact that there was no substantive evidence regarding her back pain. The General Division decision noted that the Appellant suffered from back pain, caused by injuries suffered a number of years before she stopped working. The decision stated that the Appellant adduced little, if any evidence regarding these injuries and that no medical reports or diagnostic imaging results relating to the period when the injuries occurred were filed. While acknowledging that the family physician reported on back pain, the General Division concluded that there was no substantive information regarding this.

[11] The Appellant argued, again, that she had relied on her lawyer to file relevant documents with the Tribunal to support her claim, and was not sure if all such documents had been filed. She also, in her written submissions, pointed to medical reports that outlined that she suffered from back pain, the injuries that caused this, and treatment. She also submitted that the injuries that caused this pain were soft tissue injuries that would not be revealed by diagnostic tests. Finally, the Appellant asserted that she suffers from polycythemia, and that one of the symptoms for this is bone pain, and this condition was not considered by the General Division in reaching its decision.

[12] Conversely the Respondent argued that the General Division was alive to the Appellant's complaint of back pain and that she claimed that this was one of the reasons she could not work. Counsel for the Respondent argued that the General Division correctly stated that there were no diagnostic imaging reports to support the Appellant's claim, and that the General Division did not err when it stated that it would have preferred to have had this evidence when making its decision. He also pointed to a number of medical reports which referred to the Appellant's back pain but did not suggest any further investigations regarding it and urged me to accept that this fact suggested that the pain was not a severe disability.

[13] It is clear from a review of the decision that the Appellant suffered from back pain at the relevant time. The cause of this was set out in the decision. I also accept the Appellant's

argument that this pain would not be revealed on any diagnostic testing. Pain is a subjective condition, and cannot be empirically measured. For that reason, I also do not accept that simply because there was no referral for testing or imaging regarding the pain that it was not severe. While this could be so, it is equally plausible that such interventions were not sought out because they would not lead to any different treatment or improvement in the Appellant's condition.

[14] I am persuaded that the General Division erred when it decided that there was no substantive evidence regarding back pain. The Appellant's back pain was reported by a number of treatment providers. Diagnostic imaging reports are not necessary to establish that this medical condition existed at the relevant time, how it was treated or what its impact was on the Appellant. Therefore, the finding of fact in question was erroneous. I am also satisfied that it was made without regard to all of the material before the General Division as there was evidence regarding this condition.

[15] The Appellant also argued that she suffers from polycythemia, neck, knee and hip pain, and that these conditions were not considered by the General Division. The decision refers only very briefly to the neck, knee and hip pain. It noted that the Appellant suffered from polycythemia, that it was treated with medication and historically with phlebotomies. The decision did not set out any ongoing symptoms from this condition or its effect on the Appellant's capacity to work. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47the Federal Court of Appeal clearly stated that in determining if a claimant is disabled all of their medical conditions, not just the major one(s) must be considered. I am satisfied that the General Division did not do so. This is an error of law.

[16] Leave to appeal was also granted on the basis that the General Division decision did not consider that her migraine headaches had worsened when she stopped taking Topomax. The Appellant asserted that the side effects from taking this medication were becoming intolerable as she felt like a "zombie", was not able to express herself, and did not have any emotions or interest in life in general. With her doctor she decided to stop taking daily migraine medication and to bear the pain for the most part, taking different medications when the pain became intolerable. She has done this and can now think more clearly, experiences emotions and has more enjoyment in life.

[17] The Respondent's counsel argued that the General Division decision acknowledged that the Appellant could no longer tolerate Topomax and that her headaches worsened when she stopped taking this. He contended, that by presenting this ground of appeal the Appellant was really asking the Appeal Division to reweigh the evidence to reach a different conclusion on her claim, which it ought not to do (see *Simpson v. Canada (Attorney General),* 2012 FCA 82).

[18] I am satisfied, after reviewing the decision and hearing the parties' arguments, that the General Division was alive to the Appellant's weaning off Topomax and its effect on her migraine headaches. This evidence was weighed with the other evidence to reach the decision in this matter. No error was made in this regard.

[19] The Appellant contended further, however, that her headaches occurred on an unpredictable basis. She argued that she does not know when they will occur and as such could not commit to a work schedule, and that no employer would hire her. The General Division decision sets out the Appellant's evidence that she has approximately one or two bad days, 4 average days and one good day each week and that when she would have a good or a bad day was not predictable. Counsel for the Respondent acknowledged that the decision did not consider the impact of the unpredictable nature of her headaches on her capacity regularly of pursuing any substantially gainful occupation.

[20] In *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, the Federal Court of Appeal decided that the term "regularly" in the definition of severe in the *Canada Pension Plan* is meant to describe the incapacity and not the employment. The Pension Appeals Board concluded that a claimant who was prevented from attending work regularly due to intermittent and unpredictable flare ups of a chronic disease may be found to be disabled *(Minister of Social Development v. Schummans* (January 15, 2007) CP 11228). The predictability of the Appellant's headaches was a relevant consideration in this case. The General Division did not consider it. This was also an error of law.

CONCLUSION

[21] The appeal is allowed as the General Division decision contained errors of law and a reviewable erroneous finding of fact. In *Canada (Attorney General) v. Paradis*, 2015 FCA

242 the Federal Court of Appeal suggested that if a breach of section 58 of the Act is found, the appeal should be granted.

[22] Section 59 of the Act sets out the remedies that the Appeal Division can award on an appeal. Counsel for the Respondent suggested that if this appeal was allowed it was appropriate that this matter be referred back to the General Division for a new hearing. I concur. Evidentiary issues remain to be resolved. In order to prevent any possible apprehension of bias, the matter should be assigned to a different Member of the General Division.

Valerie Hazlett Parker
Member, Appeal Division