



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development, v. M. J.* 2016 SSTADIS 295

Tribunal File Number: AD-15-1020

BETWEEN:

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Appellant

and

M. J.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: August 04, 2016

PERSONS IN ATTENDANCE

Respondent: M. J.
Respondent's friend: A. J. (Appellant's daughter)
Appellant/Minister's representative: Sylvie Doire

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), allows the appeal.

[2] The matter is remitted back to the General Division for redetermination.

INTRODUCTION

[3] This appeal is concerned with the manner in which the General Division of the Tribunal assessed and weighed the evidence that was before it. In its decision issued on May 29, 2015 the General Division found that the Respondent was disabled within the meaning of paragraph 42(2)(a) of the *Canada Pension Plan*, (CPP). The Applicant sought and was granted leave to appeal from the General Division decision.

GROUND OF THE APPEAL

[4] Leave to appeal was granted on the basis that the General Division erred in making its decision. Two specific errors of law were identified, namely that:-

- i. The General Division failed to require objective medical evidence of the severity and prolonged nature of the Respondent's main disabling condition, which was found to be asthma.
- ii. The General Division failed to engage in a meaningful analysis of the medical evidence before it and failed to address the absence of medical evidence to support a finding of disability.

[5] Leave to appeal was also granted on the basis that 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. The following were identified as erroneous findings of fact:-

- i. That the General Division did not have any objective medical evidence before it that described the nature, severity, prognosis and treatment of the Respondent's asthma on or near the end date of her minimum qualifying period, (MQP), namely December 31, 2013.
- ii. The existing medical reports did not support the General Division's conclusion that the Respondent's disability was severe and prolonged; and neither was there
- iii. That there was no medical evidence in the Record that was before the General Division to support its finding that the Respondent's efforts to obtain and maintain employment failed by reason of her medical conditions.

ISSUES

[6] The following are the issues to be determined on this appeal.

- a) Was the Respondent required to provide objective medical evidence to substantiate her claim that her asthma condition was severe and prolonged?
- b) Did the General Division err in law by failing to require such objective medical evidence?
- c) Did the General Division fail to engage in a meaningful analysis of the medical evidence before it?
- d) Did the General Division fail to address the absence of medical evidence to support a finding of disability? and
- e) In the absence of supportive medical evidence, did the General Division fail to support its finding that the Respondent's efforts to obtain and maintain employment failed by reason of her medical conditions?

LAW

[7] The grounds of appeal and the jurisdiction of the Appeal Division are set out at section 58 of the *Department of Employment and Social Development, (DESD), Act*. They are:-

58 – Grounds of Appeal – (1) 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.

SUBMISSIONS

[8] Counsel for the Appellant acknowledged that the Respondent has medical difficulties. However, she argued that her difficulties do not meet the criteria for severe and prolonged disability set out in the CPP. Secondly, Counsel for the Appellant argues that the General Division decision was capricious because there had been insufficient, objective medical evidence before it to allow the General Division to come to the conclusion that, on or before her MQP, the Respondent's condition was severe and prolonged.

[9] Counsel for the Appellant recommended that the Appeal Division allow the appeal and return the matter to the General Division for redetermination.

[10] For her part, the Respondent submitted that she meets the CPP test for severe and prolonged disability; that the General Division did not err; and that the Appeal Division should uphold the General Division decision.

ANALYSIS

[11] For the following reasons the Appeal Division allows the appeal and remits the matter back to the General Division for redetermination.

The Respondent was required to provide objective medical evidence of her condition/the General Division should have required objective medical evidence

[12] All applicants for CPP disability benefits are required to provide objective medical evidence of their disabling conditions: *Villani v. Canada (Attorney General)*, 2001 FCA 248. Relying on *Gorgiev v. Canada (Minister of Human Resources Development)*, [2005] F.C.J. No. 284; 2005 FCA 55, Counsel for the Appellant pointed to the necessity for the Respondent to provide objective medical evidence of her condition. In *Gorgiev* the Federal Court of Appeal noted at paragraph 4:-

4. As the Board correctly stated, at paragraph 15 of their reasons, the severity of a disability refers to the capacity of the claimant to work. A finding of severity is not based

on medical diagnosis alone, nor is it based solely on the subjective evidence of the claimant as to the degree of pain suffered when attempting to perform the claimant's usual or customary occupation. Such evidence must always be considered, of course, but it is relevant only to determine whether the claimant is able to perform any substantially gainful employment.

[13] Counsel for the Appellant argued that the only objective medical evidence that was before the General Division was a copy of a medical report from the Respondent's family physician, Dr. Kharjee. This report (GT1-44-47) is dated December 23, 2010, which is some three (3) years before the end of the Respondent's MQP. She submitted that there were no other medical reports in the intervening three years and thus there was little objective evidence on which the General Division could base its finding that the Respondent had a severe and prolonged condition on or before her MQP.

[14] The following medical reports are contained in the Tribunal record:-

1. CPP Medical Report, dated December 23, 2010. (GT1-44 to 47)
2. Eye examination report, dated November 27, 2009, indicating that no diabetic neuropathy had been detected during the examination. (GT1-48)
3. Report from CML HealthCare, dated November 20, 2009, showing results of blood test. (GT1-49)
4. Report from CML HealthCare, dated November 11, 2009. (GT1-50)
5. Report from CML HealthCare, dated November 13, 2009, cholesterol and blood test. (GT1-51)
6. Report from Ontario Breast Screening Programme dated May 25, 2009. No abnormalities suggestive of cancer had been detected. (GT1-52)
7. X-Ray Associates report dated August 27, 2007. Report showed arthritis with slight narrowing of the medial compartment. (GT1-53)
8. X-Ray Associates report dated July 13, 2010, indicating the presence of osteoarthritis of the right knee. (GT1-54)

[15] The Tribunal record shows that the Respondent last worked in accounting in December 2010. (GT1-35). Thus, the only medical report that post-dates her last day of work is the CPP

medical questionnaire. The Appeal Division finds the results of the eye examination and breast screening of little or no relevance to this process as the Respondent has always maintained that it was her asthma that prevented her from pursuing regularly any substantially gainful occupation. She maintained this position before the Appeal Division.

[16] Counsel for the Appellant argued that the Respondent was required to provide objective medical evidence of her health condition. The Appeal Division agrees. This requirement was clearly set out in *Villani* and the line of cases that follow it. Therefore, it is an error of law not to require objective medical evidence. However, this error alone does not necessarily mean that a finding of severe and prolonged disability is vitiated: *Martin v. MHRD* (August 10, 2001) CP 14001. *Martin* is, of course, of persuasive value only but it, like *Densmore v. MNHW* (June 2, 1993) CP 2389, does leave open the door for a determination on highly credible, subjective evidence only.

[17] In the instant case, the only objective, medical evidence concerning the Respondent's main disabling condition was the CPP medical report. As well, the General Division did not make an express, credibility finding regarding the Respondent's testimony. The Appeal Division considered all of the circumstances of the report and concluded that this evidence was not sufficient to support a finding that the Respondent was disabled. The circumstances were:-

1. That the medical report was created three years before the MQP;
2. That it was the only report that commented directly on the Respondent's asthma;
3. That Dr. Kharjee did not state that the Respondent was incapable regularly of pursuing any substantially gainful occupation. He noted that she could not work during an asthma attack;
4. That, Dr. Kharjee noted that the Respondent had had 6 such episodes in 6 months; and
5. There was no other intervening report.

[18] Accordingly, the Appeal Division finds that the Respondent did not meet her onus to provide sufficient, objective medical evidence of her medical conditions.

[19] Furthermore, as set out in *Villani* the General Division had an obligation to require such evidence. While, as submitted by Counsel for the Appellant, the Respondent's oral testimony could form the basis of a favourable decision, the General Division was obligated to explain why it preferred it in the absence of the objective medical documentation in support of a severe disability. As it failed to do so, the General Division erred in law.

The General Division failed to engage in a meaningful analysis of the medical evidence before it and failed to address the absence of medical evidence to support a finding of disability?

[20] The medical evidence set out above was all of the medical evidence that had been before the General Division when it made its decision. (paragraphs 17 to 20) At paragraph 28, the General Division stated the legal test for disability and acknowledged its obligation to consider the *Villani* factors. The General Division then addressed the Respondent's oral testimony. It indicated that the Respondent testified that her asthma was the condition that prevented her from working. The General Division records the Respondent as testifying that her asthma was very bad; that she used a puffer every day; and that she was sometimes confined to her downstairs living room as climbing stairs posed a challenge. The General Division concluded from the Respondent's testimony that she was not employable.

[21] The only other time that the General Division addressed the medical evidence was at paragraph 33, when it discussed the CPP medical report completed by the Respondent's family physician, Dr. Kharjee. The General Division noted that Dr. Kharjee stated that the Respondent had "frequent asthma exacerbation." However, Dr. Kharjee also noted that the Respondent had had 5-6 exacerbations in the last six months. (GT1-44) The General Division did not address the significance of this.

[22] It is clear from the decision that the General Division did not enter into any enquiry or analysis of the Respondent's condition in the intervening period between the CPP report and the end of the MQP. At paragraph 28 of the decision, the General Division stated its conclusion in relation to the Respondent's asthma, noting:-

[28] In this case, the Appellant's primary disabling condition is her asthma and breathing problem, she testified at the hearing that her asthma is very bad and that she is

on puffer every day, she sometimes has to stay downstairs in the living room because going up a few stairs would make her feel like losing her breath... (*Typed as written*)

[23] There is no further analysis of the Applicant's medical conditions. There are only conclusions. For example at paragraph 30 after discussing the *Granovsky* test, the General Division concluded that:-

“...In this case, it is the effect of the Appellant's conditions especially her frequent breathing problem caused by asthma [that] precludes her from doing any type of remunerative employment as she is not able to commit the working time on a regular basis due to her health condition.” (*Typed as written*)

[24] Further, it is clear from paragraph 32 that the decision was written in terms of the Respondent's present as opposed to her pre-MQP condition.

[32] Although the respondent pointed (sic) that the Appellant did not see any specialist for her osteoarthritis, the Appellant stated clearly that the only condition that prevents her from working is her asthma and that situation is getting worse, as she finds herself using the asthma puffers and taking the prôt ozone more often, it is very hard to expect the Appellant to be “regularly of pursuing any substantially gainful occupation.” (*Typed as written*)

[25] The General Division did not address the Respondent's medical conditions and their influence on her ability to pursue regularly any substantially gainful occupation on or prior to her MQP. It stated the legal requirements and then it drew conclusions. The Appeal Division finds that this is an error of law.

[26] It is also clear that the General Division did not address the paucity of medical evidence to support its finding of disability. While the General Division referred to Dr. Kharjee's CPP medical report in its analysis; it made no reference to it being the only report concerning the disabling condition.

[27] The Appeal Division has considered the question of whether this, by itself, constitutes an error of law as submitted by Counsel for the Appellant. The Appeal Division does not agree that it does. In the view of the Appeal Division to make such a finding runs counter to the principle that a decision-maker need not refer to every piece of evidence. However, the Appeal

Division does agree that given the length of time that elapsed between Dr. Kharjee's CPP medical report and the Respondent's MQP, the General Division would have benefited from reports that covered the period December 2010 to December 2013. Reports from this period would have provided a clearer picture of the Respondent's health condition during that time.

The General Division failed to support its finding that the Respondent's efforts to obtain and maintain employment failed by reason of her medical conditions

[28] Counsel for the Appellant submitted that the General Division did not explain how it reached its conclusion that the Respondent could not obtain and maintain employment by reason of her medical conditions. She conceded that the General Division could have made its finding on the basis of the Respondent's oral testimony; however, Counsel for the Appellant argued that the decision did not allow the reader to discern on what basis the General Division arrived at its conclusions. The Appeal Division concurs.

[29] Applicants for CPP disability are required to show efforts at obtaining alternate employment or that their efforts have been rendered nugatory by their medical condition(s): *Klabouch v. Canada (Minister of Human Resources Development)*, 2004 FCA 377. In the face of her testimony that she made no effort to obtain alternate employment, the General Division was required to show how it arrived at its conclusion that the Respondent was a person whose medical condition rendered her unemployable. The General Division failed to do so and, therefore, the Appeal Division finds it committed an error of law.

CONCLUSION

[30] Leave to Appeal was granted on the basis that the General Division may have committed errors of law and may have based its decision on erroneous findings of fact when it concluded that the Respondent met the CPP criteria for a severe and prolonged disability. On the basis of the foregoing analysis, the Appeal Division finds that the General Division breached subsection 58(1)(b) of the DESD Act by failing to require objective medical evidence of the Respondent's disabling condition and by failing to support its finding that the Respondent's efforts to obtain and maintain employment failed by reason of her medical

conditions. The Appeal Division also finds that the General Division breached subsection 58(1)(c) of the DESD Act by failing to engage in a meaningful analysis of the medical evidence before it.

[31] In light of the above discussion, the Appeal Division allows the appeal.

DECISION

[32] The Appeal is allowed. The Tribunal exercises its jurisdiction under s. 59 of the DESD Act to refer the matter back to the General Division for reconsideration by a different member.

Hazelyn Ross
Member, Appeal Division