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

[TRANSLATION]

Citation: *Minister of Employment and Social Development v. M. S.*, 2016 SSTADIS 70

Date: February 5, 2016

File number: AD-15-1052

APPEAL DIVISION

Between:

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

Applicant

and

M. S.

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

REASONS AND DECISION

DECISION

[1] Leave to appeal before the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) is granted.

INTRODUCTION

[2] On June 30, 2015, following an in-person hearing, the Tribunal's General Division (GD) issued a decision and allowed the Respondent's appeal. The GD found that:

> ...the appellant had a severe and prolonged disability in February 2007, when she lost her job upon her return from sick leave. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(*b*) CPP). The application was received in December 2011; therefore the Appellant is deemed disabled in September 2010. According to section 69 of the CPP, the disability pension is payable commencing with the fourth month following the month in which the applicant became disabled. Payments will start as of January 2011.

[3] The Applicant filed an application for leave to appeal before the AD on September 28, 2015, within the time limit.

[4] In its application for leave to appeal, the Applicant included some submissions. The Respondent was requested to send in her submissions by November 9, 2015.

[5] The Respondent's submissions consisted of a letter dated October 27, 2015, written by her husband, as well as [*translation*] "Respondent's submissions" put together by her lawyer on November 9, 2015.

[6] The Applicant was requested to present additional submissions, which it did, on December 11, 2015.

ISSUE

[7] The Tribunal must determine whether the appeal has a reasonable chance of success.

THE LAW AND ANALYSIS

[8] In accordance with subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, "[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted" and the AD "must either grant or refuse leave to appeal".

[9] Subsection 58(2) of the *Department of Employment and Social Development Act* states that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[10] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

(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 or order, 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.

[11] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first, and lower, hurdle for the Applicant to meet than the one that must be met on the appeal on the merits. At the application for leave to appeal stage, the Applicant does not have to prove their case, but simply establish a reasonable chance of success.

[12] The Tribunal will grant leave to appeal if the Applicant shows that any of the above grounds of appeal has a reasonable chance of success.

[13] To do so, the Tribunal must, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, be able to determine if there is a question of law, fact, jurisdiction, or natural justice that could lead to the setting aside of the decision attacked.

Submissions

[14] The Applicant submits that:

(a) The GD issued a decision in violation of paragraphs 58(1)(*a*), (*b*) and (*c*) of the *Department of Employment and Social Development Act*.

(b) The GD erred in fact and in law in failing to apply the Federal Court of Appeal jurisprudence that requires objective medical evidence of the applicant's medical condition. The GD also failed to adequately analyse the inconsistency between the evidence presented at the hearing and the medical evidence on file.

(c) The GD decision was based on erroneous findings of fact, made in a perverse or capricious manner, or without regard for the evidence before it. The GD findings that the Respondent's depression and anxiety were severe and prolonged and that she had limited mental functions are not sufficiently supported by the medical evidence on file.

[15] The Respondent submits that:

(a) The Applicant is seeking to overturn the GD decision on several baseless grounds.

(b) The GD completely respected and applied the Federal Court of Appeal case law, and there is ample objective medical evidence in the file.

(c) The Federal Court of Appeal has found that the respondent's testimony is crucial in making sense of objective medical evidence. Otherwise, there wouldn't be any need to hold a hearing.

(d) The Applicant is dissatisfied with the GD's decision and wants a more detailed analysis. The law in no way requires that the GD decision be the size of an encyclopedia.

(e) The Respondent did not complete the documents and forms herself as she is illiterate. The findings of the GD are correct in both fact and law.

[16] In response, the Applicant submitted the following:

(a) The GD decision contains errors of law and fact.

(b) The GD failed to adequately analyse the inconsistency between the evidence presented at the hearing and the medical evidence on file.

(c) The Respondent's submission are general and imprecise and do not refer to specific exhibits and relevant case law does not provide a detailed response.

(d) The GD decision is not transparent or intelligible, and the reasons to support the decision cannot justify the GD's decision-making process with regard to the facts and law on file.

(e) The Respondent is seeking to submit new evidence (that the Respondent is illiterate); the two letters written by the Respondent on February 24, 2009, and May 18, 2012, would prove that the Respondent is not illiterate.

GD Decision

[17] The GD's decision states that:

> [7] The Appellant's minimum qualifying period ended on December 31, 2008.
>
> [30] The Appellant started receiving a CPP retirement pension in January 2012.
>
> [48] The medical evidence on file does not include a comprehensive evaluation of the Appellant's mental and physical condition. The Appellant's representative noted that she did not have the financial means to obtain this evaluation. Moreover, Dr. Adams' clinical notes submitted by the Appellant do not include the period of February 2007 to February 2012. The Appellant's representative also noted that it had been difficult to obtain Dr. Adams' clinical notes because he is no longer practicing.
>
> [49] The medical reports submitted as evidence show that the Appellant had in 2008 a knee that was permanently damaged by a torn meniscus (Dr. Corrigan's report dated February 3, 1999), hip pain that was most likely caused by her back condition rather

than the arthritis mentioned in Dr. Suranyi's October 2007 report (Dr. Corrigan's report dated April 28, 2008), and knee pain caused by early and mild osteoarthritis (Dr. Corrigan's report dated April 28, 2008). This pain is severe enough for Dr. Corrigan to prescribe the Appellant Mobicox, despite the fact that she has hypertension. However, he did warn her of the side effects (Dr. Corrigan's report dated April 28, 2008).

[50] The medical evidence also shows that in 2007, the Appellant experienced carpal tunnel nerve compression in both arms (Dr. Harris' report dated November 21, 2007). One month after complaining of numbness in the tips of her fingers, she denies having symptoms of carpal tunnel syndrome (Dr. Harris' report dated November 21, 2007). She reiterates that she no longer had this condition in 2001 (Dr. Suranyi's report dated September 28, 2011).

[51] Dr. Adams' report dated September 25, 2008, states that the Appellant has mild osteoarthritis in her knee and bilateral carpal tunnel syndrome. He does not state that she has depression and anxiety (Dr. Kristoff's report dated January 25, 2007, and Dr. Adams' clinical notes of November 2006 to January 2007), despite the fact that the Appellant has been taking Paxil since 2006 and sees him regularly in order to renew her prescription. Paxil is also omitted from the list of medications on the medical report form.

[52] The medical evidence submitted regarding the Appellant's physical condition after 2010 in relation to her back must be carefully assessed because she fell off a horse in 2010 and this seems to have caused her symptoms to increase. The Tribunal must evaluate the Appellant's condition on December 31, 2008.

[53] None of the submitted medical reports state whether the Appellant is able to work. Only Dr. Corrigan stated that he believes that it would be difficult for her to work on her feet all day. However, none of the doctors consulted had conducted an overall assessment of the Appellant, on both the physical and mental level. Dr. Adams' 2008 report also fails to make any mention of the Appellant's condition, despite the fact that he is her family doctor and receives all the notes from the specialists she sees. If we consider each of the Appellant's physical and mental problems individually, her condition may not be severe; however, the Tribunal must consider the Appellant’s condition as a whole.

…

[56] At the hearing, the Appellant stated under oath that the main reason that she stopped working was burn-out, depression, and anxiety. The burn-out she experienced was also an element that she had brought up in her communications with the Respondent both in 2008 and 2011. Nonetheless, at the time, she did not provide medical or psychiatric reports to support her claims, which she has done in this appeal.

…

[58] The Appellant was sincere in her testimony. Her memory seemed fairly good, but she had trouble understanding the questions that were asked and what was being said. When she wasn't being addressed, such as when her representative was presenting her submissions, she seemed very distant. The Tribunal found that the inconsistencies in the Appellant's claims were not a result of bad faith on her part, but rather show the consequences of her developmental disability.
…

[65] The Appellant's overall physical and mental condition in December 2008 can be briefly summarized as follows. She has knee and leg pain and she has limited options in terms of pain medication, she is unable to work on her feet all day without pain, she walks at the speed of eight feet per minute and requires a cane, she also has depression and anxiety, she want to be alone and goes out of her way to avoid seeing people she knows when she goes out. Furthermore, although she worked up to 14 hours a days in 2006, in December 2008, she did almost nothing all day at home. She needs to take a nap in the afternoon. To add to this condition is the fact that the Appellant has limited mental capacity, has no education, and is illiterate at 57 years old.

[66] The Tribunal finds that, in a realistic context, in December 2008, the Appellant was not in a condition to hold a substantial job in a competitive environment. Her condition also made it impossible to predict whether she would be able to show up to work as often as necessary. The evidence on file suggests that the Appellant therefore did not have the ability to work. She was not even able to apply in a workplace that she was used to.

[67] The burden of proof that rests on the Appellant is not to convince the Tribunal beyond a reasonable doubt that she is incapable of working. The Tribunal finds that on a balance of probabilities, until December 31, 2008, the Appellant's disability was severe.
…

[69] The Appellant stated that she has not improved since 2008. At the hearing, she did not have a cane, but was walking very slowly and with difficulty. Her back and legs had gotten worse, but that could be caused by her fall off a horse in 2010. Dr. Suranyi's medical report dated September 28, 2011, contained the following information:

[70] The Appellant's mental capacity is irreversible. As regards her mental health, the Appellant states that she has not felt any improvement since December 2008. She also stated that she avoids family events. Dr. Adams' notes of February and April 2012 state that the Appellant was still dealing with depression six years after her initial diagnosis, despite the fact that she was on anti-depressants from 2006 to 2011, and has not been working since 2006. Dr. Chow's report in October 2012 also states that the Appellant should see a psychiatrist.

[71] Dr. Adams' notes show that he had once more referred the Appellant to Dr. Kristoff. However, the Appellant did not see Dr. Kristoff because, like Dr. Adams, he had stopped practicing. She is currently without a doctor.

> [72] In light of these circumstances, the Tribunal finds that, on a balance of probabilities, the Appellant's condition, particularly her mental condition, will likely last for a long, continuous, and indefinite period. As a result, the Tribunal finds that the Appellant's disability is prolonged.

[18] The Respondent attended the hearing before the GD and was represented by a lawyer. She testified at the hearing. The GD Member found that she was sincere and that the inconsistencies in her applications were not a result of bad faith, but rather illustrate the consequences of her developmental disability.

[19] The Applicant was invited, but did not attend the hearing before the GD. It had provided the GD with its written submissions and the appeal file. A summary of the Applicant's submissions is stated in paragraph 42 of the GD decision. By not attending, the Applicant missed the opportunity to cross-examine the Respondent in person.

[20] The GD considered the Applicant's argument to the effect that the medical reports submitted by the Respondent do not support a finding that her condition, on December 31, 2008, was severe and prolonged.

[21] This, essentially, is the Applicant's position before the AD.

[22] The GD cited the following cases:

(a) The severe criterion must be assessed in a real-world context (*Villani v. Canada* (*A.G.*), 2001 FCA 248).

(b) The measure of whether a disability is “severe” is not whether the Appellant suffers from severe impairments, but whether his disability “prevents him from earning a living” *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, paragraphs 28 and 29).

(c) It is the Applicant's capacity to work and not the diagnosis of their disease that determines the severity of the disability under the CPP: *Klabouch v. Canada (Minister of Social Development)*, [2008] FCA 33.

(d) All of the impairments of the claimant that may possibly affect employability are to be assessed, not just the major or main impairments (*Bungay v. Canada (A.G.)*, 2011 FCA 47).

[23] The GD found that on December 31, 2008, the Appellant's disability was severe and prolonged.

The Alleged Errors

[24] The Applicant submits that the GD erred in fact and in law in failing to apply the Federal Court of Appeal jurisprudence that requires objective medical evidence of the claimant's medical condition. The Applicant cited several Federal Court of Appeal cases.

[25] The Applicant cited *Villani v. Canada (Attorney General)*, 2001 FCA 248. Paragraph 50 states the following:

> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation." Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.

[26] The Applicant cited paragraph 4 of *Gorgiev v. Canada (Minister of Human Resources Development)*, 2005 FCA 55, which states the following:

> A finding of severity is not based on medical diagnosis alone, nor is it based solely on the subjective evidence of the claimant as to the degree of pain suffered when attempting to perform the claimant's usual or customary occupation. Such evidence must always be considered, of course, but it is relevant only to determine whether the claimant is able to perform any substantially gainful employment.

[27] The Applicant cited paragraph 2 of *Canada (Attorney General) v. Fink* FCA 354, which states:

> While the term 'disability' has different meanings under different insurance and pension plans, under the CPP, the measure is employability. To support a claim, disability must

> normally be demonstrated on more than the claimant’s evidence that he or she suffers pain or discomfort that prevents employment...

[28] The Applicant cited paragraph 4 of *Warren v. Canada (Attorney General)*, 2008 FCA 377, which states the following:

> In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant’s disability. It is well established that an applicant must provide some objective medical evidence...

[29] The Applicant cited paragraph 97 of *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, which states:

> The Applicant is claiming disability benefits under the Plan. I note that the Plan is a statutory scheme that allows for the payment of benefits in defined situations as set out in the legislation.

[30] Although this case deals with the need to provide objective medical evidence of the applicant's condition, it does not insist on medical evidence on each of the applicant's physical and mental conditions, nor on a comprehensive assessment of the Applicant's mental and physical condition.

[31] The Respondent's file contains objective medical evidence, as well as objective evidence of a medical nature. The Respondent has also [*translation*] "more than just stated" that her pain and discomfort prevent her from working. The Respondent's testimony at the hearing is not the only evidence considered when determining disability and the GD did not [*translation*] "rely almost entirely on the Respondent's testimony at the hearing to support its finding that the disability, in 2008, was severe and prolonged".

[32] As regards the argument that the GD's analysis is lacking and fails to show how it could have made these findings, as well as the GD's duty to conduct a thorough analysis rather than a selective summary of the evidence without analysing the gaps and inconsistencies, the GD decision in paragraphs 42 to 78, stated above, show a thorough analysis. It found that the inconsistencies [*translation*] "are not a result of bad faith on the part of the Respondent, but demonstrate the consequences of her developmental disability".

[33] The GD did not err in law by not applying Federal Court of Appeal jurisprudence. Neither did it err in law by not providing a proper analysis of the evidence presented at the hearing and of the medical evidence on file.

[34] The Applicant is claiming that the following errors of fact were committed:

(a) The GD failed to take into account Dr. Corrigan's finding that the Respondent had mild osteoarthritis in her knees and that Dr. Corrigan did not draw any conclusions as to her eligibility for a disability pension.

(b) The GD's finding with regard to the severity of the Respondent's physical disability in February 2007 is incompatible with the lack of medical evidence and the horse riding accident in 2010. The GD does not sufficiently explain how its finding is compatible with the lack of evidence and the Respondent's activities after December 2008.

(c) The GD did not look into the fact that Dr. Adams had prescribed the drug Effexor in 2012, but that this drug was not included among the drugs listed by Dr. Chow in his 2012 report.

(d) The Respondent testified that she has been without a doctor since 2013, but the GD failed to analyse the implications of this testimony, namely that this suggests the Respondent is unable to get prescriptions for pain-relieving drugs, thus implying that her condition is not severe or prolonged.

(e) The GD found that the Respondent was illiterate despite the fact that there is nothing to prove this, as well as the fact that the Respondent is bilingual and that the file indicates that she had filled out the disability forms herself and written her own letters disputing the Minister's decisions to deny her claim.

(f) As regards the prolonged nature of the Respondent's mental condition, the GD found that the state of the Appellant's mental functions was irreversible without any objective evidence.

(g) The GD also erred in fact when it interpreted Dr. Chow's October 2012 report. The report leads to the conclusion that Dr. Chow had mistakenly written [*translation*] "psychiatrist", whereas the context of his recommendation would clearly suggest that Dr. Chow was instead referring to a [*translation*] "physiatrist", given that his recommendation consisted of " ... proper daily home exercise program for range of motion conditioning and explanation of chronic pain release ...".

[35] The Respondent's representative submits that granting permission for leave to appeal is equivalent to granting an applicant a second chance to plead their case and [*translation*] "if the Minister now chooses to no longer attend hearings, this should not give it the impression that it's ok, it can always appeal it".

[36] I agree that if the Applicant decides not to attend a hearing before the GD, it should not believe that it can simply appeal the GD's decision in case it is dissatisfied with the outcome.

[37] The Applicant's submissions with regard to the alleged factual errors are impacted by its decision to skip the hearing.

[38] For an error of fact to justify a revision, the GD must have "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". This caveat does not include merely any erroneous finding of fact.

[39] For example, it is not sufficient that the error described in paragraph [34] g) be established, it is also necessary for the GD to have based its decision on this finding. Given that the report is dated October 2012 and that paragraph 70 of the decision falls under the decision's "analysis" section regarding the prolonged nature, is it possible to conclude that the GD based its decision on this error?

[40] Moreover, as regards the erroneous finding of fact "made in a perverse or capricious manner or without regard for the material before it", one of the cited conditions must first be established.

[41] Presenting a convincing argument that an erroneous finding of fact was "made in a perverse or capricious manner or without regard for the material before it" is difficult when the

Applicant chose not to be present when all of the evidence was brought before the GD, namely the testimony and submissions at the hearing. Did the Applicant refer to the recording of the hearing to confirm all the facts brought to the knowledge of the GD?

[42] The GD is not compelled to, in its decision, refer to each piece of evidence in the file or provided at the hearing.

[43] The GD referred to Dr. Corrigan's finding that the Respondent had mild osteoarthritis in her knee (paragraphs 23 and 49 of the GD decision) and noted that there were no reports submitted that state whether or not the Appellant was able to work. The GD also stated that, in Dr. Corrigan's opinion, it would be difficult for her to work on her feet all day. The GD did not fail to take these elements into consideration.

[44] As regards the horse-riding accident in 2010, the GD refers to this in paragraphs 26, 40, 42, 52, and 69 of its decision. In paragraph 52, the GD states that:

> [*translation*]
> The medical evidence submitted regarding the Appellant's physical condition after 2010 in relation to her back must be carefully assessed because she fell off a horse in 2010 and this seems to have caused her symptoms to increase. The Tribunal must evaluate the Appellant's condition on December 31, 2008.

[45] The GD did not seem to have reconciled the severity of the Respondent's physical disability with her activities after December 2008, more specifically, the fact that she rode a horse in 2010.

[46] The GD did not look into why the drug Effexor was not included with those listed by Dr. Chow in his 2012 report; however, I don't see how this would be an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before it.

[47] The GD found that the Respondent has been without a doctor since 2013. The Applicant’s claim implies that the Respondent does not have prescriptions, thus [*translation*] "suggesting a condition that is not severe or prolonged". The GD did not find that the Respondent has been without prescriptions since 2013. Had the Applicant attended the hearing, it would have been able to question the Respondent on the subject.

[48] The GD found that the Respondent is "essentially illiterate". The Applicant submits that there is a lack of evidence to confirm this, yet it did not attend the hearing. Indicating that the Respondent was bilingual, and had filled out the forms and written her letters herself are arguments that the Applicant should have presented at the hearing before the GD.

[49] The GD's finding that the state of the Respondent's mental functions was irreversible was not clearly explained; however, was it made in a perverse or capricious manner or without regard for the material before it?

[50] The Applicant is arguing that there are many errors of fact. The only ones on which the DG seemed to have based its decision and that were possibly made in a perverse or capricious manner or without regard for the material before it are:

(a) [*translation*] "Dr. Chow's 2012 report also states that the Appellant would need to see a psychiatrist" (paragraph 70 of the GD decision).

(b) The severity of the Respondent's physical disability and her activities after December 2008, more specifically her going horse-back riding in 2012.

(c) [*translation*] "The state of the Appellant's mental functions is irreversible" (paragraph 70 of the GD decision).

[51] Upon review of the appeal file, the GD’s decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that one of the grounds of appeal has a reasonable chance of success. The Applicant has raised a question relating to an erroneous finding of fact, the answer to which could lead to the setting aside of the contested decision, more specifically described above in paragraph [50].

CONCLUSION

[52] The Tribunal grants leave to appeal before the Tribunal’s AD.

[53] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[54] I invite the parties to make submissions on: a) whether a hearing should be held, b) the type of hearing, and c) the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division