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

Citation: ***E. M. v. Minister of Employment and Social Development,*** **2016 SSTADIS 159**

Date: May 4, 2016

File number: AD-15-1231

Appeal Division

BETWEEN:

E. M.

Applicant

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's Representative - Patrick Castagna

Respondent's Representative - Vanessa Luna

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] The Appellant applied for a *Canada Pension Plan*, (CPP), disability pension. The Respondent denied the application initially, and maintained its denial upon reconsideration. The Appellant appealed to the Social Security Tribunal, (the Tribunal). On August 13, 2015 the Tribunal's General Division denied the appeal. The Appellant applied for leave to appeal the General Division decision, which leave was granted by a different member of the Appeal Division who found that the Appellant had advanced grounds that potentially had a reasonable chance of success.

ISSUE(S)

[3] The issues that arise for determination are:-

a. Did the General Division make an erroneous finding(s) of fact in relation to the status of the Applicant's back pain after he injured his knee?

b. Did the General Division disregard the testimony and written evidence that was before it when it found as a fact that the Appellant had withdrawn from the WSIB Labour Market Re-entry programme without justification?

PRELIMINARY ISSUES

Degree of Deference

[4] Counsel for the Appellant made no submissions on the question of standard of review or degree of deference that the Appeal Division should accord to the General Division decision. For her part, the Respondent's representative made extensive submissions on the question. After outlining the legislative history of the relevant sections of the *Department of Employment and*

Social Development Act, (the DESD Act), the Respondent's representative compared the legislative provisions relevant to the powers on appeal of the former Board of Umpires and the Appeal Division. She submitted that the Appeal Division was modeled after the former and thus should exercise a similar degree of deference vis-à-vis decisions of the General Division as that exercised by the former Board of Umpires with respect to decisions of the former Boards of Referees.

[5] In the submission of the Respondent's representative, the Appeal Division ought to accord deference to the General Division on questions of fact and mixed fact and law; with no deference on questions of law. In relation to the questions at issue in this appeal, they being questions of fact, the Appeal Division should show deference to the General Division decision.

[6] The Appeal Division is mindful of 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] These 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.

[7] 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 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.

[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.

THE APPLICABLE STATUTORY PROVISIONS

[8] 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

[9] 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 may have erred when it concluded that there was "no evidence any condition that pre-existed the Appellant's right knee injury in February 2003 significantly worsened subsequent to February 2003 and prior to the end of the Appellant's MQP." [Decision at para 51]
- The General Division may have erred in fact when it determined that the Appellant withdrew from a WSIB Labour Market Re-entry programme without justification.

ANALYSIS

Did the General Division make an erroneous finding of fact in respect of the Appellant's back pain?

[10] In relation to this issue, Counsel for the Appellant argued that the General Division paid scant attention to the Appellant's back pain when there was evidence that the Appellant had two disabling conditions, namely, the knee injury of 2003 and the pre-existing back condition. He argued that while the General Division found that there was no evidence that the Appellant's back pain had worsened after his 2003 knee injury there was ample documentary evidence to establish that it had. Counsel for the Appellant pointed to the medical report

completed by the Appellant's family physician in 2012 and the 2003 report of Dr. Annisette, the orthopaedic surgeon. Counsel submitted that both Dr. Annisette and the Appellant's family physician identified back pain as one of the Appellant's disabling conditions and he argued that the restrictions placed on the Appellant made it impossible for him to find work. Counsel for the Appellant asked the Appeal Division to accept as fact that the Appellant's knee injury alone was sufficient to allow the conclusion that his back pain necessarily worsened.

[11] The Minister's representative rebutted this submission. She argued that paragraphs 10, 11 and 18 of the decision clearly show that the General Division was alive to the Appellant's back injury.

[12] Upon consideration of the arguments of the parties as well as the Tribunal record, the Appeal Division concluded that the General Division did have regard to the evidence and testimony concerning the Appellant's back injury and surgery. (decision at paragraph 51)

[13] In the view of the Appeal Division, what Counsel for the Appellant is really contesting is that portion of the General Division's conclusion at paragraph 51 that there was no evidence that prior to the MQP any of the Appellant's pre-existing conditions had worsened significantly after he had injured his right knee. This is borne out by the fact that counsel underlined the word "no" when he cited paragraph 51 in the submissions that accompanied his application for leave, which paragraph reads:-

> [51] There is no evidence any condition that pre-existed the Appellant's right knee injury in February 2003 significantly worsened subsequent to February 2003 and prior to the end of the Appellant's MQP. In this regard, the Appellant was not seen or treated for back pain, left forearm pain, wrist pain or right thumb pain subsequent to the Appellant's knee injury in 2003, or contemporaneous to his MQP, or for many years thereafter, if at all. Further, the Appellant's only treatment for knee pain subsequent to physiotherapy shortly after left knee surgery in August 2005 has been medication and a knee brace.

[14] The Minister's representative argued that the important words in the sentence were "significantly worsened." She drew a difference between there being no evidence and there being no evidence of significant worsening of the pre-existing conditions. She made the further submission that it was not that the General Division found that there was no evidence the

Appellant's back condition had worsened but that it found no evidence of significant worsening. When asked, the Minister's representative explained that the significance of this distinction lay in the inability of the Appellant to establish that he was incapable regularly of pursuing any substantially gainful employment. The Minister's representative expanded her argument noting that the medical evidence that predated the Appellant's MQP shows that the focus of the Appellant's medical consultations was his knee and not his back and his 2003 consultation with Dr. Annisette was with respect to his knee and not his back. She submitted that the dearth of medical information respecting the Appellant's back prior to the MQP supported the General Division's findings.

[15] The Appeal Division concurs. In the view of the Appeal Division it is logical to interpret the General Division's statement as stressing the absence of evidence of significant worsening in the appellant's pre-existing conditions as opposed to "no evidence" of worsening. Furthermore, the Appeal Division finds that the medical documentation prior to the December 31, 2005 MQP was indeed focused on the Appellant's knees. The Appeal Division finds that in these circumstances it is reasonable to expect that if the Appellant's knees had become a real concern, there would have been the concomitant medical evidence to support this.

[16] The Appeal Division is not persuaded that the statement by Dr. Yovanovich in September 2003 medical report that the Appellant had begun to use a "Fentanyl patch for chronic mechanical back pain" means that he was disabled by back pain on or before December 31, 2005. Neither is the Appeal Division persuaded by the September 2013 report by Dr. Annisette. (GT1-98/99 &335). In this report Dr. Annisette states that the Appellant suffers from "severe degenerative disc disease of the lumbar spine and osteoarthritis of the right knee. He confirmed that the Appellant had been suffering from this disease since December 2005 or earlier. (GT1- 99). However, this conclusion was undermined by earlier findings that included x-rays taken in November 2005 that showed that the Appellant's disc disease was mild to moderate.

[17] AS the result of the foregoing, the Appeal Division finds that the General Division's conclusions concerning the status of the Applicant's back pain prior to the MQP was not based

on erroneous findings of fact that it made conversely or perversely or without regard for the material before it.

Did the General Division err with respect to its findings respecting the Appellant's retraining efforts?

[18] Counsel for the Appellant submitted that the General Division also argued disregarded the Appellant's testimony and written evidence that was before it when it found as a fact that the Appellant had withdrawn from the WSIB Labour Market Re-entry programme without justification. The Appeal Division finds that this submission is not well-founded.

[19] The Appeal Division finds that there was ample evidence in the Tribunal record to support the General Division finding. For example in a letter dated April 15, 2004,(GT1-464) the Appellant's WSIB counsellor detailing his non-attendance in upgrading classes and reminding the Appellant of his obligations under WSIB policy. The Appellant's counsellor detailed what was considered to be issues of non-cooperation, namely:-

"In review of recent events 1 note the following issues of non-cooperation:

- Failure to return to school/voluntary withdrawal from school on December 11, 2006.
- Failure to attend your LMR progress meeting pre-scheduled for December 20, 2006.
- Failure to communicate to myself and your LMR Case Manager that you a) withdrew yourself from school on December 11, 2006, and b) rationale to support the decision to-date.
- Failure to call your LMR Case Manager to explain why you would not be attending your pre-scheduled meeting on December 20, 2006 to-date.

Your actions as noted above are considered evidence of non-cooperation in your LM} Plan. Should you not contact me immediately to discuss what has transpired, the following will happen:

- The L MR plan will be terminated and your benefits will be adjusted to reflect the Suitable Employment and Business (SEB) earnings that have been outlined in the LMR assessment (SEB identified in plan is National Occupational Classification code 2162).
- You would not be entitled to any further LMR services (i.e. a new LMR assessment or plan, or the reactivation of a terminated assessment or plan).

In the meantime, I have suspended your benefits effective December 11, 2006. The last cheque you cashed, which was issued to you on December 14, 2006 in the amount of $1445.84 covered the pay period from November 27, 2006 to December 11, 2006. You will not be receiving further benefits until you explain what has transpired and all issues are resolved. (GT1-464/465 & 483)"

[20] There is evidence that the Appellant's training file was closed due to his non-participation in the training programme that had been devised for him. (GT1-636-639) on January 23, 2007, the Vocational Rehabilitation Consultant wrote to the Appellant advising him of the decision to discontinue his retraining due to his non-participation. Counsel for the Appellant contended that he did not withdraw voluntarily, but that he did so because he did not have capacity to complete the training programme. The Appeal Division rejects this submission, noting that the Appellant always had the ability to discuss his situation with his WSIB advisors and to adjust his situation as needed. (GT1- 465). For these reasons, the Appeal Division is not persuaded that the General Division based its finding regarding the Appellant's withdrawal from the Labour Market Re-entry Programme.

[21] Furthermore, the Appeal Division rejects the submission of Counsel for the Appellant that the Appellant's restrictions rendered him incapable regularly of pursuing any substantially gainful employment. The General Division noted that the Appellant did not accept modified employment that had been offered by the employer, nor did he look for work after his retraining was discontinued. (Paras. 13 -14)

[22] In *A.P. v. MHRSD,* (December 15, 2009) CP 26308 (PAB) the Pension Appeals Board stated that "an essential element of qualifying for a disability pension is efforts of serious efforts by the applicant to help himself or herself." A proposition that has found expression in several other cases including *Klabouch v. Canada (Minister of Social Development),* 2008 FCA 33. The Tribunal record that was before the General Division does not support that the Appellant made serious efforts to help himself. Accordingly, the Appeal Division finds that the General Division did not err in regard to its finding that the Applicant had not discharged his onus to establish that he was entitled to a CPP disability pension.

CONCLUSION

[23] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division