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

Citation: *J. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 60

Tribunal File Number: AD-16-968

BETWEEN:

J. B.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 23, 2017

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of a decision of the General Division of the Social Security Tribunal (Tribunal) summarily dismissing the Appellant's appeal for payment of the *Canada Pension Plan* (CPP) disability benefit earlier than the maximum 15-month retroactivity period after it determined she was not incapacitated from applying earlier than September 2013. The General Division dismissed the appeal because it was not satisfied that it had a reasonable chance of success.

[3] No leave for appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right when dealing with a summary dismissal from the General Division.

[4] Having determined that no further hearing is required, this appeal is proceeding pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations* (SST Regulations).

OVERVIEW

[5] The Appellant applied for CPP disability benefits on September 3, 2013. Her application was approved by the Respondent, with a first payment date of June 2012, which marked the maximum retroactivity period of 15 months prior to the date of application. On January 28, 2014, the Appellant requested the Respondent to reconsider the effective start date of her disability benefits on the ground that her incapacity actually began on February 10, 2011. The Respondent denied this request at the reconsideration level on March 4, 2014. The Appellant appealed the reconsideration decision to the General Division on May 29, 2014. In her submissions, the Appellant claimed that cognitive issues caused by exposure to chemicals in her place of employment had disabled her since 2008. Two psychiatric reports were enclosed.

[6] In compliance with section 22 of the SST Regulations, the General Division notified the Appellant in writing of its intention to summarily dismiss the appeal. The letter said:

> The Tribunal is bound by the *Canada Pension Plan* (CPP) legislation. As per subsection 60, "No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act." Subsection 60(10) governs the period of incapacity and states that "For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed." In your case, the Tribunal finds that your CPP disability benefits have been approved with maximum retroactivity possible (15 months). The Tribunal deems that there is insufficient evidence to prove total incapacity, such that it prevented you or someone on your behalf to apply for CPP disability benefits at an earlier date.

[7] In her response to the General Division dated December 1, 2015, the Appellant stated that she has been significantly impaired for a very long time and went off work in February 2011. She submitted that she had the incapacity to form an intention to apply earlier due to cognitive deficiencies. The Appellant also made reference to a case of the Pension Appeals Board,*Weisberg v. MSD*,[1] and submitted a letter, dated November 25, 2015, from her family doctor endorsing her claim that she had had significant medical impairment of her cognitive function since February 2011.

[8] On March 31, 2016, the General Division issued its decision. It contained a detailed review of the medical evidence and concluded that the Appellant had not shown she was incapacitated for the period after she stopped working in February 2011 to September 2013, when she submitted her application for CPP disability benefits.

[9] On June 10, 2016, the Appellant filed an appeal of the summary dismissal decision with the Appeal Division of the Tribunal, alleging error on the part of the General Division. I have decided that an oral hearing is unnecessary and the appeal will proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

[1] *Weisberg v. Canada (Minister of Social Development)*, 2004, CP 21943.

(b) This form of hearing respects the requirements under the SST Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[10] Subsection 53(1) of the DESDA states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Under subsection 56(2), no leave is required to appeal a summary dismissal to the Appeal Division.

[11] Subsection 54(1) of the DESDA makes it clear that the General Division can only take an action that should have otherwise been taken by the Minister:

> The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or Commission in whole or in part or give the decision that the Minister or Commission should have given.

[12] Section 22 of the SST Regulations states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[13] According to subsection 58(1) of the DESDA, the only grounds of appeal are the following:

(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 made in a perverse or capricious manner or without regard for the material before it.

[14] Subsections 60(8) to 60(10) of the CPP set out the requirements for a finding of incapacity:

(8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

(b) the person had ceased to be so incapable before that day, and

(c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

ISSUES

[15] The issues before me are as follows:

(a) How much deference should the Appeal Division extend to decisions of the General Division?

(b) Did the General Division err in summarily dismissing the Appellant's claim that she lacked the capacity to apply for the CPP disability benefit earlier than September 3, 2013?

SUBMISSIONS

[16] In her notice of appeal dated July 26, 2016, the Appellant claimed 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. Specifically, she alleged that the General Division erred by failing to take into account the referenced *Weisberg* case. She knew that she had suffered some impairment, but was "unsure of forming and making a decision to apply for CPP- D benefits earlier." She asked for retroactive disability payments from May 2011 to June 2012.

[17] The Respondent made no submissions.

ANALYSIS

Degree of Deference Owed to the General Division

[18] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[2] In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[19] The Federal Court of Appeal decision *Canada (MCI) v. Huruglica*[3] has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

---

[2] *Dunsmuir v. New Brunswick,* [2008] SCR 190, 2008 SCC 9.
[3] *Canada (Minister of Citizenship and Immigration) v. Huruglica,* 2016 FCA 93.

[20] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law. "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[21] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> […] the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object […] The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[22] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations.

[23] The word "unreasonable" is nowhere to be found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Summary Dismissal

[24] Although the Appellant did not explicitly question the General Division's decision to proceed by way of summary dismissal, I have decided to address this question at length.

[25] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Had the General Division either failed to identify the test or misstated the test altogether, this would have qualified as an error of law—one that is held to a strict standard.

[26] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 3 and 35 of its decision. However, it is insufficient to simply recite the test for a summary dismissal without properly applying it. Having correctly identified the test, the General Division was then required to apply the law to the facts. The decision to summarily dismiss therefore involved a question of mixed fact and law and was subject to a degree of deference—within the parameters of subsection 58(1).

[27] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. Although I am not bound by decisions of my fellow members of the Appeal Division, I am persuaded by the reasoning in *A.P.v. M.E.S.D. and P.P.,*[4] in which my colleague used the language of "utterly hopeless" to distinguish an arguable appeal from one that was appropriate for a summary dismissal. As long as there was some factual foundation to support the appeal and the outcome was not "manifestly clear," then the matter would not qualify for summary dismissal. A merely weak case would not be appropriate for a summary disposition, as it would necessarily involve assessing the merits of the case, examining the evidence and assigning weight to it. Assessing the evidence and the merits of the case signals that the matter is not appropriate for a summary.

[28] Here, the General Division clearly considered the evidence before it and assessed the case on its merits. In its analysis, the General Division wrote:

---

[4] *A.P. v. Minister of Employment and Social Development and P.P.,* (2015), SSTAD-15-297.

[29] It then becomes imperative for the Tribunal to determine if there is sufficient evidence to prove that the Appellant did not have the capacity of forming or expressing the intent to make an application on her own behalf earlier than the day the application was actually made. The scope of the Appellant's activities, given her medical conditions, must be looked at in deciding whether she was incapacitated from forming an intention to apply.

[30] The Appellant has argued that she became incapacitated effective February 10, 2011, the day she ended her employment with CRA. It is important to understand the difference between disability and incapacity. A person can be totally disabled physically or be slow in his/her mental functioning, yet can have the mental capacity to take decisions or form intent to do so. The Federal Court of Appeal has established the principle governing the issue of incapacity in *Sedrak v. Canada* (2008 FCA 86) that the capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of his world view does not indicate a lack of capacity. The evidence at hand shows that the Appellant attended medical appointments and treatments on her own on a regular basis for the entire period of alleged incapacity. She consulted Dr. Wilson and Dr. Bell in 2011 and 2012 and also underwent an MRI on her own. There is no evidence that she was dependent on anyone for her appointments or required anyone else's assistance in understanding the medical consultations. In February 2013 the Appellant consulted Dr. Parsons and also signed a letter of consent for a medical examination.

[31] Dr. Stein's report on May 24, 2013 provides a synopsis of the Appellant's cognitive abilities. The report is evident of her capacity to manage her tasks on a daily basis, and the ability to drive a car that requires alertness. Even though she has slowed down quite a bit as compared to her ability to multitask prior to being disabled, the Appellant still has the capacity and capability to complete work tasks at home on her own pace. The following excerpt from Dr. Stein's report amply sums up the Appellant's cognitive abilities: *"She interacted easily, had reasonable recall for historical events, and was able to present her symptoms in an organized manner during the interview. She did express feelings of sadness, anger, and anxiety when relating specific events but did not show significant affect during the interview. She denied significant symptoms of depression, suicidal ideation, or homicidal ideation. Her assessment of her illness, the help she has gotten to date and the advocacy she has been able to do for herself suggest unimpaired insight and judgment. Her cognitive function was grossly intact during the interview. No abnormalities of form or content of thought were noted."*

[32] In *Morrison v. MHRD* (1997), CP 4182 (PAB), the Board stated that *"There is little of generality or flexibility in s. 60. Rather, it is precise and narrow. It does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity, quite simply, of "forming or expressing an intention to make an application ..."*

> [33] The Tribunal also cannot ignore that the Appellant is a single parent responsible for the upbringing of her two teenaged children. This shows that she had the capacity to take important decisions and certainly does not allude to any incapacity.

[29] The fact that the General Division was required to assess and weigh the evidence at length indicates that there were triable issues. While the General Division was entitled to make findings of fact as to whether the Appellant was incapacitated, this went beyond applying the test for a summary dismissal. If the General Division had to analyze the evidence, assign weight and decide upon whether the evidence could support a finding of incapacity, it cannot be said that there was no reasonable chance of success, no triable issue or no merit to the appeal.

[30] While the General Division correctly recited the test for a summary dismissal, that does not necessarily mean the correct law was applied. In this case, the General Division blurred the distinction between an "utterly hopeless" case without merit and a possibly weak or very weak case, and thereby improperly characterized the dismissal of the appeal as a summary dismissal. In so doing, the General Division not only misapplied the law, it potentially denied the Appellant a full opportunity to be heard; in choosing to summarily dismiss her appeal, the General Division closed itself off from considering the possibility that the Appellant's case, weak though it may have been, might have benefitted from admission of oral evidence pertaining to the nature and extent of her claimed incapacity.

[31] Having decided that the General Division improperly employed the summary dismissal process to dispose of this case, I find it unnecessary to investigate whether the General Division erred in its analysis of the Appellant's claimed incapacity. It is irrelevant whether the General Division's decision was defensible on the merits, as the overriding consideration must be whether the correct procedure was followed under the DESDA.

CONCLUSION

[32] I find that the General Division mischaracterized the disposition of this matter as a summary disposal. For the reasons set out above, the appeal is allowed and the matter referred to the General Division for a *de novo* hearing.

[33] To avoid any potential for an apprehension of bias, the matter should be assigned to a different member of the General Division and the decision of the General Division should be removed from the record.

Member, Appeal Division