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

Citation: *M. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 714

Tribunal File Number: AD-16-1153

BETWEEN:

M. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

HEARD ON: December 4, 2017

DATE OF DECISION: December 8, 2017

Canada

REASONS AND DECISION

DECISION

The appeal is allowed and the matter returned to the General Division for reconsideration. To avoid any perception of bias, the appeal should be reconsidered by a different General Division member.

INTRODUCTION

[1] The Appellant is a Mennonite widow who was born in Mexico and came to Canada in 1984. Low German is her mother tongue, and she completed Grade 6 in this language in Mexico. After coming to Canada she worked in physically demanding jobs. She last worked as a school custodian until May 2014. She has not returned to this job, or tried any other job or retraining since then. She suffers from idiopathic thrombocytopenia purpura (ITP), hypothyroidism, gastroesophageal reflux disease (GERD), chronic back pain with compression fractures, and osteoporosis, and claimed that she was disabled under the *Canada Pension Plan* (CPP) as a result. She applied for a CPP disability pension, which the Respondent refused. She appealed the refusal to this Tribunal. On June 23, 2016, the Tribunal's General Division determined that the Appellant did not suffer from a severe disability under the CPP.

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on September 26, 2016, and leave to appeal was granted on August 1, 2017. The appeal was heard by videoconference.

THE LAW AND ANALYSIS

[3] The Federal Court of Appeal decision *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, decided that administrative tribunals must look first to their home statutes for guidance in determining their role and what standard of review is to be applied to decisions under review. The *Department of Employment and Social Development Act* (DESD Act) is the home statute for this Tribunal.

[4] The only grounds of appeal available under the DESD Act are set out in subsection 58(1). They are that the General Division failed to observe a principle of natural justice, made

an error of law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[5] Paragraphs 58(1)(*a*) and (*b*) of the DESD Act do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations. The word "unreasonable" is not found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "without regard for the material before it". As suggested by *Huruglica*, those words must be given their own interpretation. The language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

[6] The Appellant submits that the General Division decision was based on erroneous findings of fact made without regard to the material before it, and that the General Division erred in law.

Erroneous Findings of Fact

[7] Paragraph 7 of the decision sets out that the General Division had to decide whether the Appellant was disabled on or before the date of the hearing. Paragraph 27 states that the Appellant must prove that she is disabled on or before December 31, 2016, which was after the hearing date. Paragraph 27 uses the phrase "on or before", which would include the hearing date, so no error regarding the date of disability was made.

[8] The Appellant argues that the General Division decision was based on an erroneous finding of fact made without regard to all of the material before it as paragraph 29 of the decision referred to her suffering from "back discomfort" rather than back pain. However, in paragraphs 33, 35, 38 and other paragraphs in the decision this condition is referred to as back pain. The Appellant did not suggest that the General Division did not understand her condition. I am not satisfied that by choosing to use the words "back discomfort" in one paragraph of a 43 paragraph decision the General Division made any erroneous finding of fact in this regard.

[9] The decision also found that there was a conflict between Dr. Sinclair's opinion that the Appellant had a permanent disability and Dr. Paul's opinion that the Appellant should avoid

work that required significant lifting and bending. The Appellant argues that the finding of fact that these reports conflicted was erroneous and not based on all of the material that was before the General Division. She suggests that Dr. Paul's opinion, when considered in full, was that at the time of the report (February 2015), the Appellant should receive short-term disability benefits, and her progress should be evaluated after treatment at the pain clinic and with medication. Dr. Sinclair's report stating that the Appellant was permanently disabled was written approximately six months after Dr. Paul's letter, and would have taken into account the treatment received during that time. Consequently, she argues, the medical opinions do not conflict.

[10] The General Division decision is silent about why it decided that these reports conflict. I am satisfied that this was an erroneous finding of fact made without regard to all of the material that was before the General Division. During the time between Dr. Paul's report and Dr. Sinclair's report, treatment was given and other medical evidence generated, including medical imaging reports and documents written by Dr. Soderman at the pain clinic. As the General Division concluded that the reports conflicted, I am not satisfied that it considered this other evidence, or the timing of these reports. Therefore, the finding of fact that the reports conflicted was erroneous. The decision was based on this finding of fact, at least in part. The appeal should be allowed on this basis.

[11] If I am wrong on this and these reports do conflict, I am satisfied that the General Division decision did not provide sufficient reasons for not placing weight on Dr. Sinclair's report. In *R. v. Sheppard*, 2002 SCC 26, the Supreme Court of Canada stated that reasons must be given for findings of fact made upon disputed or contradicted evidence upon which the outcome of the case is largely dependent. Whether the Appellant in this case was permanently disabled was central to the issue to be decided. Contradictory medical opinions about the Appellant's prognosis should therefore be addressed and reasons given for deciding that she was not disabled in spite of Dr. Sinclair's opinion that she was. The General Division erred in this regard.

Errors in Law

[12] The Appellant also argues that the General Division erred in law by misstating the legal test to be met for a CPP disability as it states in paragraph 38:

> There is no report factually determining that the disability complained of has produced symptoms that are the major cause of or wholly prevents the Appellant from being able regularly to seek suitable employment in a similar or more sedentary position or in another field that the evidence seems to suggest that the Appellant has reasonable transferable skills to do.

Subsection 42(2) of the CPP provides that a person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. This exact wording is found in paragraph 5 of the decision. While I agree that "suitable work" and "substantially gainful occupation" may have different meanings, I am not satisfied that the General Division applied the incorrect legal test in this case. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada stated that reasons for a decision are to be read as a whole, and their meaning to be ascertained in this context. Paragraph 5 of the decision clearly sets out the correct legal test to be met. Paragraph 38, when read in the context of the entire decision, considered the Appellant's testimony, and its consistency with the medical evidence. In this paragraph, the General Division set out its decision that there was no report that concluded that the Appellant was prevented from working. I am satisfied that this is not a misstatement of the legal test for disability under the CPP.

[13] The Appellant also argues that the General Division erred in law as it improperly applied the legal principle set out in *Inclima v. Canada (Attorney General)*, 2003 FCA 117. The legal principle is that if a disability claimant has some capacity to work, they must demonstrate that they could not obtain or maintain employment because of their condition. The General Division found that the Appellant in this case had some capacity to work and because she made no effort to work or retrain after May 2014 she had not met this legal obligation. I accept that the Appellant does not agree with this conclusion. However, simple disagreement with the decision made is not sufficient to demonstrate that the General Division made an error in law. As the General Division found that the Appellant had retained capacity for some work, it appropriately set out and applied the *Inclima* principle to the facts before it.

[14] However, I am satisfied that on balance the General Division decision erred in law. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal decided that

if a disability claimant suffers from more than one condition, all their conditions must be examined, not just the main one. In this case the General Division examined the evidence regarding the Appellant's ITP, and found that she stopped working in May 2014 because of it. Fortunately for the Appellant this condition stabilized after treatment and before the General Division hearing. The General Division also found that the Appellant suffered from back pain at the time of the hearing, but that that this condition was not severe as that term is defined in the CPP. The General Division did not consider what impact her GERD, hypothyroidism or osteoporosis had on her capacity to work. This was an error in law as these conditions existed at the relevant time and the Appellant claimed that they contributed to her disability.

[15] As the General Division decision contains errors under subsection 58(1) of the DESD Act, the appeal is allowed. As evidence will need to be considered and weighed, it is appropriate that the matter be returned to the General Division for reconsideration.

Valerie Hazlett Parker
Member, Appeal Division

APPEARANCES

Kenneth Brooks	Counsel for the Appellant
Penny Brady	Counsel for the Respondent
Sarah Mitchell	Law Student, Observer