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

Citation: *M. Q. v. Minister of Employment and Social Development,* 2016 SSTADIS 106

Tribunal File Number: AD-15-1140

BETWEEN:

M. Q.

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 March 1, 2016

DATE OF DECISION: March 8, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant	M. Q.
Counsel for the Appellant	Kristy Fleming
	Anita Wong
Counsel for the Respondent	Faiza Ahmed Hasan

INTRODUCTION

[1] The Appellant claimed that he was disabled by post-concussion syndrome, chronic fatigue, pain and other medical conditions when he applied for a *Canada Pension Plan* disability pension. The Respondent denied 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 pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division held a hearing in person and on July 27, 2015 dismissed the appeal.

[2] On November 9, 2015 the Appellant was granted leave to appeal. He argued that the General Division erred as it did not consider whether the post-concussion syndrome would have prevented him from being able to retrain, did not consider that he had a reasonable explanation for not retraining for alternate work, based its decision on an erroneous finding of fact that his family doctor reported that he could not work in his trained field when he also reported that he was unable to work at all, erred by speculating that he would be able to work in some capacity with counselling, retraining and accommodations, and erred in law as it considered his capacity to work at a future Minimum Qualifying Period (the date by which a disability pension claimant must be found to be disabled in order to receive a *Canada Pension Plan* disability pension). In

contrast, the Respondent argued that the General Division did not err as claimed, or in the alternative that any such error was not fatal to the decision rendered.

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

a) The complexity of the issues under appeal;

b) The fact that the appellant might be the only party in attendance;

c) The fact that the appellant or other parties were represented;

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

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

ANALYSIS

[4] The Tribunal is governed by the *Department of Employment and Social Development Act*. Subsection 58(1) of the Act states that 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 therefore decide if the General Division decision contains an error as set out in section 58 of the Act such that the decision cannot stand. Each ground of appeal argued by the parties is dealt with below.

Whether Post-concussion Syndrome Prevented Retraining

[5] In order to be disabled under the *Canada Pension Plan* (CPP) a claimant must be unable not just to pursue the work he was doing prior to becoming disabled, but any substantially gainful occupation. Accordingly, if a claimant is found to have some capacity to work, he is obliged to demonstrate that attempts to obtain or maintain work were unsuccessful due to his disability (*Inclima v. Canada (Attorney General)*, 2003 FCA 117). In this case, the General Division found as fact that the Appellant had some capacity to retrain and work in another field but did not do so. Based in part on this finding of fact, it decided that the Appellant was not disabled. The Appellant argued that the General Division erred when it concluded that he had the capacity to retrain as it did not consider that the symptoms of post-concussion syndrome and his other conditions would prevent him from being able to successfully retrain for work. Counsel for the Appellant argued that although Dr. McMaster concluded that the Appellant would be able to retrain after assessing him on one occasion, the Appellant's family physician, Dr. Golisky wrote at least two reports that stated that the Appellant was unable to work. She argued that these reports should have been given more weight and been persuasive on this issue. In addition, because the Appellant must nap every day, he would not be able to effectively complete any retraining course.

[6] With this argument, the Appellant essentially asks this tribunal to reevaluate and reweigh the evidence that was put before the General Division. This is the province of the trier of fact. The tribunal deciding an appeal ought not to substitute its view of the persuasive value of the evidence for that of the Tribunal who made the findings of fact – *Simpson v. Canada (Attorney General),* 2012 FCA 82. Hence, the General Division did not err in this regard.

Application of the *Inclima* Decision

[7] The Appellant also argued that the General Division erred in its application of the legal principles from *Inclima* and subsequent cases to the facts before it. Both counsel acknowledged and I agree that *Inclima* stands for the principle stated above. Counsel for the Appellant argued, however, that decisions subsequent to *Inclima* modified its application (see for example *Boyle v. Minister of Human Resources Development*, June 10, 2003 CP 18508 PAB). In these cases, the Pension Appeals Board applied *Inclima* and concluded that because the claimant had a

reasonable explanation for not seeking alternate employment, they could be found to be disabled even though they had not made an attempt to obtain or maintain alternate work. I find this argument persuasive. When examining a disability claimant as a whole, one should consider if he attempted work within his limitation, or if not, why he did not do so. He should not be faulted for not seeking alternate work if he had a reasonable reason for not doing this. Counsel contended that in this case the Appellant reasonably did not seek out retraining or alternate work as his doctor advised him to restrict his mental and physical exertion so that his symptoms were not exacerbated and that the General Division erred by not considering this reasonable explanation for not seeking alternate work. Neither counsel pointed to anything in the General Division decision that demonstrated that it had considered the Appellant's explanation for not seeking alternate work and whether that was reasonable. I am persuaded that this was an error in law.

Dr. Golisky's Report

[8] In December 2011 Dr. Golisky wrote to the Appellant's insurer and reported that the Appellant was not able to work. In June 2014 he wrote that the Appellant was not able to work in his chosen field. In that same letter Dr. Golisky also stated that he did not believe that the Appellant would be able to be gainfully employed in the future. Counsel contended that the General Division based its decision on an erroneous finding of fact when it concluded that the Appellant could not work only in his chosen field; counsel for the Respondent contended that this conclusion was a reasonable one to be drawn from the 2014 letter.

[9] Section 58 of the Act provides for a ground of appeal when a decision is based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. I am satisfied that any error made with respect to this finding of fact was not made perversely or capriciously. The General Division considered Dr. Golisky's evidence as well as the other medical and oral evidence before it. I am also not satisfied that any such error was made without regard to the evidence that was before the General Division.

Capacity to Work with Counselling, Retraining and Accommodations

[10] The General Division concluded that the Appellant would be able to work with further counselling, retraining and accommodations by an employer. This was based on the assessment conducted by Dr. McMaster. The Appellant contended that this was an error as the Appellant had undergone eight counselling sessions and it was not clear to the medical professionals that further counselling would provide the Appellant with any benefit. This was reported in the decision, along with the General Division's conclusion that it was not clear if further counselling would be beneficial. The Respondent contended that the fact that counselling had not been beneficial was only one factor considered in reaching this conclusion.

[11] I am satisfied that on balance the General Division erred in reaching this conclusion. The evidence was not clear that the Appellant would benefit from further counselling. This conclusion was also speculative. There was no evidentiary basis to find that with retraining, counselling and accommodation the Appellant would be able to pursue a substantially gainful occupation – these resources were not available to the Appellant at the time of the hearing, and there was no evidence that they would be made available to him in the future. The evidence, in fact, was that the Appellant could not afford to pay for further counselling. I am persuaded that this finding of fact was made perversely or without regard to all of the evidence that was before the General Division.

Minimum Qualifying Period

[12] The General Division decision correctly stated that the Appellant's MQP is calculated to be December 31, 2017.This is a date in the future. Hence, the General Division was not able to determine if the Appellant was disabled on or before this date. So, it was to have considered if he was disabled on or before the date of the hearing (July 8, 2015). I am satisfied that it did not do so, but turned its mind to whether the Appellant was disabled in the future.

[13] The General Division decision stated that it had to decide if the Appellant was disabled on or before the MQP, stated to be December 31, 2017. It also considered if he had a capacity to work in the future, after retraining, counselling and with accommodations. The fact that the

General Division considered the most up to date medical information before it does not lead to the conclusion that it turned its mind to whether he was disabled at the date of the hearing. Instead, it speculated about what his condition might be in the future. This was an error in law.

CONCLUSION

[14] For the reasons set out above I am satisfied that the General Division decision contained errors as set out in section 58 of the Act. I acknowledge that the Supreme Court of Canada, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 stated that the result and the reasons must be considered together to determine if the decision in question falls within an acceptable range of outcomes. In this case I am satisfied that the decision does not fall within that range as the decision contained errors of law and other errors under section 58 of the Act.

[15] Section 59 of the Act sets out the remedies that can be granted by the Appeal Division. In this case, evidentiary issues remain. The matter is referred back to the General Division for reconsideration. To avoid any possibility of an apprehension of bias it should be considered by a different General Division Member and the decision of July 27, 2015 should be removed from the record.

Valerie Hazlett Parker
Member, Appeal Division