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

Citation: *A. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 294

Tribunal File Number: AD-16-332

BETWEEN:

A. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: June 13, 2017

DATE OF DECISION: June 26, 2017

Canada

REASONS AND DECISION

IN ATTENDANCE

Appellant	A. B.
Representative for the Appellant	Paul Hosack (counsel)
Representative for the Respondent	Stéphanie Pilon (paralegal)
	Dale Randell (counsel – observer)
	Annie Richard (paralegal – observer)

INTRODUCTION

[1] This is an appeal of the General Division decision dated November 30, 2015. The General Division determined that the Appellant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability would not be "severe" by the end of her minimum qualifying period on December 31, 2015. I granted leave to appeal, on the ground that the General Division may have based its decision on several erroneous findings of fact.

ISSUES

[2] The following issues are before me:

(a) Did the General Division base its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it in determining:

(i) that there was no formal diagnosis for her condition?

(ii) that the MRI scans were "consistently normal"?

(iii) that there was evidence supporting the premise that the Appellant is unable to undertake any employment?

(iv) that the Appellant is not taking any medication for her symptoms?

(b) What is the appropriate disposition of this matter?

ALLEGED ERRONEOUS FINDINGS OF FACT

(a) Diagnosis

[3] The Appellant submits that the General Division erred in finding that none of her health caregivers had provided a diagnosis for her medical condition. At paragraph 34, the General Division wrote that there was "no definite diagnosis confirmed either by her family physician or by her specialists" for her condition. At paragraph 41, the General Division then wrote that the family physician had initially thought that the Appellant's symptoms could be related to multiple sclerosis but that this was discounted by her neurologists and "later by him." Finally, at paragraph 42, the General Division wrote that the "sum of the evidence shows that the Appellant has no definite diagnosis of her symptoms […]"

[4] The General Division appears to have relied on the family physician's medical report dated August 13, 2015 (GD5-6 to GD5-8), in finding that no definitive diagnosis had been made. The family physician wrote at GD5-7 that, "despite numerous neurological consultations there has not been a formal diagnosis made."

[5] The Appellant submits that the General Division erred, as the family physician also stated in the same report that it was his "impression and medical opinion that [the Appellant] suffer[s] from multiple sclerosis. She has numerous symptoms commensurate with this disease." (also at GD5-7)

[6] The General Division found that the diagnosis of multiple sclerosis was "later" discounted by the family physician. However, his medical report of August 13, 2015 (GD5-6 to GD5-8) was the most recent medical opinion before the General Division and, by then, the family physician clearly was of the opinion that the Appellant was suffering from

multiple sclerosis. He concluded his report by writing, “In review it is my impression and medical opinion that this woman does suffer from multiple sclerosis.”

[7] However, the last entry in the family physician’s clinical records immediately preceding this medical opinion, dated June 9, 2015, indicated that the Appellant exhibited symptoms that day, “much like she had when we thought she Have [*sic*] multiple sclerosis. She has been fully investigated for this and there is no definitive diagnosis” (GD5-14).

[8] The Appellant had been referred to several specialists, who were consistently unable to provide a definitive diagnosis. For instance, in April 2013, Dr. R. Giammarco, neurologist, was skeptical that the Appellant had multiple sclerosis (GD5-24). He referred the Appellant to a colleague for a second opinion and, in October 2013, Dr. Patricia Mandalfino, neurologist, concluded that there was insufficient evidence, clinically or radiologically, to confirm a diagnosis of multiple sclerosis (GD5-22). In June 2014, Dr. Fullerton, an internist, was of the opinion that it was difficult to be certain of an exact diagnosis, but he was also of the opinion that a migraine equivalent was a good possibility (GD5-17 to 18). In August 2014, Dr. Fullerton was still of the opinion that the Appellant’s diagnosis remained elusive (GD5-12/16).

[9] Based on the totality of this medical evidence, the Respondent argues that the General Division could conclude that there was no definitive diagnosis. In any event, the Respondent claims that, even had there been a clear diagnosis, the evidence fails to show how the Appellant’s medical condition impacts her ability to work at any other job.

[10] The family physician’s own clinical records and the specialist’s medical opinions raise questions as to how the family physician could conclude in his report of August 13, 2015 that the Appellant definitively suffers from multiple sclerosis.

[11] The Appellant argues that Dr. Weber was able to diagnosis her with multiple sclerosis because such a diagnosis is consistent with the multiple symptoms she experiences and with the MRI she underwent on July 22, 2015. Dr. Weber discussed the July 2015 MRI, positing that the changes in the MRI “could be in keeping with the diagnosis of multiple sclerosis, which as we know is a progressive illness” (GD5-7).

[12] Given the evidence before it, the General Division certainly could have concluded that there is no definitive diagnosis to account for the Appellant's symptoms and diagnostic findings. The General Division could have rejected Dr. Weber's diagnosis as set out in his August 13, 2015 report, even if it had been based on a review of the Appellant's symptoms and the MRI of July 22, 2015. After all, the MRI results were not conclusive.

[13] The General Division could have also rejected the diagnosis if it had been based on the Appellant's symptoms. After all, the Appellant had exhibited these symptoms for some time and had undergone extensive investigations by specialists, and yet, no clear diagnosis had emerged from those investigations.

[14] It is clear however, that the General Division erred in broadly stating that there was no formal diagnosis for the Appellant's condition, when the family physician had offered one. If the General Division rejected Dr. Weber's opinion that there was a definitive diagnosis—and it is not entirely clear whether it overlooked or rejected it—the member should have explained why she preferred the earlier medical evidence over that of the family physician's medical opinion.

[15] The Respondent argues that a diagnosis would not have been conclusive evidence of a severe disability. However, as I indicated in my leave to appeal decision, although I generally agree that a mere diagnosis alone is insufficient to establish severity, a new diagnosis or one that is recently confirmed could affect an applicant's employability: *Plaquet v. Canada (Attorney General)*, 2016 FC 1209. This may hold true particularly for a medical condition such as multiple sclerosis, and it was therefore significant in this case to determine whether a diagnosis had been made and, if so, to determine what that diagnosis was.

(b) MRI scans

[16] The Appellant argues that the General Division erred in finding that the MRI scans were "consistently normal." At paragraph 42, the General Division wrote: "The sum of the evidence shows that the Appellant has no definite diagnosis of her symptoms, her neurological examinations and assessments have been consistently normal and she is not

involved in any active treatment" and that, as a result, there was no evidence supporting the premise that she was unable to undertake some form of employment.

[17] Yet, at paragraph 14, the General Division noted that the neurologist Dr. Giammarco indicated that she had reviewed one of the scans and that it revealed "multiple white matter lesions (more than expected of a person of the Appellant's age)." The MRI of the brain was done on February 17, 2013 (GD5-25 to 26) and Dr. Giammarco prepared her consultation report in April 2013 (GD5-23 to 24).

[18] In her consultation report dated April 15, 2013, Dr. Giammarco wrote:

> The standard bloodwork was normal.
>
> She had an MRI, though, that showed over 30 white matter lesions […] I reviewed these with a radiologist and the lesions are still not specific, they really don't show features that are suggestive of demyelinating disease. There are no periventricular or posterior fossa lesions. The question did come up as to whether this might be M.S.

[19] An MRI was also done on July 22, 2015 (GD5-9 to 10), to rule out multiple sclerosis. The bulk of the findings from this recent MRI were stable when compared to previous scans. The radiologist indicated that the findings at the bilateral cerebral hemisphere "could reflect sequelae of demyelination from multiple sclerosis […] Sequelae of chronic, microangiopathic ischemic change or vascuilitis could manifest similarly." The radiologist also noted other findings at the brainstem, but it was unclear whether they reflected "progression of disease versus visualization of these foci […]" (GD5-9).

[20] The General Division likely would have found it helpful had the Appellant obtained a medical opinion to explain the clinical significance of these diagnostic examinations and what they might suggest, if anything, from a disability perspective. The findings may have been largely stable in both the 2013 and 2015 scans, but I am nevertheless prepared to accept that, although the scans may not have resulted in a definitive diagnosis, they were not "consistently normal." After all, the radiologist described the appearances in the most recent scan as "abnormal" and suggested that they possibly reflected sequelae of demyelination from multiple sclerosis, chronic microangiopathic change, or vasculitis.

(c) Work capacity

[21] The Appellant submits that the General Division also erred at paragraph 42 in finding that there was no supporting evidence that she was unable to undertake some form of employment. The Appellant points to paragraphs 20 and 25 of the General Division decision, which read as follows:

> [20] On November 5, 2013 Dr. Weber wrote in support of the Appellant's disability application. […] He reported that the Appellant continued to complain of persistent dizziness, weakness, fatigue, migratory paresthesia, dysesthesia, headaches, and periods where she felt faint. He said he suspected that she could be epileptic. He concluded that she remains "disabled from gainful employment because of her symptoms".
>
> [. . .]
>
> [25] On August 13, 2015, Dr. Weber reported that there had been little improvement in the Appellant's condition since November 3, 2013 [. . .] He reported that the Appellant suffers from neurologic conditions and symptoms and despite numerous opinions and investigations there has been no help forthcoming. He reported that she has multiple days where she cannot function. He believes she suffers from MS and has numerous symptoms commensurate with the disease. He indicated that she does not have a drug plan and cannot afford some of the medication used for multiple sclerosis. He believes she would be an unreliable employee.

[22] Unlike in his 2013 report, the family physician did not actually state in his most recent report that the Appellant remained "disabled from gainful employment because of her symptoms." Nevertheless, the November 5, 2013 report supported the Appellant's contention that she was unable to undertake some form of employment, even if it did not contain the precise words "some form of employment." (The wording in Dr. Weber's report more closely resembled the test of whether the Appellant was incapable regularly of pursing any substantially gainful occupation.) Accordingly, the General Division erred in making a blanket generalization that there was no supporting evidence that the Appellant was unable to undertake some form of employment.

[23] The General Division should have then addressed these medical opinions regarding the Appellant's capacity regularly to pursue a substantially gainful occupation.

(d) Medications

[24] The Appellant alleges that the General Division erred at paragraph 34 in finding that she was not taking any medications when it wrote, “She is not on any medication for her symptoms. In fact as of August 2015, her family physician reported that she was not on any medication. However, he did report that she had continued to use marijuana with good results.” The Appellant notes that, despite these findings, the General Division subsequently found that she was taking medication for her migraine headaches.

[25] It appears that the member’s initial findings regarding medication use were in the context of the Appellant’s possible multiple sclerosis. Certainly the preceding and following paragraphs relate only to the multiple sclerosis-like symptoms. In that regard, the findings at paragraph 34 may not represent erroneous findings of fact, but without qualifying the statement, it was overbroad and on that basis, could constitute an erroneous finding of fact for the purposes of subsection 58(2) of the *Department of Employment and Social Development Act*.

(e) Other alleged errors

[26] The Appellant alleges that the General Division made other errors but, because I have found that the member erred in the manner above, it is unnecessary for me to visit each of them.

CONCLUSION

[27] As the General Division based its decision on erroneous findings of fact that it had made in a perverse or capricious manner or without regard for the material before it, the appeal is allowed, and the matter is returned to the General Division for redetermination by a different member.

Janet Lew
Member, Appeal Division