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

[TRANSLATION]

Citation: *Minister of Employment and Social Development v. M. S.,* 2016 SSTADIS 346

Tribunal File Number: AD-15-1052

BETWEEN:

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

Appellant

and

M. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF HEARING: June 7, 2016

DATE OF DECISION: September 2, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative	Sylvie Doire
Respondent	M. S.
Respondent's representative	Etienne St-Aubin

INTRODUCTION

[1] On June 30, 2015, the Tribunal's General Division allowed the Respondent's appeal. The General Division determined that:

a) The Tribunal finds that, realistically, in December 2008, the Appellant was not in a condition to hold a substantial job in a competitive environment. Her condition also made it impossible to predict whether she would be able to show up to work as often as necessary. The evidence on file suggests that the Appellant therefore had no ability to work. She was not even able to apply to a workplace that was familiar.

b) The burden of proof that rests on the claimant is not to convince the Tribunal beyond a reasonable doubt that she is incapable of working.

c) The General Division concluded on a balance of probabilities that on December 31, 2008, the Respondent's disability was severe.

d) The Respondent's condition will likely last for a long, continued, and indefinite duration. As a result, the General Division found that the Appellant's disability was prolonged.

File Background

[2] The Respondent applied for a Canada Pension Plan (CPP) disability pension in December 2011. The Appellant denied the initial application as well as the request for reconsideration. The Respondent appealed the reconsideration decision before the Office of the Commissioner of Review Tribunals, which transferred her file to the Tribunal in April 2013.

[3] The Appellant had found that the Respondent was not entitled to a disability pension because her condition in 2008 (the Respondent's minimum qualifying period [MQP] ended on December 31, 2008) was neither severe nor prolonged.

[4] The MQP date is not under review.

[5] The Respondent's request is based on her physical and mental state. She has leg problems, and has experienced stress and depression. She went on sick leave in 2006 and her employer had replaced her while she was on leave. She has not worked since October 2006.

[6] At the hearing before the General Division, the Respondent was accompanied by her representative. The Respondent testified and her representative filed oral submissions to supplement the written submissions that had been filed. The Appellant did not attend, but filed written submissions before the hearing. The Appellant stated that the medical reports submitted by the Respondent do not support a finding that her condition was severe and prolonged on December 31, 2008, and that the physical condition caused by her falling off a horse in 2010 was not relevant in determining her condition on December 31, 2008.

[7] The GD found that the Respondent had a severe and prolonged disability in February 2007, when she lost her job upon her return from sick leave. It also found that the Respondent's claim was received in December 2011; therefore, she was deemed disabled since September 2010 and her disability pension payments would begin in January 2011.

[8] On September 28, 2015, the Appellant filed an application for leave to appeal with the Appeal Division of the Tribunal. Leave to appeal, limited to the Appeal Division's grounds, was granted on February 5, 2016.

[9] The GD's decision states that:

> [*Translation*]
>
> [50] The Applicant is arguing that there are many errors of fact. The only ones on which the DG seemed to have based its decision and that were possibly made in a perverse or capricious manner or without regard for the material before it are:
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> > a) [*translation*] "Dr. Chow's 2012 report also states that the Appellant would need to see a psychiatrist" (paragraph 70 of the GD decision).
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> > b) The severity of the Respondent's physical disability and her activities after December 2008, more specifically her horseback riding in 2012.
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> > c) [*translation*] "The state of the Appellant's mental functions is irreversible" (paragraph 70 of the GD decision).
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> [51] Upon review of the appeal file, the GD's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that one of the grounds of appeal has a reasonable chance of success. The Applicant has raised a question relating to an erroneous finding of fact, the answer to which could lead to the setting aside of the contested decision, more specifically described above in paragraph [50].

[10] The Appellant had brought forward other grounds for appeal in its application for leave to appeal and leave to appeal was denied on these matters. Leave to appeal was therefore limited to the findings of fact cited above.

ISSUES

[11] Did the General Division base 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?

[12] The Tribunal's Appeal Division must also decide whether it should dismiss the appeal; render the decision that the General Division should have rendered; refer the matter back to the General Division; or confirm, rescind, or revise the decision.

THE LAW

[13] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), 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.

[14] Subsection 59(1) of the DESDA states that the Appeal Division may dismiss the appeal, issue the decision that the General Division should have issued, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or modify the General Division's decision in whole or in part.

SUBMISSIONS

[15] The Appellant submitted the following:

a) The statement by Dr. Chow that the Respondent would need to see a "psychiatrist" is an erroneous finding of fact;

b) The General Division stated that the Respondent's back and leg condition could be due to her fall off a horse in 2010, yet subsequently disregarded this fact when it found that this condition existed before or as of the MQP.

c) The General Division could not have found that there was a physical disability preventing the Respondent from carrying out any type of work without disregarding the fact that she had been physically able to ride a horse after her MQP.

d) In paragraph [70] of the General Division decision, the General Division determined that the state of the Respondent's mental capacity was irreversible; this element is in no way relevant to the Respondent's CPP assessment.

e) The Respondent was able to work with this same mental capacity in the past.

f) The evidence brought before the General Division does not support the finding that the Respondent's physical condition, taken in isolation or in addition to her mental

condition, was severe as per the CPP definition because there was no medical evidence to show that she was unable to work.

[16] The Appellant also made submissions on issues for which leave to appeal was not granted.

[17] The Respondent submits that:

a) Many of the grounds for appeal submitted by the Appellant were addressed in the Appeal Division decision granting leave to appeal; the Appellant must therefore limit itself to the issues for which leave to appeal was granted.

b) Dr. Chow's October 12 report seems to have erroneously used the word "psychiatrist" rather than "physiatrist"; however, the General Division refers to this only peripherally. Rather, the General Division focuses on Dr. Adams' statements, which are relevant and sufficient to direct the General Division's decision.

c) The horseback riding was suggested by the Respondent's spouse in an attempt to ease her depression. It happened only once. The Respondent was unable to perform the activity and fell.

d) The General Division did not focus on this fact; this is an argument on which the Appellant could have elaborated had it decided to attend the hearing.

e) The General Division heard the evidence on the Respondent's mental challenges, which she has had to live with since childhood. She has an irreversible mental disability of which the member had the right to be made aware. Moreover, the Respondent testified that her family and friends had helped her with all written materials.

f) This element is admissible as a factor limiting the Respondent's chances of working during the relevant period.

g) The Appellant chose not to attend the hearing before the General Division, in which it would have had the opportunity to cross-examine the Respondent and file oral submissions to supplement the written submission it had filed.

h) There are consequences to choosing not to participate in an initial hearing; the Appellant cannot expect a *de novo* hearing before the Appeal Division.

ANALYSIS

STANDARDS OF REVIEW

[18] Certain recent Federal Court of Appeal decisions seem to suggest that the Appeal Division should not apply a standard of review to General Division decisions: *Canada (A.G.) v. Paradis*; *Canada (A.G.) v. Jean*, 2015 FCA 242; and *Maunder v. Canada (A.G.)*, 2015 FCA 274. Nonetheless, in *Hurtubise v. Canada (A.G.)*, 2016 FCA 147, an Employment Insurance decision, the Federal Court of Appeal found that an application of a standard of review by the Appeal Division to a General Division decision was reasonable.

[19] There seems to be a discrepancy with regard to how the Tribunal's Appeal Division should review appeals of decisions rendered by the General Division, and in particular, whether the standard of review for questions of law and jurisdiction differs from the standard of review for questions of fact and mixed fact and law.

[20] Given that I am unable to reconcile this seeming discrepancy, I will assess this appeal by referring to the provisions of the DESDA, without referring to "reasonableness" and "correctness" so as to avoid the application of standards of review.

The General Division's Decision

[21] As regards the findings of fact that the Appellant argues are erroneous, the General Division decision states:

> [*Translation*]
> [26] The Appellant fell off a horse in the fall of 2010, which caused her back and leg pain. During the summer of 2011, her pain intensified for no apparent reason.

> [40] In October 2012, the Appellant had a consultation with Dr. Chow, an orthopedist. He determined that she was not a candidate for surgery, that her pain was chronic, and that a consultation with a psychiatrist would be in order. His report implies that the Appellant's back condition is a result of her fall from a horse the preceding year. He added that the Tylenol 3, which she has been taking quite a long time, could have caused nerve hypersensitivity.
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> [52] The medical evidence submitted regarding the Appellant's physical condition after 2010 in relation to her back must be carefully assessed because she fell off a horse in 2010 and this seems to have caused her symptoms to increase. The Tribunal must assess the Appellant's condition on December 31, 2008.
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> [69] The Appellant stated that she has not improved since 2008. At the hearing, she did not have a cane, but was walking very slowly and with difficulty. Her back and legs had gotten worse, but that could be caused by her fall off a horse in 2010. This is stated in Dr. Suranyi's medical report dated September 28, 2011.
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> [70] The Appellant's mental capacity is irreversible. As regards her mental health, the Appellant states that she has not felt any improvement since December 2008. She also stated that she avoids family events. Dr. Adams' notes of February and April 2012 state that the Appellant was still dealing with depression six years after her initial diagnosis, despite the fact that she was on anti-depressants from 2006 to 2011, and has not been working since 2006. Dr. Chow's report in October 2012 also states that the Appellant should see a psychiatrist.

The Alleged Errors

[22] As regards the Respondent's physical condition and her fall off a horse in 2010, the General Divisions stated that:

a) her back condition [*translation*] "must be assessed with a great deal of care";

b) it needed to assess the Respondent's condition on December 31, 2008;

c) the deterioration of her back and leg condition can be related back to her fall off a horse in 2010.

[23] The General Division did not overlook this fact in finding that her physical challenges existed before or at the time of the MQP. The evidence on file shows that the Respondent has had knee and leg problems since 1999. The General Division noted that in December 2008, the Respondent [*translation*] "has knee and leg pain and she has limited options in terms of pain

medication, she is unable to work on her feet all day without pain, she walks at the speed of eight feet per minute and requires a cane, she also has depression and anxiety, she want to be alone and goes out of her way to avoid seeing people she knows when she goes out. Furthermore, although she worked up to 14 hours a days in 2006, in December 2008, she did almost nothing all day at home. She needs a nap in the afternoon. To add to this condition is the fact that the Appellant has limited mental capacity, has no education, and is illiterate at 57 years old."

[24] The Appellant maintains that the General Division disregarded the fact that the Respondent had had the physical capacity to ride a horse after the MQP. The Respondent had tried once, at the request of her spouse, to ride a horse, and she fell and injured herself. The only conclusion that can be drawn is that the Respondent did not have the physical capacity to perform this activity rather than the fact that she did have such a capacity.

[25] With regard to paragraph [70] of the General Division decision and Dr. Chow's report, the General Division notes that [*translation*] "Dr. Chow's report in October 2012 also states that the Appellant should see a psychiatrist." The report is written in English, and at the bottom of the first page, it is stated: “We feel that possibly a referral to a psychiatrist for a proper daily home exercise program for range of motion conditioning and explanation of chronic pain release may be more important.”

[26] The General Division repeated what the doctor had written. If Dr. Chow had made a typographical error in his report by writing "psychiatrist" (he should have written "physiatrist" instead), then the General Division decision was not an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before it.

[27] With regard to paragraph [70] of the General Division decision and the phrase [*translation*] "the [Respondent's] mental functions are irreversible", the Appellant maintains that this element is in no way relevant to the CPP disability assessment and that the Respondent had worked in the past.

[28] There is direct evidence that the Respondent has limited mental capacity, and the General Division has noted that in addition to the Respondent's overall physical and mental health [*translation*] "is the fact that she has limited mental capacity, no education, and is illiterate at 57 years old".

[29] A person's mental capacity is integral to their ability to work. It is relevant in determining a disability. The Federal Court of Appeal case law is clear: the Tribunal must take into account the person's individual factors within a realistic context, and these factors help supplement evidence of a mental or physical condition. (See for example *Villani v. Canada (A.G.)*, 2001 FCA 248)

[30] The Appellant also submits that if the finding that the [*translation*] "irreversible mental capacity" is relevant in assessing the severity of the disability, it is not relevant to the disability's prolonged nature. Given that paragraph [70] falls under the [*translation*] "Prolonged nature" heading, the Appellant claims that the General Division based its conclusion—that the disability is severe and prolonged—on an erroneous finding of fact.

[31] Headings and subheadings are used in Tribunal decisions to facilitate reading. Including facts under a certain subheading whereas they may be more relevant to another subheading is certainly not a reviewable error.

[32] In summary, the General Division did not base 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 Appellant's Other Submissions

[33] In its application for leave to appeal, the Appellant had brought forth other grounds for appeal; however, leave to appeal was limited to only the findings of fact cited above. Nonetheless, the Appellant also presented, at the appeal on the merits, submissions on issues for which leave to appeal had not been granted. These submissions were not analysed in this decision.

[34] The Appellant seeks to make the overall point that the evidence considered by the General Division does not support the conclusion that the Respondent's condition was severe within the meaning of the CPP because there was no medical evidence proving that she was unable to work. This is a reiteration of grounds for appeal for which I had not granted leave to appeal. This overall argument was rejected in my decision of February 5, 2016.

[35] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first, and lower, hurdle for the Applicant to meet than the one that must be met on the appeal on the merits. At the application for leave to appeal stage, the Applicant does not have to prove their case, but simply establish a reasonable chance of success. If certain grounds brought forth at the application for leave to appeal stage were determined not to have a reasonable chance of success, there should not be an attempt to prove these grounds at the appeal on the merits.

[36] The Tribunal is required to proceed as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[37] The Appellant chose not to attend the hearing before the General Division and cross-examine the Respondent. It must bear the consequences of its choice and cannot simply appeal a decision rendered by the General Division because it is unsatisfied with the outcome. Its submissions with regard to the alleged factual errors are impacted by its decision to skip the hearing. It gave up its opportunity to cross-examine the Respondent and to present oral submissions to the General Division when all the elements brought before the General Division were presented.

[38] For an error of fact to justify a revision, the General Division must have "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". Presenting a convincing argument that an erroneous finding of fact was "made in a perverse or capricious manner or without regard for the material before it" is difficult when the Appellant chose not to be present when all of the evidence was brought before the General Division.

[39] An appeal before the Appeal Division of the Tribunal is not a second chance to once again plead your case given that an appeal before the Appeal Division is not *de novo* and is limited by subsection 58(1) of the DESDA.

CONCLUSION

[40] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division