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

Citation: *Minister of Employment and Social Development v. B. P.,* 2016 SSTADIS 377

Tribunal File Number: AD-16-583

BETWEEN:

Minister of Employment and Social Development (formerly known as the Minister of Human Resources and Skills Development)

Appellant

and

B. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: September 15, 2016

DATE OF DECISION: September 28, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

Appellant	Julia Betts (counsel) Sara Webb (paralegal)
Respondent	Geoffrey Laxton (paralegal)

OVERVIEW

[1] This is an appeal of a decision of the General Division, dated January 20, 2016, which determined that the Respondent was unable to continue working at her part-time job as a cashier by January 2011, and that she therefore had a severe and prolonged disability at that time and was entitled to a Canada Pension Plan disability pension. As the application for a disability pension was received in June 2013, the General Division deemed the Respondent disabled in March 2012. The General Division calculated that payment of a disability pension should therefore commence as of July 2012.

[2] The Appellant filed an Application Requesting Leave to Appeal to the Appeal Division on April 20, 2016. The Appellant submitted that the General Division erred in law and in fact and that it exceeded its jurisdiction. I granted leave to appeal on May 19, 2016 on these grounds.

[3] The Respondent argued that the decision of the General Division should be upheld, as she met the onus of proof in establishing that she had a severe and prolonged disability by the end of her minimum qualifying period, and that to remit this matter to the General Division for a redetermination amounts to an abuse of process.

[4] The onus and burden of proof in this appeal lies on the Appellant to establish that the General Division erred as alleged in the application requesting leave to appeal.

ISSUES

[5] The issues before me are as follows:

1. Did the General Division err in law, base its decision on an erroneous finding of fact without regard for the material before it, or exceed its jurisdiction?

2. What is the appropriate disposition of this appeal?

GROUNDS OF APPEAL

[6] The Appellant submits that the General Division erred as follows, that it:

(a) failed to ensure that there was any objective medical evidence at or around the end of the minimum qualifying period;

(b) based its decision on an erroneous finding of fact that the Respondent had stopped working in January 2011, when there was no evidence to support this finding; and,

(c) exceeded its jurisdiction by finding that the Respondent had stopped working in January 2011, to coincide with the requirement that she be found disabled within her proration period of January 2011.

[7] I will consider the second and third of these grounds together, given the overlapping issues.

(a) Objective medical evidence

[8] The Respondent argues that the decision of the General Division should be upheld, as the member found her testimony persuasive. She also claims that it should not be overlooked that she had undergone a drastic surgical procedure to reduce her weight to alleviate the intensity of her pain. However, my review of this matter does not involve a reassessment of the evidence, as that is beyond the scope of this appeal. Subsection 58(1) of the *Department of Employment and Social Development Act* stipulates very limited grounds of appeal.

[9] The Appellant on the other hand submits that it is insufficient to rely on subjective evidence alone to establish a severe and prolonged disability. The Appellant argues that a claimant is required to adduce objective medical evidence and at least address why it chose to rely on the Respondent's testimony in the absence of any supporting medical evidence. The Appellant cited several legal authorities.

[10] In *Villani v. Canada (Attorney General)*, 2001 FCA 248 at para. 50, the Federal Court of Appeal held that not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension, as:

> Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[11] Similarly, in *Warren v. Canada (Attorney General)*, 2008 FCA 377 at para. 4, the Federal Court of Appeal held that "it is well established that an applicant must provide some objective medical evidence" and that, in the proceedings before it, the Pension Appeals Board made no error in law in requiring objective medical evidence of the applicant's disability.

[12] The Federal Court of Appeal acknowledged in *Gorgiev v. Canada (Minister of Human Resources Development)*, 2005 FCA 55 at para. 4, that a medical diagnosis and the subjective evidence of a claimant as to the degree of pain suffered must always be considered, but they are not the sole bases upon which to establish severity.

[13] According to the Questionnaire which she completed in June 2013 for her application for a disability pension, the Respondent suffers from osteoarthritis and medial meniscal tears in her knees, as well as lower back pain (GD3-62 to GD3-68).

[14] The Appellant argues that the primary focus is on the Appellant's disability at the end of her minimum qualifying period of December 31, 2010, or if applicable, within a prorated period, which in this case is January 2011. The Appellant submits that there was no supporting objective medical evidence that the Respondent experienced any lower back

pain, either at the end of her minimum qualifying period, or within the prorated period. The Appellant concedes that the diagnostic examination of the Respondent's right knee could be seen as establishing that she was symptomatic with knee pain by the end of December 2010, but that evidence alone does not establish that her disability was severe. The Appellant argues that the evidence regarding the Respondent's knee pain suggested only mild symptoms by the end of December 2010.

[15] Most of the medical documentation before the General Division consisted of records that were prepared after the end of the minimum qualifying period. Two diagnostic examinations were conducted in January 2011. The x-rays of the right knee showed mild osteoarthritic changes (GD3-53) and the x-rays of the lumbar spine showed no acute abnormalities (GD3-54). The presence of these two diagnostic examinations suggests that the Respondent must have been symptomatic in her right knee and lower back, otherwise these examinations would not have been arranged. However, the examinations alone would not establish severity.

[16] At the very least, there needs to be some clinical corroboration, whether in the form of clinical records or medical reports. In this regard, the General Division noted at paragraph 14 that there were no consultation reports from either the orthopaedic surgeon or rheumatologist whom the Respondent had apparently seen. At paragraph 15, the General Division also noted that the Respondent's former family physician, now retired, did not retain good records. There was little in the way of documentation that addressed the Respondent's depression, lower back or knee issues at or around the minimum qualifying period or the proration period.

[17] The Respondent's family physician prepared a return to school/work certificate in October 2007 (GD3-43). He was of the opinion that the Respondent would be unable to return to school or work indefinitely due to a severe stress reaction and depression. Apart from the fact that this certificate does not address the severity question, it was prepared several years prior to the end of the minimum qualifying period.

[18] A Patient Medical Record prepared by Pharmacy City for the timeframe from September 2007 to October 2012 suggests that the Respondent was not taking any

antidepressants in 2010, but she began taking Cipralex 10 mg in January 2011. The printout also indicates that she had been on Cipralex 10 mg in late 2007 and the early half of 2008 (GD3-42).

[19] The Patient Medical Record printout also suggests that, for 2010, the Respondent had not been prescribed and was not taking any pain relief medication (GD3- 42). In January 2011, the Respondent was on non-steroidal anti-inflammatories. She took Meloxicam, typically used to treat rheumatoid arthritis and osteoarthritis. However, the printout suggests that she was not on any pain relief medication again after early 2011, until mid-October 2012.

[20] While the Patient Medical Record could be seen as establishing that the Respondent was depressed and was symptomatic with pain, it does not establish severity.

[21] There are gaps in the medical records. Not only are there no further diagnostic examinations after January 2011 until March and May 2013, but there are no narrative opinions from any physicians or specialists, or any clinical records for the material time.

[22] While there is some objective medical evidence that arose shortly after the end of the minimum qualifying period, from which it could be inferred that the Respondent was symptomatic with lower back and at least right knee pain, and a pharmacy printout that indicates she was also depressed, they fall far short of establishing that her disability was severe at that time.

[23] I am satisfied that there was no objective medical evidence at or around the minimum qualifying period or the proration period, as contemplated by the Federal Court of Appeal, to establish that the Respondent was severely disabled by that time. Additionally, a review of the decision of the General Division indicates that the member did not focus on whether the Respondent could be found severely disabled by the end of the minimum qualifying period. There is no reference to the minimum qualifying period or the proration period in the member's analysis. Together, these constitute errors of law.

[24] The Respondent cited *Tracey v. Canada (Attorney General)*, 2015 FC 1300, but the Federal Court's analysis regarding the standard of review analysis to be applied by the Court

when reviewing decisions of the Appeal Division on applications for leave to appeal has no applicability in this appeal before me.

[25] *Tracey* is of no assistance to the Respondent, if she intends to rely upon it to adduce any evidence before me. The Respondent submits that there is further evidence of the severity of her disability, as she has now been expedited for surgery for her knees, but the Federal Court held that the introduction of new evidence is no longer an independent ground of appeal. The Federal Court was more definitive in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503 at para. 28. Manson J. held that, unlike its predecessor the Pension Appeals Board, an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in section 58 of the DESDA.

(b) Cessation of work

[26] The Appellant submits that the General Division exceeded its jurisdiction and based its decision on an erroneous finding of fact without regard to the material before it when it found that the date of onset of disability was January 2011. The General Division determined that it was at this time when the Respondent was no longer able to continue working at her part-time job as a cashier. (The evidence indicates that the Respondent worked briefly as a personal support worker and/or housekeeper in 2012 and 2013, but the General Division clearly accepted that these constituted failed work attempts.)

[27] The Appellant argues that there was no evidence on the record to support such a finding. The Respondent declined to address this issue.

[28] The only evidence which could possibly tie the cessation of work to January 2011 is the diagnostic examinations of January 21, 2011 (GD3-53 and GD3-54). However, the General Division did not refer to nor rely upon these diagnostic examinations to find the Respondent disabled in January 2011. In any event, the diagnostic reports do not mention that the Respondent had stopped working.

[29] The evidence before the General Division regarding when the Respondent stopped working as a part-time cashier is as follows:

- the Respondent completed a Questionnaire in support of her application for a disability pension. She indicated that she worked as a part-time cashier between 2010 and 2011, but was "unsure of exact dates" (GD3-63).

- the Record of Earnings shows that the Respondent had declared earnings for 2011, but it does not indicate when those earnings might have been realized (GD3-28 to GD3-35); and,

- the Respondent testified that she stopped working as a cashier possibly in 2010, although did not provide a more definitive date (affidavit sworn by Stéphanie Pilon, paralegal, on April 20, 2016 at AD1-114 and13:10 to 14:44 of the audio- recording of the hearing)

[30] The evidence before the General Division is inconclusive as to when the Respondent stopped working as a cashier, and it is unclear from the evidence how the General Division could have determined that the Respondent had stopped working in January 2011. I find that there is no evidentiary basis to the General Division's conclusion that the Respondent had stopped working in January 2011. At most, the evidence could only have supported a finding that the Respondent may have stopped working in either 2010 or 2011.

[31] As the trier of fact, the General Division is expected to assess the evidence and to make findings of fact on that evidence. Having found that the Respondent was disabled, it was required to determine the date of onset of disability. From this perspective, it was acting within its jurisdiction. It was also within its jurisdiction to make findings of fact in regards to when the Respondent might have stopped working, even if ultimately it made an erroneous finding.

[32] The Appellant suggests that the General Division was motivated to ensure that the Respondent received a disability pension, and that it therefore intentionally chose January 2011 as the date when she stopped working to accomplish this objective, although it was

aware that there was no evidence to support such a finding. There was no evidence presented to support this allegation. Therefore, I decline to find that the General Division exceeded its jurisdiction in this regard.

ABUSE OF PROCESS

[33] The Respondent cited the Auditor General's Report on the Canada Pension Plan Disability Program and recent comments made by the Minister of Employment and Social Development, regarding the appeals process, in arguing that remitting the matter to the General Division amounts to an abuse of process, as it will effectively result in a significant delay. The Respondent argues that as she has already proven that she is disabled and the General Division has determined her eligible for a disability pension, she ought not to be subjected to having to prove her case again. She indicates that any delays will cause financial hardship. She also notes that since the hearing before the General Division, the severity of her condition involving her knees has deteriorated such that she no longer has to wait until age 60 for surgery, as it has now been expedited.

[34] The Supreme Court of Canada considered this issue in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 SCR 307. Bastarache J. held that, "delay, without more, will not warrant a stay of proceedings as an abuse of process … In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay". At paragraph 133, Bastarache J. stated, "There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected".

[35] The Respondent has not adduced any evidence to suggest that any delay will impact on the fairness of the hearing. The Supreme Court of Canada has held that unacceptable delay may nevertheless amount to an abuse of process even where the fairness of the hearing has not been compromised:

> Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for

> other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the system into disrepute.

[36] In order to find an abuse of process there must be some evidence that proceeding would be contrary to the interests of justice and that it would do damage to the public interest in the fairness of the administrative process.

[37] I conclude that there is no evidence before me which would justify a finding of an abuse of process. The Respondent indicates that delays will cause financial hardship for her and that it will have some impact on her family, although there was no documentation provided to support this submission. I am not persuaded that any delay which may result will cause actual prejudice of such magnitude that the public's sense of decency and fairness are affected.

DISPOSITION

[38] The Appellant submits that the appropriate disposition is to remit the matter to a different member of the General Division. Given the errors made by the General Division, I order that this matter be returned to a different member of the General Division for a redetermination.

Janet Lew
Member, Appeal Division