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

Citation: *A. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 135

Date: April 8, 2016

File number: AD-15-1071

APPEAL DIVISION

Between:

A. P.

Appellant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

PERSONS IN ATTENDANCE

Appellant	-	A. P.
Appellant's Representative	-	Stephen Yormack/Adele Clewlow
Respondent's Representative	-	Penny Brady

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan*, (CPP), disability pension. The Respondent denied the application and maintained its denial upon reconsideration. The Appellant appealed from the reconsideration decision to *Social Security Tribunal*, (the Tribunal), and on September 2, 2015 a Member of the Tribunal's General Division issued a decision denying appeal.

[3] The General Division found that the Appellant did not have a disability that was severe and prolonged as defined by subparagraph 42(2)(a)(i) of the CPP. The Appellant successfully sought leave to appeal the General Division decision.

ISSUE(S)

[4] Several inter-related issues arose for determination, namely whether the General Division: -.

a. failed to address the Appellant's subjective level of pain?
b. is under a general duty to assess an applicant's subjective level of pain? And if so, does the failure amount to an error law?
c. misinterpreted and misquoted the Appellant's oral testimony, thus committing an error of fact?
d. took medical evidence out of context, thereby committing an error of fact?
e. committed errors law and errors of mixed fact and law that included misapplying the law with respect to training and failing to address the Appellant's credibility.

PRELIMINARY ISSUES

[5] The Appellant's counsel raised two preliminary issues on which the Appeal Division gave an oral ruling. First, Counsel for the Appellant submitted that the hearing should be a

hearing *de novo,* with the Appeal Division accepting and considering new evidence. Second, he submitted that the Appellant's case involved chronic pain syndrome, therefore, the General Division was required to make credibility findings on her testimony about her subjective level of pain. Counsel for the Appellant argued that as the General Division did not make credibility findings it erred and the only appropriate resolution was for the Appeal Division to remit the matter back to the General Division for determination of this issue.

[6] The Respondent's representative, while agreeing that the hearing before the Appeal Division was not in the nature of judicial review; disagreed that it, or indeed any hearing before the Appeal Division, should proceed as a hearing *de novo.* Citing *Tracey v. Canada (Attorney General)* 2015 FC 1300, the Respondent's representative argued that "new evidence" was not included as a ground of appeal under the Tribunal's governing statute. Therefore, new evidence was not admissible on an appeal before the Appeal Division. Furthermore, the *Department of Employment and Social Development Act,* (the DESD Act), provides for a specific process by which "new evidence" could be introduced, namely, an application to rescind or amend a decision pursuant to section 66 of the DESD Act. The Respondent's representative made the further submission that the hearing should proceed as scheduled with all new evidence being excluded.

[7] On the issue of credibility, the Respondent's representative submitted that a credibility assessment was not always required.

Ruling

[8] Having heard the submissions of both Counsels, the Appeal Division ruled as follows:-

a. The jurisdiction of the Appeal Division is defined by subsection 58(1) of the DESD Act. Recent decisions of the Federal Court and Federal Court of Appeal have clarified the scope of the Appeal Division jurisdiction and enquiry, making it clear that the Appeal Division is limited to enquiring only whether the General Division had breached any of the provisions set out under this subsection

b. *Tracey* has clarified the nature of the appeal before the Appeal Division as being neither a judicial review nor a hearing *de novo.*

c. *Tracey* also clarified that new evidence is not ordinarily admitted at an Appeal Division hearing. As the Appeal Division found that there was no rational basis for

admitting the proposed new evidence it would be excluded and the hearing would proceed on that basis.

d. The question of credibility and the requirement to assess same is a legal issue and one that was live at the hearing.

[9] Counsel for the Appellant expressed his disagreement with the Appeal Division ruling, arguing that the Appellant ought to be allowed to present *viva voce* evidence.

STANDARD OF REVIEW

[10] The only discussion regarding "standard of review" came from the Respondent. In her written submissions, the Respondent's representative argued that the Appeal Division should show deference to the General Division on factual questions or questions of mixed fact and law. On questions of law, no deference was owed to the General Division. She argued that this was the intention of Parliament when it created the Appeal Division.

[11] The Respondent's representative made the further submissions that, considered in its entirety, the General Division decision is correct in law and when the Appellant's evidence and the applicable law are considered, the General Division decision is "intelligible, transparent and reasonable".

[12] The Appeal Division is mindful of the recent decisions of the Federal Court and the Federal Court of Appeal which run counter to the position taken by the Respondent's representative. These decisions dictate that the Appeal Division should confine its enquiry to a determination of whether the General Division has breached any of the provisions of ss. 58(1) of the DESD Act without engaging the principles or language of "judicial review"[1] The decisions take the view that this was the legislator's intent when it created the Appeal Division and that it is the legislator's intent that is paramount. This position was underscored in the recent decision of the Federal Court of Appeal in *Minister of Citizenship and Immigration v. Huruglica et al* 2016 FCA 93. In *Jean, Maunder,* and in *Tracey* the Courts were at pains to

[1] *Canada (Attorney General) v. Jean; Canada (Attorney General) v. Paradis,* 2015 CAF 242 (CanLII), 2015 FCA 242; *Maunder v. Canada (Attorney General),* 2015 FCA 274; In *Tracey v. Canada (Attorney General)* 2015 FC 1300. The Federal Court of Appeal and the Federal Court observed that the scope of the Appeal Division's jurisdiction is set out in section 58 of the DESD Act.

specifically delimit the ambit of the Appeal Division as excluding "judicial review." The Appeal Division is bound by the decisions of the Federal Court and Federal Court of Appeal, however, the status of and the applicability of the substantial body of case law built up under the former regime remains to be clarified.

THE APPLICABLE STATUTORY PROVISIONS

[13] Appeals to the Appeal Division are governed by Sections 56 to 59 of the DESD Act. The grounds of appeal are set out at ss. 58 (1) and are:-

58(1) 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, 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

[14] Per ss. 58 (2) leave to appeal is granted only where the Appeal Division is satisfied that the appeal has a reasonable chance of success. The Appeal Division granted leave to appeal with respect to the following arguments:-

- The General Division was under a duty to assess the Appellant's subjective level of pain and to make credibility findings accordingly;
- The General Division committed errors of fact or of mixed law and fact by misinterpreting and misquoting the Appellant's evidence as well as taking medical evidence out of context.
- the General Division may have misapplied the law with respect to training.

ANALYSIS

Was the General Division under a duty to assess the Appellant's subjective level of pain and to make credibility findings?

[15] Counsel for the Appellant made two interrelated submissions under this plank. First, he contended that the Appellant suffers from "chronic pain syndrome", which he described as an "inorganic condition". He submitted that the condition is recognised in law as a disabling condition; and he made the further submission that by not considering whether the Appellant was disabled by chronic pain syndrome, the General Division misdirected itself and misapplied

the law. Counsel's second submission was that the General Division had both a general duty to assess credibility and the specific duty to assess the Appellant's credibility in order to determine whether or not to accept the Appellant's evidence regarding how affected she is by her chronic pain syndrome.

[16] In response, the Respondent's representative countered that the General Division was under no duty, either general or specific, to assess credibility. The Respondent's representative took the further position that the Appellant had not established that she suffers from a chronic pain syndrome; and that the General Division did not err when it preferred the medical evidence to the Appellant's *viva voce* testimony.

[17] In *Nova Scotia Workers' Compensation Board v. Martin,* (2003) 2 S.C.R. 504, the Supreme Court of Canada, (the SCC), offered the following definition of 'chronic pain syndrome":-

> Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques.

[18] In *Martin,* a case involving equality rights, the SCC found that the blanket exclusion of chronic pain from the Nova Scotia workers' compensation scheme infringed s15(1) of the Canadian Charter of Rights and Freedoms, which infringement was not justifiable under s. 1 of the Charter.

[19] The Respondent's representative argued that the Appellant was required to establish that she suffers from a chronic pain syndrome. She pointed to the absence of any mention in the medical documentation to this condition. The difficulty with this position is that while the documentation does not refer to a "chronic pain syndrome;" it does refer to "chronic pain" and it is not clear to the Appeal Division that the *Martin* definition makes a distinction between "chronic pain syndrome" and "chronic pain." . For instance, the CPP Medical Report refers to

"chronic low back pain" and relates it to the Appellant's medical diagnosis.[2] (GT1-40) As well, the Appellant has been described as suffering from chronic degenerative disc disease; (GT1-493) and "chronic back pain secondary to an L4-5 disc herniation in 2006." (GT2-3)

[20] Even if the medical documentation, does not refer to "chronic pain syndrome" the Appeal Division is of the view that in this case the enquiry cannot end at this point, there being clear reference in the medical documentation to the Appellant suffering from chronic pain as set out above. This having been said the case law is clear that in cases of chronic pain or chronic pain syndrome an applicant is still required to establish that the pain prevented him from pursuing regularly any substantially gainful occupation. *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33.

[21] Counsel for the Appellant maintained that the General Division erred in law because it heard the Appellant's evidence concerning her chronic pain but did not address it in the decision. He submitted that the omission went to a critical point and is, therefore, fatal to the decision. For her part, the Respondent's representative countered that the General Division did consider the Applicant's testimony about her chronic back pain but preferred the medical evidence.

[22] With respect the Appeal Division is not persuaded that the General Division did any more than record the Appellant's testimony concerning her chronic pain and her subjective levels of pain in respect of her back as this is not mentioned in the Analysis section of the decision. At the same time, for the reasons that follow, the Appeal Division is not persuaded that this was an error of law that was fatal to the General Division decision.

[23] It is clear that the General Division decision turned on its finding that there was no independent medical evidence that supported that the Appellant was incapable regularly of pursuing any substantially gainful employment. On this point, the General Division writes:-

> [33] "there is no record of any physician or other health professional advising the Appellant that she must not engage in any occupation. Rather, and the Respondent accepts this, the Appellant was cautioned against working in any occupation that required lifting more than 10 kgs.,

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[2] See Box 4 of the Medical Report:-

"unable to do all aspects of her job at Purolator due to chronic low back pain." (GT1-40)

> repetitive bending or twisting or prolonged periods of standing or sitting without at least briefly alternating positions. Her own family doctor, in the last report on record from her, stated that the Appellant was capable of clerical/administrative work and concluded that the Appellant's condition was prolonged but not severe."[3]

[24] The Tribunal record supports the conclusions of the General Division. The family physician's report to which the General Division refers is dated December 13, 2013. In the report, Dr. McKay states of the Appellant:-

> She has chronic back pain secondary to an L4-5 disc herniation in 2006. She had a remote laminectomy l4-5 at age 18 by history. She re-injured herself in a fall in 2008. She had a small recurrent disc herniation at l4-5 in 2011 on MRI. She is able to work but she is not able to lift over 75 lbs which is required for her job at Purolator. She is capable of clerical/administrative work. Her diagnosis is chronic mechanical low back pain. Her condition is severe but not prolonged. (GT2-3)

[25] The Appeal Division finds that in the context of an absence of further documentary evidence that could rebut the diagnoses of the Appellant's family physician the General Division did not err in law by not addressing either the Applicant's chronic back pain and her subjective assessment of it. Furthermore, subsequent findings of the General Division obviated the need for it to assess in greater detail the Appellant's back pain.

Was the General Division under a duty to assess the Appellant's credibility?

[26] Counsel for the Appellant argued that the General Division was under both a general duty to make credibility findings as well as a specific duty to make credibility findings regarding the Appellant's subjective assessment and description of her level of pain. He relied on the decision of the Pension Appeals Board in *MNHW v. Densmore* (June 1, 1998) CP 2389 as support for his position.

[27] The Respondent's representative countered that the General Division is under no general duty to assess credibility; that no such duty derives from either case law or the governing Act. She submitted that while the DESD requires the General Division to provide reasons for its

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[3] In a report addressed to the Appellant's counsel, Dr. Mckay stated that,

I rarely see A. P. in the office. The last time I saw her was in June 2013 regarding an unrelated problem. She has chronic back pain secondary to an L4-5

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decisions, which reasons must be transparent, intelligible and demonstrate reasonableness the DESD clearly did not impose a general duty to consider credibility. The Respondent's representative also asserted that the General Division was did not have a specific duty to make a credibility assessment concerning the Appellant's evidence.

[28] As stated earlier, counsel for the Appellant relied on *Densmore* for its position regarding the General Division and its duty to assess the credibility of the Appellant. In *Densmore,* the PAB found the appellant a credible witness. However, having regard to the following, the Appeal Division is of the view that the PAB did not base its decision solely on its credibility findings.

> "Mrs. Densmore has impressed us a genuine person, eager to lead a normal and active life. Her work history as related by her husband, lays to rest any suggestion that she is a malingerer. None of the doctors to whom she was expose, have doubted her sincerity. In particular, the two physiatrists who got involved, one on the behalf of the Minister and the other at the instance of the Respondent, agree on the diagnosis of chronic pain."

[29] The PAB made it clear that objective medical evidence was desirable, issuing the following caution:-

> We caution also that it is incumbent upon the person who applied for benefits, to show that treatment was sought and efforts were made to cope with the pain. As a result, it will be desirable, although by no means essential in all cases, for an applicant, and helpful to the Board that evidence of a psychiatric or psychological or physiatric nature be adduced from medical practitioners who by virtue of their experience and general expertise in this difficult area of medicine are able to assist the Board.

[30] Accordingly, the Appeal Division is not persuaded that, as submitted by Counsel for the Appellant, that *Densmore* is support for the proposition that a credibility assessment is always required in cases of chronic pain. Counsel for the Appellant did not refer the Appeal Division to any other case law that could support such a finding; nor is the Appeal Division aware of any. In the view of the Appeal Division what emerges from *Densmore* is the statement that in cases of chronic pain syndrome a credibility assessment may be required on a case by

case basis.[4] It would seem to the Appeal Division that the need arises only where there is an absence of the supportive, objective medical evidence that is required by *Villani v. Canada (Attorney General)* 2001 FCA 248. In the Appellant's case the General Division did have medical evidence on which it actually relied. This evidence, however, did not support the Appellant's position.

[31] With regard to the question of whether the General Division was under a specific duty to determine and pronounce on the credibility of the Appellant, given this discussion the Appeal Division is not persuaded by the arguments of Counsel for the Appellant that it was. In any event, the General Division did comment on the Appellant's credibility. It commented specifically on the Appellant's evidence of Dr. Taylor's advice as well as on her denial that she had told WSIB that she was ready to return to work. In the view of the General Division, there was ample reason to doubt and to reject her testimony. Reference is made to the following paragraphs of the decision:-

> [34] The Appellant's evidence that Dr. Taylor told her that all work must stop if she starts to feel numb in her foot or leg is a limitation that is not contained in his report. The Appellant was referred to Dr. Taylor, at the request of her legal representative, for the specific purpose of documenting her restrictions for WSIB purposes. The Tribunal does not accept that such a significant limitation with such dire consequences as testified to by the Appellant would be omitted from Dr. Taylor's report when written and would not have been corrected in the five years since then. The Tribunal finds it inconceivable that this limitation would not be documented anywhere in the hundreds of pages submitted in support of the Appellant's application. The Appellant's evidence was not credible on this point and she has not established by a balance of probabilities that she is subject to such a limitation.
> [35] Before the WSIB in January 2014 the Appellant expressed her desire to return to modified work. When asked about it at the hearing she testified that WSIB must have been "crazy" to think she could work at a sedentary position. The Appellant testified that if she obtained employment she would only be able to guarantee attendance once a week. The Tribunal does not accept her evidence on this point. It notes that she

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[4] This case again raises the difficult issue of whether an applicant for benefits may successfully invoke the definition of a disability contained in the Act based on the chronic pain syndrome, and if so, under what circumstances and on what evidence may she do so.
The issue is difficult because its resolution depends upon the view which the Board ultimately takes of the genuineness of what are strictly subjective symptoms. In effect, the judgment call, made generally without the assistance of objective clinical signs, will be one of credibility on a case by case basis, as to the severity of the pain complained of.

> was able to complete a four month upgrading course from September 2014 to December 2014. It was from 9 am to noon five days a week.

[32] As the trier of fact, the General Division is charged with hearing the evidence of the parties, weighing the evidence and rendering decisions based on the facts and the law. Absent error, as determined pursuant to subsection 58(1) of the DESD, it is not the role of the Appeal Division to reweigh the evidence with a view to reaching a conclusion that better favours an appellant. In light of the General Division finding that the medical evidence did not support the Appellant[5], the Appeal Division is not persuaded that it erred in law whether in law or in fact or in mixed law and fact with respect to the credibility findings that it did make.

Did the General Division misquote, misinterpret and take evidence out of context?

[33] Counsel for the Appellant submitted that the General Division committed errors of fact by misinterpreting and misquoting the Appellant's evidence and by taking the medical evidence out of context. He made particular reference to its findings concerning the omission from Dr. Taylor's report of any mention that the Appellant should stop work if her foot or leg became numb. As stated earlier, the Appeal Division is not persuaded that the General Division's findings in regard to Dr. Taylor's medical report contained any error

Did the General Division err when it concluded that the Appellant could pursue regularly any substantially gainful occupation?

[34] Counsel for the Appellant also argued that the General Division erred when it found that the Appellant had not met her onus to show that she was unable to pursue regularly any substantially gainful occupation. In addition to its findings concerning the absence of objective medical evidence, the General Division made findings about the Appellant's compliance with prescribed medical attention and her efforts to retrain. Relying on *Romanin v. MHRD* (November 18, 2004), CP 21597, Counsel for the Appellant submitted in the leave application that the General Division erred in equating attendance in a retraining programme to retained

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[5] GT1-87 contains the statement that the Appellant told her family physician, Dr. McKay, that she was ready to go back to work and could lift the baby and groceries without problems.

work capacity. The Appeal Division finds no error in either the General Division's statement of or its application of the relevant case law on these points.

[35] The Appeal Division notes that the General Division did not so much equate attendance at school or retraining with retained work capacity as noting the brevity of the Appellant's attempt to retrain and its insufficiency as a basis of determining whether the Appellant was unable to pursue regularly any substantially gainful occupation. The Appeal Division finds that no error arises from this determination.

CONCLUSION

[36] The Appeal Division granted leave to appeal on the basis that the Appellant had raised an arguable case. Having heard the arguments of the parties, and on the basis of the above discussion, the Appeal Division dismisses the appeal.

[37] The Appeal is dismissed.

Hazelyn Ross
Member, Appeal Division