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

Citation: *V. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 119

Tribunal File Number: AD-16-1023

BETWEEN:

V. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: March 27, 2017

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal (Tribunal) issued on June 8, 2016, which determined that the Appellant was not eligible for disability benefits under the *Canada Pension Plan* (CPP), because her disability was not "severe" during her minimum qualifying period (MQP), which ended on December 30, 2010.

[2] Leave to appeal was granted on February 3, 2017, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[3] The Appellant applied for CPP disability benefits on June 22, 2012. In her application, she disclosed that she was 43 years old and attended school up to Grade 12, later receiving training as a personal support worker (PSW). She was employed as a PSW from August 1996 to November 2009, when she left her job following a workplace injury.

[4] The Respondent denied the application initially on October 16, 2012, and on reconsideration on January 23, 2013, on the grounds that her disability was not severe and prolonged as of the MQP. On November 16, 2015, despite the length of time that had elapsed since the filing deadline, the Appellant was given permission to appeal these denials to the General Division. In the meantime, the Appellant had submitted a second application for CPP disability benefits on January 20, 2015. This application was adjudicated and denied at the initial level on August 15, 2015.

[5] At the hearing before the General Division on June 6, 2016, the Appellant testified that she injured her head and neck in November 2005, while performing a patient transfer. She was off work for two months and then returned to modified duties. She underwent a discectomy

surgical procedure in April 2007, but the pain persisted and her performance deteriorated until she was terminated two years later. She has not worked since then. Although she participated in a labour market re-entry (LMR) program under the auspices of the Workers' Safety and Insurance Board, she was unable to find a suitable job, despite making numerous applications. She attempted a work trial with the Salvation Army but was unable to complete it due to pain.

[6] In its decision of June 8, 2016, the General Division dismissed the Appellant's appeal, finding that, on a balance of probabilities, she was capable of substantially gainful employment as of the MQP. The General Division noted that there were no diagnostic imaging reports to support her complaints of severe neck pain. She was able to work at modified duties for several years following her workplace accident and subsequently completed an LMR program. It found that most of her listed medical conditions were not disabling, individually or in combination.

[7] On August 15, 2016, the Appellant's representative filed an application for leave to appeal with the Appeal Division of the Tribunal, alleging errors of fact and law on the part of the General Division. In my decision of February 3, 2017, I granted leave on the primary ground that the General Division may have failed to observe a principle of natural justice by conducting much of the oral hearing under the misapprehension that it was based on the Appellant's second application for CPP disability benefits, rather than her first.

[8] On March 17, 2017, the Respondent submitted a letter in which it consented to the matter being referred back to the General Division for a new hearing by a different member.

[9] I have now decided that an oral hearing is unnecessary and that the appeal can proceed on the basis of the documentary record for the following reasons:

(a) The Respondent has agreed to a redetermination of the Appellant's disability claim on its merits;

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

(c) This form of hearing respects the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

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

[11] According to subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the Appeal Division in whole or in part.

[12] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an appellant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the MQP.

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ISSUE

[15] Did the General Division fail to observe a principle of natural justice when it conducted a hearing in the mistaken belief that the appeal arose from the Appellant's second application of January 20, 2015, rather than her first application of October 16, 2012?

SUBMISSIONS

[16] In the application requesting leave to appeal, the Appellant's representative cited several instances in which the General Division committed errors of fact and law and breached principles of natural justice. As the Respondent has conceded that a new hearing is required, I do not see a need to rule on all the grounds advanced by the Appellant and will confine my analysis to the one issue where there is now common ground.

[17] The Appellant's representative alleged that, during the hearing on June 6, 2016, and immediately prior to the commencement of the closing argument, the presiding General Division member abruptly asked: "So what I don't understand is, why didn't you appeal your 2012 application to the SST?" A protracted argument ensued for several minutes, but the member refused to consider the February 10, 2016 letter from the Tribunal's operations manager, which confirmed the appeal was being heard on the 2012 application.

[18] In a letter dated February 16, 2017, the Appellant's representative added that it was "literally impossible" to make a case to a person who, just minutes earlier, had announced that he was only interested in hearing arguments pertaining to the 2015 application, which had not even undergone reconsideration.

[19] In its letter of March 17, 2017, the Respondent agreed, having listened to the recording of the hearing, that the General Division hearing was conducted under the mistaken impression that the appeal flowed from the January 20, 2015 application, rather than the June 22, 2012 application. After the hearing was closed, the member admitted, by way of a letter dated June 10, 2016, that the appeal did flow from the first application and that he had made his decision on it.

[20] However, the Respondent noted that, while the two applications dealt with the same medical conditions and the same December 2010 MQP, the member appeared to rely, during the hearing, on the CPP medical report that accompanied the 2015 application. This differed from its 2012 counterpart in that it offered less detail regarding the Appellant's functional limitations, treatments and prognosis. As the member's reliance on the 2015 medical report during the hearing may have negatively impacted his questions to the Appellant and his assessment of her testimony, the Respondent recommended that the Appeal Division refer the matter back to the General Division for a new hearing, pursuant to subsection 59(1) of the DESDA.

ANALYSIS

[21] I agree with the parties that the hearing before the General Division was flawed and is best remedied by a redetermination of the Appellant's CPP disability claim on its merits.

[22] My review of the audio recording of the hearing confirms that the General Division member conducted the proceeding under the mistaken impression that the appeal flowed from the January 20, 2015 application, rather than the June 22, 2012 application. The member and the representative argued about this matter, without resolution, for nearly 15 minutes before agreeing to move on to the closing argument. After the hearing was closed, the General Division member obliquely conceded, by way of a letter dated June 10, 2016, that he had been in error.

[23] Although the General Division's decision clearly stated that it was based on the first application, this did not change the fact that it held a 90-minute hearing (some of it wasted arguing over a matter that the Appellant believed was settled) on the wrong application. As noted by the Respondent, the CPP medical reports and questionnaires that accompanied the two applications differed in significant ways, and it is impossible to know how the General Division's conduct during the hearing was influenced by its presumed reliance on the second application at the expense of the first.

[24] Furthermore, this episode raised the question of just how thoroughly the General Division reviewed the evidentiary record prior to convening the hearing.

CONCLUSION

[25] For the reasons discussed above, the appeal is allowed.

[26] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member. I also direct the Tribunal to expunge from the record the General Division's decision dated June 8, 2016.

Member, Appeal Division