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

Citation: *A. J. v. Minister of Employment and Social Development*, 2016 SSTADIS 298

Tribunal File Number: AD-15-348

BETWEEN:

A. J.

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: Janet Lew

HEARD ON: May 9, 2016

DATE OF DECISION: August 5, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

APPELLANT:	V. Balasubramaniam (counsel) and A. Poologarajah (university student – observer)
RESPONDENT:	Christine Singh (counsel) and S. Johnson (articled student) (both via videoconference)

OVERVIEW

[1] This case is about whether the General Division based its decision of March 16, 2015 that the Appellant could not be found disabled under the *Canada Pension Plan*, on an erroneous finding of fact that it made without regard to the material before it, when it concluded that a gastroenterologist's report dated March 7, 2011 was "the only medical evidence that refers back to the date when the Appellant last qualified for a disability pension". The Appellant has a minimum qualifying period that ended on December 31, 2009.

BACKGROUND & HISTORY OF PROCEEDINGS

[2] I granted leave to appeal on the sole ground identified above, that the General Division may have based its decision on an erroneous finding of fact that it made without regard to the material before it.

[3] The Appellant relied on his submissions in the leave materials, as well as the medical records filed on September 17, 2015, and submissions filed on October 7 and November 27, 2015. The Respondent filed submissions on September 18, 29 and October 26, 2015. The Respondent argued that the Appeal Division ought not to interfere with the decision of the General Division, as it is overall reasonable. The Respondent sought a section 4 determination under the *Social Security Tribunal Regulations* on the admissibility of some of the Appellant's medical records, as he argued that some of the records had not been before the General Division.

[4] On November 6, 2015, I rendered a section 4 determination regarding the admissibility of some of the Appellant's medical records filed in support of the appeal. I ruled that the only evidence which would be admissible in the appeal before me would be the evidence which had been before the General Division, unless it directly addressed any of the grounds of appeal enumerated under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). I also ruled that the hearing of the appeal would not be a *de novo* hearing, and that I would not be conducting any reassessment of the evidence.

[5] The Appellant's counsel sought an in-person hearing, on the basis that, notwithstanding my section 4 determination, it would be otherwise difficult for him to address some of the Appellant's clinical records, some of which he says are illegible and continue to be "contested as inadmissible". The appeal before me is proceeding in person, pursuant to section 21 of the *Social Security Tribunal Regulations.*

ISSUES

[6] The following issues are before me:

a. is a standard of review analysis appropriate and if not, how should the Appeal Division conduct the appeal of the decision of the General Division?

b. did the General Division base its decision on an erroneous finding of fact that it made without regard to the material before it?

c. if the General Division based its decision on an erroneous finding of fact that it made without regard to the material before it, what is the appropriate relief?

STANDARD OF REVIEW

[7] Both parties agree that the Appeal Division should not conduct a standard of review analysis of decisions of the General Division: *Canada (Attorney General) v. Jean,* 2015 FCA 242.

[8] The Appellant's counsel argues that the jurisprudence of the Supreme Court of Canada and the federal courts have no applicability here, as "remedial measures should be on a broader basis".

[9] The Respondent's counsel argues that, while neither a correctness nor reasonableness standard applies, the Federal Court of Appeal has provided some guidance on how appeals of an appellate administrative tribunal ought to be conducted. The Respondent's counsel submits that, in accordance with the principles set out in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Appeal Division must look to its enabling legislation and determine legislative intent. She argues that, unlike the immigration context in which *Huruglica* operated, the DESDA provides very narrow grounds of appeal where there are alleged erroneous findings of fact. Counsel maintains, in particular, that unless the findings of fact are made either in a perverse or capricious manner, or without regard for the material before it, under paragraph 58(1)(c), the Appeal Division owes deference to the General Division on findings of fact.

[10] I agree that direction and guidance as to how appeals ought to be conducted can be found in the enabling legislation. As the Federal Court of Appeal pointed out in *Jean,* the mandate of the Appeal Division is conferred to it by sections 55 to 68 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.

[11] Accordingly, I should restrict myself to determining whether the General Division committed any of the alleged errors under subsection 58(1) of the DESDA.

ALLEGED ERRONEOUS FINDING OF FACT

[12] At paragraph 42, the General Division wrote:

> . . . The Tribunal gave significant weight to the evidence provided by Dr. Kreaden, a gastroenterologist. On March 7, 2011, he stated that after following the Appellant for 4 years and facing some treatment resistance, they had found a regimen that allowed the Appellant's ulcerative colitis to be under excellent control. The gastroenterologist stated that the Appellant's condition had been stable for 2 years. He gave a very good prognosis and stated that the Appellant should be encouraged to go back to work**. This is the only medical evidence that refers back to the date when the Appellant last qualified for a disability pension. The Tribunal notes that several medical reports submitted to the Trib unal are dated a f ew years past the App ellant's MQP and do not of f er a retrospective assessment.** Therefore, the Tribunal gave them limited weight. (My emphasis)

[13] The Appellant's counsel submits that the General Division erred when it wrote that there was no medical evidence that referred "back to the date when the Appellant last qualified for a disability pension", as there was in fact medical evidence in the hearing file which dated from 2007 to 2009 (and for that matter, to 2010). He argues that, given the General Division's finding about the lack of medical evidence dating to the minimum qualifying period, the General Division could not possibly have reviewed or considered this evidence. He also argues that this evidence addressed several medical issues, and not just the Appellant's ulcerative colitis, his primary disabling condition. He maintains that, as a consequence, the General Division also neglected to address the totality of the evidence and consider the cumulative impact of these medical issues on the Appellant.

[14] The Respondent's counsel submits that it is implicit from this paragraph that the General Division must have considered the 2007 to 2010 medical records. At paragraph 42, the General Division also referred to the medical evidence from the Appellant's family physician, the gastroenterologist and the Appellant himself and the Service Canada Questionnaire for Disability Benefits. At paragraph 45, it indicated that it considered the totality of the evidence. Finally, at paragraph 26, it specifically mentioned medical notes for

the period from August 2013 to April 2014, and indicated that they were illegible. The Respondent's counsel further submits that, when assessing the severity of the Appellant's disability, the General Division also considered other issues, such as the Appellant's personal characteristics and his efforts at obtaining and maintaining employment and whether he had been unsuccessful by reason of his health condition. The Respondent's counsel maintains that the Appellant's arguments essentially amount to a request for a reassessment of the evidence, which is not the function of the Appeal Division.

[15] The Appellant's counsel responds that the General Division could not possibly have reviewed the 2007 to 2010 medical notes, when the General Division mentioned only the notes from August 2013 to April 2014. The Appellant's counsel notes that the 2007 to 2010 medical notes were also in the same handwriting as the later notes, so it would seem reasonable that, had the General Division reviewed them, it would have also noted that there were records dating back to 2007. These clinical records are found at GT1-74 to GT1-167.

[16] The decision of the General Division suggests that there was no evidence before it which addressed the Appellant's disability at his minimum qualifying period. The General Division did not refer to nor mention any medical records which are dated earlier than March 7, 2011. It did however specifically refer to several of the gastroenterologist's reports and letters after this date, as well as to a diagnostic examination, reports from a rheumatologist, the Appellant's family physician's medical report dated May 30, 2011, and to the medical notes from August 2013 to April 2014.

[17] As I noted in my leave decision, there were at least three consultation reports which were prepared close to and around the end of the minimum qualifying period, dated January 20, March 19 and August 27, 2009 (at pages GT1-90, GT1-77 and GT1-74 of the General Division hearing file, respectively). Each of these three consultation reports addressed the Appellant's purported primary disabling condition. The gastroenterologist also prepared an Attending Physician Supplementary Statement in May 2009 (at pages GT1-75 and GT1-76). There were also lab test results for January 2009 and March 2009. The Appellant's counsel also reviewed the vast clinical records dating as far back as May 24, 2007. X-rays of the right shoulder and an ultrasound of both shoulders was performed on February 2, 2010,

shortly after the end of the minimum qualifying period (GT1-60). The Appellant's counsel indicates that he did not obtain a medical opinion addressing the cumulative impact of the various medical conditions on the Appellant's overall capacity.

[18] Generally, a decision-maker is not required to refer to each and every piece of evidence and argument before it. However, it should be clear from the decision that it considered an appellant's primary complaints or condition at the material time. It is not altogether apparent that this was the case here, given the General Division's assertion that the only evidence which addressed the Appellant's condition by the end of his minimum qualifying period was the medical report dated March 7, 2011 of the gastroenterologist (GT1-39). In fact, there were no less than three consultation reports dated 2009 and other medical records prepared at around this timeframe. Therefore the General Division erred when it stated that the only evidence at or around the end of the minimum qualifying period was the gastroenterologist's 2011 report.

[19] The Respondent's counsel argues as an alternative that even if the General Division did not consider the earlier medical evidence, the overall medical evidence, particularly the gastroenterologist's March 7, 2011 report, is definitive that the Appellant has not been continuously disabled since the end of his minimum qualifying period. This is so, given the gastroenterologist's opinion that:

> [the Appellant's] long-term prognosis is very good and he should be encouraged to go back to work and this is what he wishes to do. I believe that he probably could go back to full-time work.

[20] On the other hand, the Appellant's counsel indicates that the clinical records disclose that the Appellant suffered from other medical issues, such as bicipital tendinitis. He also argues that I should not place much weight on the March 7, 2011 report, as it reflects the Appellant's condition at a specific moment in time and is not otherwise representative of the Appellant's disability. He also claims that the Appellant's family practitioner provided a more accurate medical assessment, as he has seen the Appellant more frequently. The Respondent's counsel posits that if I should accept the Appellant's

submissions in this regard, the matter be returned to the General Division for a reassessment.

[21] I do not accept the Appellant's position that the gastroenterologist's report of March 7, 2011 warrants little weight. He has regularly followed the Appellant. However, the gastroenterologist saw the Appellant for specific medical purposes and his opinion therefore that the Appellant probably could return to full-time work may have been from this limited perspective.

[22] It would not be appropriate for me at this juncture to conduct a reassessment of the evidence, since the General Division, as the primary trier of fact, is best positioned to assess and make findings on the evidence, and determine whether, after considering also the pre-March 2011 records, it could lead to a finding that the Appellant's disability was severe and prolonged by the end of his minimum qualifying period and that he has been continuously disabled since then.

CONCLUSION

[23] As the General Division does not appear to have considered the totality of the evidence before it, namely, the pre-2011 medical records, the appeal is allowed and the matter remitted to a different member of the General Division for a hearing *de novo.*

Janet Lew
Member, Appeal Division