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

Citation: *E. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 118

Tribunal File Number: AD-15-1262

BETWEEN:

E. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: March 26, 2017

REASONS AND DECISION

OVERVIEW

[1] This is an appeal of the decision of the General Division rendered on August 17, 2015, which determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" on or before the end of her minimum qualifying period on December 31, 2007.

[2] As the Appellant did not request a hearing, and as I determined that no further hearing was required, the appeal proceeded under paragraph 43(*a*) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The following issues are before me:

a. Is a reassessment appropriate on an appeal to the Appeal Division?

b. Did the General Division base its decision on an erroneous finding of fact that the Appellant did not pursue employment at the local Real Canadian Superstore because her former supervisor did not transfer there, as she had expected?

c. What is the appropriate disposition of this appeal?

GROUNDS OF APPEAL

[4] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the following grounds of appeal:

(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.

ISSUE A: REASSESSMENT

[5] In submissions filed on July 21, 2016, the Appellant argued that the objective medical reports establish that she has a severe disability. She included several medical records and reports, including a diagnostic examination of her thoracic spine taken on May 15, 2015. The General Division had copies of all the medical records and reports, other than the diagnostic examination.

[6] It has now become well-settled law that new evidence (i.e. the diagnostic examination) does not constitute a ground of appeal. As the Federal Court recently held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367:

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[7] The diagnostic examination does not address any of the grounds of appeal. I am unprepared to find that it is admissible for the purposes of this appeal.

[8] Essentially, the Appellant is requesting that the Appeal Division reweigh and reassess the evidence in order to reach a different conclusion regarding her eligibility for a disability pension. However, as the Federal Court held in *Tracey v. Canada (Attorney General)*, 2015 FC 1300, it is not the role of the Appeal Division to conduct a reassessment when determining whether leave should be granted or denied, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[9] Additionally, I am mindful of the words of the Federal Court in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the

heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

ISSUE B: ERRONEOUS FINDING OF FACT

[10] In her application requesting leave to appeal, the Appellant argued that the General Division based its decision on an erroneous finding of fact made without regard for the material before it, that she did not pursue employment with a local Superstore because her former supervisor did not transfer there, as she had expected. She claims that she had testified that her manager had in fact transferred to her local Superstore, but she was unable to pursue employment there because of the intensity of her pain and ongoing condition.

[11] The Respondent denies that the General Division based its decision on an erroneous finding of fact that it made in a perverse and capricious manner or without regard for the material before it. The Respondent argues that, provided that there was some evidentiary basis upon which the General Division made its finding, the finding of fact is not an erroneous one that was made in a perverse or capricious manner or without regard for the material before it. Although the Respondent maintains that the evidence overwhelmingly supports the General Division decision, it did not address the specific ground upon which leave had been granted, other than to say that, "it is not contested that the Appellant did not try to find any gainful occupation." The Respondent notes that the Appellant felt that employers would not hire her because of her medical condition and therefore did not make any efforts at finding employment or trying to negotiate working conditions with her former employer.

[12] The Respondent submits that, even if the General Division had based its decision on an erroneous finding of fact made without regard for the material before it, its decision can nevertheless stand. The Respondent finds support for this in *Construction Labour Relations v. Driver Inc.*, 2012 SCC 65, where, at paragraph 3, the Supreme Court of Canada held that, "For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708)." In this regard, the Respondent contends that the General Division reasonably found

that the Appellant was not disabled within the meaning of the *Canada Pension Plan*. In particular, the Respondent claims that the evidence before the General Division, which included medical and other documentary evidence, as well as the Appellant's testimony, did not establish that she had a severe and prolonged disability within the meaning of the *Canada Pension Plan.* The Respondent submits that the General Division's decision, on the grounds upon which leave to appeal was granted, is overall reasonable and contains no reviewable error that would permit the intervention of the Appeal Division.

[13] The audio recording of the hearing indicates that the Appellant testified as follows, in response to a question about why she quit working at the Superstore:

> The pain became pretty bad and I was also moving, not by choice, but I didn't have to stop working because of the moving. Umm. Superstore they're also in X where I moved to in 2007 and they did ask me not to quit. They asked me to transfer. I was thinking about it and, at that time, they had a policy that even if I quit, and go back within a year, I still get to keep my seniority and the wages. And because I was so much in pain umm when I moved, well I said take a couple of months to see how I'm feeling, see how things are going and then decide if I go back or not, which that, that's what I did.
>
> And also, my favourite person, manager, that I was working with in X, he also shortly after was transferred to X and I was happy about it. I say, well, if I go back, I know I have a nice person there. He also transferred to, I guess, he got a promotion in X. He was assistant manager and then he got promoted to a manager and moved to X.
>
> . . .
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> I was visiting him often and talked to him afterwards in X and I was happy about that, but I just slowly, slowly couldn't figure out how I get back to work because of my condition. (1:01:00 to 1:03:36 of recording)
>
> (My emphasis)

[14] The Appellant's evidence suggests that her supervisor had been promoted and then transferred to the X location of the Real Canadian Superstore, where she visited him.

[15] In setting out the evidence, the General Division wrote:

> [31] […] Her back pain was increasing and she had been thinking about quitting superstore [*sic*] in X. In fact, they asked her to transfer to the X Superstore. She considered it, but was disappointed to learn that her supervisor was not going to be transferred as originally planned. Moreover, she was in so much pain, she felt [*sic*] couldn't take up their offer.

[16] At paragraph 49 of the analysis, in addressing the issue set out by the Federal Court of Appeal in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, i.e. whether the Appellant had fulfilled her obligation to show that efforts at obtaining and maintaining employment had been unsuccessful by reason of her health condition, the General Division wrote:

> In her testimony, she suggested that she might have taken a job at the X Superstore, had her supervisor in X followed through with his original plan of transferring to the smaller community.

[17] The General Division essentially determined that the supervisor did not transfer to X, and that, as a result of him remaining in X, the Appellant did not pursue any employment opportunities that might have been available at the X Real Canadian Superstore. The General Division's finding in this regard, that the Appellant's former supervisor did not transfer to the smaller community, is unsupported by the testimony.

[18] In light of the Appellant's oral testimony that her former supervisor not only transferred to X, but that she often visited him, I find that the General Division's conclusion that "she might have taken a job at the X Superstore, had her supervisor in X followed through with his original plan of transferring to the smaller community" was made erroneously in a perverse or capricious manner or without regard for the material before it.

[19] Under subsection 58(1) of the DESDA, I also have to determine whether the General Division based its decision on that erroneous finding of fact. In this case, it is clear that the General Division based its decision in part on this finding, given that the member indicated that he was "obliged to focus on the Appellant's capacity and functionality," and then proceeded to examine why she left her employment in the first instance, and then why she failed to pursue employment at her former employer's X location. The member acknowledged that the Appellant experienced pain and depression, but found that her

depression was situational, resulting from external factors partly in her own control. The member focused on what he perceived as the Appellant's testimony, that she might have taken a job, had the supervisor transferred to X. The member implied that, had the supervisor transferred to X, the Appellant more likely than not would have resumed her employment at the Superstore, and would have seen some improvement in her depression. Apart from his analysis of the medical evidence, these considerations were central to the member's analysis of whether the Appellant exhibited any capacity and functionality.

[20] Given the evidence that was before the General Division, I find that the member based his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him.

ISSUE C: DISPOSITION

[21] The Respondent argues that General Division decisions are entitled to significant deference, given that, as the trier of fact, it is closer to the facts and evidence, having heard the testimony of the parties firsthand, and having had the opportunity to assess credibility and weigh the evidence. The Respondent contends that the Appeal Division may only intervene if the finding of fact is made in a "perverse or capricious manner" or is made "without regard to the material" before the General Division. As I have found that the member based his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him, I find that little or no deference ought to be accorded with respect to the particular set of facts that I have identified above.

[22] Although the Respondent concedes that the Appeal Division may intervene if the finding of fact is made in a "perverse or capricious manner" or is made "without regard to the material before it," the Respondent nevertheless submits that deference should be shown as the General Division's decision that the Appellant was not disabled is overall reasonable. In this regard, the Respondent referred me to several of the General Division's findings. The Respondent argues that, given the Appellant's medical conditions and the lack of evidence of employment effort and possibilities, the General Division's conclusion that there was simply not enough evidence to show that her disability was "severe" on or prior to the end

of her minimum qualifying period on December 31, 2007 was not made in a perverse or capricious manner.

[23] The Federal Court of Appeal, however, rejects this approach for an administrative tribunal such as the Appeal Division: *Canada (Attorney General) v. Jean*, 2015 FCA 242 (CanLII) and *Maunder v. Canada (Attorney General)*, 2015 FCA 274 (CanLII), and cautions that administrative tribunals refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context. The Federal Court of Appeal counsels the Appeal Division to look to its enabling statute. It notes that when the Appeal Division hears appeals pursuant to subsection 58(1) of the DESDA, its mandate is conferred to it by sections 55 to 69. In *Jean*, the Federal Court of Appeal stated that there was "no need to add to this wording the case law that has developed on judicial review."

[24] In *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal indicated that "one must seek instead to give effect to the legislator's intent." The Federal Court of Appeal indicated that the determination of the role of a specialized administrative body is "purely and essentially a question of statutory interpretation" (at paragraph 46). This approach requires us to analyze the words of the DESDA in their entire context, "in their grammatical and ordinary sense harmoniously" with the scheme of the DESDA and its purpose and object.

[25] Adopting the approach set out by the Federal Court of Appeal requires me to consider the evolutionary path of the DESDA, its purported purpose and object, and the wording of subsection 58(1) of the DESDA. I conclude that some measure of deference must be accorded by the Appeal Division to the General Division on findings of fact. However, I find that no deference is to be accorded where there are errors of law or, as was the case here, where any erroneous findings of fact, upon which the General Division bases its decision, are made in a perverse or capricious manner or without regard for the material before it.

[26] Given the directions from the Federal Court of Appeal, the Respondent has not convinced me that the DESDA permits me to necessarily uphold a decision of the General Division on the basis that it is overall reasonable. There may be some circumstances

whereby upholding a decision is warranted (e.g. when there is no medical evidence whatsoever to support a finding of any disability, although there might be several erroneous findings of fact, for instance, relating to an appellant's employment or work efforts). In the circumstances of this case, however, the analysis regarding the Appellant's capacity and functionality were so closely intertwined with her failure to pursue employment at her former employer's local business, that it would not be appropriate to overlook the erroneous finding of fact and find that the decision was overall reasonable.

[27] The appeal is allowed and the matter is returned to the General Division for a redetermination.

Janet Lew
Member, Appeal Division