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

Citation: *Minister of Employment and Social Development v. C. H.,* 2017 SSTADIS 623

Tribunal File Number: AD-16-790

BETWEEN:

Minister of Employment and Social Development

Appellant

and

C. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: November 9, 2017

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, C. H., seeks a disability pension under the *Canada Pension Plan* (CPP). She maintains that back pain and right leg pain prevent her from working. She last worked in 2010.

[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 (MQP), 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. An oral hearing for this appeal was held in person, 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 explain its reasons for deciding the weight to afford contradictory evidence? or by (b) failing to consider binding jurisprudence?

[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 had 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 regardless of whether it appears on the face of the record.[3]

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

[10] I find that there was contradictory evidence pertaining to the Respondent's residual capacity to work and that the General Division failed to adequately explain its reasons for deciding to afford more weight to certain evidence over other evidence.

[11] From my review of the record, the following evidence appears to be contradictory:

a) On the one hand, reports by an orthopedic surgeon[4] and a physiotherapist[5] in 2011 that a full recovery and a return to work was anticipated, a psychological assessment[6] that did not suggest that the Respondent was precluded from all types of employment but did suggest a psychosomatic factor to the Respondent's pain, a questionnaire that the Respondent completed in April 2012 in the context of a physiotherapist's report[7] that notes no impact to mental capacity and suggests capacity to do light work; and

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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] Report of Dr. Joseph Cybuski, February 2011, GD7-11 to 14.
[5] Report of Dr. Brunet and R. Deschamps PT, GD7-10.
[6] Reesor Pigeon Psychological Assessment Report, August 18, 2011, at GD2-46.
[7] GD2-72 and 73.

b) On the other hand, the report of chiropractor, Dr. Blair-Patel, on August 21, 2014, which concluded that the Respondent's condition was difficult to diagnose and difficult to manage, and wherein the chiropractor had not identified any definitive therapeutic intervention that would improve the Respondent's condition, and the Respondent's oral testimony about her limitations due to pain.

[12] The General Division stated that it preferred the evidence noted in 11b) above, but it did not adequately explain its reasons for affording more weight to this evidence than to other evidence (such as that noted in 11a) above).

[13] 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.[8] A failure 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.

[14] As a result, I find that the General Division erred in law by failing to adequately explain its reasons for deciding the weight to afford contradictory evidence.

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

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

[16] 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, 2012 (her MQP).[9] The terms "severe" and "prolonged" are defined in the CPP and have been interpreted extensively in the jurisprudence.

[17] In its analysis of whether the Respondent had a disability as defined in the CPP, the General Division referred to one Federal Court of Appeal case.[10] 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.

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[8] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13.
[9] CPP at paragraph 42(2)(*a*).
[10] *Villani v. Canada* (*Attorney General*), [2002] 1 FCR 130, 2001 FCA 248.

[18] The Respondent last worked in 2010. She had been employed as a cook and was 22 years old when she injured her back at work. As a result, she stopped working and she has not attempted to work or to retrain since that injury. [11] At the date of her MQP, she was 25 years old.

[19] The General Division was required to conduct an assessment of the "severe" criterion in a real-world context.[12] 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 that condition. If the General Division failed to reasonably determine the Respondent's workforce attachment, then the *Villani* real-world assessment was not complete.[13]

[20] I find that the General Division's assessment was incomplete. It made no analysis of the impact, if any, of the Respondent's relatively young age, such as the possibility of retraining or developing alternative skills.

[21] The General Division referred to the Respondent's injuries, afforded weight to a post-MQP report and the Respondent's oral testimony, and concluded "the Tribunal was hard pressed to imagine what else the Appellant could do, given her level of education and her life experience with her lower back and leg issues."

[22] By concluding a severe disability on the basis of an incomplete real-world assessment, the General Division did not apply *Villani* correctly and, thereby, erred in law.

[23] In addition, contrary to other binding jurisprudence, the General Division did not consider the following:

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[11] General Division decision at paragraphs 8, 18, and 22.
[12] *Villani*, *supra*.
[13] *Murphy v. Canada (Attorney General)*, 2016 FC 1208.

a) Whether the Respondent had capacity, prior to the end of her MQP, to perform part-time work, modified activities, sedentary occupations or the like.[14] Instead of assessing the Respondent's residual work capacity, if any, the General Division accepted her oral testimony that "[l]imitations with her lower back and leg would significantly limit her ability to function in a vocational setting" and made no other analysis on this point.

b) Whether the Respondent had not complied with reasonable proposed treatment recommendations.[15] The General Division noted that surgery had not been recommended to the Respondent,[16] but it did not refer to other treatments that had been recommended (such as referral to a chronic pain clinic, weight loss, gradual progression to daily exercise, and core strengthening)[17] and that the Respondent appears not to have followed.

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

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

[25] In order to render a decision on whether the Respondent had a severe and prolonged disability on or before December 31, 2012, which considers and applies relevant jurisprudence, it will be necessary to review the facts in detail and weigh the evidence.

[26] 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.

[14] *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158.
[15] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[16] General Division decision at paragraphs 12, 19 and 23.
[17] Report of Dr. Atack, May 2012, GD2-63 to 64 and report of Dr. Wai, January 21, 2013, GD7-7 and 8.

CONCLUSION

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

Shu-Tai Cheng
Member, Appeal Division