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

Citation: *P. J. v. Minister of Employment and Social Development,* 2017 SSTADIS 463

Tribunal File Number: AD-17-346

BETWEEN:

P. J.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 21, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted and the appeal is allowed.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated July 17, 2015, which determined that he was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because his disability was not "severe" prior to his minimum qualifying period (MQP).

BACKGROUND

[2] The Applicant submitted an application for CPP disability benefits on February 28, 2012. He indicated that he was 47 years old and had studied telecom management at a community college. He was most recently employed at Bell Canada in an administrative capacity, a job he left in November 2009 because of degenerative disc disease in his lower back.

[3] The Respondent refused the application initially and on reconsideration on the grounds that the Applicant's disability was not severe and prolonged as of his MQP, which it determined ended on December 31, 2011. In January 2013, the Applicant appealed these refusals to the Office of the Commissioner of Review Tribunals. On April 1, 2013, pursuant to the *Jobs, Growth and Long-term Prosperity Act*, the appeal was transferred to the General Division.

[4] On July 7, 2015, the General Division conducted an in-person hearing in X, Ontario. In written reasons issued on July 17, 2015, the General Division found that there was insufficient medical evidence to show that the Applicant was suffering from a "severe" disability during the MQP. It also found that he had made insufficient effort to find work other than his former occupation: "The Appellant is a young man who has a good education, is proficient in the English language, and has an array of transferable skills in both sedentary and active positions."

[5] On July 31, 2015, the Applicant applied for leave to appeal, alleging that, in rendering its decision, the General Division did not give sufficient weight to medical evidence from his treating physicians—most notably, a May 2015 report by Dr. Samuel, his family doctor. In a decision dated August 27, 2015, the Appeal Division refused leave to appeal, finding that the appeal had no reasonable chance of success. It found that the grounds advanced by the Applicant amounted to no more than a demand to reweigh evidence that had already been considered by the General Division.

[6] The Applicant then applied for judicial review at the Federal Court. In a judgement dated April 21, 2017, the Honourable Justice James Russell found that the Appeal Division erred in failing to notice that there were persuasive grounds for appeal—specifically, he found that the General Division overlooked evidence relevant to the Applicant's claim that he had a severe disability.

[7] In the interests of justice and efficiency, I will combine consideration of the request for leave to appeal with an assessment of this matter on its merits. I have decided that an oral hearing is unnecessary and that the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file, nor is there any need for clarification;

(b) This form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

THE LAW

Department of Employment and Social Development Act

[8] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[9] According to subsection 58(1) of the 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.

[10] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, an applicant does not have to prove the case.

[11] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success—*Canada v. Hogervorst*[1]; *Fancy v. Canada.*[2]

Canada Pension Plan

[12] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant 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.

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

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[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[14] 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 he or she is 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.

SUBMISSIONS

[15] In the application requesting leave to appeal dated July 27, 2015, the Applicant's then-representative submitted that the medical evidence on file established the severity of her client's combined organic and psychological conditions prior to the expiration of the MQP date. She also argued that the General Division did not place appropriate weight on the medical evidence that was before it, notably that of Dr. Samuels.

[16] In a letter dated May 11, 2017, the Applicant's new legal representative advised the Tribunal of the Federal Court's decision, highlighting passages in which Justice Russell found that the medical evidence supported the severity of the Applicant's overall medical condition.

[17] The Tribunal has provided a copy of the leave to appeal materials to the Respondent. However, the Respondent did not file any submissions.

ISSUES

[18] The issues before me are as follows:

(a) How much deference should the Appeal Division extend to decisions of the General Division?

(b) Does the appeal have a reasonable chance of success?

(c) If so, should the appeal be allowed on its merits?

(d) If the appeal succeeds, what remedy is appropriate?

ANALYSIS

Degree of Deference

[19] 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*.[3] 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.

[20] The Federal Court of Appeal decision *Canada v. Huruglica*[4] 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 […]"

[21] 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.

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

Weighting of Medical Evidence

[22] The Applicant submits that the General Division overlooked evidence relevant to his claim that he had a severe disability.

[23] This submission is not merely arguable; it has sufficient merit to convince me that this appeal must be allowed without further hearing. As noted by the Federal Court, the General Division specifically addressed Dr. Samuel's reports and medical conclusions at paragraph 39 of its decision, but it appears to have completely overlooked the crucial fact that the Applicant's doctors had indicated that he was incapable of work prior to Dr. Samuel's opinion to that effect in 2015. In doing so, it based its decision on an erroneous finding of fact without regard for the material before it.

[24] In paragraph 39 of its decision, the General Division found Dr. Samuel's August 2011 CPP medical report less than compelling because there was "no mention of his ability to return to work or his limitations preventing work." Yet in May 2015, when Dr. Samuel prepared a follow- up letter unequivocally declaring the Applicant unemployable, the General Division discounted this opinion because it was made "well beyond the MQP."

[25] Dr. Samuel's August 2011 report stated that the Applicant had been diagnosed with chronic back pain, depression and urine incontinence, and it noted various functional limitations, among them difficulties with prolonged sitting, standing and walking. He foresaw no significant improvement. The report also stated that the prognosis of the main medical condition was "guarded." As noted by the Federal Court in its decision returning this matter to the Appeal Division, "guarded," in medical terminology generally means that the patient is acutely ill with questionable outlook, and it is often used by nurses and physicians to indicate that recovery is unlikely.

[26] Although Dr. Samuel's August 2011 report did not explicitly state that the Applicant was incapable of work, his comments as a whole—which were, after all made pursuant to an application for disability benefits—give rise to a strong presumption that he believed his patient to be unemployable. More significantly, Dr. Samuel also disclosed that he had taken over the Applicant's care from Dr. Gordon, who had passed away in 2010. In September 2009, shortly

before the Applicant left his job once and for all, Dr. Gordon prepared an “evolution note” for Bell Canada’s disability insurer, in which he said that the Applicant’s condition had deteriorated in a way that affected all aspects of his daily living—including, it must be assumed, work.

[27] In assessing disability claims, medical reports should not be read in isolation from each other; each provides context for the others and, taken together, they may—or may not—create a coherent narrative. In this case, Dr. Gordon’s note, in conjunction with Dr. Samuel’s reports and other medical evidence documenting the Applicant’s decline, indicated a lack of employability during the MQP. I find that the General Division failed to consider the evidence before it in its totality.

CONCLUSION

[28] The Applicant has submitted grounds that not only raise an arguable case, but also demand that the appeal be allowed on its merits. For the reasons discussed above, the appeal succeeds on the grounds that the General Division based its decision on an erroneous finding of fact without regard for the material—specifically, Dr. Gordon’s September 2009 note and the implications that flow from it.

[29] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. In this case, it is appropriate that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member.

Member, Appeal Division