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

Citation: *D. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 715

Tribunal File Number: AD-16-1230

BETWEEN:

D. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

HEARD ON: December 5, 2017

DATE OF DECISION: December 11, 2017

Canada

REASONS AND DECISION

DECISION

The appeal is dismissed.

PRELIMINARY MATTERS

[1] The Appellant filed documents with the Appeal Division related to his application for a disability tax credit. He wished to rely on these documents to support his arguments on appeal. These documents were not before the General Division when it made its decision in this matter. An appeal before the Appeal Division of the Social Security Tribunal is not a new hearing, and the presentation of evidence is generally not permitted given the constraints of subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) (see *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100). Consequently, I did not place any weight on this evidence or on the submissions related thereto in making my decision.

[2] At the teleconference hearing of this appeal, the Appellant's representative also proposed to have the Appellant give oral testimony. The Tribunal explained the nature of the appeal hearing, including that it was not a new hearing of the matter, and that new testimony would not be accepted. The representative was offered some time to reorganize his presentation, which he declined and the hearing proceeded.

INTRODUCTION

[3] The Appellant completed high school and obtained a college certificate. He was employed in physical labour at a distillery until he injured his back on the job. After the injury he returned to work until he suffered a mental breakdown. He has not worked since 2005. The Appellant applied for a Canada Pension Plan disability pension and claimed that he was disabled by back pain from the injury and mental illness. The Respondent refused his application. The Appellant appealed this refusal to the Tribunal. On September 24, 2016, the Tribunal's General Division dismissed the appeal, deciding that the Appellant was not continuously disabled from the end of the minimum qualifying period (the date by which a disability pension claimant must be found to be disabled to be eligible for the pension) until the time of the hearing.

[4] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division and leave to appeal was granted on July 27, 2017. The only issue on this appeal is whether the General Division erred when it determined that the Appellant was not continuously disabled from December 31, 2007 (the minimum qualifying period) until the hearing.

THE LAW AND ANALYSIS

[5] 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. The DESD Act is the home statute for this tribunal.

[6] 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. 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.

[7] The Appellant testified before the General Division about his ongoing physical and mental health struggles, and his testimony is summarized in paragraphs 29 to 34 of the General Division decision. The Appellant testified that he continues to experience back pain that radiates down his leg, and that this pain, together with his depression and anxiety, contribute to his inability to work. He also misinterprets people, and on one occasion would have hurt someone if his son had not stepped in to prevent this.

[8] The Appellant's wife also wrote a letter describing the Appellant's condition, which was summarized by the General Division in paragraph 35 of the decision.

[9] The Appellant also produced a number of medical reports, which were before the General Division and summarized in the decision. The General Division decision states that there was no medical evidence that supports the Appellant's claim that he was disabled from March 2010 until 2013. In particular, the Appellant received no ongoing treatment or referrals for his back pain during this time. The Appellant acknowledged that there was no such medical evidence regarding treatment for his back pain, and submits that because he was not a surgical candidate there was, essentially, nothing more that could be done for him medically. He stated that he continued to take non-prescription medication, and to use a TENS machine and an inversion table. There is no indication that evidence regarding the use of the TENS machine or inversion table was presented to the General Division. It cannot be faulted for not considering evidence that was not before it.

[10] The Appellant received mental health treatment from Dr. Franklin from 2005 to 2009, which was documented. Dr. Lamont, the family physician, also summarized his visits with the Appellant until 2013, and notes only one visit for mental health in March 2010, then nothing until 2013 when he referred Appellant to Dr. Shenava, a psychiatrist. Dr. Lamont also completed a form for the Workplace Safety and Insurance Board in 2010 where he "checked boxes" to indicate that the Appellant had no anxiety or other mental health conditions.

[11] It is clear that the General Division did not disregard the Appellant's testimony. It was summarized in the decision and the Appellant took no issue with the summary. I am satisfied that the General Division considered this evidence along with the medical reports. The General Division concluded that there was scant evidence between March 2010 and the referral to Dr. Shenava in 2013 that the Appellant continued to suffer from the claimed medical conditions or that he received treatment for them. The only objective evidence was the form completed by Dr. Lamont in December 2010 that indicated that the Appellant had no ongoing mental illness.

[12] The Appellant contends that his mental health treatment stopped in 2009, not because he did not require it, but because he could not afford to continue. I accept this. The General Division also noted that the Appellant did not seek out counselling from his family physician

(doctor's notes indicate that he had done this in 2005) or any community resource during this time. The General Division found that the Appellant's testimony was not sufficient to overcome this gap in the written evidence. This is a reasonable conclusion.

[13] I am not convinced that the General Division erred because it should have inferred from the fact that Dr. Shenava diagnosed and treated the Appellant for similar mental health problems in 2013 as did Dr. Franklin that the condition continued from 2009 to 2013. As the Appellant's representative argued at the hearing of the appeal, some illnesses have symptoms that wax and wane. It is not clear whether this occurred in this case. It was not unreasonable for the General Division to conclude that the condition did not exist continuously between 2009 and 2013 when the only evidence on point was the form Dr. Lamont completed in December 2010, which did not support the Appellant's position.

[14] The Appellant also submits that the General Division erred when it gave some weight to the form Dr. Lamont completed in 2010. He contends that little weight should be given to this evidence because Dr. Lamont is not a mental health specialist, but a family physician. This argument asks the Appeal Division to retry the evidence to reach a different conclusion. In *Gaudet v. Canada (Attorney General)*, 2013 FCA 254 the Federal Court of Appeal held that a reviewing tribunal is not to retry the issues, but to assess whether the outcome was acceptable and defensible on the facts and the law.

[15] There is no suggestion that the General Division failed to observe a principle of natural justice or erred in law. Under paragraph 58(1)(*c*) of the DESD Act, the Appeal Division is to intervene only if erroneous findings of fact are made perversely, capriciously or without regard to the material before the General Division. As such, the General Division is to be shown some deference regarding findings of fact since they have heard the oral testimony. I am satisfied, on balance, that the General Division considered all of the material that was before it. The decision was based on findings of fact that were logical and based on this evidence. The findings of fact were not made erroneously. The decision was not at odds with the record, and was defensible on the facts and the law.

[16] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

APPEARANCES

D. M.	Appellant
Roderick Lesperance	Appellant's representative
Nathalie Pruneau	Respondent's counsel
Jennifer Hockey	Observer