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

Citation: *A. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 267

Tribunal File Number: AD-16-171

BETWEEN:

A. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Meredith Porter

HEARD ON: May 9, 2017

DATE OF DECISION: June 8, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Sandra Doucette—Representative for the Respondent

A. S.—Appellant

DECISION

The appeal is allowed. This matter is referred back to the General Division for redetermination by a different member.

INTRODUCTION

[1] On September 29, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension was not payable under the *Canada Pension Plan* (CPP).

[2] An application for leave to appeal the General Division decision was filed with the Appeal Division, and leave to appeal was granted on August 5, 2016.

[3] Submissions were received from both the Appellant and the Respondent following the granting of leave to appeal. A hearing was scheduled for May 9, 2017. Due to unforeseen local circumstances at the Respondent's offices, the same representative who had drafted the submissions on the Minister's behalf was not able to participate in the scheduled videoconference hearing. Instead, an alternate representative participated in the hearing via videoconference and proceeded with her colleague's drafted submissions, and she also provided additional oral submissions.

[4] The decision to hear this appeal by videoconference was based on the following reasons:

a) the complexity of the issue(s) under appeal;

b) the documentary information in the file required clarification;

c) the fact that this form of hearing is the most appropriate to address inconsistencies in the evidence; and

d) the requirements under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] Did the General Division err in law, base its decision on an erroneous finding of fact, or breach a principle of natural justice?

THE LAW

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

SUBMISSIONS

[7] The Appellant submits that:

a) The General Division based its decision on an erroneous finding of fact in finding that the Appellant had failed to follow up with treatment for her health condition when she had in fact followed her physicians' advice.

b) The General Division's finding that there was no evidence of a diagnosis in the medical records was based on an erroneous finding of fact made without regard for the materials

before the General Division, as there was a diagnosis in the medical evidence handed to the General Division at the time of the in-person hearing on September 9, 2015.

c) A principle of natural justice was breached; however, the details of the Appellant's argument on this issue were not clear from the written submissions that the Appellant had filed, and no further details were provided when requested during the course of the hearing.

[8] The Respondent submits that:

1) The Tribunal's Appeal Division should show no deference to the General Division decision on questions of natural justice, jurisdiction, and law; the General Division's findings in these areas must be correct. Conversely, on questions of fact, the Appeal Division should demonstrate some deference and should intervene only if the finding of fact was "erroneous" and "made in a perverse or capricious manner or without regard for the material before it [the General Division]."

2) The General Division correctly found that there was no evidence of a diagnosis in the record, as a medical report before the General Division states that "no such genetic test exists" (GD-5, pp. 51–52).

c) The Respondent does concur that the General Division erred in finding that the Appellant had not been diagnosed with hypermobility disorder. However, this error was not an erroneous finding of fact made in a "perverse or capricious manner." Although an error was made, the decision is still reasonable and should stand.

d) Without a finding that the Appellant lacked work capacity, the Appellant failed to demonstrate that she had pursued all treatment options to the fullest extent. Furthermore, she was also required to demonstrate efforts to retrain or obtain alternate employment within her limitations and that those efforts had failed as a result of her health condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33, and *Inclima v. Canada (Attorney General)*, 2003 FCA 117).

e) The General Division erred in fact by finding that there was no evidence of a diagnosis in the record before it. The report from Dr. Naidu provides a diagnosis of hypermobility disorder, which affects both the Appellant's physical and mental health.

f) The General Division erred in fact by finding that there was insufficient evidence demonstrating the Appellant's lack of capacity to work. Dr. Panaro's report dated July 15, 2013, states that "[i]t is severe pain that is affecting her ability to work."

g) The General Division decision lists, at paragraph 24, various factors to be considered in determining the severe criterion under the CPP pursuant to *Villani v. Canada (Attorney General)*, 2001 FCA 248 (the "*Villani* factors"). Although stated, the General Division did not proceed to provide a complete analysis of the Appellant's circumstances within the context of "real world" considerations as set out in *Villani*.

h) The General Division decision, at paragraph 30, states "[…] the Tribunal finds that the Appellant was able to satisfy, on the balance of probabilities, that she suffers from a severe disability in accordance with the CPP criteria." However, at paragraph 31, the decision states "Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criteria." Essentially, the General Division makes no comprehensible decision on this matter.

i) Despite the errors noted above, applying *Inclima*, the Appellant has still failed to demonstrate efforts to obtain alternate employment within her limitations. She has also failed to demonstrate that she made efforts to further her education and to retrain. The General Division decision should therefore stand.

ANALYSIS

Degree of Deference to the General Division Findings

[9] The Appellant has not made submissions on this issue.

[10] The Respondent submits that the wording of subsection 58(1) of the DESD Act requires that the Appeal Division show no deference to the General Division on questions of natural justice, jurisdiction and law. Deference, however, should be demonstrated where the error

asserted is one based on an erroneous finding of fact, or mixed fact and law, because the General Division is at an advantage compared with the Appeal Division, having heard the parties' evidence first-hand and having had a better opportunity to assess the credibility and reliability of the testimony and evidence. The Respondent submits that the Appeal Division's standard of review is similar to the standard of review for the former umpires when reviewing decisions of the former Board of Referees. Formerly, umpires reviewed the Board of Referees decisions on questions of law, jurisdiction or natural justice, and they applied a correctness standard. On questions of fact, or mixed fact and law, the standard applied was reasonableness.

[11] I find that the arguments that the Respondent has put forward hold weight. Until recently, the Supreme Court's decision in *Dunsmuir v. New Brunswick*, [2008] 1SCR 190, 2008 SCC 9, was the recognized authority for the applicable standard of review by both appellate-level courts and administrative tribunals. Matters involving alleged errors of law, jurisdiction or natural justice were to be reviewed for correctness. There was a lower threshold of deference owed to the first-level decision-maker. Where there was an alleged error of fact, or mixed fact and law, the degree of deference was higher, and only those findings considered unreasonable could be interfered with.

[12] The Federal Court of Appeal, in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, clarified the previous approach. The Court confirmed that appellate-level administrative tribunals should not use standards of review designed for appellate courts. When reviewing an appeal from the first level of an administrative tribunal, the appellate level's analysis should consider such factors as: i) the wording of the enabling legislation; ii) the intent of the legislature when creating the tribunal; and iii) the fact that the legislature is empowered to determine a standard of review, if and when appropriate. I note that the Court in *Huruglica* was dealing with an Immigration and Refugee Board decision; however, the decision has implications for other administrative tribunals, such as this Tribunal.

[13] Applying the reasoning of the Court in *Huruglica* to this case and turning to the wording in section 58 of the DESD Act, the Appeal Division is to address alleged errors of fact found in the General Division decision only when the alleged erroneous finding of fact was made in a "perverse or capricious" manner, or "without regard for the material before it [the General

Division].” This means that not all errors of fact are reviewable. The words “perverse” and “capricious”, or the phrase “without regard for the material before it” specifies when the Appeal Division may intervene in the General Division’s findings, and they demonstrate a high degree of deference to the General Division. The Appeal Division does not have broad power to reconsider evidence that the General Division has already considered and then to substitute its decision simply on the basis that the Appeal Division member would have determined the matter differently. Deference is afforded to the General Division’s findings unless the outcome of the decision falls outside a range of possible, acceptable outcomes that are indefensible in respect of the facts and law.

[14] On the contrary, the wording in paragraphs 58(1)(*a*) and (*b*) does not include any qualifying language for when errors of law, breaches of the principles of natural justice or questions of jurisdiction should be reviewed. I interpret this to mean that all alleged errors of law, breaches of natural justice and questions of jurisdiction are reviewable by the Appeal Division, with no deference to be afforded to the General Division.

The General Division Decision

Grounds of Appeal

[15] I first wish to deal with the Respondent’s argument that leave to appeal had been granted to the Appellant on only one ground, namely, that it was unclear from the General Division decision whether the Appellant’s doctor had completed a test with regards to her diagnosis. The Respondent argues that this sole ground, on which leave to appeal was granted, could not succeed on appeal because it was unclear from the material in the record whether such a test even existed. I note the Respondent’s argument that I may consider only this ground of appeal in deciding the appeal on the merits. In *Mette v. Canada (Attorney General)*, 2016 FCA 276, the Federal Court of Appeal stated that the Appeal Division is not required to limit grounds of appeal to those grounds, as enumerated in subsection 58(1) of the DESD Act, found to have a reasonable chance of success. Leave to appeal is either granted or refused. The Court stated, at paragraph 15:

> However, subsection 58(2) provides that leave to appeal “is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of

> success." The provision does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave.

[16] I read this to mean that, unless the Appeal Division specifically limits leave to appeal to specific grounds in its decision granting leave to appeal, the Appeal Division may consider on appeal any grounds that the Appellant has argued. The Appeal Division stated no limits in granting the Appellant leave to appeal in this case. I find that I am able to consider all grounds that the Appellant has raised on appeal.

Erroneous Finding of Fact—The Record

[17] The Appellant alleges that the General Division made two erroneous findings of fact: first, that the Appellant had not fully followed the advice of her attending medical professionals and, second, that the General Division erroneously found that there was no evidence of a diagnosis in the medical records contained in the record before it. The Respondent concurs that the General Division based its decision on these erroneous findings of fact; however, it initially asserted that it was not made in a "perverse or capricious manner."

[18] The alleged errors arise from two medical reports that the Appellant claims she delivered to the General Division at the hearing on September 9, 2015. One medical report was from Dr. Naidu dated August 20, 2013, and the other was from Dr. Panaro dated July 15, 2013. Both reports are referred to in the General Division decision at paragraph 16. The Appellant claims to have handed both reports, along with several receipts for physiotherapy that she had attended over a six-month period preceding the hearing, to the General Division member hearing her case. None of these documents or receipts can be found in the Tribunal record. However, additional copies were filed with the Appeal Division when the Appellant filed an application requesting leave to appeal the General Division decision.

[19] The member granting leave to appeal notes at paragraph 23 of her decision that, at the time when the Appeal Division granted leave to appeal, the Appellant's position was that the General Division had "ignored" Dr. Naidu's report. At paragraph 24 of the decision, the Appeal Division states "The Tribunal record does not contain any medical reports from Dr. Naidu." Both medical reports were considered "new evidence" at the Appeal Division level and,

because appeals to the Appeal Division are not *de novo* hearings, new evidence cannot be considered. The submission of new evidence is not a ground of appeal enumerated in subsection 58(1) of the DESD Act.

[20] I find that the General Division did not submit these reports for inclusion in the Tribunal record, but that the General Division referred to these reports in its decision. I have listened to the entire recording of the General Division hearing, and the General Division member does note that the Appellant handed additional documents to him at the start of the proceedings. The member then voices some concern that these documents were not included in the evidentiary record shared with the Minister prior to the hearing, and that the Minister would not have had the chance to consider the contents of the documentation. However, at the conclusion of the General Division hearing, the member states that a decision would be rendered based on the evidence submitted at the hearing and all other documents already contained in the written record. It is unclear whether the General Division actually admitted the reports from Dr. Naidu and Dr. Panaro, along with the receipts for physiotherapy, into the record.

[21] I note that the General Division is not required to admit additional evidence at the time of the hearing. The issue of the submission of evidence becomes an error of fact, however, when the General Division neglects to include newly submitted evidence into the Tribunal record, but then relies on the details contained in the documents in making a decision. What results is a decision that is at odds with the evidentiary record, and the findings in the decision appear arbitrary without an evidentiary basis supporting them. This is the case here.

[22] The General Division noted the evidence of one of the physicians whose report was submitted by the Appellant at the time of the hearing: the one from Dr. Panaro. The General Division cites at paragraph 26 of its decision that Dr. Panaro "indicated that there was nothing normal about [the Appellant] and there was nothing more that he could do for her."

[23] There is also the August 2013 report from Dr. Naidu. This report confirms the Appellant's diagnosis as being hypermobility disorder, and it notes that this health condition has impacted the Appellant's mental health immensely. At the hearing before the Appeal Division, both the Appellant and the Respondent concurred that this report documents a diagnosis of the

Appellant's health condition and that the General Division's finding that no diagnosis had been made is an erroneous finding of fact.

[24] The General Division also notes, at paragraph 27 of the decision, that the Appellant failed to provide evidence that she had attended the recommended physiotherapy sessions. At the time of the hearing, the Appellant provided to the General Division member receipts from physiotherapy sessions that she had attended. Again, it is unclear whether the General Division admitted the receipts as evidence.

[25] In failing to clarify the facts contained in the evidentiary record on which the General Division based its decision, I find that the General Division erred. I find that the erroneous finding of fact was made in a perverse or capricious manner and without regard for the material before the General Division.

Breach of Natural Justice

[26] The Appellant submits that the General Division decision breached the principles of natural justice, although no details were provided in her written submissions. During the course of the hearing, the Appellant was asked to clarify her argument on this issue. However, no further details were provided. She maintained that it was "simply unfair that the General Division did not find her disabled" based on the evidence. However, on the issue of a breach of natural justice, the Respondent submits that the General Division had written an incomprehensible decision in finding that the Appellant both satisfied the CPP criteria for a severe disability and failed to satisfy the CPP criteria.

[27] I agree that the General Division decision includes both a finding that the Appellant has been found severely disabled pursuant to CPP criteria, and that she has not been found severely disabled. After a careful review of the decision, I find that the General Division made an error of omission in paragraph 30 or made an inadvertent error in forgetting to write the word "not" in the second line of that paragraph so that the line actually reads "the Appellant was NOT able to satisfy…" (capitalization is my emphasis). There is evidence in support of my finding. In the analysis portion of the decision, the General Division references several instances where the

Appellant failed to meet her burden of proof; the evidence in the record did not support a finding in her favour.

[28] However, for the reasons I have discussed above, reducing the error to an error of omission or an inadvertent error does not necessarily render the decision as a whole an understandable one. Parties are entitled to an understandable decision accompanied by clear reasons in support of the findings made. This is a principle of natural justice. A decision must reflect that the decision-maker carefully thought through the issues, law and facts before him or her. This in turn aids in the control of administrative discretion, and it builds confidence in both the accountability of administrative decision-makers and the work of administrative tribunals as a whole.

[29] Both the Appellant and the Respondent concur that the General Division decision is incomprehensible because, without a clear justification for whether evidence is being admitted into the Tribunal record, the General Division decision is resultantly at odds with the evidentiary record. This is in addition to the incomprehensible conclusion it reached—regardless of whether the Appellant satisfied the CPP criteria. I find that their submissions are correct and that the General Division decision results in an incomprehensible decision that is a breach of the principles of natural justice.

Error of Law

[30] The Appellant made no submissions on this issue.

[31] The Respondent initially submitted that, despite the General Division's erroneous finding of fact, that the General Division decision should stand. The Respondent argued that the Appellant still failed to show that she had made reasonable efforts at obtaining employment or efforts to retrain, and that she neglected to prove that those efforts had failed as a result of her health condition (*Inclima*).

[32] However, the Respondent subsequently raised the question of work capacity at the hearing before the Appeal Division. At the hearing, the Respondent concurred that Dr. Panaro's report dated July 15, 2013, contains a statement that the Appellant's severe pain is affecting her ability to work, and that this statement supports the argument that the Appellant's capacity to

work was not to the extent found by the General Division. I agree with the Respondent's position on this issue.

[33] Unless there is evidence of work capacity, an appellant is not required to demonstrate efforts to obtain employment within his or her limitations, pursue further education or retrain. Both the Appellant and the Respondent agreed that there is evidence that the Appellant may not have had capacity to work, in which case *Inclima* would not apply. I agree with their argument. I find that, in failing to properly assess the Appellant's capacity to work, the General Division incorrectly applied *Inclima* in this case.

[34] I find that this is an error of law.

CONCLUSION

[35] The appeal is allowed, as I have found that the Appellant and the Respondent have successfully argued all three grounds of appeal enumerated in section 58(1) of the DESD Act.

[36] I am referring this matter back to the General Division for reconsideration by a different member.

Meredith Porter
Member, Appeal Division