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

Citation: *T. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 519

Tribunal File Number: AD-16-807

BETWEEN:

T. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: October 5, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On May 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 not payable to the Appellant.

[2] The Appellant sought leave to appeal that decision and leave was granted on July 18, 2017.[1]

[3] Pursuant to s. 58(5) of the *Department of Employment and Social Development Act* (DESDA), the application for leave to appeal became the Notice of Appeal. In accordance with s. 42 of the *Social Security Tribunal Regulations* (Regulations), the parties were given an opportunity to file submissions on the appeal. The Respondent filed submissions on September 13, 2017 and the Appellant filed additional submissions on September 15, 2017. In its submissions, the Respondent stated it is content to have this appeal determined on the basis of the written record. The Appellant's representative expressed no preference.

[4] I have determined that no further hearing is required and this appeal shall proceed on the record pursuant to s. 43(*a*) of the Regulations. There are no gaps in the file, there is no need for clarification and both parties have had the opportunity to file submissions on the appeal. Furthermore, a hearing on the record is consistent with the Tribunal's obligation to proceed as informally and as quickly as circumstances, fairness and natural justice permit, as set out in s. 3(1) of the Regulations.

SUBMISSIONS

[5] In the decision granting leave to appeal, I concluded that the grounds of appeal argued by the Appellant's representative in the application for leave to appeal did not have a

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[1] *T. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 342.

reasonable chance of success. However, following the direction of the Federal Court in *Griffin v. Canada (Attorney General)*, 2016 FC 874, I reviewed the underlying record and identified a concern with the General Division member's treatment of the evidence. I stated in my reasons:

> [30] The member's finding that the Applicant was not compliant with treatment recommendations appears to have been central to his conclusion that she did not meet the definition of severity under the CPP. By apparently failing to take into account the letter of Dr. Seligman dated August 31, 1989, and report of Dr. Meisami dated April 2, 1998, as evidence that the Applicant had been following her medical advisors' recommendations, the member may have based his decision that the Applicant's condition was not severe on an erroneous finding of fact made without regard to the material before him. If so, this would constitute a ground of appeal under s. 58(1)(*c*) of the DESDA. I have concluded that the proposed appeal has a reasonable chance of success on this basis.

[6] The Appellant's representative has focussed her submissions on this ground of appeal. She submits that the Appellant was compliant with her physicians' treatment recommendations and draws the Tribunal's attention to two documents that were before the General Division: (i) a letter dated January 27, 1989 from the Behavioural Health Clinic, where P. Miller, Senior Clinical Supervisor, stated that the Appellant "has been involved in a pain management program under my supervision which involves physiotherapy";[2] and (ii) a letter dated December 20, 1995 from Dr. L. Hilbert, of the Physical Medicine Clinic, who noted: "She was seen by a chiropractor who suggested neck manipulation but she declined and I fully agree with that. She had one trial of cervical traction in lying position which made her worse."[3] The Appellant's representative submits that the first provides evidence that the Appellant participated in a pain management program. The second is evidence that she was complying with the treatment recommendations "to the best of her abilities".[4]

[7] The Appellant's representative also submits that while the Appellant "was not always able to fully comply with the various recommended treatment programs, nonetheless her failure

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[2] GD3-108.
[3] GD3-130.
[4] AD6-2.

to fully engage or pursue some of these programs was not unreasonable. In our view it is indicative of someone with a severe and chronic disability".[5]

[8] For its part, the Respondent submits that the General Division decision contains no errors. While conceding that the General Division may have misapprehended the evidence with respect to the Appellant's compliance with her physicians' recommendations that she attend the Downsview Rehabilitation Centre and the Pain Investigation Clinic at the Toronto Western Hospital, the Respondent submits that there were numerous other instances where the Appellant was apparently non-compliant with treatment recommendations and therefore the General Division had a defensible reason for concluding the Appellant had been non-compliant with treatment.[6] In this regard, the Respondent submits that Appellant was not compliant with the following treatment recommendations:[7]

a) On June 29, 1993, Dr. Katz recommended physiotherapy,[8] but the only evidence showing the Appellant attended physiotherapy was after her February 1995 motor vehicle accident;

b) The May 13, 1994 report from Dr. Tepperman[9] recommended massage therapy and on November 4, 1994, Dr. Roscoe said massage therapy might offer her symptomatic relief. There is no evidence she did massage therapy;

c) In Dr. McGillivray's report of October 3, 1997, he recommended acupuncture;[10] and

d) The Appellant did not provide any prescriptive history to demonstrate that she was actively taking any medication.

[9] The Respondent also submits that, even without considering the issue of the Appellant's non-compliance with treatment recommendations and its impact on the determination of disability, the General Division had already determined[11] that the Appellant's condition was

[5] AD6-3.
[6] AD5-9, para. 20.
[7] AD5-9.
[8] GD3-44 to GD3-45.
[9] GD3-134 to GD3-145.
[10] GD3-138.
[11] At para. 71 of the reasons.

not severe because the medical evidence did not establish that she had a severe disability on or before the minimum qualifying period (MQP) date of December 31, 1997.

[10] Finally, the Respondent submits that the totality of the evidence does not support a finding that the Appellant's disability was severe and prolonged on or before the MQP date. It also contends that she demonstrated work capacity as she was employed in other positions after her workplace accident in 1988 and stopped working only after a motor vehicle accident in 1995. In addition, the Appellant was only diagnosed with fibromyalgia six years after her MQP.

THE APPEAL DIVISION'S ROLE

[11] According to s. 58(1) of the DESDA the only grounds of appeal are that:

> a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> 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.

[12] The issue before me is whether the General Division committed an error falling within one of these grounds.

[13] Subsection 59(1) of the DESDA provides that the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the General Division's decision in whole or in part.

[14] In *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93, the Federal Court of Appeal held that neither the standards of review analysis applied by courts when they conduct judicial review of decisions made by administrative decision-makers (as discussed in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9) nor the principles engaged by appellate courts' review of lower court decisions (as discussed in *Housen*

v. Nikolaisen, [2002] 2 SCR 235, 2002 SCC 33) automatically apply to appeals within a multilevel administrative framework (paras. 46–48). Rather, "the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context" (at para.46).

[15] Thus, when the legislator has designed a multilevel administrative framework, the scope of the appeal tribunal's review of the lower tribunal's decision is to be determined by the language in the governing statute. Although *Huruglica* dealt with a decision of the Refugee Appeal Division of the Immigration and Refugee Board, the Court's reasoning applies equally to other multilevel administrative frameworks, such as the Tribunal.

[16] Based on the unqualified wording of s. 58(1)(*a*) and (*b*) of the DESDA, no deference is owed to the General Division on questions of natural justice, jurisdiction or errors of law.

[17] Paragraph 58(1)(*c*) directs the Appeal Division to intervene if the General Division based its decision on an erroneous finding of fact that it made "in a perverse or capricious manner" or "without regard to the material before it". This language suggests that the Appeal Division should intervene only when the General Division bases its decision on an error that is clearly egregious or at odds with the record: see *R. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 58. In *Hussein v. Canada (Attorney General)*, 2016 FC 1417, the Federal Court held that "the weighing and assessment of evidence lies at the heart of the SST-GD's [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

NEW DOCUMENTS

[18] The Appellant's representative enclosed with her submissions 14 documents that were not put into evidence before the General Division.[12] The representative states that she included the documents to provide evidence to show the Appellant was compliant with treatment recommendations. She explained that she did not believe this "is new evidence but evidence

[12] AD6-4 to AD6-24.

that could have been provided at our original hearing by way of enquiry and questioning".[13] The documents consist of 13 medical records and one letter from the Workplace Safety and Insurance Board of Ontario. As these documents were not in evidence before the General Division, if admitted, they would constitute new evidence on this appeal.

[19] As the Federal Court recently confirmed in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at para. 23, "In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing […]. They also do not consider new evidence." (See also *Marcia v. Canada (Attorney General)*, 2016 FC 1367.) These principles apply at the leave to appeal stage as well as on appeal. Although there are limited exceptions to this principle, none applies in this case. As these documents were not before the General Division when it made its decision, they can have no bearing on a claim that the General Division committed an error falling within the scope of s. 58(1) of the DESDA. Accordingly, the 14 additional documents are not admissible and I have not considered them further. Moreover, I have not considered the Appellant's submissions that refer to these documents.

DISCUSSION

[20] The Respondent concedes that the General Division member erred in his assessment of the evidence concerning whether the Appellant was compliant with her physicians' recommendations that she attend the Downsview Rehabilitation Centre and a pain clinic. However, it argues that the Appellant was not compliant with other treatment recommendations and, therefore, the General Division member had "a defensible reason for concluding that the Appellant had been non-compliant with treatment".[14]

[21] I am not persuaded by this argument for the following reasons.

[22] First, although the Respondent puts forward a number of treatment recommendations[15] with which, it contends, the Appellant did not comply, the member did not mention any of these in his reasons. There is no basis to infer that the member considered these in making his decision that she was not compliant and not disabled within the meaning of the CPP. If these

[13] AD8-1.
[14] AF5-9, para. 22.
[15] Listed at para. 8, above.

matters were material to his reasoning, they ought to have been referred to in his analysis: *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498, at para. 51.

[23] In addition, given the evidence that was before him,[16] the General Division member erroneously concluded that the Appellant had not been compliant with her physicians' recommendations that she attend the Downsview Rehabilitation Centre and the Pain Investigation Clinic. This finding was material to his decision that her disability was not severe at her MQP and continuously thereafter. Although findings of fact are entitled to a significant degree of deference,[17] I have no hesitation in concluding that the member based his decision on an erroneous finding of fact made without regard for the material before him, an error falling within the ambit of s. 58(1)(*c*) of the DESDA.

[24] The only other instance of non-compliance referred to by the General Division member was that the Appellant "did not follow through with an MRI of her back because she is claustrophobic. It was not until August 30, 1999 that she had the MRI of her back after her MQP."[18] The Federal Court of Appeal stated in *Lalonde v. Canada (Minister of Human resources Development)*, 2002 FCA 211, that consideration of a claimant's disability in the "real world" context[19] means the Tribunal must consider whether the Appellant's refusal to undergo treatment is unreasonable and what impact that refusal might have on her disability status should the refusal be unreasonable. The General Division member did not engage in any analysis to consider whether the Appellant acted reasonably in refusing an MRI for this period of time and, if unreasonable, what the impact of this delay was on the Appellant's disability status as at the MQP date of December 31, 1997. The failure to conduct any such analysis constitutes an error of law. Errors of law are entitled to no deference. I conclude the member committed an error under s. 58(1)(*b*) of the DESDA.

[25] I also note the Respondent is not correct when it submits that the only evidence showing the Appellant attended physiotherapy was after her February 1995 motor vehicle accident. At paras. 23 and 24 of his reasons, the General Division member referred to attendance at a physiotherapist in 1988 and 1989. Also, Dr. Seligman, orthopaedic surgeon, wrote in his

[16] Described in paras. 25 through 29 of my reasons on the application for leave to appeal.
[17] *Hussein*, *supra*, at para. 44.
[18] General Division reasons at para. 72.
[19] Referring to *Villani v. Canada (Attorney General)*, 2001 FCA 248 at para. 43.

August 31, 1989 report that the Appellant had been on two courses of physiotherapy that had not helped her.[20]

[26] The Respondent contends that even without considering the issue of the Appellant's non-compliance with treatment recommendations and its impact on the determination of disability, the General Division had already determined that the Appellant's condition was not severe because the medical evidence did not establish that she had a severe disability on or before the minimum qualifying period (MQP) date of December 31, 1997.

[27] Although the member in para. 71 of his reasons stated that the medical evidence did not establish that the Appellant had a disability on or before the MQP date, he then went on to consider her compliance with treatment options. At para. 72 he stated:

> The Tribunal has concluded that the Appellant's condition cannot be considered severe before her MQP and continuously thereafter because she has not exhausted all treatment options that were recommended to her.

[28] In my view, his conclusion that the Appellant had not exhausted all treatment options was material to his conclusion that her disability was not severe within the meaning of the CPP. Therefore, I am unable to agree that the member's finding of non-compliance with treatment was superfluous to his conclusion that the Appellant's disability was not severe on or before the MQP date.

[29] Finally, the Respondent argues that the totality of the evidence does not support a finding that the Appellant's disability was severe and prolonged on or before the MQP date of December 31, 1997, and that she demonstrated work capacity before her accident in 1995. Given the errors I have identified, it would not be appropriate for me to conduct an assessment of the evidence, since the General Division, as the trier of fact, is best positioned to assess and make findings on the evidence, which it can do on a reconsideration of this matter.

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[20] GD3-43.

DISPOSITION

[30] The appeal is allowed.

[31] The errors I have identified are not determinative of the Appellant's claim for disability benefits, and her entitlement to disability benefits continues to be contested. This matter is referred back to the General Division for reconsideration by a different member.

Nancy Brooks
Member, Appeal Division