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

Citation: *J. W. v. Minister of Employment and Social Development,* 2017 SSTADIS 332

Tribunal File Number: AD-16-629

BETWEEN:

J. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: July 13, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal (Tribunal) rendered on January 22, 2016. The General Division determined that the Appellant had ceased to be eligible for a disability pension under the *Canada Pension Plan* as of the end of September 2009, effectively resulting in an overpayment to him.

[2] Although the General Division determined that the Appellant had ceased to be eligible for a disability pension as of the end of September 2009, it appeared to have done so on the basis that the Appellant had failed to comply with the reporting requirements under section 70.1 of the *Canada Pension Plan Regulations* (Regulations), as he had failed to inform the Respondent when he had returned to work. Given that the General Division focused on whether the Appellant met his reporting requirements, I granted leave to appeal on the basis that the General Division may have failed to *de facto* determine whether the Appellant had ceased to be severely disabled.

[3] I have determined that a further hearing is unnecessary and that this appeal can proceed on the basis of the written submissions.

ISSUE

[4] In his submissions filed on July 7, 2017, the Appellant raised new issues that he had not previously brought up in his application for leave to appeal. Therefore, the issues before me are as follows:

- **a.** whether the General Division failed to assess whether the Appellant had ceased to be severely disabled by September 2009; and
- **b.** whether the General Division displayed any bias.

[5] The Appellant also filed a copy of a medical report dated February 21, 2017, prepared by Dr. Khalil, and a letter dated April 4, 2017, prepared by Dr. Gokul, his family physician, in support of his appeal.

GROUNDS OF APPEAL

a. Disability

[6] As I indicated in my leave to appeal decision, there was little in the way of medical evidence from 2009 to 2012, so the General Division resorted to reviewing the Appellant's activities and limitations during this timeframe. The General Division also examined whether the Appellant was mentally or physically disabled, although it did so from the perspective of whether the Appellant lacked the ability to decide whether he was required to report a return to work under section 70.1 of the Regulations.

[7] At no point did the General Division identify the proper legal test for assessing a severe disability under the *Canada Pension Plan.* Under paragraph 42(2)(*a*) of the *Canada Pension Plan*, a person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation.

[8] The closest the General Division came to citing the language of paragraph 42(2)(*a*) of the *Canada Pension Plan* is at paragraph 20 of its decision, where the General Division wrote:

> The record shows based on evidence on file and the evidence at the hearing, which establishes that the Appellant was gainfully, employed starting in June 22, 2009 to the time of a second altercation in an assault at his place of residence in 2013. Whereas his work and family business was part-time the other work the Appellant identified as full-time with varying periods of employment. During this time there is no medical record showing any worsening of the Appellant's condition which caused his initial disability.

[9] If the Appellant was regularly engaged in a substantially gainful occupation, as suggested by the General Division's findings at paragraph 20, the Appellant would not be considered severely disabled under the *Canada Pension Plan*.

[10] However, the Appellant maintains that he has been incapable regularly of pursuing, and that he has never been engaged in, a substantially gainful occupation since October 2003, when he sustained a severe closed-head injury after being attacked with a baseball bat.

[11] Although he was employed by a family-owned business from June 22, 2009 to October 3, 2011, the Appellant claims that he had benefitted from a benevolent employer and that he had received accommodations. The Respondent argues that, although the Appellant missed work because of his medical problems and although he received some workplace accommodations, for the most part, he was able to work independently and with minimal supervision and, accordingly, this did not constitute a benevolent employer. The General Division determined that the Appellant "was working nominal 20 hours a week and getting paid $2000 a month in remuneration." The General Division determined that there was nothing in the evidence to suggest that the Appellant "failed in carrying out his duties as assigned or varied." The General Division concluded that the nature of the employment was such that the Appellant was obligated to report his return to work.

[12] The General Division also noted that the Appellant was employed between May 31 and August 23, 2012, by Simco Management, who paid him $5,000 per month. The Appellant suggests that this employment was short-lived and that it represents a failed attempt to return to work. Indeed, the evidence indicates that the employer terminated the Appellant from this employment because of performance issues. At paragraph 12, the General Division noted that the Appellant had testified during the hearing that he had held five different full-time positions in 2012 and 2013, each of varying length, from one month to six months, and that he had difficulty holding a job near the end of this period. The General Division described this employment as full-time "with varying periods of employment."

[13] In its submissions, the Respondent argues that the Appellant had employment earnings of $40,415 in 2013, from a property management company. The General Division did not address these submissions in its decision.

[14] Although the earnings history suggests that the Appellant was regularly engaged in a substantially gainful occupation after September 30, 2009, the General Division did not make any findings in this regard. There were submissions from both parties regarding the Appellant's ability to carry out his duties and his need for workplace accommodations, but the General Division did not make any specific findings as to whether the Appellant had a benevolent employer. Rather, it focused on whether the Appellant was so disabled that it rendered him unable to comply with the reporting requirements under section 70.1 of the Regulations, which ultimately led it to conclude that the Appellant ceased to be disabled. The General Division should have focused on the issue of whether the Appellant had ceased to be disabled, i.e. had ceased to be incapable regularly of pursuing any substantially gainful occupation. Its misfocus constitutes an error of law.

[15] The General Division noted that the Appellant's employment at the family-owned business was part-time and that his subsequent employment in 2012 was full-time "with varying periods of employment." However, the General Division failed to ascertain the Appellant was capable or incapable regularly of pursuing any substantially gainful occupation in 2012. It is unclear what the General Division meant by "varying periods of employment" but, given the evidence, it appears that, although the Appellant may have been employed on a full-time basis, these stints were relatively short-lived and may have constituted failed attempts at work. The General Division did not examine these issues.

[16] The Respondent argues that, although the General Division misstated the correct legal test, the decision is legally sound as the member applied the proper test and the misstatement was insignificant and of no consequence. The Respondent cited *Osei v. Canada (Minister of Employment and Immigration*), [1990] FCJ No. 940 (FCA) and *Saverimuttu v. Canada (Minister of Citizenship and Immigration*), 2002 FCT 1021.

[17] In *Osei*, the tribunal correctly stated the test at the beginning of the hearing, at the beginning of its reasons and at the end of its reasons; it misstated the test in the body of its reasons. The Federal Court of Appeal wrote:

> In the same way as an improper formulation of the test by the tribunal may be obviated by a proper application, a proper formulation may be obviated by an improper application. In the instance case there is reason to fear that the tribunal did not properly evaluate the evidence that was before it because it misapplied the test which it properly understood. That being so the decision cannot stand.

[18] In *Saverimuttu*, the Federal Court held that, although there were different decisions by different judges, the issue remained whether the Refugee Determination Division had properly applied the test. In that case, the Federal Court found that the Board had done so.

[19] Given that the General Division had examined whether the Appellant was disabled from the perspective of whether he had the ability to fulfill his obligations under section 70.1 of the Regulations, rather than whether he was incapable regularly of pursuing any substantially gainful occupation, I am prepared to allow the appeal on this issue.

[20] I will also address the other issues that the Appellant has raised.

b. Bias

[21] The Appellant alleges that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, given that it was biased towards him. The Appellant explains that the member was necessarily biased, as he disclosed on the cover page of his decision that he was a member "under the Minister of Employment and Social Development" and therefore serves at the pleasure of one of the parties to the appeal.

[22] The Minister of Employment and Social Development was the Respondent to the appeal. This was set out in the style of cause on the cover page of the General Division's

decision. Although the decision did not have a line separating the style of cause or the parties from the member's name (similar to the cover page for this particular decision), the General Division member is, in fact, a member of the Tribunal and not "under" the Minister of Employment and Social Development. Tribunal members operate independently from parties to an appeal.

[23] The Appellant also alleges that the General Division member was biased because he "chose to disregard [*sic*] the medical evidence of highly regarded medical professionals ate [*sic*] that he is unfit and unable to perform gainful employment." Although the member's analysis of the medical evidence was neither detailed nor extensive, the member clearly considered it. For instance, at paragraph 19, the member indicated that there was no medical evidence presented at the hearing that established that the Appellant was disabled to the point that he was unable to decide or to determine the need to report. At paragraph 20, the member also found that there were no medical records between June 2009 and 2013 that showed any deterioration of the Appellant's condition that had caused his initial disability. Finally, at paragraph 21, the member commented specifically on the family physician's reports dated October 7, 2014 and September 4, 2015. I agree that the member should have considered the medical evidence in the context of the issue of whether the Appellant had ceased to be disabled under the *Canada Pension Plan*, rather than whether he had the ability to inform the Respondent that he had returned to work, but, if anything, this represents an error of law rather than any bias on the part of the General Division member.

[24] As my colleague Pierre Lafontaine noted in *A.S. v. Canada Employment Insurance Commission*, (July 6, 2017), AD-17-378 (currently unreported), these are very serious allegations that should be made with great caution. They cannot rest on an applicant's mere suspicion, pure conjecture, insinuations or mere impressions. My colleague cited *Arthur v. Canada (Attorney General)*, 2001 FCA 223, where the Federal Court of Appeal stated that allegations of bias challenge the integrity of the tribunal and its members who participated in the impugned decision. The Federal Court of Appeal remarked that such allegations cannot be made lightly and that they must be supported by material evidence demonstrating conduct that derogates from the standard.

[25] The Appellant suggests that the General Division's failure to consider his family physician's medical reports establishes such material evidence of conduct that derogates from the standard. However, the fact that the General Division did not rely on these medical reports is largely immaterial, because the General Division was required to address the issue of whether the Appellant ceased to be severely disabled by the end of September 2009. The 2014 and 2015 medical reports were not determinative of whether the Appellant ceased to be severely disabled by the end of September 2009. The Appellant has not adduced any material evidence that demonstrates conduct that derogates from the standard and, hence, his allegations of bias are not borne out.

[26] Finally, the Appellant argues that the General Division should have considered the fact that he is of limited financial means and is unable to repay any overpayment. However, this consideration is also irrelevant to the issue of whether the Appellant ceased to be severely disabled by the end of September 2009.

NEW EVIDENCE

[27] The Appellant filed updated medical reports in support of his appeal. The General Division did not have copies of these updated medical records.

[28] It has now become well-established law that new evidence generally is not permitted on an appeal under section 58 of the DESDA. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28, Manson J. determined that:

> Under sections 55 to 58 of the DESDA, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former [Pension Appeals Board], which was *de novo*, an appeal to the [Social Security Tribunal – Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58.

[29] In *Marcia v. Canada (Attorney General)*, 2016 FC 1367, at para. 34, McVeigh J. held that "[n]ew evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing de novo."

[30] In *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31, Russell J. determined that "new evidence is not admissible except in limited situations […]"

[31] More recently, in *Glover v. Canada (Attorney General)*, 2017 FC 363, the Federal Court adopted and endorsed the reasons in *O'Keefe*, in concluding that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The Court also noted that the DESDA makes provisions under section 66 for the General Division to rescind or amend a decision where new evidence is presented by way of application.

[32] Based on the facts before me, I am unconvinced that there are any compelling reasons why I should admit the report, as there is no indication that it falls into any of the exceptions. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for new evidence.

CONCLUSION

[33] As I have determined that the General Division erred in law, the appeal is allowed. Despite the fact that the earnings suggest that the Appellant was regularly engaged in a substantially gainful occupation up to at least October 2011 and that he may have had a benevolent employer, given that some of the facts are in dispute, it is appropriate to return this matter to the General Division for a redetermination on the merits.

Janet Lew
Member, Appeal Division