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

Citation: *Minister of Employment and Social Development v. S. M.,* 2017 SSTADIS 340

Tribunal File Number: AD-16-922

BETWEEN:

Minister of Employment and Social Development

Applicant

and

S. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: July 17, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the April 18, 2016, General Division decision, which held that the Respondent was entitled to a disability pension under the *Canada Pension Plan.* In that decision, the General Division found the Respondent disabled as of her minimum qualifying period (MQP), which ended on December 31, 2013. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which was received on July 13, 2016.

ISSUE

[2] The Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 58(1) of the 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 made in a perverse or capricious manner or without regard for the material before it.

[6] The process of assessing whether to grant leave to appeal is a preliminary one. It requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[7] The Applicant has identified the following grounds of appeal:

a) The General Division erred in law in making its decision; and

b) 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.

Error in law

[8] The Applicant submits that the General Division Member did not engage in a meaningful analysis of all the medical evidence. This included not addressing the Respondent's own declaration that, while on vacation for six weeks, she was able to engage in many activities that appeared incongruent with her being found to have a severe and prolonged disability. The Applicant recognizes jurisprudence to the effect that a decision-maker is presumed to have considered all the evidence when making its decision and need not refer to each and every piece of evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82, at paragraph 10). However, the Applicant argues that this presumption must be balanced with the requirement for the decision-maker to clearly articulate its reasons for favouring certain medical information, in the instance where there is contradicting medical information (*Canada (Attorney General) v. Fink*, 2006 FCA 354, at paragraph 7, and *Belo Alves v. Canada (Attorney General)*, 2014 FC 1100).

Erroneous finding of fact

[9] The Applicant submits that it relied on *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667, at paragraphs 15 to17, to support the following argument:

a) When the decision-maker refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it is possible to infer that the agency overlooked the contradictory evidence when making its finding of fact. (Paragraph 16 of AD1)

[10] Additionally, the Applicant relied on *Canada (Attorney General) v. MacLeod*, 2010 FCA 301, at paragraph 5, and on *Vincent v. Canada (Attorney General)*, 2007 FC 724, at paragraph 38, to support the following argument:

a) A decision that is "inconsistent with the evidentiary record" or that is based upon evidence that was "not appropriately considered" will be one made in a perverse or capricious manner. (Paragraph 20 of AD1)

[11] Specifically, the Applicant submits that the General Division incorrectly dealt with the following five elements in its decision:

a) The General Division decision did not address findings in Dr. Joshi's January 2014 report that would suggest the Respondent's condition was not severe. The Applicant submits that these items were not only absent from the General Division decision, but that there were also no reasons given for their absence from the analysis. (GD2)

b) The General Division decision did not address Dr. Atkinson's opinion in a report dated April 7, 2014, stating that, "at this point in time, there is no reason that she should not get better. Her blood work is normal. She has had ample time to recover." (GD2) Additionally, no explanation was given for the absence of this information from the decision.

c) The General Division decision did not mention the Respondent's correspondence with the Applicant on March 25, 2016, in which the Respondent voluntarily told the Respondent that for six weeks, she was up every day, exercising, playing baseball

and babysitting. She also reported that she was able to walk "10,000 steps most days even with low energy, minimal eating, & heat swelling." These comments were absent from the General Division decision and no explanation for their absence was given.

d) The General Division relied heavily on a July 12, 2015, report that was produced after the expiry of the MQP and it chose not to rely on the reports of two specialists who treated the Respondent around the time of the MQP. Additionally, the Applicant notes that the General Division decision seems to list contradictory information about the Respondent's medication routine at the time of the hearing. Paragraph 14 of the General Division decision lists medications that the Respondent was on at the time of the hearing, but then paragraph 25 of the decision notes that she discontinued three of those medications in 2013.

e) The General Division decision mentions a report from Dr. Elzen dated March 18, 2013, which states that the Respondent had been unable to work since January 2013 due to migraine headaches. However, the General Division decision did not mention a report from Dr. Elzen, dated March 20, 2013—just two days later. The Applicant submits that the March 20, 2013, report contained comments directly related to her condition and that it should therefore have been considered. Again, no information was provided in the decision as to why this report was not referenced.

ANALYSIS

[12] In previous decisions, the courts have addressed the issue of an allegation that an administrative tribunal has failed to consider all the evidence before it. In *Simpson*, it was argued that the Pension Appeals Board had ignored, attached too much weight to, misunderstood or misinterpreted certain medical reports. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

[13] However, it is also been established that this presumption must be balanced with the duty to provide reasons so that the decision can be understood. In *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26, the Supreme Court of Canada clearly set out the purposes for providing reasons for a decision. These include permitting the parties to know the decision that was made, why that decision was made and why some evidence was preferred over other evidence when presented with contradictory evidence upon which the outcome of the case is dependent.

[14] The decision of the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92, is also instructive. The Federal Court of Appeal concluded that, in failing to explain why it rejected the considerable body of apparently credible evidence indicating that the Respondent's disability was not "severe," the Pension Appeals Board had failed to discharge the duty of providing adequate reasons for its decision.

[15] Further, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3SCR 708, 2011 SCC 62, the Supreme Court of Canada again stated that reasons for decisions should allow the reader to understand why the decision was made and should enable appellate review. Without some analysis of the contradictory medical evidence, this purpose for giving written reasons is not achieved (*Atri v. Canada (Attorney General)*, 2007 FCA 178, at paragraph 10, and *Canada (Attorney General) v. Ryall*, 2008 FCA 164).

[16] The Applicant argues that five elements or pieces of evidence were incorrectly dealt with at the General Division level. With respect to Dr. Joshi's January 2014 report, although it was referenced in paragraph 24 of the General Division decision, the Applicant argues that relevant information was omitted without adequate reasons explaining the omission. At paragraph 24, the General Division Member wrote:

> In a January 5, 2014 psychiatric consultation report Dr. Joshi provided an assessment of the Appellant. Dr. Joshi detailed that the Appellant had suffered from a long history of migraine headaches and that these had been quite severe and very disabling. With respect to current psychiatric symptoms, Dr. Joshi indicated that the Appellant was not experiencing depression at this time, her sleep was generally good and she did not have any current suicidal ideation.

The Applicant argues that some of the findings in the report would suggest that her condition was not severe and these findings were omitted from the General Division decision. Specifically, the Applicant submits that the following findings were omitted:

a) the finding that no concrete etiology had been found in relation to the Respondent's complaints of abdominal pain and that numerous imaging tests had been negative;

b) the finding that there was no requirement for ongoing psychiatric follow-up at that time; and,

c) the fact that "[g]iven her history and lack of acute pathological findings, there could be a component of somatization or psychological distress that could be exacerbating or contributing to her presentation of pain and sickness." (GD2 pages. 45-48)

After a review of the General Division decision, it is evident that none of these comments were specifically referenced in the decision, nor was there an explanation for their exclusion.

[17] With respect to Dr. Atkinson's April 7, 2014, report, the General Division Member referred to it in paragraph 28 of his decision, where he wrote:

> On April 7, 2014 Dr. Atkinson recommended that the Appellant restart her antidepressant medication to assist her depression and for the positive effects on her gut. Dr. Atkinson further detailed that the Appellant continued to lack energy, had pain eating, and felt depressed.

Nowhere in the review of the April 7, 2014, report does the Member reference Dr. Atkinson's comment that "at this point in time, there is no reason that she should not get better. Her blood work is normal. She has had ample time to recover." Additionally, no explanation was given as to why this was not included in the General Division's decision.

[18] The General Division excluded the Respondent's March 25, 2016, correspondence to the Minister in its entirety. This correspondence was a voluntary explanation of the Respondent's physical capabilities, perhaps showing that her disability was not severe. There was no explanation why this piece of evidence was excluded from the General Division's analysis.

[19] The General Division relied on Dr. Thompson's July 12, 2015, report, specifically at paragraphs 29 and 30. The Applicant argues that this report, produced post-MQP, was given

considerable weight, while two reports that were produced contemporaneous to the MQP were omitted from the analysis—again, without reasons as to why they were omitted. Additionally, as pointed out in the submissions, the medication routine explained in paragraphs 14 and 25 of the decision are different. In paragraph 14, there is an extensive list of medication the Respondent explained she was taking. However, paragraph 25 notes Dr. Joshi's comments indicating that she had discontinued using cipralex, amitriptyline and gabapentin in August 2013, resulting in her feeling better cognitively. This appears to be conflicting evidence that is never reconciled in the decision. This raises concerns as to how the information was weighed.

[20] Finally, with respect to Dr. Elzen's reports, it is noted that the March 18, 2013, report is referenced and relied on; however, the March 20, 2013, report is omitted without reasons explaining its absence. The Applicant submits that the second report is important because it comments directly on her condition.

[21] Clearly, the General Division has omitted certain pieces of evidence. This, coupled with a lack of reasons as to why certain evidence was not referenced—especially where there was contradictory evidence on file, raises an issue that may have a reasonable chance of success on appeal. It appears the Member failed to deal with conflicting or inconsistent evidence in a meaningful way. Adequate reasons are required to illustrate how this information is reconciled by the decision-maker. By failing to address this information, the Member may have erred in law and may have based his decision on erroneous findings of fact that he made without regard to the material before him. This raises an arguable case that may have a reasonable chance of success on appeal.

CONCLUSION

[22] The Application is granted.

[23] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Jennifer Cleversey-Moffitt
Member, Appeal Division