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

Citation: *C. I. v. Minister of Employment and Social Development,* 2017 SSTADIS 462

Tribunal File Number: AD-17-345

BETWEEN:

C. I.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

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 dated October 29, 2015, which determined that she was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was not "severe" prior to her minimum qualifying period (MQP).

BACKGROUND

[2] On January 23, 2012, the Applicant submitted an application for disability benefits under the CPP. She indicated that she was 50 years old and had attended school up to Grade 10, and had last worked as a clerk in a convenience store, a job she left in March 2009 because of weakness and pain in her back and legs, as well loss of sensation in her arms. The Applicant indicated that she has been diagnosed with several medical conditions, including Scheuermann's disease, arthritis, scoliosis and brain lesions.

[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 her MQP, which ended on December 31, 2011. In May 2012, the Appellant 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 September 8, 2015, the General Division conducted an in-person hearing in X, Ontario. In written reasons issued on October 29, 2015, the General Division focused on the Applicant's post-MQP earnings of $17,005 in 2013 and $11,106 in 2014, which it determined were "substantially gainful." The General Division thereby found that she was disqualified from CPP disability benefits.

[5] On February 9, 2016, the Applicant applied for leave to appeal, alleging that the General Division erred in law by basing its decision exclusively on the Applicant's post-MQP earnings. In a decision dated June 13, 2016, the Appeal Division refused leave because it concluded that the appeal would have no reasonable chance of success. It found that the General Division had considered factors other the Applicant's earnings in assessing the severity of her disability.

[6] The Applicant then applied for judicial review at the Federal Court. In a judgement dated March 6, 2017, the Honourable Justice Simon Fothergill found the Appeal Division's decision unreasonable "[in] light of the internal inconsistencies of the General Division's decision, and its apparent assumption that Ms. C. I. should continue to ignore the advice of her physician and maintain her employment despite debilitating pain…" He granted the application and ordered that the matter be returned to the Appeal Division for reconsideration.

[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* (SST 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 *Department of Employment and Social Development Act* (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 her application requesting leave to appeal dated October 23, 2015, the Applicant indicated that she suffers from several medical conditions, including arthritis, Scheuermann's disease, degenerative disc disease, fibromyalgia, polycythemia, migraines and brain lesions. Joint pain and weakness forced her to leave her job in 2009, but she acknowledged resuming work after her MQP, from November 2012 to March 2015, albeit with various interruptions caused by her medical conditions. However, she worked through pain and through what the General Division characterized as "considerable cost" to her personal comfort and ability to pursue any of her normal activities of daily living.

[16] The Applicant noted that the General Division wrote, at paragraph 46 of its decision, that if it were to assess her condition as of the end of her MQP, "there would be little doubt that it was a severe disability that precluded her from continuing her job in 2008." However, the General Division determined that the Applicant's employment in 2013 and 2014 did not constitute failed work attempts and showed that she had the capacity to regularly pursue a substantially gainful occupation. The General Division noted that the Applicant had had surgery on her arm in 2014 and was off work for periods of time, thus accounting for lower earnings that year.

[17] The Applicant argued that the General Division erred in law in relying exclusively on her earnings for those years and in failing to consider other relevant factors, such as her health. The Applicant relied on *St. Gelais v. The Minister of Employment and Immigration*,[3] which stands for the proposition that an applicant's earnings "are only piece of evidence which must be weighed with all the other evidence respecting disability," and to *Constantinoff v. Canada*,[4]

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[3] *St. Gelais v. The Minister of Employment and Immigration, CCH Canadian Employment Benefits and Pension Guide reports* (1994) CCH #8558 pp. 6047-6048.
[4] *Constantinoff v. Canada (Minister of Social Development*) (November 25, 2004), CP 22720 (PAB).

where the appellant was found to be disabled for the purposes of the CPP, despite having earnings of $27,000 after his MQP.

[18] The Applicant supplemented and amplified her submissions with a post-judgement brief dated June 30, 2017. In it, she elaborated on what she submitted were the General Division's deficiencies in weighing the medical evidence against her struggle to sustain employment. In light of the Federal Court judgement, the Applicant recommended that the Appeal Division set aside the General Division's decision and find her disabled.

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

ISSUES

[20] 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

[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*.[5] 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.

[5] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

[22] The Federal Court of Appeal decision *Canada v. Huruglica*[6] 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 […]"

[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.

Weighting of Post-MQP Earnings

[24] The Applicant submits that the General Division failed to weigh all the evidence in assessing the severity of her disability. In particular, she says that the General Division focused unduly on her post-MQP earnings and her ability to complete tasks at work, and gave insufficient consideration to the evidence of her medical condition.

[25] This submission is not merely arguable; it has sufficient merit to convince me that this appeal must be allowed without hearing. As noted by the Federal Court, the General Division's decision contains what appear to be, on their face, internal contradictions.

> [46] […] The Appellant has been on and off work because of her medical conditions for a number of years. Most recently, she has been unable to work between 2008 and 2012. Were the Tribunal to assess her

[6] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

> condition as of her MQP, there would be little doubt that it was a severe disability that precluded her from continuing her job in 2008. Her return to work was as a result of determined perseverance, medical treatment and mitigation strategies, under painful conditions. She "needed the money" and was prepared to ignore and "work through" her pain and the advice of her family doctor who advised her to not work, steel herself up and punish herself with the pain she has described as the recovery reward for her persistence.

[26] The General Division accepted that the Applicant met the test of severity in 2008 and found that she managed to work in 2013 and 2014 only by punishing herself by working through considerable pain against the advice of her family doctor. The General Division also appears to have accepted that the Applicant's medical condition would not improve, yet it nevertheless found that her job at Tim Horton's amounted to successful work trial. It is difficult to reconcile these findings with the General Division's ultimate conclusion that the Applicant's appeal should be denied because her disability was insufficiently severe.

[27] These were not the only internal inconsistencies in the General Division's decision. In paragraph 40, it noted that the Applicant

> has a grade 10 education with no up-grading of any kind. She has worked only in customer service jobs such as being a cashier in a convenience store or as a coffee server at Tim Horton's. *She has few transferable skills* [emphasis added].

[28] Yet in paragraph 53, the General Division found:

> It is the Tribunal's view that the Appellant's personal characteristics actually work to her advantage in terms of her being employable in the real world which has been demonstrated. *She has transferable skills.* As a result, the scope of substantially gainful occupations is much broader for the Appellant than would be the case for a much older, less educated Appellant, with limited English or French language skills [emphasis added].

[29] Ultimately, the reader is left wondering whether the Applicant's work experience was an asset or liability for the purposes of the General Division's *Villani*[7] analysis. Natural justice demands that a decision be accompanied by an intelligible explanation but, in this

[7] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

case, there is no chain of fact, law or logic that would lead the reader to conclude that the outcome is defensible.

CONCLUSION

[30] 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's decision was internally inconsistent and therefore unintelligible.

[31] 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