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

Citation: *Minister of Employment and Social Development v. M. G.,* 2017 SSTADIS 502

Tribunal File Number: AD-17-65

BETWEEN:

Minister of Employment and Social Development

Applicant

and

M. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: September 29, 2017

REASONS AND DECISION

INTRODUCTION

[1] On October 27, 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 Respondent.

[2] The General Division held a teleconference hearing, and it determined that:

a) the Respondent's minimum qualifying period (MQP) is August 2013;

b) her testimony was convincing;

c) she had suffered a severe disability before August 2013;

d) while the Respondent worked until February 2014, colleagues helped her, and she ultimately could not continue working;

e) the Respondent's ongoing symptoms of depression and chronic back pain are adequately supported by the medical evidence, and they render her unfit for any sort of employment; and

f) the Respondent's disability is long continued, and it was prolonged in August 2013.

[3] Based on these conclusions, the General Division allowed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on January 25, 2017, within the 90-day time limit.

ISSUE

[5] Does the appeal have a reasonable chance of success?

THE LAW

[6] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[8] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[9] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[10] The Applicant's grounds of appeal are that the General Division erred in law and that it made erroneous findings of fact in arriving at its decision. The Applicant's arguments can be summarized as follows:

a) The General Division erred in law when, contrary to *Klabouch v. Canada (Social Development)*, 2008 FCA 33, it relied on medical diagnoses and the Respondent's suffering instead of assessing the Respondent's capacity to work as of August 2013.

b) The General Division erred in law in failing to apply *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, and by not addressing the Respondent's failure to undergo recommended treatments.

c) The General Division made findings of fact without regard to the material before it, specifically pertaining to:

    i. the Respondent having worked for almost six months after her MQP;

    ii. her having left her work in February 2014 for a variety of reasons;

    iii. evidence that the Respondent had not fallen ill until February 2014.

ANALYSIS

Error of law

[11] The General Division's decision refers to one decision at paragraphs 31, 35 and 36: *Villani v. Canada (Attorney General)*, 2001 FCA 248.

[12] The General Division did not refer to the jurisprudence cited in the Application, including, but not limited, to *Pantic v. Canada (Attorney General)*, 2011 FC 591; *Gilroy v. Canada (Attorney General)*, 2008 FCA 116; *Monk v. Canada (Attorney General)*, 2010 FC 48; *Warren v. (Attorney General)* 2008 FCA 377; *Klabouch*; and *Lalonde.*

[13] The General Division's decision is not necessarily flawed simply because it fails to cite all potentially applicable jurisprudence. However, it may be flawed if the General Division failed to apply binding jurisprudence.

[14] The Applicant submits that the General Division erred in law by failing to apply binding Federal Court of Appeal jurisprudence and by rendering a decision that was contrary to the binding case law.

[15] In the General Division's analysis, it noted that:

> [32] In this case, the balance of the evidence persuaded the Tribunal that the Appellant does suffer a severe disability before August

2013. More precisely, an MRI of the lumbar spine dated June 10, 2008, provides that the Appellant has broad based disc bulges at L3-4 and L4-5. These findings are most pronounced at L4-5, where a moderate bulge is noted. Based on the evidence on file, there are reports providing that the Appellant has had back pain since 2006 (sciatica), she also had injections in 2007 and surgery in 2009. She had cardiac issues in 2013. In addition, a report dated October 25, 2011 from Dr. Royle provides that the Appellant has a history of major depressive disorder. In June 17, 2014, Dr. Pelletier states that the Appellant's conditions are chronic and permanent and that he has not seen any improvement in the Appellant's condition in the last five (5) years.

[33] Also, the Tribunal found the Appellant's testimony convincing. In 2014, the Appellant stopped working, she had been dealing with pain for more than 10 years as well as depression for 15 years. While she was working, she would ask her colleagues to help her move items, especially when she had migraines. She also stated that she could not walk more than five (5) feet. She had injections to assist with the pain, although they helped, the effects did not last. Other than medication, she tried acupuncture, physiotherapy and she saw a chiropractor for her back. She also tried aqua therapy but she found it too difficult afterwards, the pain was worse. She explained that she cannot stand still or sit because she needs to move all the time.

[34] The Tribunal also considered the fact that the Appellant worked until February 2014 which is six (6) months after her MQP. However, the Appellant testified that she would ask her colleagues to help her move items and she had difficulty concentrating. She also stated that she could not walk more than five (5) feet. The medical reports show that she suffered from back pain since 2006 and had a history of major depressive disorder. Ultimately, the Appellant could not continue working.

[35] The question arises, then, whether the Appellant was capable of some alternative type of work that might have accommodated her pain. Applying the *Villani* criteria, the Tribunal was hard pressed to imagine what else the Appellant could do, given her age, limited education, her past work and life experience with her symptoms. As stated, based on the evidence on file, there are reports providing that the Appellant has had back pain since 2006 (sciatica). In a report dated October 25 2011, Dr. Royle stated that the Appellant has a history of major depressive disorder. In June 17 2014, Dr. Pelletier stated that the Appellant's conditions were chronic and permanent and that he had not seen any improvement in the Appellant's condition in the last five (5) years. She also had cardiac issues in 2013. The Tribunal finds that the Appellant's limitations would significantly limit her ability to function in a vocational setting.

> [36] In the opinion of the Tribunal, the Appellant's ongoing symptoms of depression and chronic back pain are adequately supported by the medical evidence and render her unfit for any sort of employment. Given her limitations, when considered in a "real world" context (*Villani v. Canada (A.G.)*, 2001 FCA 248), the Tribunal is satisfied that the Appellant's disability is severe since August 2013.

[16] The Applicant submits that the General Division decision refers to medical notes from 2006 to 2009, a medical report in 2011 and another in June 2014; however, all these reports are either more than 19 months before the Respondent's MQP or months after she stopped working, and the General Division failed to note relevant medical evidence in 2013. It argues that the General Division erred in law as it failed to assess the Respondent's condition and work capacity as of August 2013.

[17] The record indicates that the Respondent worked until February 2014. The General Division found that the Applicant's limitations would significantly limit her ability to function in a vocational setting in 2013 and that she worked, with difficulty, until February 2014 with the help of co-workers.

[18] The General Division appears to have assigned little weight to the evidence that the Respondent continued to work until February 2014, doing so within her limitations and doing the same type of job for the previous 10 years. It did not consider this work to be evidence of ability to work requiring the claimant to show that efforts to obtain and maintain employment have been unsuccessful by reason of a health condition (see *Inclima v. Canada (Attorney General)*, 2003 FCA 117). For these reasons, it appears that the General Division may not have adequately assessed the Respondent's workforce attachment or her reasons for not attempting to find employment in August 2013.

[19] In addition, the General Division makes no reference to medical evidence in 2013. It appears to have assigned no weight to these reports.

[20] In *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13, the Federal Court of Appeal cautioned that if a board (or tribunal) decides that contradictory evidence should be dismissed or assigned little or no weight

at all, it must explain the reasons for the decision. Failing to do so presents a risk that its decision will be marred by an error of law or that it will be qualified as capricious.

[21] Perhaps the General Division did not consider the medical evidence in 2013 to have been contradictory, as the Applicant asserts. However, whether it failed to explain why that evidence was not considered and, if so, whether that failure resulted in an error of law or a capricious decision warrants further review.

[22] The issue of whether the Respondent unreasonably refused to undergo recommended treatment was not discussed in the General Division decision. There is evidence in the record that the Respondent was recommended to seek counselling for depression (one of her disabling conditions) and it does not appear that she did. Therefore, whether the General Division erred in not considering whether the Respondent "unreasonably refused to undergo recommended treatment" also warrants further review.

[23] On these issues, the Applicant's submissions and the face of the record, I am satisfied that the appeal has a reasonable chance of success at the leave to appeal stage.

Alleged erroneous findings of fact

[24] The Applicant argues that the General Division made an erroneous finding of fact when it found that the Respondent suffered from a severe and prolonged disability, because "the conclusion […] is irreconcilable with evidence before it."

[25] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. In response to the Respondent's arguments that the Appeal Division was required to refuse leave to appeal on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESD Act "does not require that individual grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." This application is one of the situations described in *Mette*.

[26] Because the alleged errors of law may be interrelated to the analysis of whether the Respondent's medical condition was severe and prolonged, I will not parse the grounds of appeal any further at this stage of the proceedings.

CONCLUSION

[27] The Application is granted.

[28] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Shu-Tai Cheng
Member, Appeal Division