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

Citation: *S. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 228

Tribunal File Number: AD-16-1049

BETWEEN:

S. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: May 18, 2017

Canada

REASONS AND DECISION

DECISION

The appeal is dismissed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) issued on May 26, 2016, which dismissed the Appellant's application for a disability pension on the basis that she did not prove that her disability was severe, for the purposes of the *Canada Pension Plan* (CPP), by her minimum qualifying period (MQP) of December 31, 2014. Leave to appeal was granted on February 27, 2017, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[2] The Appellant was 47 years old when she applied for CPP disability benefits on September 4, 2013. In her application, she disclosed that she attended school up to Grade 12 and was last employed in a bakery, a job she held from September 2000 to August 2012, when she stopped working due to severe upper and lower back pain, an anterior cruciate ligament (ACL) tear and osteoarthritis in her right knee, as well as obesity and depression.

[3] The Respondent denied the application at the initial and reconsideration levels on the grounds that her disability was not severe and prolonged as of the MQP. On July 17, 2014, the Appellant appealed these denials to the General Division.

[4] At a teleconference hearing before the General Division on May 26, 2016, the Appellant testified about her education, work experience and activities of daily living. She said that her sleep is interrupted and non-restorative due to chronic pain, which results in ongoing daily fatigue, and she requires assistance from her spouse and daughter with respect to all activities.

[5] In its decision, the General Division dismissed the Appellant's appeal, finding that, on a balance of probabilities, she was capable of substantially gainful employment. The General

Division noted that the Appellant had submitted only two medical reports in support of her application, and her orthopedic surgeon had specified only ambulatory restrictions arising from her knee condition. The General Division also found that the Appellant had not taken all reasonable steps to pursue treatment for her medical conditions and saw no evidence that they required ongoing treatment.

[6] On August 25, 2016, the Appellant's representative filed an application for leave to appeal with the Tribunal's Appeal Division, alleging various errors on the part of the General Division. In a decision dated February 27, 2017, the Appeal Division granted leave on the sole ground that the General Division may have based its decision on an erroneous finding of fact when it determined that there was no evidence that the Appellant was receiving "ongoing" treatment.

[7] The Appellant's submissions were set out in her application for leave to appeal and notice of appeal. In response to the Appeal Division's request for further submissions, the Respondent filed a brief dated April 13, 2017. In a letter dated February 3, 2017, the Appellant's representative requested a further hearing to permit the submission of additional evidence on the type of ongoing treatment his client was receiving.

[8] I have 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) There are no gaps in the file or need for clarification.

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

[9] I should note, further to the Appellant's last submission, that the Appeal Division is not ordinarily a forum in which additional evidence can be considered, given the constraints of subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), which do not give the Appeal Division any authority to make a decision based on the merits of the case. Once a hearing is concluded, an Appellant can raise new or additional information only by submitting an application to the General Division to rescind or amend its decision.

THE LAW

[10] According to subsection 56(1) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted.

[11] 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.

[12] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. According to subsection 58(2), the Appeal Division must either grant or refuse leave to appeal.

[13] 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 General Division in whole or in part.

[14] 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.

[15] 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.

[16] 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.

ISSUES

[17] The issues before me are as follows:

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

(b) Did the General Division err in finding that there was no evidence the Appellant was receiving "ongoing treatment"?

(c) If the answer to the preceding question is yes, what remedy is appropriate in this case?

Degree of Deference Owed to the General Division

Appellant's Submissions

[18] The Appellant made no submissions on this matter.

Respondent's Submissions

[19] The Respondent acknowledged the recent Federal Court of Appeal case, *Canada v. Huruglica*,[1] which it said confirmed that the Appeal Division's analysis should be influenced by factors such as the wording of the enabling legislation, the intent of the legislature when

[1] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

creating the tribunal and the fact that the legislature is empowered to set a standard of review if it so chooses. It was the Respondent's view that *Huruglica* did not appreciably change the standard to be applied to alleged factual errors; the language of paragraph 58(1)(*c*) of the DESDA continued to permit a wide range of acceptable outcomes.

[20] The Respondent submits that the Appeal Division should not engage in a redetermination of matters in which the General Division has a significant advantage as trier of fact. The wording of sections 58 and 59 of the DESDA indicates that Parliament intended for the Appeal Division to show deference to the General Division's findings of fact and to only intervene if a finding of fact is made in a "perverse or capricious manner" or is made "without regard to the material" before the General Division. However, no deference is to be shown by the Appeal Division to the General Division's decisions on questions of natural justice, jurisdiction and law.

Analysis

[21] 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 earlier set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*,[2] 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."

[22] This premise led 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

[2] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9.

> tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[23] 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.

[24] 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.

Ongoing Treatment

Appellant's Submissions

[25] The Appellant's request for leave focused on paragraph 17 of the General Division's decision, in which it wrote, "There was *no* evidence provided to suggest that any of the noted physical conditions required ongoing treatment or were disabling individually or in the combination with the totality of her health condition [emphasis added]."

[26] The Appellant alleges that this statement is incorrect. There was evidence that she required ongoing treatment and, in fact, the General Division noted, at paragraph 12(b) of its decision, that she uses both prescription and over-the-counter medications. This was further supported by Dr. Boyrazian's medical report dated September 4, 2012, which said the Appellant's medical treatment was "ongoing" and listed the prescription medications she was taking at the time, albeit to poor response.

Respondent's Submissions

[27] The Respondent argues that, if the General Division's statement is placed in context with the whole of its analysis, it is clear that it was referring to more active interventions and not to the passive intake of medication to manage the symptoms related to the Appellant's health conditions. This can be deduced from paragraphs 11 and 16 of the decision, in which the General Division noted that the Appellant was indeed taking Tylenol #3, Celebrex and an antidepressant. Therefore, the General Division was alive to the fact that the Appellant was taking medication to manage her symptoms, even though there was no medical evidence between Dr. Boyzarian's report in August 2013 and her MQP of December 31, 2014 to demonstrate that she had continued taking medication.

[28] Furthermore, in paragraphs 16 and 17 of the decision, the General Division discussed at length the Appellant's testimony in relation to her osteoarthritis, ACL tear and chronic depression. In July 2012, the Appellant did see an orthopedic surgeon, who suggested that the Appellant consider undergoing arthroscopic surgery. However, during her testimony the Appellant noted that her doctor could not guarantee success, and she expressed fear that surgery would worsen her pain, based on her sister's experience with a similar procedure. The Appellant also testified that she has not been prescribed physiotherapy for her back and knee pain.

[29] Moreover, this finding was not determinative of the General Division's ultimate conclusion, as it was only one factor among many the General Division relied upon in coming to the conclusion that the Appellant was not disabled within the meaning of the CPP. The General Division carefully reviewed the two medical reports and diagnostic imaging filed by the Appellant and put significant weight on the Appellant's testimony due to the lack of medical evidence around the time of her MQP in December 2014. After fully exploring the facts and evidence on file, the General Division rendered a decision that is intelligible and that falls within the range of possible acceptable outcomes available based on the law and the evidence that was before it. Through this appeal, the Appellant is seeking to re-litigate her disability claim as heard and decided by the General Division.

Analysis

[30] The Appellant submits that the General Division based its decision on an erroneous finding of fact when it categorically stated that there was *no* evidence of "ongoing treatment," pointing to her use of prescription and non-prescription medications and to her family doctor's description of her treatment as "ongoing."

[31] This appeal turns on the narrow question of whether "ongoing treatment" can reasonably be held to encompass passive intake of medication, as opposed to more active interventions, such as physiotherapy or surgery. In paragraph 16 of its decision, the General Division wrote:

> The Appellant testified that she has never been referred to specialists for her osteoarthritis, anterior cruciate ligament or chronic depression. Nor has she been prescribed physiotherapy for these conditions. The Appellant testified to suffering from significant functional limitations, yet does not require the use of a cane or walker. The Tribunal agrees with the Respondent's submission that notes that there is no evidence that the Appellant has sought or requires more aggressive treatment.

[32] This passage suggests that the General Division took steps to investigate what treatments the Appellant had received in the period leading up to the end of her MQP. The General Division found that she had not sought or received "more aggressive" treatments, having earlier noted (in paragraph 11) that she had been urged to try Celebrex and was regularly taking Tylenol #3 for pain. I am satisfied that the General Division was well aware that the Appellant was using medication to manage pain, and chose to draw a distinction between active treatment, such as physiotherapy, and passive treatment, such as analgesics.

[33] The General Division continued its analysis of the Appellant's treatment in paragraph 17, finding that she had been subject to minimal medical intervention since her CPP disability application:

> The family physician's only report, as noted is dated August 2013, which is sixteen months from her December 2014 MQP. At that time, he stated that further consultations and medical investigation were "ongoing," but the Appellant testified that she has not seen any specialists related to the listed diagnoses. The Appellant testified several times that she suffers from extreme dizziness and back pain; yet, the family physician does not mention either condition and the orthopaedic surgeon referred to a "previous low back condition." Radiographic evidence of the back, as noted by the Respondent does not support a finding of a severe condition. Given the extensive gap in medical evidence

> prior to her MQP of December 2014, the Tribunal is unable to determine the status of the Appellant's physical and psychological condition at the time of her MQP. The medical reporting does not establish that she was totally disabled at the time of the last medical report in August 2013 or when she stopped working in August 2012. There was no evidence provided to suggest that any of the noted physical conditions required ongoing treatment or were disabling individually or in combination with the totality of her health conditions.

[34] Given this context, I agree with the Respondent that the General Division, in finding no evidence of ongoing treatment, employed a shorthand that was intended to convey that there had been no *active* ongoing treatment. Under subsection 58(1) of the DESDA, a factual error by itself is insufficient to overturn a decision; the General Division must have also based its decision on that error, which itself must have been "made in a perverse or capricious manner or without regard for the material before it." In this case, I do not believe the General Division erred and, even if it did, I do not see how that error could be reasonably categorized as capricious, perverse or without regard for the record. In my view, the General Division was within its authority to draw an adverse inference from the fact that the Appellant addressed her musculoskeletal pain using only painkillers.

CONCLUSION

[35] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division erred in fact or law on the alleged grounds. The appeal is therefore dismissed.

Member, Appeal Division