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

Citation: *Minister of Employment and Social Development v. D. B.*, 2017 SSTADIS 619

Tribunal File Number: AD-16-980

BETWEEN:

Minister of Employment and Social Development

Appellant

and

D. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: November 8, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is returned to the General Division for reconsideration in accordance with the reasons and the directions in this decision.

OVERVIEW

[2] The Respondent, D. B., seeks a disability pension under the *Canada Pension Plan* (CPP). She maintains that chronic pain, hypertension, and fibromyalgia prevent her from working. She last worked in 2008.

[3] The General Division of the Social Security Tribunal of Canada (Tribunal) found that the Respondent had had a severe and prolonged disability prior to the end of her minimum qualifying period, and it thereby granted her the disability pension.

[4] The Appellant, the Minister of Employment and Social Development, seeks to appeal that decision based on alleged errors of law and serious errors in the findings of fact. The Tribunal's Appeal Division granted leave to appeal on the basis that the appeal had a reasonable chance of success. The appeal hearing was held by telephone conference, and both parties participated.

[5] The Appeal Division finds that the General Division erred in law in making its decision.

ISSUES

[6] Did the General Division err in law by (a) failing to consider binding jurisprudence; or (b) failing to explain its reasons for deciding the weight to afford contradictory evidence?

[7] If it did, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[8] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or 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[1]. Because the General Division may have erred in law in making its decision, the Appeal Division granted leave to appeal.

[9] The Appeal Division does not owe any deference to the General Division's conclusions on questions of law[2]. In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record[3].

Did the General Division Err in Law by Failing to Consider Binding Jurisprudence?

[10] The General Division failed to consider many Federal Court of Appeal cases that are relevant to the issues in this matter and that are binding on this Tribunal.

[11] In order to qualify for a CPP disability pension, the Respondent has to have had a severe and prolonged disability on or before December 31, 2011[4]. The terms "severe" and "prolonged" are defined in the CPP and have been interpreted extensively in the jurisprudence.

[12] In its analysis of the issue of whether the Respondent had a disability as defined in the CPP, the General Division did not refer to any jurisprudence. 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.

[13] The Respondent last worked in 2008. She had been employed at Canada Post for years and had had many positions including truck driver, letter carrier and mail sorter[5]. Her last position, as mail sorter on a midnight shift, was a sitting position. She was approved for

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[1] *Department of Employment and Social Development Act* (DESD Act) at subsection 58(1).
[2] *Canada (Attorney General) v. Paradis* and *Canada (Attorney General) v. Jean*, 2015 FCA 242 at paragraph 19.
[3] DESD Act at paragraph 58(1)(*b*).
[4] CPP at paragraph 42(2)(*a*).
[5] General Division decision at paragraphs 21 to 24.

long- term disability, through her employer's plan, and she has not attempted to work or to retrain since 2008.

[14] The General Division was required to conduct an assessment of the "severe" criterion in a real-world context[6]. This means keeping in mind factors such as age, level of education, language proficiency, and past work and life experience, when determining whether a person is incapable regularly of pursuing any substantially gainful occupation. This assessment seeks to determine a claimant's workforce attachment in light of their medical condition and the limitations resulting from this condition. If the General Division failed to reasonably determine the Respondent's workforce attachment, then the *Villani* real-world assessment was not complete[7].

[15] I find that the General Division's assessment was incomplete. It considered her previous positions with one employer and her limitations with ambulating, and then concluded that "it is unreasonable to expect that […] the [claimant] would be hired by any reasonable employer." In essence, the General Division concluded that the Respondent is incapable regularly of pursuing any substantially gainful occupation because she has chronic pain and limitations with ambulating, but it did not consider relevant principles of law set out in the jurisprudence.

[16] Contrary to binding jurisprudence, the General Division did not consider the following:

a) Whether the objective medical evidence supports the Respondent's subjective evidence that she suffers from pain or discomfort that prevents employment[8]. The General Division referred to one medical report, which states that the Appellant's conditions prevent her from ambulating and make her unable to walk. However, the remainder of the medical evidence was "of little assistance."[9]

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[6] *Villani v. Canada* (*Attorney General*), 2001 FCA 248.
[7] *Murphy v. Canada (Attorney General)*, 2016 FC 1208.
[8] *Canada (Attorney General) v. Fink*, 2006 FCA 354.
[9] General Division decision at paragraphs 19 and 20.

b) Whether the Respondent had capacity, prior to the end of her minimum qualifying period, to perform part-time work, modified activities, sedentary occupations, or the like[10]. Instead of assessing the Respondent's residual work capacity, if any, the General Division accepted that her last work position was "in essence" sedentary and made no other analysis on this point.

c) If the Respondent had some work capacity prior to the end of her minimum qualifying period, then she must show that efforts to obtain and maintain employment were unsuccessful by reason of a health condition[11]. The General Division noted that the Respondent has not applied for any work and accepted the Respondent's testimony that her physician "knows that she cannot do any type of work." The General Division did not consider whether the Respondent showed efforts to obtain and maintain employment and whether those efforts were unsuccessful by reason of her health condition.

[17] Therefore, I find that the General Division erred in law in making its decision.

Did the General Division Err in Law by Failing to Explain its Reasons for Deciding the Weight to Afford Contradictory Evidence?

[18] Having already found that the General Division erred in law by failing to consider binding jurisprudence, I need not decide this issue. However, I will make some observations.

[19] The Appellant submits that in concluding severe disability, the General Division "jumped to a conclusion," a conclusion that was not supported by the evidence. The Appellant also argues that there was contradictory evidence.

[20] If the General Division decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision[12].

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[10] *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158.
[11] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[12] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13.

[21] I reviewed the evidence referred to by the parties, and I did not find directly contradictory evidence. However, I note that one of the purposes of written reasons is to explain to parties why a decision was made and this requires some explanation by the General Division of how the evidence was assessed and weighed. In addition, the General Division's reasons must disclose an intelligible basis for its decision capable of permitting meaningful review by the Appeal Division.

Should the Appeal Division Refer the Matter Back to the General Division for Reconsideration?

[22] In order to render a decision on whether the Respondent had a severe and prolonged disability on or before December 31, 2011, which considers and applies relevant jurisprudence, it will be necessary to review the facts in detail and weigh the evidence.

[23] It is the General Division's (and not the Appeal Division's) role to find the facts and weigh the evidence. As such, this matter will be referred back to the General Division for reconsideration. A *de novo* hearing before a different General Division member is appropriate.

CONCLUSION

[24] The appeal is allowed. The matter is referred back to the General Division for reconsideration.

Shu-Tai Cheng
Member, Appeal Division