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

Citation: *E. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 376

Tribunal File Number: AD-15-245

BETWEEN:

E. T.

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: Hazelyn Ross

HEARD ON: September 20, 2016

DATE OF DECISION: September 28, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

E. T.	**-**	**Appellant**
Hossein Noorimand	**-**	**Counsel for the Appellant**
Sylvie Doire	**-**	**Respondent's Representative**
Nadia Asha	**-**	**Student-at-Law (observer)**
Justine Seguin	**-**	**Student-at-Law (observer)**

INTRODUCTION

[1] On March 16, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision in the Appellant's appeal of a reconsideration decision. The General Division determined that the Appellant was not eligible to receive a disability pension under the *Canada Pension Plan*, (the CPP).

[2] The Appellant sought and obtained leave to appeal from the General Division decision. The Appeal Division granted leave to appeal on one specific ground, namely, did the General Division err in regard to its assessment of whether the Appellant met the CPP criteria for severe and prolonged disability as of his minimum qualifying period qualifying period, (MQP), of December 31, 2012.

[3] This appeal proceeded by Videoconference for the following reasons:-

a) The complexity of the issue(s) under appeal.
b) The fact that the appellant will be the only party in attendance.
c) The information in the file, including the need for additional information.
d) The form of hearing is the most appropriate to address inconsistencies in the evidence.
e) The fact that the appellant or other parties are represented.
f) The requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] At issue is whether the General Division based its decision on an erroneous finding of fact. It can be framed in the following terms:-

Did the General Division consider the correct time period when it made its assessment that the Appellant did not provide the Tribunal with any evidence that he had looked for alternate employment?

THE LAW

[5] Subsection 58(1) of the *Department of Employment and Social Development Act,* (the DESD Act), sets out the grounds of appeal from a General Division decision. These are:-

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.

[6] In the context of this appeal, the relevant principle is that applicants for a CPP disability pension who are found to have retained work capacity must show that their efforts at obtaining and maintaining employment were rendered unsuccessful by virtue of their health condition: *Inclima* v. *Canada (A.G.)*, 2003 FCA 117.

SUBMISSIONS

[7] On his behalf, Counsel for the Appellant submitted that in making its determination regarding the Appellant's attempts to obtain and maintain alternate employment, the General Division used a time period during which the Appellant was not claiming that he was disabled. Counsel submitted that, as a result its analysis in paragraph 41 of the decision was faulty. He also submitted that the General Division did not have regard to critical medical evidence that had been presented to it.

[8] The Respondent's representative submitted that the issue raised on appeal relates more to subsection 58(1)(c) of the DESD Act, namely that the General Division based its decision on an erroneous finding of fact. On further consideration of the issue, the Appeal Division concurs.

[9] The Respondent's representative urged the Appeal Division to apply a standard of reasonableness to the General Division's decision. She submitted that when this standard is applied the General Division did not err; that it had regard to, and analysed, all of the evidence concerning the Appellant's health conditions. This evidence included medical reports relating to his health conditions, namely his heart surgeries, hernia and hernia surgery, and depression. The evidence also related to the motor vehicle accident of 2010, the CPP medical report concluded by Dr. Nejad, the psychologist's report as well as other medical reports. As well, the Respondent's representative submitted that the General Division not only weighed the evidence, which is its prerogative provided explanations for the weight it gave to the evidence,.

STANDARD OF REVIEW

[10] The Respondent's representative submitted that the General Division is owed deference on the first two grounds of appeal but not on the third ground, the Appeal Division is guided by the recent decision of the Federal Court of Appeal, (FCA), in *Huruglica v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No. 845. In *Huruglica,* the FCA addressed the question of the role of a tribunal's second level body, concluding that in the case of the Immigration and Refugee Board, the Refugee Appeal Division functions like an appellate body vis-a-vis the Refugee Division. The FCA held, that:-

> [30] The selection of the appropriate standard of review is a legal question well beyond the scope of the RAD's expertise, even though it depends on the interpretation of the IRPA[1], the RAD's home statute.

[11] The FCA found that the RAD had neither the expertise nor the experience to determine the appropriate standard of review to apply to an RPD decision. The FCA thereby removed the standard of review analysis from the jurisdiction of the RAD; reserving same to itself. At the

[1] Immigration and Refugee Protection ACT

same time, the FCA extended the ambit of its dicta to other decision-making bodies with a two-tiered structure.

> [33] The determination of the standard of review that an appellate tribunal must apply to a lower decision maker and the process by which that determination is reached has significance outside the refugee context.
>
> [43] It flows that in creating an internal appellate body, within the executive branch of government, the principle of standard of review, a function of the division of powers between the executive and the judiciary, is of lesser importance and applicability. The traditional standard of review analysis is not required.

[12] The FCA's position in *Huruglica* follows on from that taken earlier on in *Canada (Attorney General) v. Jean; Canada (Attorney General) v. Paradis*, 2015 CAF 242 (CanLII), 2015 FCA 242, as well as in *Maunder v. Canada (Attorney General)*, 2015 FCA 274 that affirmed the position taken by the Federal Court in *Jean /Paradis* and in *Tracey v. Canada (Attorney General)* 2015 FC 1300. This position required that when the Appeal Division hears appeals under ss. 58 (1) of the DESD Act, the governing statute of the Tribunal, the enquiry is to be confined to the mandate provided by sections 55 to 69 of the DESD Act.

[13] In regard to the RAD's determination of the standard of review, the FCA held that the "RAD erred in simply reviewing the RPD's decision on the reasonableness standard rather than conducting an independent assessment of the Applicant's claim".

[14] In light of the position taken by the FCA, the Appeal Division declines to conduct a standard of review analysis in this matter.

ANALYSIS

[15] In conducting its analysis, the Appeal Division finds it helpful to recap the pertinent facts of the Appellant's history prior to deciding if the General Division did base its decision on an erroneous finding of fact.

1. The Appellant worked as a manager of a gas station from 1989 to 2010.

2. He was self-employed, carrying on a window-washing business between 2005 and December 2010.
3. The Appellant had post-aortic valve and mitral valve replacement surgeries on January 19, 2009. (GT1-77) Dr. Nejad indicated in the CPP medical report that "post-surgery, he felt short of breach and experienced extreme fatigue and could no longer work."
4. On February 16, 2010, the Appellant was involved in a motor vehicle accident.
5. The Appellant's last day of work was in August 2010. (GT1-103)
6. The Appellant closed his window-washing business in December 2010.

[16] Counsel for the Appellant submitted that the General Division should not have made conclusions regarding the time period when the Appellant was a self-employed window washer. The impugned statement being that "apart from his experience as a self-employed window cleaner, the Appellant has not provided the Tribunal with any evidence that he has been looking for work or tried to find a more suitable employment."

[17] The Appeal Division agrees with the position taken by Counsel for the Appellant because, the Appellant having claimed to become disabled as of December 2010, the period in question falls before his claimed disability and was, therefore, irrelevant to the assessment of his efforts at obtaining alternate employment. The General Division should have considered only the period following December 2010.

[18] While coming to this conclusion, the Appeal Division is not satisfied that this was an error sufficient to undermine the whole of the General Division's determination. The General Division found that following the surgeries to repair his heart conditions the medical evidence did not suggest that the Appellant did not have retained work capacity. These surgeries took place in early 2009. It was not in dispute that the Appellant worked until August 2010. Therefore, the Appeal Division finds that it was open to the General Division to conclude that he retained work capacity in 2010. Applying the principle in *Inclima*, the Appellant had the onus of establishing that his efforts to work or to retrain had been stymied by his health conditions.

[19] Notwithstanding the General Division error, the Appeal Division is not satisfied that the Appellant met this onus. The General Division found a total absence of any evidence to suggest that the Appellant looked for work after he stopped working as a window-washer. At the Appeal Division hearing Counsel for the Applicant cited medical evidence that he stated corroborated the Appellant's position that he was disabled. Counsel submitted that the General Division ignored that evidence.

[20] The Appeal Division is not persuaded of Counsel's position. First, as submitted by the Respondent's representative, the General Division did address the medical evidence. It noted and summarised his medical conditions, which included his hernia surgery of March 2010, left shoulder strain, chronic lower back pain and insomnia. (para. 21). Further, the General Division expressly stated that, in arriving at its decision, it had considered the totality of the evidence and the Appellant's medical conditions. The General Division is presumed to have read and considered all of the evidence before it: *Simpson v. Canada (Attorney General),* 2012 FCA 82 (CanLII). In addition, the evidence and, therefore, the attendant arguments, had been before the General Division, however, it had not found that they supported the Applicant's position. The Appeal Division is not tasked with reweighing the evidence.

CONCLUSION

[21] In the context of an appellant who continued to work for more than a year after heart surgeries and for several months after he was involved in a motor-vehicle accident and after he had undergone hernia surgery, the Appeal Division finds that the General Division could reasonably find that the Appellant retained work capacity. Furthermore, where the Appellant did not provide evidence of attempts at finding alternate work or retraining the Appeal Division finds that 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.

[22] The Appeal is dismissed.

Hazelyn Ross
Member, Appeal Division