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

Citation: *H. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 286

Tribunal File Number: AD-14-314

BETWEEN:

H. D.

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: Janet Lew

HEARD ON: March 10, 2016

TYPE OF HEARING: Teleconference

DATE OF DECISION: July 29, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

Representatives for the Appellant	Bozena Kordasiewicz (counsel) and Alexandra Victoros (counsel)
Representative for the Respondent	Duane Schippers (counsel)

OVERVIEW

[1] This is an appeal of the decision of the General Division dated April 24, 2014. The General Division determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that she did not have a severe and prolonged disability on or before the end of her minimum qualifying period of December 31, 2013.

[2] Counsel for the Appellant filed an application requesting leave to appeal to the Appeal Division on July 8, 2014. Leave to appeal was granted on May 5, 2015, on three grounds: firstly, the General Division failed to follow or properly apply the "real world" analysis set out in *Villani v. Canada (Attorney General*), 2001 FCA 248; secondly, it did not consider all of the medical issues and evidence; and thirdly, it failed to assess the Appellant's disability at the end of her minimum qualifying period.

[3] A preliminary issue arose regarding the format and the procedure which the appeal should follow.

ISSUES

[4] The issues before me are as follows:

1. As a preliminary issue, what is the scope of the appeal?
2. Did the General Division do any of the following:
    a. fail to consider all of the medical issues and evidence?

b. fail to assess the Appellant's disability at her minimum qualifying period? or

c. fail to follow or apply the "real world" analysis set out in *Villani*?

3. If the General Division erred, what is the appropriate disposition of this appeal?

HISTORY OF PROCEEDINGS

[5] The Appellant applied for a Canada Pension Plan disability pension on November 25, 2011. The Respondent denied her application initially and upon reconsideration. The Appellant appealed the reconsideration decision and the appeal was heard by the General Division.

[6] The General Division heard the appeal in person. It acknowledged that the Appellant's medical conditions required monitoring and future treatment, but ultimately found that "the main issues that were cited by the medical report completed when applying for [Canada Pension Plan] benefits were resolved or are now being managed adequately". The General Division also wrote that "[w]hen considering the totality of the evidence, the Tribunal does not find the evidence upholds a determination the Appellant's medical conditions were severe at the time of her [minimum qualifying period]".

[7] Referring to *Villani* and *Klabouch v. Canada (Social Development)*, 2008 FCA 33, the General Division found that the Appellant had the capacity for some type of employment at her minimum qualifying period, and that she had not shown any effort to seek any type of appropriate employment. It therefore dismissed the appeal.

[8] Leave to appeal was granted on the three grounds cited above.

[9] A videoconference hearing before the Appeal Division proceeded on October 9, 2015. The Appellant's counsel confirmed that two new medical reports had been filed with the Appellant's leave application: a report dated April 3, 2014 of an otolaryngologist and a report dated June 3, 2014 from a rheumatologist. Counsel submitted at that hearing that the

two new reports should be allowed as they met the requirements under subsection 66(1) of the *Department of Employment and Social Development Act* (DESDA) that they had not been previously discoverable by the exercise of reasonable diligence and the reports could lead the General Division to change its original decision. I determined that, while the latter might be so, the Appellant should have filed an application to rescind or amend with that Division whose decision she endeavoured to have rescinded or amended.

[10] Counsel for the Appellant initially sought a hearing *de novo* before the Appeal Division, but abandoned this position and indicated that the Appellant would rely on the grounds upon which leave had been granted as the basis for her appeal.

ISSUE ONE: SCOPE OF APPEAL

[11] The parties agree that the nature of the appeal before the Appeal Division does not consist of a hearing *de novo,* a judicial review or standard of review analysis. The Appellant is of the position that, once leave to appeal has been granted, the wide range of remedial authority conferred upon the Appeal Division under subsection 59(1) of the DESDA gives rise to a legitimate expectation that the Appeal Division will review all of the evidence before the General Division to substitute its own decision in place of that of the General Division, if necessary. In other words, the appeal necessarily involves a reassessment of the evidence that was before the General Division. She dismisses any notion advanced by the Respondent that appeals before the Appeal Division should be patterned after those conducted by the former Employment Insurance umpires and that it should conduct a "circumscribed review", which takes into account the following:

(a) respective roles and expertise of the General Division and the Appeal Division;

(b) Parliament's intent – the nature of the Appeal Division appeal; and

(c) the degree of deference to be accorded to the General Division.

[12] Despite the similarities in the language under the (now repealed) relevant sections of the *Employment Insurance Act* and subsection 58(1) of the DESDA, the Appellant's

counsel submits that there are significant differences between the employment insurance and the Canada Pension Plan disability schemes. She argues that appeals before the former Board of Referees and the Umpires are largely facts-driven, disability appeals generate voluminous records, and the benefits under the *Canada Pension Plan* are of greater duration. She contends that had Parliament intended the Appeal Division to conduct standard of review analyses, this would have been embodied in the governing legislation. As the statute is silent, she argues that the Appeal Division ought to conduct a reassessment and resolve any ambiguities in the Appellant's favour.

[13] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal suggested that a standard of review analysis is not appropriate when the Appeal Division is reviewing appeals of decisions rendered by the General Division. The Federal Court of Appeal endorsed this approach in *Maunder v. Canada (Attorney General)*, 2015 FCA 274. The Federal Court of Appeal suggests that, whereas the review and superintending powers of "federal boards" is provided for by section 18.1 of the *Federal Courts Act* and subsection 28(1) of the *Federal Courts Act*, there are no similar provisions in the DESDA conferring a review and superintending power upon the Appeal Division.

[14] Notwithstanding the fact that the courts have traditionally held that umpires should conduct a standard of review analysis (although the *Employment Insurance Act* also did not confer any review and superintending powers upon umpires) and despite the fact that the language in subsection 58(1) of the DESDA was taken from subsection 115(2) of the *Employment Insurance Act* (since repealed), the Federal Court of Appeal cautions against "borrowing from the terminology and the spirit of judicial review in an administrative appeal context" and that an "administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or … "federal boards".

[15] As the Federal Court of Appeal has pointed out in *Jean*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the DESDA, where it hears appeals pursuant to subsection 58(1) of the DESDA. That provision sets out the grounds of appeal and subsection 59(1) of the DESDA sets out the powers of the Appeal Division. The only grounds of appeal under subsection 58(1) are as follows:

(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.

[16] The Federal Court of Appeal recently addressed this issue in greater detail in *Canada (Minister of Citizenship and Immigration) v. Huruglica et al.,* 2016 FCA 93, where it indicated that the determination of the role of a specialized administrative body is "purely and essentially a question of statutory interpretation" (at paragraph 46).
Although the decision was in the context of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, undertaking the same exercise would require an analysis of the words of the DESDA in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the DESDA and its object.

[17] Ultimately, the Federal Court of Appeal determined in *Huruglica* that there was nothing in the wording of the IRPA, read in the context of the legislative scheme and its objectives, that support the application of a standard of reasonableness or of palpable and overriding error to any findings of fact or mixed fact and law made by the Refugee Protection Division (RPD). At paragraph 78, the Federal Court of Appeal held that, at that stage of its analysis, the role of the Refugee Appeal Division (RAD) was to intervene when the RPD was wrong in law, in fact or in fact and law. This translated into an application of the correctness standard of review.

[18] After conducting its statutory analysis, the Federal Court of Appeal concluded that, with respect to findings of fact and mixed fact and law, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. After carefully considering the RPD decision, the RAD is to carry out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done

this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. The Federal Court of Appeal determined that no other interpretation of the relevant statutory provisions was reasonable.

[19] Clearly, I "must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context" and restrict myself to determining whether the General Division, in the proceedings before me, committed the alleged errors.

ISSUE TWO: GROUNDS OF APPEAL

(a) Did the General Division consider all of the issues?

[20] The Appellant's counsel argues that the General Division erred in law in failing to have regard to the principles set out in *Taylor v. Minister of Human Resources Development* (July 4, 1997), CP4436 (PAB) and *Canada (Minister of National Health and Welfare) v. McDonald,* (October 7, 1988), CP01527 (PAB), in that it failed to consider all of the medical issues and evidence in their totality. The Appellant suffers from multiple health problems, including thyroid cancer, asthma, chronic obstructive pulmonary disease, pain and numbness in her face and the right side of her neck, lower back pain radiating down to her lower extremities and resulting in physical restrictions, anxiety and depression, sleep apnea and daytime fatigue and exhaustion. The Appellant's counsel suggests that the General Division focused on the Applicant's medical conditions which somewhat improved with bariatric surgery, such as diabetes, high blood pressure and elevated cholesterol, and that it neglected to consider the impact of the other medical issues which had arisen by the end of her minimum qualifying period.

[21] The General Division discussed most of these conditions in its analysis. However, it did not specifically refer to the thyroid cancer, asthma, pain or numbness in the face and right side of neck, sleep apnea, daytime fatigue and exhaustion. I granted leave to appeal on this ground on the basis that the General Division may not have fully considered all of the

medical issues and evidence in their totality, in assessing whether the Applicant's disability could be considered severe by the end of her minimum qualifying period. I indicated, however, that the Appellant would need to point out that there was some evidence before the General Division which showed that the medical conditions existed prior to the end of the minimum qualifying period.

[22] The Respondent's counsel contends that there was "very little documentary evidence" to suggest that each of the disabilities either existed or were severe. The Appellant's counsel argues that the Appellant relies on both the documentary record and the Appellant's testimony before the General Division. She notes that the Appellant testified that her pressing medical issues in 2013 and 2014 were her obesity and thyroid cancer, and that her other medical issues therefore appeared to be only secondary issues.

[23] A review of the hearing file before the General Division indicates the evidence regarding the various medical issues is as follows:

(a) **thyroid cancer** – there are references throughout to a family history of cancer. On July 11, 2012, when seen by Cindy Mather, the Appellant reported that she was being investigated for "thyroid r/o cancer?" (GT1-132) and on November 16, 2011, a colonoscopy was recommended, given the strong family history of colon cancer (GT1-161/384). In March 2014, a biopsy of her thyroid was suspicious for papillary carcinoma (GT4-3).

(b) **asthma** – The Appellant was first seen by a respirologist in March 2011 and seen in follow-up on July 12, 2011 and February 23, 2012. She diagnosed her as having moderate COPD and asthma. The respirologist recommended that she continue with her medications and also recommended that she be off work until construction at her workplace was completed (GT1-153/318/389, -187/295 and -191/214/286). In a visit on November 6, 2012, the respirologist indicated that she would see the Appellant in follow-up in one year (GT1-417). The family physician's various clinical records and letters dated April 13, 2012 and May 16, 2012, indicate that the Appellant suffers from a variety of conditions, including asthma. The April 2012 letter indicates that the

conditions do not allow her to return to work at that time, although the family physician did not indicate how he came to this opinion (GT1-110/147).

(c) **pain or numbness in the face and right side of neck** – there are references throughout the medical records of varying degrees of pain or numbness in these areas. For instance, the neurologists' consultation reports of November 14, 2011 and March 23, 2012 indicate that the Appellant was experiencing episodes of right head pain (GT1-148, -162) along with right-sided constant numbness on the right side of her face and neck pain (GT1-50). When seen at Mental Health Services in November 2011, the Appellant reported having chronic pain which began in April with a tingling, burning sensation in her face and neck (GT1-330). In his letter dated April 1-3, 2012, the family physician confirmed right-sided neck/arm pain (GT1-110/147). In June 2012, the Appellant reported to an internist that her main complaint was pain on the right side of her face and discomfort in her neck (GT1-277 and -278);

(d) **sleep apnea** – there are references throughout the medical records that the Appellant has sleep apnea. Indeed, she attended at the Sleep Clinic in Kitchener, where she was confirmed as having mild to moderate sleep apnea (GT1-173 and GT1-183. When seen by an internist, she reported that she had had her driving licence withdrawn, probably on the basis of severe obstructive sleep apnea (GT1-277);

(e) **daytime fatigue and exhaustion** – On June 28, 2011, the Appellant reported to her family physician that she had been feeling extreme fatigue for the past two weeks (GT1-293). When seen two days after that at the Sleep Clinic, her primary complaint was being fatigued "all the time" (GT1-188).

[24] The General Division indicated that the Appellant was required to prove that she had a severe and prolonged disability on or before December 31, 2013. It appears that the General Division did not consider any medical issues that first or arose or were diagnosed after this date, as they would have been irrelevant to the issue of whether they caused or

contributed to a severe disability. The General Division likely did not consider the biopsy results (GT4-3) that she might have thyroid cancer for this reason.

[25] The remainder of the Appellant's complaints pre-dates the end of the minimum qualifying period. The Respondent points out that the General Division reviewed each of the complaints. However, it is insufficient to review the complaints without undertaking any analysis, when the Appellant complains of and regards them as among her primary complaints.

[26] The General Division did not address the Appellant's asthma, although it may be that the General Division discussed it under the umbrella of chronic obstructive pulmonary disorder. Although COPD and asthma are similar, there are some differences between the two. That said, the evidence does not seem to suggest that the Appellant's asthma was a factor which affected her capacity regularly of pursuing any substantially gainful occupation. While there was a contraindication for her to be exposed to certain environments or to be engaged in physically demanding labour because of her asthma, the evidence suggests that her asthma otherwise did not impair her capacity.

[27] Despite suggestions by the Appellant that the pain and numbness on the right side of her face and neck, despite being referred to various specialists for investigation, and despite recognizing submissions from the Appellant's counsel in this regard, the General Division did not address this particular complaint, nor how the pain and numbness might have affected the Appellant's capacity regularly of pursuing any substantially gainful occupation. It is unclear whether the General Division might have been dismissive that the Appellant could have been experiencing severe right-sided pain and numbness, as the MRI results were inconclusive, but if so, it should have set this out.

[28] Although it is unclear from the records of the Sleep Clinic as to when the Appellant began to experience chronic fatigue or how long it might have persisted, sleep and fatigue were also significant complaints for the Appellant and may have had some impact on her capacity regularly of pursuing any substantially gainful occupation. The Appellant testified that she "did not sleep well at night at all" because of her pain (29:25 of recording). In her submissions, the Appellant noted that, at her minimum qualifying period, she had difficulty

sleeping due to pain and problems using a CPAP machine. Yet, apart from mentioning these complaints in its summary of the evidence, the General Division did not address them in its analysis.

[29] Generally, a decision-maker need not refer to each and every piece of evidence and argument before it. However, the decision should demonstrate that the General Division considered at least the Appellant's primary complaints or condition. It is not apparent that it did so in this case. The General Division's oversight to consider whether these complaints might have impacted on the Appellant's capacity constitutes an error.

(b) Did the General Division consider the Appellant's disability at the end of the minimum qualifying period?

[30] The question as to whether the General Division considered all of the issues and evidence before it overlaps with the issue as to whether it considered the Appellant's disability at the end of her minimum qualifying period. The General Division did not appropriately consider the Appellant's disability at the end of her minimum qualifying period, as it overlooked what the Appellant described as her primary complaints which existed by that time. Although the Respondent argues that the Appellant was still required to prove that she had undertaken efforts to seek and maintain employment, this presupposes that she had the requisite capacity. If the General Division did not properly consider all of the Appellant's disabilities, it could not have appropriately determined whether indeed she might have had the requisite capacity regularly of pursuing any substantially gainful occupation.

(c) *Villani* "real world" analysis

[31] The Appellant's counsel further submits that although the General Division properly set out the test under *Villani*, it erred in law by failing to apply the "real world" analysis when it did not consider the Appellant's personal characteristics such as her age, limited work experience in an office environment, and whether she is employable in the "real world". Given that I have found that the General Division failed to consider the totality of the evidence, I need not consider this issue.

CONCLUSION

[32] The evidence indicates that the Appellant was experiencing several medical issues prior to the end of her minimum qualifying period. However, some of these issues were not considered by the General Division, including what the Appellant described at various times as her primary medical complaints. The appeal is therefore allowed.

Pursuant to section 59 of the DESDA, the matter is referred to a different member of the General Division for reconsideration.

Janet Lew

Member, Appeal Division