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

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 459

Tribunal File Number: AD-16-450

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: September 20, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On February 17, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable to the Appellant. The General Division further determined that payments were to start March 2016, four months following the date of disability of November 2015.

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division, claiming that the General Division had erred in determining the deemed date of disability. Leave to appeal was granted on May 12, 2016, solely with respect to a possible error of law associated with the use of the concept of "continuity of care" in relation to the date of disability.

METHOD OF PROCEEDING

[3] Pursuant to s. 42 of the *Social Security Tribunal Regulations* (Regulations), the parties are given 45 days after the day on which leave to appeal is granted to file submissions or file a notice stating that they have no submissions to file. Thereafter, pursuant to s. 43 of the Regulations, the Appeal Division must either make a decision on the appeal or send a notice of hearing "if it determines that further hearing is required."

[4] In this appeal, the Appellant's representative was given an extension of time to provide further submissions following her review of the Respondent's submissions (which she had not received in a timely fashion). The Appellant's representative then advised that she would be relying upon her previous written submissions, and she also clarified her position on the date of disability. She requested a videoconference hearing. The Respondent has not requested a hearing.

[5] I find no basis for a determination that further hearing is required in this appeal: there is to be no testimony, both parties are represented, both representatives have provided written submissions, and both representatives have had the opportunity to address the other's

submissions. Although the Appellant's representative has requested a hearing, she has not provided any reasons as to why this is required.

[6] Pursuant to s. 43 of the Regulations, therefore, I must make a decision on the appeal in consideration of the materials on file. I note that this method of proceeding also aligns with the Tribunal's obligation to proceed informally and expeditiously, while respecting the requirements of fairness and natural justice, set out in s. 3(1) of the Regulations.

[7] Accordingly, I have considered the file documentation before the General Division, the above-noted decisions of the General Division and Appeal Division, the Appellant's supplementary submissions (May 30, 2017) and those found in her Application for Leave to Appeal (April 21, 2016), and the Respondent's submissions (June 23, 2016).

ISSUES

[8] Did the General Division err in law in making its decision, in relation to the concept of "continuity of care"? If so, what is the appropriate remedy?

ANALYSIS

The General Division decision

[9] Pursuant to s. 42(2)(*b*) of the CPP, a person is deemed to have become disabled at the time when the person became disabled, but in no case earlier than 15 months prior to the date of application (in this case, January 2012). As such, the General Division had to determine at what point the Appellant had become disabled within the meaning of the legislation, i.e. at what point the Appellant had both a severe and prolonged disability.

[10] In finding that the Appellant had a severe disability, the General Division emphasized her fibromyalgia condition:

> [40] […] The Appellant had been able to work for a number of years with the scoliosis and no active signs of lupus were identified by Dr. Jerome […] The Tribunal also accepts that the evidence does not show that [the] Appellant's mental health is a factor that would prevent the Appellant from working. The Tribunal however finds that the impact of

> fibromyalgia is significant and renders the Appellant incapable regularly of pursuing any substantially gainful occupation.

[11] In the analysis of severe disability, the General Division noted: the views of family physician Dr. Hoirch and rheumatologist Dr. Jerome that the Appellant's symptoms made it unlikely that she could work at any substantially gainful occupation; the Appellant's efforts to implement therapy suggestions; the unpredictability of the Appellant's condition; the Appellant's established chronic pain disorder since 2012; an attempt at modified duties in 2011; and a lack of work capacity such that employment efforts were not required. The General Division concluded that the Appellant had a severe disability "on or before the date of the hearing, February 3, 2016."

[12] In finding that the Appellant had a prolonged disability, the General Division stated the following:

> [50] The Appellant's fibromyalgia was diagnosed by her original family doctor and confirmed by specialists in 2012 and 2014. The Appellant was seen by a number of different rheumatologists standing in for Dr. Keesal. There did not appear to be a continuity of care until the referral to Dr. Jerome. Both her current family doctor and Dr. Jerome have stated that despite medication and efforts at managing her condition through various treatment modalities, her symptoms do not allow her to work at the current time. Dr. Jerome hoped that the Appellant would be able to return to a normal level of function but could not predict how long a recovery might take.
>
> [51] The Tribunal finds that the Appellant's disability is long continued and of indefinite duration.

[13] As for the date of disability, the General Division concluded as follows:

> [52] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2015 when continuity of care had been established with Dr. Jerome and when both her family physician and the rheumatologist stated that despite medication and serious attempts at recommended treatment modalities her symptoms prevented a normal level of function.

[14] While the concept of "continuity of care" may have different dimensions, the General Division member used the term in relation to the establishment of a longer-term patient-physician relationship, with a specific physician (Dr. Jerome). The decision notes that the Appellant had been diagnosed with fibromyalgia as a young adult (around 2000) and in 2009, whereas in 2006 a rheumatologist had found no evidence of fibromyalgia. A pain specialist diagnosed a chronic pain disorder in October 2012, and the Appellant saw several different rheumatologists for her fibromyalgia between November 2012 and April 2013. She was then referred to Dr. Jerome in September 2014, and she has continued under his care. I do not interpret the General Division decision as asserting that the Appellant was not receiving regular medical care prior to seeing Dr. Jerome, since the member clearly knew of the Appellant's medical history. Rather, I interpret the decision as concluding that continuity of care with one specific fibromyalgia specialist was not established until the Appellant came under Dr. Jerome's care.

Did the General Division err in law in making its decision?

[15] In this appeal, leave was granted solely with respect to a possible error of law in relation to the date of disability and "continuity of care."

[16] Paragraph 42(2)(*a*) of the CPP stipulates that "[a] person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability […]." The content of the concept of disability (and when it arose) is a question of law, which is defined in the legislation and refined in the case law. The General Division's conclusion that the date of disability was November 2015 is a conclusion of law drawn from facts. The application of the law to the facts is a mixed question (see *Canada (Attorney General) c. Bernier*, 2017 FC 120). I note that s. 58(1) of the *Department of Employment and Social Development Act* (DESDA) does not contemplate errors of mixed fact and law, but rather addresses errors of fact and law separately. In this appeal, the Appellant's argument with respect to "continuity of care" relates primarily to the content of the legal construct of disability. Consistent with the leave to appeal decision outlining a possible error of law, the relevant ground of appeal to the Appeal Division, under s. 58(1)(*b*) of the DESDA, is

that "[t]he General Division erred in law in making its decision, whether or not the error appears on the face of the record."

[17] In *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies must give effect to the legislator's intent with respect to the grounds of appeal found within their home statutes. See also *Canada (Attorney General) v. Jean*, 2015 FCA 242. In this context, I agree with the Respondent that, on the unambiguous wording of s. 58(1)(*b*) of the DESDA, no deference is owed to the General Division on questions of law.

[18] As outlined above, the date of disability is the date on which the Appellant's disability became both severe and prolonged. The General Division decision states two reasons for selecting November 2015 as the date of disability, the first of which is "when continuity of care had been established with Dr. Jerome." On this basis, I reject the Respondent's submission that the General Division decision does not relate the date of disability to "continuity of care"; it clearly does, in part.[1]

[19] The Appellant argues that "[c]ontinuity of care has nothing to do with the date of onset of disability […] and is an error that we are asking the SST-AD remedy." I agree that the establishment of an ongoing care relationship with a specific physician is not, in and of itself, relevant to whether an individual has a severe disability or a prolonged disability. The definitions of these terms are found in s. 42(2)(*a*) of the CPP:

> 42(2)(*a*)(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

[1] The Respondent's submissions attempted to distinguish between the "deemed date of disability" and the "determination of the date by which the Appellant's disability was considered to be both severe and prolonged," arguing that "continuity of care" was referenced in respect of the latter but not the former. This is a false dichotomy since, on the facts of this appeal, the deemed date of disability *is* the date by which the disability was severe and prolonged.

> (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death;

[20] It may well be that an ongoing care relationship facilitates investigation, treatment and greater understanding of a patient's condition, such that persuasive evidence of a severe and prolonged disability becomes available. In this manner, a finding of disability may naturally coincide with or follow from continuity of care with a treating physician. However, I find nothing within the statutory definitions above which suggests that the establishment of continuity of care with a particular physician is itself a factor in determining whether and when a disability has become either severe or prolonged. The General Division relied, in significant part, upon the established date of continuity of care in selecting the date of disability. Since the concept of "continuity of care" had no direct bearing on the date the disability had become severe or prolonged, this was an error of law.

Remedy

[21] Subsection 59(1) of the DESDA allows the Appeal Division to, among other things, refer the matter back to the General Division for reconsideration, or to confirm, rescind or vary the General Division decision.

[22] The Appellant's representative asserts that the Appellant became disabled in June 2011, based upon medical evidence demonstrating a severe and prolonged disability when the Appellant stopped working. As such, she requests that the date of disability be deemed to be January 2012, 15 months prior to the date of application. I do not find this to be the appropriate remedy in the circumstances of this appeal.

[23] Continuity of care with Dr. Jerome was but one reason given for selecting November 2015 as the date of disability, and it may well be that, aside from this factor, the General Division member did not consider the Appellant's disability to be severe, or prolonged, or both, until November 2015. Yet, although the Respondent's submissions outline a variety of plausible reasons for the General Division to have concluded that the Appellant's disability was not prolonged until November 2015, the General Division's conclusion on the date of disability does not allude to such reasons. The General Division member did not make a specific finding

of fact on the date by which the Appellant's disability was "severe," nor did she make a specific finding of fact on the date by which the Appellant's disability was "prolonged." Moreover, a variety of evidence was highlighted, from different time frames, in the analyses of "severe" and "prolonged." Consequently, and even though the conclusion references supportive medical evidence from November 2015, it is difficult to know the extent to which the General Division member relied, inappropriately, upon continuity of care to establish the date of disability. As a revised date of disability does not obviously or necessarily flow from the error of law made by the General Division, I find it appropriate to refer the issue of the date of disability back to the General Division for redetermination by a different member.

CONCLUSION

[24] This appeal is allowed on the basis that the General Division erred in law by relying, in significant part, upon an irrelevant consideration of "continuity of care" in determining the date of disability. The issue of date of disability is referred back to the General Division for redetermination by a different member.

Shirley Netten
Member, Appeal Division