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

Citation: *Minister of Employment and Social Development v. M. W.,* 2017 SSTADIS 451

Tribunal File Number: AD-16-878

BETWEEN:

Minister of Employment and Social Development

Appellant

and

M. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

HEARD ON: August 28, 2017

DATE OF DECISION: September 12, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative for the Appellant	Sandra Doucette, Department of Justice
Respondent	M. W.
Representative for the Respondent	James Crocco
Respondent's husband and observer	R. W.

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), issued on March 27, 2016, that determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was "severe and prolonged" during the minimum qualifying period (MQP), which ended on December 31, 1998. Leave to appeal was granted on March 20, 2017, on the grounds that the General Division may have erred in rendering its decision.

PRELIMINARY ISSUES

[2] At the outset of the hearing, the Respondent's representative raised the possibility of submitting additional documents, among them letters from the Appellant's husband and daughter, as well as medical records from 1978 to 1988. This written evidence did not appear to have been before the General Division, and I declined to admit it at this late stage, as the Appeal Division is not mandated to consider fresh evidence that goes to the merits of a disability claim.

[3] I also took note of the fact that the Respondent had recently requested a copy of the audio recording of the hearing before the General Division but was told by Tribunal staff that it was unavailable because of technical difficulties. The Respondent's representative indicated that he would not be making an issue of this lapse, which I agree has no bearing on the

outcome of this appeal. In any case, the Tribunal is not obliged under the law to record its proceedings, although it usually does so as a matter of practice.

OVERVIEW

[4] The Respondent was 51 years old when she applied for CPP disability benefits on August 9, 2011. In her application, she disclosed that she attended high school up to grade 12 and later earned a diploma in ministry from X's University. Although she has a history of chronic pain and depression dating to the 1970s, she has held a variety of jobs over the years and has taken an active role in her church. From 1998 to 2006, she did not work, except for a three-month contract as a youth counsellor. From August 2006 to March 2007, she worked as a part-time receptionist for R. R., a private spa, and from April 2007 to August 2008, she had a full-time office job at a rehabilitation centre in X. She said that she struggled in both jobs, missing time off work because of pain and anxiety. She later worked casually as a driver for her brother's automotive shop.

[5] The Appellant refused the application at the initial and reconsideration levels on the grounds that the Respondent's disability was not severe and prolonged as of the MQP. On February 8, 2012, the Respondent appealed these refusals to the CPP Review Tribunal (RT). The RT dismissed the appeal on November 27, 2012, and the Respondent appealed this decision to the Pension Appeal Board (PAB). In April 2013, pursuant to the *Jobs, Growth and Long-Term Prosperity Act*, the appeal was transferred to the Tribunal's Appeal Division.

[6] On September 15, 2014, the Appeal Division allowed the appeal on consent and directed the General Division to conduct a *de novo* hearing. At an in-person hearing held on September 14, 2015, the Respondent described her medical conditions and explained how they prevented her from sustaining regular employment. She said that for many years she has been unable to maintain anything other than sporadic employment. She insisted that she has attempted every treatment that her doctors have recommended.

[7] In its decision dated March 27, 2016, the General Division allowed the Respondent's appeal, finding that, on a balance of probabilities, she was incapable of substantially gainful work as of the MQP. It noted that, while the Respondent had held a series of short-lived jobs,

all of them had been marked with significant difficulties. The General Division found that the Respondent offered "candid but compelling evidence that she was trying hard to maintain employment but was unable to do so."

[8] On June 23, 2016, the Appellant filed an application for leave to appeal and notice of appeal with the Tribunal's Appeal Division, alleging various errors of fact and law on the part of the General Division.

[9] In a decision dated March 20, 2017, I granted leave to appeal, finding at least a reasonable chance of success on all grounds on all grounds claimed by the Appellant. I also invited the parties to provide submissions on whether a further hearing was required and, if so, in what format. The Respondent filed submissions on April 19, 2017.

[10] On June 6, 2017, I decided to hear oral submissions by way of a videoconference for the following reasons:

- the complexity of the issues under appeal;
- the information in the file, including the need for additional information;
- the availability of videoconference in the area where the Respondent resides;
- the requirement under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

THE LAW

[11] According to subsection 58(1) of the *Department of Employment and Social Development Act* (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] 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 General Division's decision in whole or in part.

[13] 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.

[14] The calculation of the MQP is important because a person must establish that they had a severe and prolonged disability during the MQP.

[15] 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 they are 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

[16] In my decision of March 20, 2017, I allowed leave to appeal on the following questions:

Alleged Errors of Law

(a) Did the General Division disregard the test for severity by failing to consider whether the Respondent was "incapable regularly" of substantially gainful work as of her MQP?

(b) Did the General Division err in relying almost exclusively on the Respondent's subjective testimony, thereby failing to apply Federal Court of Appeal jurisprudence requiring CPP disability claims to be supported by objective medical evidence?

Alleged Erroneous Findings of Fact

(a) Was the General Division's conclusion that the Respondent's disability was severe and prolonged as of December 1995 irreconcilable with the evidence, specifically Dr. Dow's clinical records indicating no disabling event or condition during the MQP?

(b) Did the General Division fail to meaningfully address contradictory evidence about when the Respondent might have become incapable of employment?

(c) Did the General Division ignore overwhelming evidence that the Respondent's condition was not, from 1995 onwards, "prolonged" according to the statutory definition?

(d) Did the General Division err in finding that the Respondent lacked work capacity after the MQP, despite the fact that she reported significant earnings in 2007 and 2008?

[17] Subsidiary issues include the appropriate degree of deference that the Appeal Division should show to General Division decisions and the implications of the Appellant's non-attendance at the hearing before the General Division.

[18] Should I decide that the General Division has indeed committed an error that falls into one of the grounds of subsection 58(1) of the DESDA, then I must determine what remedy is appropriate.

ANALYSIS

[19] Although the Appellant has raised multiple objections to the General Division's reasons and the outcome that resulted therefrom, this appeal hinges on two essential questions: (i) the extent to which the General Division can rely on a claimant's subjective testimony in the face of contradictory objective evidence and (ii) the amount and duration of post-MQP earnings that meet the threshold of "substantially gainful," thereby disqualifying a claimant from the CPP disability pension.

[20] Having reviewed the parties' submissions, I have concluded that the appeal succeeds on the second question alone for the reasons set out below. Accordingly, I see no need to address the remaining grounds of appeal.

Degree of Deference

[21] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[1] In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[22] The Federal Court of Appeal decision *Canada v. Huruglica*[2] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role. This premise led the Court to determine that the appropriate test flows entirely from an administrative tribunal's governing statute: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent […]"

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[1] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9
[2] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

[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. 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" and "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.

Appellant's Non-Participation in Oral Hearing

[24] In a written submission dated November 29, 2016, the Respondent argued that the appeal should fail because of the Appellant's failure to attend the oral hearing before the General Division. She suggested that the Appellant should not now be allowed to challenge, on appeal, evidence and testimony that it could have contested had it appeared on September 14, 2015.

[25] In my view, this argument has merit, but only up to a point, and it ultimately cannot derail this appeal. First, it should be remembered that the appeal before the General Division proceeded both in writing and orally—and that both parties made written submissions. Second, had the Appellant objected only to the General Division's wholesale acceptance of the Respondent's testimony, then its absence from the hearing could have potentially barred it from second-guessing her credibility, as it did not avail itself of an opportunity to expose her to cross-examination and thereby highlight evasions and inconsistencies, if any. However, the Appellant has also tendered allegations of errors of law that cannot be reasonably said to have been caused, or affected by, its non-attendance at the oral portion of the hearing. As it happens, those grounds are the subject of this decision allowing the appeal.

Post-MQP Employment

Submissions

[26] The Appellant alleges that the General Division based its decision on an erroneous finding of fact. The General Division erred in finding that the Respondent lacked work capacity post-MQP and that her attempts to work after 1998 were evidence that she could not pursue a substantially gainful occupation. It stated that her 2007 and 2008 earnings were not substantially gainful because the jobs she held were unsustainable. The Federal Court has determined that a return to work lasting only a few days can be considered a failed attempt, but that two years of earnings consistent with the claimant's history cannot. In 2007, almost ten years after her MQP, the Respondent's Record of Earnings indicated that she earned more than $22,000, which was the highest amount that she had ever earned. In an earlier submission, she indicated that she returned to work from 2007 to 2008 "out of sheer financial necessity," but this cannot be relevant to the determination of whether a claimant has a severe and prolonged disability.[3]

[27] In written submissions dated April 19, 2017, the Respondent replied that her sporadic employment history demonstrated that she was incapable of working on a predictable basis. She defended the General Division's decision, which she said correctly noted that her employment history was marked with significant difficulties, requiring her to take constant breaks and to rely on support from co-workers. Furthermore, each attempt at re-employment ended with the Respondent being put on medical leave due to her various conditions.

[28] The Respondent acknowledges that she worked after the MQP. The General Division correctly noted that her "pattern of employment has certainly been greatly if not solely affected by her various serious health conditions" and "these jobs have all been marked with significant difficulties." The General Division ultimately found that "these attempts after the MQP date cannot equate a capacity to work but a lack thereof." In 2007, the Respondent worked for a "benevolent employer" who allowed her significant flexibility, including giving her time off, letting her do not much work on bad days and allowing her to fall asleep at her desk without reprisal. Despite these accommodations, the Respondent nonetheless found herself unable to continue.

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[3] *Carter v. Canada (Attorney General)*, 2008 FC 1046.

[29] The Respondent accuses the Appellant of fixating on the fact that her highest-ever earnings occurred after her MQP. The notion that higher earnings equates to capacity for substantially gainful work does not account for inflation. The Respondent submits that it is an error to compare earnings in 2007 with those of prior years without considering that wages have risen consistently year over year. The Respondent also rejects the Appellant's suggestion that she left her post-MQP employment for reasons other than her medical condition. While workplace stress was a factor, the Appellant ignored relevant context, including the fact that the Respondent had been diagnosed with clinical depression prior to the MQP and suffered two nervous breakdowns. It is well-known that lupus is associated with stress, which itself can trigger painful inflammations.

Analysis

[30] This is a case where the General Division accepted the Respondent's subjective evidence and found her disabled in the face of apparently contrary documentary evidence, most notably significant post-MQP earnings in 2007 and 2008. The question is whether, in making this determination, the General Division properly exercised its jurisdiction to weigh the evidence or whether it committed an error in violation of subsection 58(1) of the DESDA. In its decision, the General Division relayed the Respondent's testimony about the most active period of her post-MQP employment:

> [32] From August to October 2006, she worked for R. R., a spa. She worked as receptionist. She testified that her health was not going well. She explains that she needed the money. She is not sure whether the employer was aware of her medications and health conditions. She explains she only worked for 53 days out of 99 days. She would miss a significant amount of days due to health issues. Her job was to do scheduling. She was placed off work due to medical reasons.
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> [33] From December 2007 to March 2007, she made a subsequent attempt to work for the same company. She was not full time. Her job came to an end as per the doctor's recommendation again.
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> [34] In April 2007, she went on to work for a rehab centre in X. Her spouse was also working for this centre doing "jack of all trade" jobs. She worked from April 2007 until August 2008. She was working in the office. She was working on a computer. It was a full time job but not able to do full hours and would fall asleep at her desk. She would miss time on sick days. Her employer was very flexible and would let

> her not do much work when she had a bad day. She would be ok for the first few hours of the shift then she would be a mess. She explains a mess as being so tired and was unable to concentrate experiencing brain fog and difficulties with concentration. She would also miss time. She could not cope with the job or the pain. She testified that the stress of employment was exacerbating her symptoms. She explains she is a fighter and refused to give up.
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> [35] She went on to work for X's auto, her brother. She tried to drive cars for her brother from X to X. She explains she got pinched nerve in her neck. She would do this from time to time. This pain got worst in the neck which led to a formal diagnosis of degenerative disc disease. There was no interview with her brother.
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> [36] It was very sporadic work with no real pattern. The job came to an end when she got the pinch nerve. She would take medication to control the pain. She was suffering from excruciating pain radiating to her right arm.
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> [37] She started taking extra drugs while employed in X. She developed bacterial infection. She explains she had to resign because she was too sick.

[31] I agree with the Respondent that engaging in a comparative analysis of her prior income levels, as the Appellant would have the General Division do, provides little illumination and, in any case, is not an approach recommended by the Courts.[4] However, I do find it notable that the General Division did not refer in its decision to the dollar amounts ($22,679 and $14,783, respectively) of the Respondent's reported earnings in 2007 and 2008, nor did it discuss any of the jurisprudence that has elaborated on the meaning of "substantially gainful." In my view, this is a deficiency.

[32] In its analysis proper, the General Division addressed the Respondent's 2007–08 employment but again elided the dollar amounts associated with the jobs she had during that period.

> [82] The Appellant testified to the various jobs she held after the MQP date. While it is true that she held various term positions for short period of times, the Tribunal cannot evacuate the fact that these jobs have all been marked with significant difficulties. These difficulties are evidences [*sic*] by the ongoing problems to maintain employment, the need for constant breaks and pace herself. On this specific topic, the

[4] *Fancy v. Canada (Social Development)*, 2008 FC 1414, at para. 13.

> Appellant offered candid but compelling evidence that she was trying hard to maintain employment but was unable to do so. The Tribunal accepts this evidence without reserve.
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> [83] While the Appellant had earnings in 2007 and 2008, these earnings simply cannot equate to a substantially gainful employment because the jobs she held during this period of time was clearly not sustainable for her. In fact, it led to a flare-ups [*sic*] of her health issues and the impossibility to continue with these jobs. In fact, this trend of trying and failing has been consistent for years after the MQP date.

[33] The Respondent convinced the General Division that her post-MQP employment consisted entirely of a series of unsustainable jobs, yet its decision made no attempt to reconcile what it characterized as failed work trials with earnings exceeding $14,000 in one year and $22,000 in the next.

[34] In his oral submissions before me, the Respondent's representative attempted to raise evidence that more than $7,476 of the 2007 amount was Employment Insurance (EI) sickness benefits, but I saw nothing in the record to indicate that the General Division received this information or took it into account. In my experience, EI sickness benefits are not usually reported as employment income on Records of Employment; be that as it may, the Appeal Division does not typically accept new evidence, particularly where a party has already had an opportunity to present it to the General Division as trier of fact.

[35] While a trier of fact is entitled to weigh evidence as it sees fit, it must do so within the strictures of procedural fairness, which demand that a decision be accompanied by an intelligible explanation. In *R. v. R.E.M.*,[5] the Supreme Court of Canada set out the test for sufficiency of reasons in the context of criminal law, quoting with approval an earlier Ontario Court of Appeal decision:[6]

> In giving reasons for judgment, the trial judge is attempting to tell the parties *what* he or she has decided and *why* he or she made that decision" (emphasis added). What is required is a logical connection between the "what"—the verdict—and the "why"—the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[5] *R. v. R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51.
[6] *R. v. Morrissey*, 1995 CanLII 3498 (ON CA).

[36] This logic also applies to decisions of administrative tribunals. There must be a chain of fact, law and logic that leads the reader to conclude that the outcome is defensible. In explaining why the Respondent's post-MQP employment was not substantially gainful, the General Division omitted crucial links in that chain.

[37] Beyond considerations of fairness, there is the substantive question of whether the General Division was in compliance with the law when it found that the Respondent's 2007–08 work fell short of substantially gainful. First, the General Division appears to suggest that the very fact that a claimant has had a series of relatively short-lived jobs is itself evidence of disability. I see no basis for this in the jurisprudence. As held by the Federal Court of Appeal in *Canada v. Scott*,[7] it is the incapacity, and not the employment, which must be "regular," and an ability to hold any form of employment may disqualify a claimant from the CPP disability pension, provided that employment is "substantially gainful."

[38] Second, the severity of a disability may depend on many factors—including the ability to generate income. While one may hesitate to apply a numerical formula to assess capacity,"[8] a claimant's level of earnings can be a valid measure of whether he or she has engaged in a substantially gainful occupation. Hundreds of cases have attempted to determine whether a given amount of income met the standard of "substantially gainful," although many of them emanate from the now-defunct PAB and therefore carry no more than persuasive weight. These kinds of cases are inevitably tethered to their particular fact situations, but I am not aware—even accounting for wage inflation—of any that has found an annual income approaching $23,000 as less than "substantially gainful." This Tribunal must, of course, follow the Federal Court of Appeal, but none of its leading cases on this subject would appear to be in alignment with the General Division's liberal approach: *Fehr v. Canada*[9] and *Gill v. Canada*[10] both held that findings of non-severity could be reasonable for seasonal and part-time work. In *D'Errico*

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[7] *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34.
[8] Since May 29, 2014, the CPP has contained a statutory definition for "substantially gainful" that is tied to the maximum monthly amount payable. Although it is not applicable to the Respondent, whose application was received prior to that date, it does provide some guidance as to what qualifies as "substantially gainful."
[9] *Fehr v. Canada (Attorney General*, 2005 FCA 299.
[10] *Gill v. Canada (Attorney General)*, 2011 FCA 195.

v. Canada,[11] the Court agreed with an earlier finding of disability, but the appellant in that case made no more than $200 per week—or approximately $10,000 on an annualized basis. In oral submissions before me, the Respondent's representative referred to *MSD v. Kuipers*[12] but, apart from it being a PAB case, it involved post-MQP earnings of $7,000 for part-time, casual work on behalf of a benevolent employer. In the present case, the Respondent earned considerably more in a full-time job, which lasted 16 months. The Respondent claims that she was able to hold onto this job for as long as she did thanks to a benevolent employer, but I see no indication in the record that such evidence was ever presented to the General Division. It therefore could not have been among the General Division's considerations in concluding that the Respondent was disabled despite her 2007–08 earnings. In any event, even if evidence of a benevolent employer was introduced, it was not mentioned in the General Division's decision and, like so much else, played no apparent role in its reasoning. While the General Division accepted the Respondent's claims that she struggled in her post-MQP jobs, it did not grapple with the larger fact that, despite her difficulties, she nevertheless did succeed in sustaining reasonably remunerative work over an extended period.

CONCLUSION

[39] For the reasons discussed above, the appeal succeeds on the ground that the General Division erred in law in finding that the Respondent's post-MQP employment was not "substantially gainful."

[40] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a de novo hearing before a different General Division member.

Member, Appeal Division

[11] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.
[12] *Minister of Social Development v. Kuipers* (July 12, 2007), CP 24448 (PAB).