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

Citation: *Minister of Employment and Social Development v. B. C.,* 2016 SSTADIS 468

Tribunal File Number: AD-15-1128

BETWEEN:

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

Applicant

and

B. C.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

HEARD ON: November 22, 2016

DATE OF DECISION: December 5, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative:	Justine Seguin
Respondent:	B. C.
Respondent's Counsel:	Randy Knight
Observer:	M. S.

INTRODUCTION

[1] On July 22, 2015 the General Division of the Social Security Tribunal of Canada (Tribunal) issued its decision in the Respondent's appeal of a reconsideration decision. The General Division determined that the Appellant suffers from a severe medical condition that would preclude all gainful employment at the time of his minimum qualifying period, (MQP), of December 31, 2009. Accordingly, he qualified for a disability benefit under the *Canada Pension Plan* (CPP).

[2] On October 22, 2015, the Appeal Division of the Tribunal received a request for leave to appeal from the General Division decision. Based on its finding that the General Division may have committed either an error of law or based its decision on an erroneous finding of fact, the Appeal Division granted the request for leave to appeal.

Appeal Format

[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 or other parties are represented.

ISSUE

[4] The issues in this appeal are:

1. Did the General Division fail to analyse the evidence in order to determine whether the Respondent was incapable of obtaining or maintaining employment because of his health condition?

2. Did the General Division fail to consider significant evidence regarding causation and treatment of the Respondent's claimed disabling conditions?

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) 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.

PRELIMINARY ISSUE

[6] The Appellant raised the question of the admissibility of a policy document prepared by the Ontario Human Rights Commission (OHRC) and submitted by the Respondent as part of its submissions at AD8-162. The Appellant argued that this document was evidence and, also, that it had not been before the General Division. The Respondent disagreed with the position taken by the Appellant; with his counsel stating that the document was not evidence. However, he conceded that the document had not been before the General Division hearing. In light of the clear pronouncements by the Federal Court and Federal Court of Appeal (FCA) regarding the

scope of the documents that the Appeal Division could consider, the Member ruled that the OHRC policy document would be excluded.

SUBMISSIONS

[7] The Appellant's representative submitted that the General Division had failed to undertake the analysis required of it by *Inclima v. Canada (Attorney General)* 2003 FCA 117. This analysis dictates that in order to qualify for the CPP disability benefit the Respondent had to show that he had made efforts to obtain and maintain alternative employment but that his efforts to do so had been rendered futile by virtue of his health condition. The pertinent statement being: -

> "Applicant's for a CPP disability pension are required to show not only that they have a serious health problem, but where there is evidence of work capacity, must also show that their efforts at obtaining and maintain employment have been unsuccessful by reason of their health condition".

[8] The Appellant's representative took the position that while the General Division identified the correct test; it failed to undertake the requisite or any analysis of the evidence, which failure constituted an error of law. In addition, she submitted that the evidentiary underpinnings of the appeal only served to highlight the flaws in the General Division's analysis, and she argued that, without the appropriate analysis, the General Division could not make a finding of disability. She submitted that the Tribunal record contains ample evidence that the Respondent had retained work capacity.

[9] The Appellant's representative made a second major submission, namely, that the General Division erred in finding that "no doctor had come up with a diagnosis" concerning the Respondent's medical condition. She argued that the Respondent had been diagnosed with chronic pain and that the General Division should have considered the medical report that contains this diagnosis, but did not do so. The Appellant's representative pointed out that at GT1-166, Dr. Billings offered an explanation of chronic pain and that had the General Division properly analysed the evidence, it would have deduced that the Respondent's injuries had led to him suffering chronic pain. She contended that the failure to consider the medical diagnosis of chronic pain meant that the General Division could not have properly assessed the Respondent's capacity to work.

[10] The submissions of the Counsel for the Respondent were rather succinct. He argued that, contrary to the Appellant's submissions, the General Division did not commit an error of law by failing to cite the *Inclima* test. He took the position that the General Division had cited and applied *Villani v. Canada (Attorney General),* 2001 FCA 248 with respect to the meaning of the CPP definition of severe disability, and that overall its decision was reasonable.

[11] Regarding the Appellant's position that the General Division had committed an error of fact, the Counsel for the Respondent argued that the General Division did consider the medical evidence of the Respondent's chronic pain, and had cited the diagnosis of the Respondent's chronic pain. He argued further that having done so, the General Division found on evidence that it deemed credible that the Respondent retained capacity to work. He also submitted that the General Division went on to accept that the Respondent's efforts to obtain work were hampered by his health condition. He noted that the Respondent made some 70 applications for work, however, the General Division did not engage in an in-depth exploration of his job search in its decision.

[12] Mr. B. C. has a diagnosis of bilateral repetitive strain injury involving both shoulders, both elbows, as well as his neck. We recommend that he remain on permanent modified duties, i.e. no heavy lifting, no repetitive usage of either arm, and no overhead work with either arm, as well as avoiding any sustained neck posture.

ANALYSIS

[13] The two main issues in this appeal are whether the General Division failed to properly apply the principle in *Inclima,* and whether it disregarded medical evidence. An examination of the General Division decision shows that the issue of retained work capacity was a central tenet of the decision. After setting out the Respondent's onus in the appeal, the General Division addressed the question of work capacity, stating: "[48] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition."

[14] The General Division briefly discussed the Respondent's testimony regarding his attempts to find alternative employment or to retrain, noting that: "[48] The Appellant testified

that he applied for many jobs after completing a job search training program. Because he had various physical restrictions, he was unable to be hired anywhere."

[15] The General Division continued to discuss the Respondent's attempts at paragraphs 49 and 50 of the decision, stating:

> [49] In addition, he undertook upgrading programs through the WSIB's LMR program. He was required to switch courses either because he did not have the required marks to gain entry to programs or because of a difficult commute. The WSIB eventually told him that he would be customer service clerk.
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> [50] He continued to work for 3 years after his work-place injury, albeit in a modified duties capacity owing to his physical restrictions.

[16] It is clear from the decision that the General Division found the Respondent to be a credible witness and that, on that basis it accepted his testimony and found that he suffered from a severe disability as defined in the CPP. This is shown from the following paragraphs of the decision:

> [53] The Review Tribunal has an obligation to consider both the oral and the documentary evidence and credible oral evidence should be given due weight and serious consideration: *Pettit v. MHRD* (April 22, 1998) CP 4855 (PAB). Further, the very nature and credibility of subjective evidence can outweigh the absence of any clinical medical evidence: *Smallwood v. MHRD* (May 1999) CP 9274 (PAB). Although decisions of the Pension Appeals Board (PAB) are not binding, these decisions give significant guidance to decision makers. The Tribunal concluded that the Appellant was a credible witness. He had good recall and was well prepared for his hearing even though he was not represented.
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> [54] The Tribunal has therefore concluded that the Appellant suffers from a severe medical condition that would preclude all gainful employment at the time of his MQP of December 31, 2009.

[17] The Appellant's representative submitted that the General Division did little more than identify the appropriate test; that it did not engage in any analysis regarding the test. She argued that the Respondent's capacity to work was demonstrated by the fact that he was able to complete his Workplace Safety and Insurance Board (WSIB) sponsored programme at Conestoga College, engage in volunteer activities with Big Brothers, and complete job re-training through the WSIB after which a suitable occupation was identified for him.[1] She also

[1] (GT1- 371 to 399)

pointed to the statements in the Functional Abilities Evaluation[2] (FAE) as indicating that the Respondent had retained work capacity (GT1-97). In addition, the Appellant's representative pointed to the fact that despite difficulties, the Respondent was not unsuccessful in completing the work at Conestoga College (GT1-351).

[18] Regarding the Respondent's attempts to obtain work, the Appellant's representative argued that the Respondent had been selective in the types of jobs he had applied for and had either refused to apply for or take positions that paid less than the rate of pay ($13.67) suggested by the WSIB or which were outside of his area. She noted that the Respondent was provided with some 61 recommendations and 100 job leads but submitted only 28 resumes.

[19] The Appellant's representative submitted that the General Division failed to analyse the Applicant's job search and that the failure to do so meant that it could not pronounce on whether it was a genuine search. It also meant that the General Division could not properly apply the *Inclima* test. Pointing to the Respondent's limitation of his job search to a geographic area and rate of pay, she argued that the decision in *Canada (MHRD) v. Rice*, 2002 FCA 47 applied to the instant case as the test is the assessment of the capacity to work and not the availability of suitable employment.

[20] In the opinion of the Appellant's representative, if the Respondent was not actively seeking employment, the test for disability could not be properly applied. She submitted that there was nothing in the Tribunal record that showed that the Respondent had not limited his job search. Therefore, notwithstanding the dicta in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62[3] regarding sufficiency of reasons, the principle in *Canada (MHRD) v. Quesnelle*, 2003 FCA 92 applied, and the General

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[2] On November 28, 2008 it was noted that "Mr. B. C. has successfully completed the Functional Restoration Program (FRP). His functional outcomes were noted as:
At the time of discharge, Mr. B. C. was demonstrating the ability to perform activities at a level that would be classified as within the **"light"** physical demand level as defined by the National Occupational Classification (NOC) physical demand levels (For definitions, please refer to Appendix B - Glossary of Terms)." (GT1-97)

[3] The Supreme Court of Canada ruled in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 that "reasons may not include all the arguments, statutory provisions, jurisprudence and other details the reviewing judge would have preferred, but that does not necessarily impugn the validity of either the reasons or the result under the reasonableness analysis."

Division was under an obligation to explain how it came to its decision at paragraph 52 that the Respondent was incapable regularly pursuing any substantially gainful occupation.

[21] In rebutting the position that the General Division had erred in law, the Respondent's Counsel submitted that the General Division had accepted the evidence of the Respondent's job search and had also accepted that the WSIB report was biased. He agreed that the General Division could have delved deeper into the Respondent's job search, but he argued that it did not have to; and he submitted that as depth (sufficiency) of the reasons, not being a "stand-alone" basis for reversing a decision, the General Division decision should stand.

[22] Counsel for the Respondent also submitted that the General Division's decision was grounded in its finding that the Respondent was a credible witness. He made the further argument that as the General Division had not found that the Respondent had retained work capacity, it had not committed any error of law. He submitted correctly that it is only where a finding of retained work capacity is made that an applicant has to demonstrate that he or she could not obtain and maintain employment by reason of their disability. Based on the finding in paragraph 52 of the General Division decision that the Respondent was unemployable. The paragraph is set out below:

> [52] It is not the diagnosis of the illness that determines the severity of the disability but whether the disability stops the Appellant from earning a living: Granovsky v. Canada (Minister of Employment and Immigration), [2001] SCR 703. It is the Appellant's capacity to work and not the diagnosis of [his/her] disease that determines the severity of the disability under the CPP: Klabouch v. Minister of Social Development, [2008] FCA 33. The Tribunal is mindful of these decisions in case law and has determined that the findings in these cases apply to this decision also. Although no doctor has come up with a very definitive diagnosis of the Appellant's medical conditions, the cumulative effect of these conditions have made the Appellant unemployable in spite of his previous work experience and his education. (*typed as written*)

[23] Counsel for the Respondent urged the view that the General Division decision was reasonable, and that the Appeal Division ought not to disturb it.

[24] The Appeal Division carefully considered the arguments made by the representatives of the parties, the Tribunal record, and the case law. Having done so, the Appeal Division concludes that the situation is not unlike that which arose in *Quesnelle,* where the FCA ultimately found that the decision of the Pension Appeals Board (PAB) was deficient with

regard to its explanation of the basis for its decision. Addressing this deficiency, the FCA stated:

> [7] In its reasons, the Board briefly described the conclusions of six doctors who had submitted reports or given oral testimony expressing a variety of views. The Board also referred to the testimony of Ms. Quesnelle respecting her attempts to resume work, her symptoms and her strategies for reducing pain. It noted that there was strong evidence on both sides and that cases of fibromyalgia present difficulties for the Board, although it has "the responsibility of deciding whether the Appellant suffers from fibromyalgia which is debilitating to the point where the Appellant can no longer work at a job which will provide an appropriate livelihood." After stating that it had considered all the evidence, the Board allowed the appeal, because it "found the testimony of the Appellant and Dr. Leung to be credible". This is the totality of the Board's explanation of the basis of its decision.

[25] The Appeal Division finds that the General Division's decision-making at paragraph 52 is strikingly similar to the PAB decision. Here the General Division set out the relevant case law; noted that there had not been a definitive diagnosis of the Respondent's medical conditions, and then proceed to find him disabled. Like the PAB in *Quesnelle,* the General Division based its decision on its conclusion that the Respondent had been a credible witness.

[26] As with the PAB, which was under a statutory duty to provide reasons for its decisions, subsection 54 (2) of the DESD Act also places the General Division under a statutory duty to provide reasons for its decisions. As with *Quesnelle* the Tribunal record is voluminous. However, The Appeal Division finds that the General Division was under a duty to explain why it rejected the considerable body of evidence, notably the FAE and the WSIB reports which state that the Respondent had retained work capacity.

[27] In the view of the Appeal Division the following paragraphs in *Quesnelle* are on point:

> [8] The Board is under a statutory duty to provide the parties with reasons for its decision: *Canada Pension Plan*, subsection 83(11). In my opinion, in omitting to explain why it rejected the very considerable body of apparently credible evidence indicating that Ms. Quesnelle's disability was not "severe", the Board failed to discharge the elementary duty of providing adequate reasons for its decision. The size and complexity of the record before it called for an analysis of the evidence that would enable the parties and, on judicial review, the Court, to understand how the Board reached its decision despite the mound of apparently credible evidence pointing to the opposite conclusion.

> [9] This is not to say that it was not open to the Board to find on the evidence before it that Ms. Quesnelle was suffering from a severe disability within the meaning of subparagraph 42(2)(*a*)(i): a careful analysis of the evidence might have led the Board to the same conclusion that it reached. However, in the absence of any indication in the Board's reasons that it engaged in a meaningful analysis of the evidence, its decision cannot stand.
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> [11] … In this case, the Minister represents the public interest in the financial integrity of the Canada Pension Plan and its due administration according to law, and there is a public interest in ensuring that claimants are not paid benefits to which they are not entitled. Both parties are entitled to a fair hearing before the Board and, without reasons that adequately explain the basis of a decision, neither party can be assured that, when a decision goes against it, its submissions and evidence have been properly considered.
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> Moreover, without adequate reasons, the losing party may be effectively deprived of the right to apply for judicial review.
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> [12] In any event, the only justification provided by the Board for its decision was that it found the testimony of Ms. Quesnelle and Dr. Leung to be credible. This does not pass muster as "reasons" on any standard of adequacy.

[28] In light of this reasoning, the Appeal Division finds that the General Division erred in law when it failed to properly apply *Inclima,* and failed to give reasons for why it did so. For this reason alone, the appeal must succeed.

The General Division failed to consider medical evidence

[29] Counsel for the Appellant took issue with the General Division's statement that "… no doctor has come up with a very definitive diagnosis of the Appellant's medical conditions." She pointed to Dr. Axelrod's medical report (GT1-176), where he diagnosed the Respondent with neck pain, neck and shoulder pain, and bi-lateral repetitive strain. Dr. Axelrod stated that the Respondent described the "insidious onset of bilateral shoulder and elbow pain, as well as central neck pain, which occurred after repetitive lifting and carrying of 40 kg bags of flour." He went on to state that the Respondent "has gone on to develop neck pain and bilateral shoulder and elbow pain".

[30] Thus, the General Division was clearly in error when it made the impugned statement. Accordingly, the Appeal Division finds that the General Division based its decision, at least in part, on an erroneous finding of fact. The appeal also succeeds on this ground.

DECISION

[31] The Appellant's counsel submitted that the Appeal Division should allow the appeal, and pursuant to section 59 of the DESD Act, refer the matter back to the General Division for reconsideration. In the circumstances of this case, the Appeal Division agrees. Accordingly, the appeal is allowed, and the matter is referred back to the General Division for redetermination.

Hazelyn Ross
Member, Appeal Division