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

Citation: *J. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 76

Tribunal File Number: AD-15-1092

BETWEEN:

J. P.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

HEARD ON February 11, 2016

DATE OF DECISION: February 15, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	J. P.
Counsel for the Appellant	Eric Katzman
Representative for the Respondent	Laura Penney
Counsel for the Respondent, observing	Hasan Junaid

INTRODUCTION

[1] The Appellant claimed that he was disabled by back and ankles injuries, and ongoing pain that resulted from these injuries, when he applied for a *Canada Pension Plan* disability pension. The Respondent refused his application 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 hearing and on July 31, 2015 dismissed the appeal.

[2] On October 19, 2015 the Appeal Division of the Tribunal granted the Appellant leave to appeal the General Division decision to the Appeal Division of the Tribunal. The Appellant argued that the General Division decision contained errors that fell within section 58 of the *Department of Employment and Social Development Act* and the appeal should be allowed. The Respondent argued that the General Division decision was reasonable, and defensible on the law and the facts, and as such the appeal should be dismissed.

STANDARD OF REVIEW

[3] Both parties presented arguments regarding whether a standard of review analysis should be applied in this matter. The leading case on the issue of what standard of review is to

be applied by a Court in reviewing a decision is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. The correctness standard of review is to be applied to questions of jurisdiction, and questions of law that are of importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

[4] In *Attorney General of Canada v. Jean*, 2015 FCA 242 the Federal Court of Appeal seemed to suggest that the Appeal Division of the Social Security Tribunal should not subject appeals before it to a standard of review analysis, but should determine whether any grounds of appeal as set out in section 58 of the *Department of Employment and Social Development Act* should succeed.

[5] 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 to grant leave to appeal a decision of the General Division. Section 59 of the Act states what remedy can be granted on an appeal (the section is set out in the Appendix to this decision).

[6] The parties' representatives relied on the *Jean* decision. Counsel for the Appellant contended that the appeal should be allowed in this case because the General Division decision was based on erroneous findings of fact made without regard to all of the material before it, which is a ground of appeal in section 58 of the Act. He also contended that the reasons for the decision were deficient, and did not explain why the decision was made.

[7] The Respondent's representative argued that the wording of section 58 of the Act suggests what amount of deference is owed to the General Division decision upon review, and that while an error of law would not require that the Appeal Division show any deference to the General Division decision, as this appeal involved questions of mixed law and fact, some deference to the General Division was owed.

[8] The Act is silent regarding the amount of deference that is to be shown to the General Division on questions of mixed fact and law. I am not persuaded that questions of mixed fact and law are to be treated the same as pure questions of law. An appeal to the Appeal Division is not a hearing *de novo*. The Appeal Division does not hear evidence at first instance, and does not assess this, nor make findings of credibility. This is for the trier of fact, the General Division. Hence, the General Division is owed deference on factual matters. If a an error of mixed fact and law results in an erroneous finding of fact then the Appeal Division should show deference to the General Division decision. If, however, an error of mixed fact and law results in the incorrect law being applied to the facts, the Appeal Division should show no deference to the General Division and this error should be treated as an error in law (see *Housen v. Nikolaisen* 2002 SCC 33). In this case, the Appellant did not suggest that the incorrect law was applied. Hence, I must decide if the decision was based on an erroneous finding of fact that was made without regard to the material that was before the General Division.

ANALYSIS

[9] Leave to appeal was granted on five different grounds. They are each analysed below.

The Appellant's Use of Medication

[10] First, leave to appeal was granted on the basis that the General Division may have erred by not considering the impact of side effects of medication on the Appellant's capacity to work. In particular, the decision set out that the Appellant testified that he had difficulty with focusing and concentrating as a result of his medication. He was not able to drive as a result. Counsel for the Appellant argued that although this testimony was summarized in the decision, the General Division based its decision on an erroneous finding of fact made without regard to all of the material before it when it did not conclude from this evidence that the Appellant, as a result of taking medication, was not capable of pursuing any substantially gainful occupation.

[11] Conversely the Respondent submitted that the Appellant's ability to drive was not an issue in this proceeding, as none of his work experience or training required that he be able to

do so, and this would not be required for sedentary work. The representative also referred to specific portions of the General Division decision that set out the evidence regarding this issue to support her argument that it was considered. The representative argued that when all of the evidence and the decision were examined as a whole, no error was made. In the alternative, the representative suggested that if such an error was made, it would not impugn the entire decision.

[12] I acknowledge that the decision set out, in its summary of the evidence, that the Appellant suffered side effects from his medication regarding his ability to focus and concentrate. The General Division considered the Appellant's evidence, and weighed all of the oral evidence with the written evidence in making its decision. It is for the General Division, as the trier of fact, to receive and weigh the evidence. It is not for an appellate body to reweigh the evidence or to substitute its view of the persuasive value of the evidence (*Gaudet v. Attorney General of Canada* 2013 FCA 254). I am also satisfied that the Appellant's inability to drive does not necessarily lead to the conclusion that he could not perform any substantially gainful occupation. Therefore, the General Division made no erroneous finding of fact in this regard.

The Appellant's Attempts at Self-employment

[13] Leave to appeal was also granted on the basis that the General Division decision may have been based on an erroneous finding of fact made without regard to all of the material before it as it may not have considered the evidence presented regarding the Appellant's attempts to run his own business. In *Inclima v. Attorney General (Canada)*, 2003 FCA 117 the Federal Court of Appeal decided that where there is work capacity, a claimant must show that efforts to obtain or maintain work were not successful because of the disability in order to receive a *Canada Pension Plan* (CPP) disability pension. In this case, the General Division based its decision, in part, on its finding of fact that the Appellant did not make any attempts to obtain work within his limitations prior to the Minimum Qualifying Period (the date by which a claimant must be found to be disabled in order to receive the disability pension). In this case, the Minimum Qualifying Period (MQP) was December 31, 2011 or November 30, 2012 with

proration. The Appellant worked after he sustained the injuries on modified duties, and attempted to start his own business in 2014.

[14] The Appellant argued that his evidence regarding the unsuccessful attempt to run his own business in 2014 demonstrated that he was not able to obtain or maintain work, and the General Division erred by not so concluding. Further, he argued that because he underwent four surgeries between the accident in 2009 and the end of 2012, he was unable to attempt to work during this time. The Appellant contended that the General Division decision contained an error as it did not consider this evidence.

[15] In response, the Respondent argued that the General Division did not err by not considering this evidence, as the decision focused on the Appellant's capacity to pursue substantially gainful work at the MQP, not in 2014 which was at least two years after that date. In addition, the representative suggested that the fact that the Appellant could not run his own business did not automatically lead to the conclusion that he was not able to complete any sedentary work.

[16] The General Division decision correctly set out the law regarding a claimant's obligation to try to obtain or maintain employment within his limitations. In this case, the General Division considered evidence regarding this issue around the time of the MQP. This is the time that is to be considered to determine if a claimant is disabled under the CPP. It made no error in doing so. I am not persuaded that the General Division ignored the Appellant's evidence regarding his attempt to run his own business as it was referred to in the decision. As this evidence related to a time after the MQP however, it was not necessary for the General Division to analyse this evidence in any detail. Accordingly, I am satisfied that the General Division made no error as it stated the law correctly, and applied the relevant facts to the law.

[17] I also agree with the Respondent's argument that one must not necessarily conclude that because the Appellant could not run a home-based business, he was unable to do any sedentary work at all.

The Appellant's Educational Limitations

[18] Leave to appeal was also granted on the basis that the General Division may have erred by not considering that the Appellant graduated from high school taking "low level" courses, had been diagnosed with Attention Deficit Disorder, and had learning difficulties. Counsel for the Appellant argued that because of the learning difficulties and his limited education, the Appellant would not be able to retrain for sedentary work. He further argued that, in addition, the General Division should have considered that all of the Appellant's work experience was in manual labour. As a result of not considering this, the Appellant contended that the General Division did not apply the principles set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248 as it did not consider a real world approach to the issue before it.

[19] The Respondent argued that when the decision is examined along with the record, including the recording of the hearing, it is clear why the General Division decision did not provide a detailed analysis of the Appellant's learning and academic difficulties. She referred to the transcription of part of the hearing that was produced in the Respondent's written submissions. This transcription made it clear that during the hearing there was lengthy discussion regarding the Appellant's diagnoses, "low level courses" and educational challenges. The transcription also set out why the General Division did not consider this issue to be material to the matter at hand.

[20] On appeal the decision in question is to be considered in the context of the record and the materials filed. In addition, in *Simpson v. Canada (Attorney General)*, 2012 FCA 82 the Federal Court of Appeal set out clearly that a decision need not refer to every piece of evidence and argument raised. I am satisfied that this issue was canvassed in detail at the General Division hearing, and that when the decision is examined in the context of the hearing and the materials filed, the General Division made no error regarding this issue.

[21] I also accept the Respondent's argument that the *Villani* decision does not set out a rigid list of factors that are to be examined to decide if a claimant is disabled under the CPP; rather it states that a claimant is to be looked at in a "real world" context, where their personal characteristics and medical conditions are to be considered together. In this case the General

Division referred to this decision, and analysed the evidence in accordance with these principles. The General Division made no error in doing so.

Substantially Gainful Occupation

[22] The Appellant was also granted leave to appeal on the basis that the General Division may have erred by not considering if any work that the Appellant could do was substantially gainful. Counsel for the Appellant disagreed that the decision of *Butler v. MSD* (April 27, 2007), CP21630 (Pension Appeals Board) referred to in the General Division decision was relevant to this matter. He also argued that the General Division should have considered and weighed the Appellant's evidence that he would only have been able to work approximately two hours per day, and concluded that this would not have been a substantially gainful occupation. Hence, he submitted, the Appellant was disabled under the CPP.

[23] The Respondent's representative argued that the General Division did consider the Appellant's testimony about how much he thought he could work, but that this testimony was hypothetical and directed toward the time of the hearing and not the MQP. Accordingly, it was not an error to not place much weight on this evidence. She further submitted that the General Division decision was based, at least in part, on the medical evidence near the time of the MQP that stated that the Appellant would be able to work with restrictions. As such the General Division did not err.

[24] The Appellant's testimony that he thought he could only work for about two hours each day was reported in the General Division decision. The medical evidence that suggested that the Appellant could work with restrictions near the time of the MQP was also reported. I am satisfied that the General Division considered all of this evidence and weighed it in reaching its decision in this matter. Again, it is not for the Appeal Division of the Tribunal to reweigh the evidence to reach a different conclusion. While I appreciate that the Appellant may disagree with how the evidence was weighed, the appeal cannot succeed on this basis.

[25] Similarly, the General Division made no error in referring to the *Butler* decision. The general principles set out in that decision were relevant to this matter, as in both cases the claimant complained of ongoing pain.

Regularity

[26] Finally, leave to appeal was granted on the basis that the General Division may have erred in law as it did not consider if the Appellant's disability was regular. In *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 the Federal Court of Appeal confirmed that predictability is the essence of regularity under the definition of severe in the CPP. Counsel for the Appellant argued that in this case, there was evidence that the Appellant was not able to work on a regular basis, and as such he should have been found to be disabled. In contrast, the Respondent argued that the General Division decision canvassed factors related to the Appellant's capacity to work predictably, for example when it summarized the evidence regarding his work on modified duties. The representative argued that the General Division decision considered all of this evidence when it concluded that the Appellant did not demonstrate that he was incapable regularly of pursuing any substantially gainful occupation.

[27] I am not persuaded, on balance that the General Division erred in its consideration of this issue. The evidence regarding the Appellant's injuries, their effect on his ability to function, his return to work on modified duties and his later attempt to run a business are clearly set out in the decision. The General Division reached its decision after considering all of the evidence and submissions that were before it. I also accept that the decision need not refer to each and every argument that was presented to it. The reasons for decision need to be such that the parties can understand what decision was made and why it was made (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. This was accomplished.

CONCLUSION

[28] The Supreme Court of Canada decided (*Newfoundland Nurses'*) that a decision must be examined together with the reasons to determine if it falls within the acceptable range of possible outcomes that are defensible on the facts and the law. In this case, I am not persuaded that the General decision was outside of this range. The decision summarized the evidence before it, considered the written and oral evidence, and reached a decision that is detailed, intelligible and understandable. It is defensible on the facts and the law.

[29] The appeal is dismissed for these reasons.

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.