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

Citation: *S. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 135

Tribunal File Number: AD-16-253

BETWEEN:

S. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: March 31, 2017

REASONS AND DECISION

INTRODUCTION

[1] On November 30, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable to the Appellant.

[2] An application for leave to appeal the General Division decision was filed with the Appeal Division of the Tribunal. Leave to appeal was granted on August 9, 2016, with respect to possible errors in relation to evidence of psychological problems and fibromyalgia, and a failure to reference recent supportive medical reports.

[3] This appeal is proceeding on the record. No further hearing is required, since there is to be no testimony, both parties are represented, and both representatives have provided detailed written submissions. This method of proceeding is consistent with the Tribunal's obligation to proceed informally and expeditiously, while respecting the requirements of fairness and natural justice, set out in s. 3(1) of the *Social Security Tribunal Regulations*.

[4] I have considered the file documentation before the General Division, the above-noted decisions of the General Division and Appeal Division, the Appellant's submissions (February 5, 2016; September 16, 2016; and February 21, 2017), and the Respondent's submissions (September 23, 2016). The Respondent declined to provide reply submissions.

GROUNDS OF APPEAL

[5] According to s. 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 that it made in a perverse or capricious manner or without regard for the material before it.

[6] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. In this respect, I agree with the Respondent's submission that, based on the unqualified wording of ss. 58(1)(*a*) and (*b*) of the DESDA, no deference is owed to the General Division on questions of natural justice, jurisdiction, or errors of law. I further agree that the language of s. 58(1)(*c*) requires the Appeal Division to show some deference on factual errors: in addition to the impugned finding of fact being material ("based its decision on") and incorrect ("erroneous"), it must also have been made in a perverse or capricious manner or without regard for the evidence, for the appeal to succeed.

[7] Appellant's counsel relies upon the earlier decision of *Canada (Attorney General) v. Jean*, 2015 FCA 242 to assert that no deference is owed to the General Division, broadly speaking. In *obiter*, that decision suggested that "we must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context," and referred to the mandate of the Appeal Division under the DESDA; these comments are consistent with *Huruglica.* However, the court in *Jean* also stated that the Appeal Division has as much expertise as the General Division "and thus is not required to show deference." It went on to explain that the Appeal Division ought to have determined, in that case, whether the General Division erred in law by applying the specific language found in s. 58(1)(*c*) of the DESDA, with "no need to add to this wording the case law that has developed on judicial review." In context, *Jean* proposes that the concept of deference as found in the reasonableness standard of judicial review ought not to apply to Appeal Division review of General Division decisions, and that such appellate review is to be guided by the statutory provisions without elaboration. I do not interpret *Jean* to indicate that a degree of deference may not be found within those statutory provisions, nor do I interpret *Jean* to suggest that mere disagreement on a material finding of fact constitutes a reviewable error (indeed, in the result, *Jean* addressed only an error of law). Rather, as noted above, the ground of appeal set out in s. 58(1)(*c*) requires the finding

of fact to be material, incorrect, and made either in a perverse or capricious manner or without regard for the evidence. In any case, as will be seen below, this appeal does not turn on the degree of deference afforded the General Division on errors of fact.

DISCUSSION

[8] For ease of reference, the General Division's analysis of whether the Appellant had a severe disability is reproduced in its entirety below:

> [46] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Tribunal noted that the Appellant had done only heavy, physical labour in the past, but also noted that the Appellant is still young and should be able to be re-trained for work that is more suitable for his limitations.
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> [47] 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 (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant testified that he was able to do some light farm work in 2012-13.
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> [48] In her initial medical report of November 2012, Dr. Wendling did not report any mental health concerns. In January, 2012, Dr. Hussain, Psychiatrist, noted that the Appellant did not appear to be overly distresses or anxious. In fact, the Appellant, in his oral testimony, stated that he was not depressed. This would rule out a severe a severe [*sic*] psychological problem that would preclude all work. In addition, the mental health association closed his file as there were no further concerns.
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> [49] The Appellant was diagnosed with restless leg syndrome by his family doctor. However, a subsequent sleep study showed no abnormal movement of his extremities.
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> [50] In May, 2012, the Appellant was seen by Dr. Freeman who noted that the Appellant had a full ROM of his back and was able to weight-bear. Conservative treatment was recommended. Also, in October 2012, the Appellant was seen by Dr. Croft in the orthopedic clinic. The doctor recommended conservative treatment such as weight loss and strengthening of core muscles. No follow-up was needed.
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> [51] Dr. Pope, Rheumatologist, did not diagnose the Appellant with fibromyalgia.

> [52] In August 2102 [*sic*], Dr. Boyd noted the Appellant appeared well and in no apparent distress. He displayed a good range of motion of the spine in all directions. The diagnosis is chronic mechanical low back pain and knee pain. Dr. Boyd recommended physiotherapy and occupational therpy [*sic*] to improve the quality of his life.
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> [53] An Orthopedic examination in July 2012 indicated that the Appellant has no restriction with walking or sitting and is still doing some things around the farm. He has a normal walk and gait and his relaxes are normal with power of 5/5.
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> [54] Dr. Lawendy, Orthopedic Surgeon, noted in October 1013 [*sic*], that the Appellant is doing quite well following his accident and is making progress with his ROM and with weight-bearing.
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> [55] The Tribunal is mindful of the following decision of the Pension Appeals Board (PAB): Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled. Barata v MHRD (January 17, 2001) CP 15058 (PAB). The Tribunal is of the opinion that the collective effects of the Appellant's medical conditions do not render the Appellant severely disabled. He has been treated with very conservative treatment recommendations.
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> [56] The Tribunal has concluded that the Appellant does not have a physical or psychological condition that would prevent him from seeking and maintain suitable gainful employment at the time of his MQP of December 31, 2013.

[9] Leave to appeal was granted by the Appeal Division on the basis that the General Division:

a) disregarded Dr. Wendling's diagnoses of depression and anxiety in the initial medical report, by stating in paragraph 48 that she had not reported any mental health concerns;

b) may have disregarded the full content of Dr. Hussain's January 2012 report, by referencing only one aspect of that report in paragraph 48;

c) likely erred by making no reference to contrary information when stating, in paragraph 51, that Dr. Pope did not diagnose fibromyalgia; and

d) likely erred when it failed to address supportive medical evidence from 2013 in its analysis.

[10] Although these concerns had been framed as potential errors of fact, the Appeal Division decision did not clarify the nature of the errors for which leave was granted. Consequently, based on the decision *Mette v. Canada (Attorney General)*, 2016 FCA 276, I do not consider my analysis in this decision to be constrained to one particular statutory ground of appeal. Ultimately, these errors reflect an inadequacy of reasons, and it is on this basis that the appeal is allowed.

[11] In her submissions, though focused on errors of fact, Appellant's counsel points out that decision-makers must give reasons for material findings of fact made on disputed or contradictory evidence, and reasons must reflect a meaningful analysis of the evidence (*R. v. Sheppard*, 2002 SCC 26; *Canada (Minister of Human Resources Development)* v. *Quesnelle*, 2003 FCA 92; *Canada (Attorney General) v. Fink*, 2006 FCA 354). Respondent's counsel did not address this aspect of the Appellant's submissions, despite being given an opportunity to do so.

[12] The General Division decision cites the test for severe disability at the outset: "A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation." Yet, prior to concluding that the Appellant did not have such a disability, and despite conflicting evidence on file, the decision does not contain findings of fact with respect to such matters as the Appellant's diagnoses, associated functional limitations, work capacity, and employment efforts. I was able to locate three findings of fact in the analysis: the Appellant "had done only heavy, physical labour in the past," the Appellant "should be able to be re-trained for work that is more suitable for his limitations," and the Appellant did not have "a severe psychological problem that would preclude all work." The reader is left to guess at the General Division's other findings, based upon the selection of evidence reiterated in the analysis, from which no conclusions are clearly drawn. I note that the recitation of evidence (whether accurate or not) is not a finding of fact, and it is an especially poor substitute when contradictory evidence is not mentioned.

[13] The claimed errors upon which leave to appeal was granted illustrate the inadequacy of the General Division's reasons. With respect to the psychological evidence, the inaccurate description of Dr. Wendling's report, in particular, makes it impossible to know whether the finding of fact was made in consideration of the evidence. There may well be an evidentiary basis for a finding that the Appellant did not have a severe psychological problem precluding

work prior to December 2013, as Respondent's counsel asserts (particularly given Dr. Hussain's statement that "his depression is not that severe that he cannot work"), but it is not discernible from paragraph 48. As for the statement of Dr. Pope's non-diagnosis of fibromyalgia in paragraph 51, this highlights both the absence of reviewable findings of fact on the Appellant's diagnoses and associated limitations, and the failure to explain why Dr. Wendling's diagnosis of fibromyalgia was (implicitly) rejected. The General Division is certainly entitled to prefer one medical opinion over another, but must give reasons for doing so. Finally, while I am not persuaded that the General Division was obliged to address the June 12, 2013 chart note (since it did not contain new information with respect to the Appellant's diagnosis, limitations, or employability), the analysis does not contain a meaningful assessment of the evidence cited in respect of the Appellant's back condition and its impact on employment.

[14] In the result, I find, as in *Fink*, that the General Division decision "does not analyse, accept, reject or otherwise explain why it prefers any of the medical or expert opinion evidence over others which it is required to do," and further misstates evidence, thwarting the reader's efforts to understand its findings and conclusion. The requirements for meaningful analysis and intelligible reasons derive from the statutory obligation to provide written reasons (s. 54(2) of the DESDA), as well as the principles of natural justice applicable to the Tribunal; the latter principles include the right to have all relevant evidence considered by the decision-maker and the right to a reasoned decision that permits the reader to understand the basis of the decision. This appeal is allowed on the basis that the General Division erred in law and failed to observe principles of natural justice, by providing reasons that do not reflect a meaningful analysis of the evidence, and that cannot be effectively reviewed or understood.

[15] As in *Quesnelle*, I emphasize that it was and remains open to the General Division to find, on the evidence before it, that the Appellant did not have a severe disability within the meaning of s. 42(2)(*a*)(i).

CONCLUSION

[16] The appeal is allowed. Pursuant to s. 59(1) of the DESDA, the matter is referred back to the General Division for redetermination of the Appellant's appeal, by a different member.

Shirley Netten
Member, Appeal Division