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

Citation: *P. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 512

Tribunal File Number: AD-16-226

BETWEEN:

P. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: October 3, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant is appealing the General Division's decision dated November 6, 2015, which determined that she did not establish that she had a severe and prolonged disability for the purposes of the *Canada Pension Plan* by the end of her minimum qualifying period on December 31, 2013. The General Division concluded that the Appellant was therefore not entitled to a disability pension.

[2] I granted leave to appeal on the basis that the General Division may have erred in law by applying a different legal test for "severe" than that set out in paragraph 42(2)(*a*) of the *Canada Pension Plan.* I also granted leave to appeal on the basis that the General Division may have based its decision on erroneous findings of fact that it had made in a perverse or capricious manner or without regard to the material before it, when it found that the Appellant did not have irritable bowel syndrome or experience any symptoms of the condition until after she had been formally diagnosed with the condition in March 2015, and when it found that she retained the capacity regularly of pursuing any substantially gainful occupation at the end of her minimum qualifying period.

[3] Both parties are represented by counsel. Apart from providing additional medical information current to January 5, 2017, the Appellant did not file any further written submissions or respond to the Respondent's written submissions of April 6, 2017. Furthermore, as neither party requested an oral hearing, and as there are no gaps in the file and there is no need for clarification, I have determined that an oral hearing is unnecessary and that this matter can be decided on the basis of the documentary record, pursuant to paragraph 43(*a*) of the *Social Security Tribunal Regulations*.

ISSUES

[4] I acknowledge that the Appellant has raised several issues in his application requesting leave to appeal, but I found that (apart from the three issues that I have identified above) they did not raise an arguable case. The Appellant has not since made any other submissions that would compel me to revisit these other issues. Accordingly, the issues before me are as follows:

a. Can I consider any new evidence?

b. Did the General Division properly apply the legal test for "severity" under subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan*?

c. Did the General Division base its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard to the material before it, when it determined that the Appellant did not experience any symptoms of irritable bowel syndrome until she was formally diagnosed with the condition in March 2015?

d. Did the General Division base its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard to the material before it, when it determined that the Appellant retained some capacity?

[5] If the response to any of the above questions is "yes," what is the appropriate disposition of this matter?

GROUNDS OF APPEAL

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) limits the grounds of appeal to 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 that it made in a perverse or capricious manner or without regard for the material before it.

a. New evidence

[7] The Appellant filed submissions on May 30, 2017, in which she provided additional medical information, current to January 5, 2017 (document AD4). These records did not form part of the evidentiary record before the General Division.

[8] As I indicated in my leave to appeal decision, new evidence generally is not permitted on an appeal, given the limited grounds of appeal under subsection 58(1) of the DESDA. In *Canada (Attorney general) v. O'Keefe*, 2016 FC 503, at paragraph 28, Manson J. held 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.

[9] In *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at paragraph 31, Russell J. determined that "new evidence is not admissible except in limited situations […]." In *Glover v. Canada (Attorney General)*, 2017 FC 363, the Federal Court adopted and endorsed the reasons in *O'Keefe*, 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 provisions under section 66 of the DESDA enable the General Division to rescind or amend a decision where new evidence is presented by way of application.

[10] Although I indicated in my leave to appeal decision that new evidence could be considered under limited circumstances, such as where it addresses any of the grounds of appeal, the Appellant does not argue that the additional medical information falls into any of

the exceptions or that it addresses any of the grounds of appeal. The Appellant has not provided me with any submissions why I should be considering the additional medical information, other than to argue that they show that she had been experiencing symptoms prior to December 2013 and had remained in long-term treatment with the Headache Clinic until 2015, before it was suggested that she would possibly obtain more assistance at the Pain Clinic (AD4-1). The Appellant states that her symptoms have not improved and that she remains disabled for the purposes of the *Canada Pension Plan*. The Appellant argues that the records show that her disability is both severe and prolonged, as ongoing regular treatments have not resulted in any improvement.

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

[12] Essentially, the Appellant is seeking a reassessment. However, as I have noted above, subsection 58(1) of the DESDA provides for only limited grounds of appeal. It does not allow for a reassessment or rehearing of the evidence: *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

b. Legal test for severity

[13] The Appellant asserts that the General Division erred in law, in applying a much stricter legal test for severity than under subparagraph 42(2)(*a*)(ii) of the *Canada Pension Plan*. That subparagraph defines a severe disability as one in which a person is "incapable regularly of pursuing any substantially gainful occupation." The Appellant claims that, rather than determining whether she was incapable regularly of pursuing any substantially gainful occupation, the General Division instead determined whether she was prevented from any type of work or "cannot work at all." At paragraph 36, the General Division wrote:

> The Tribunal finds that this evidence does not relate to a severe medical condition that would prevent the Appellant from any type of work. Even

> though Dr. Emery states the Appellant's symptoms affect her ability to work, he did not rule that the Appellant cannot work at all.

[14] In my leave to appeal decision, I noted that the General Division correctly recited the legal test for severity at paragraph 39, where it wrote that that the Appellant had not established that she had a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation. Nevertheless, I granted leave to appeal on the basis that there was an arguable case that, had the General Division ultimately applied a test for "severe" other than that defined by paragraph 42(2)(*a*) of the *Canada Pension Plan*, as suggested in paragraph 36, this could constitute an error of law.

[15] The Respondent argues that, when the General Division's decision is read as a whole, it becomes clear that the General Division understood and applied the correct test for severity. The Respondent notes that the General Division set out the correct legal test for severity at the outset of its decision, at paragraph 6. The Respondent notes that the General Division also referenced *Inclima v. Canada (Attorney General)*, 2003 FCA 117, at paragraph 38, where it wrote:

> Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant has not provided evidence that she tried to seek other employment (casual, part-time or full-time) suitable to her physical limitations and that she could not maintain that employment due to her medical conditions. Therefore, it cannot be said that the Appellant has satisfied the principle set forth in *Inclima* supra.

[16] The Respondent submits that in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62, at paras. 20 to 22, the Supreme Court of Canada established that one should not read the reasons and result in isolation, but that they should be read together to determine whether the result falls within the range of possible acceptable outcomes as required under the reasonableness standard of review. The Respondent further argues that reasons need not be comprehensive, and that, as set out by the Federal Court of Appeal in *Simpson v. Canada (Attorney General)*, 2012 FCA 82, at paragraph 10, "[…] a tribunal need not refer in its reasons to

each and every piece of evidence before it, but is presumed to have considered all the evidence."

[17] The Respondent maintains that, although the General Division restated the test differently at paragraph 36, overall, it is evident from paragraphs 6 and 38 that the member understood and applied the correct test for severity.

[18] In *Newfoundland and Labrador Nurses*, the Supreme Court of Canada addressed the issue of whether the underlying decision of the arbitrator demonstrated "justification, transparency and intelligibility." The Supreme Court of Canada found that the reasons showed that the arbitrator was alive to the question at issue and came to a result within the range of reasonable outcomes.

[19] While I agree that one should avoid reading reasons and results in isolation and that one should read them together, the Federal Court of Appeal has rejected any notion that the Appeal Division should conduct any standard of review analysis. In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal wrote at paragraph 19 that:

> When it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court. Given the risk of a blurring of lines, it seems to me that we must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context. Not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal (ss. 18.1 and 28 of the *Federal Courts Act*, R.S.C. 1985, c F-7). Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act. In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(*b*) of the *Act*). There is no need to add to this wording the case law that has developed on judicial review.

[20] Hence, in reading the reasons and result together, I should refrain from doing so for the purposes of conducting any reasonableness standard of review. Instead, I should read the reasons and result together to derive some context, as it may provide some clarity as to what test the General Division may have applied when it assessed the severity of the Appellant's disability.

[21] At paragraphs 36 and 37, the General Division analyzed the medical evidence. At paragraph 37, the General Division noted that the Appellant had received several treatment recommendations in 2014, but that there was insufficient evidence before it to determine whether the Appellant had accepted or pursued them, as well as how effective they might have been. The General Division did not make any specific findings that the Appellant had refused treatment, or what impact any non-compliance might have had on the Appellant's medical status. The General Division did not make any particular findings in paragraph 37 regarding the severity of the Appellant's disability, other perhaps than to suggest that if the Appellant had been able to manage her fibromyalgia with medication since 1990, her fibromyalgia alone could not have been that severe. However, this does not consider the cumulative impact of each of her medical conditions. Paragraph 37 provides no guidance or any indication of the test that the General Division might have applied in assessing the severity of the Appellant's disability.

[22] At paragraph 36, the General Division seemingly required the Appellant to adduce evidence that she could not work at all, in order to establish that she was severely disabled. The General Division wrote, "The Tribunal finds that this evidence does not relate to a severe medical condition that would prevent the Appellant from any type of work." Here, the General Division seemed to define a "severe medical condition" as one that prevented the Appellant from any type of work. Furthermore, in the following sentence, it wrote, "Even though Dr. Emery states the Appellant's symptoms affect her ability to work, he did not rule that the Appellant cannot work at all." Again, the General Division seemed to require that the Appellant establish that she was unable to work at all. There is nothing in paragraph 36 to indicate that the General Division considered whether the Appellant was incapable regularly of pursuing any substantially gainful occupation or that it was applying an abbreviated form of the severity definition.

[23] The Respondent urges me to find that, by correctly reciting the legal test, the General Division necessarily thereby properly applied it. However, in this case, given that the General Division essentially defined a severe medical condition as one "that would prevent the Appellant from any type of work," I cannot be assured that, although the General Division correctly recited the legal test for severity at paragraphs 6 and 39, that it necessarily thereby properly applied it. I cannot accede to the Respondent's arguments in this regard.

c. Retained capacity

[24] The Appellant submits that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard to the material before it, in determining that the Appellant retained some capacity, on the basis of Dr. Emery's medical notes, in which he stated that the Appellant's symptoms affected her ability to work. The General Division determined that Dr. Emery "did not rule that the Appellant cannot work at all." Given my findings above, it is it unnecessary for me to address this issue.

d. Irritable bowel syndrome

[25] Similarly, given that I am allowing this appeal, it is unnecessary for me to determine whether the General Division erred on the issue of whether she could have had irritable bowel syndrome or had experienced any symptoms of irritable bowel syndrome before she was formally diagnosed with the condition in March 2015.

[26] However, I do not find that the General Division determined that she could not have been experiencing symptoms or that she could not have had the condition until a formal diagnosis had been made. Indeed, the General Division accepted that the Appellant "had limitations set forth by her ailments," but it simply found that there was insufficient evidence that her disabilities were severe on or before December 31, 2013. The General Division also noted that Dr. Emery had prepared several medical reports, including as early as May 2012, in which he had diagnosed the Appellant with irritable bowel syndrome, among other things. The General Division noted that Dr. Emery was of the opinion that, by

October 2012, the Appellant's symptoms made it impossible for her to work on a consistent basis and certainly less than 60% of her regular duties. The General Division also noted that the Appellant had undergone numerous investigations for irritable bowel syndrome and that she was receiving treatment for her symptoms, although there had been no significant improvement in her symptoms or functionality. It is clear that the General Division was aware that the Appellant had been diagnosed with irritable bowel syndrome before the end of her minimum qualifying period, but it concluded that, overall, the evidence did not establish that her condition was severe by the end of her minimum qualifying period.

DISPOSITION

[27] The appeal is allowed. Section 59 of the DESDA provides that I may refer this matter back to the General Division for redetermination. As it is not readily apparent whether the General Division applied the legal test for severity as defined by the *Canada Pension Plan*, it is appropriate that the matter be returned to the General Division for a redetermination.

Janet Lew
Member, Appeal Division