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

Citation: *Minister of Employment and Social Development v. J. J.*, 2017 SSTADIS 753

Tribunal File Number: AD-16-728

BETWEEN:

Minister of Employment and Social Development

Appellant

and

J. J.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 20, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] The Respondent completed Grade 12 and obtained a college diploma. She worked as a Registered Practical Nurse at a health centre until January 2011. She claimed that she could no longer work because of depression and anxiety, including panic attacks. She applied for a Canada Pension Plan (CPP) disability pension. The Appellant, the Minister of Employment and Social Development (Minister), refused the application. The Respondent appealed the refusal to the Social Security Tribunal of Canada (Tribunal). On February 24, 2016, the Tribunal's General Division allowed her appeal and decided that the Respondent was disabled in September 2012, when her psychiatrist reported that she was unable to work at any job, until May 2015, when she was able to return to work after receiving electroshock treatment (ECT).

[3] The Minister applied for leave to appeal this decision and on July 11, 2016, leave to appeal was granted on the basis that the General Division may have erred in law.

[4] This appeal was decided on the basis of the written record for the following reasons:

a) Pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations*, the Member has determined that no further hearing is required; and

b) This appeal involves only one narrow legal issue.

THE LAW AND ANALYSIS

[5] In *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal 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 on an appeal. The *Department of Employment and Social Development Act* (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), namely, 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 Minister argues that the General Division erred in law as Parliament intended for the CPP disability plan to provide a pension where a disability forces a claimant to leave the workforce on a long-term basis, and not for a temporary period where a medical condition prevents them from working. According to the Minister, the Federal Court of Appeal confirmed this in *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366. Further, the Minister argues that the General Division erred in this case because it did not consider this decision or apply this legal principle in making its decision.

[8] Simply failing to refer to a decision is not an error of law. However, if a decision-maker fails to apply a relevant legal principle in making its decision, it is such an error. In this case, the General Division decision contains a thorough summary of the evidence. This includes evidence that the Respondent had a family history of mental illness, that she suffered from mental illness for a number of years, that she sought appropriate treatment for her illness, and that she followed treatment recommendations. At the time of the minimum qualifying period (the date by which the Respondent had to be found to be disabled in order to be eligible for the disability pension), the Respondent's treating psychiatrist, and psychiatrists engaged by her representative and her health care insurer, all confirmed that her mental illness was severe. At the time of the minimum qualifying period (MQP), she was undergoing treatment. The medical prognosis at that time was that her condition would continue without significant improvement, and was "prolonged," as that term is defined in the CPP. It was not until approximately six

months after the MQP that the Respondent was referred to a different treatment facility, where she later underwent ECT, which eventually improved her condition to the point that she could return to work in 2015.

[9] The General Division decision refers to the Federal Court of Appeal decision in *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309. Like *Litke*, this decision states that the CPP disability pension is not meant as a temporary benefit, to tide a claimant over for a period of time that they cannot work. In *Henderson*, the claimant suffered from knee problems. The medical evidence, prior to his MQP, was that his condition would improve after specific treatment. Accordingly, the Federal Court of Appeal confirmed that Mr. Henderson's disability was not prolonged because significant improvement was anticipated at the MQP. *Litke* was also a case where the claimant suffered from a disability, and it was anticipated that she would be able to return to work after treatment.

[10] The General Division considered this principle in paragraphs 44 to 46 of its decision, and quoted this legal principle from both *Henderson* and *Litke*. In addition, the General Division decision considered Pension Appeals Board decisions and acknowledged that they were not binding. In these cases, the Board allowed for payment of a CPP disability pension for a defined period when the likelihood of a return to substantially gainful work following treatment was questionable, or the prognosis at the time of the application was not positive (paragraph 47). This Tribunal also followed this principle in *Canada (Minister of Employment and Social Development v. D.Z.*, 2016 CanLII 99715 (SST).

[11] In the matter at hand, the General Division analyzed the facts, including that the Respondent's treating psychiatrist consistently reported that she was unable to work at any job, that she had tried many treatments prior to ECT without resolution of her condition, and that no other treatments were contemplated prior to the MQP. After examining the facts and all the relevant law, the General Division decided that this case was an exceptional one, where the disability pension should be granted for a defined period because at the time of the MQP, the Respondent's prognosis was poor and no further treatments were anticipated. The facts were thus distinguishable from those in *Henderson* and *Litke*, where an improvement in the claimants' conditions was expected at the time of the MQP.

[12] I also note that paragraph 42(2)(*a*) of the CPP requires a disability to be severe and prolonged. Prolonged means likely to be long continued and of indefinite duration or likely to result in death. It does not mean permanent. This is further bolstered by subsection 70(1) of the CPP, which provides for a disability pension to cease to be paid when a recipient ceases to be disabled.

[13] For these reasons, I am satisfied that the General Division did not err in law. The General Division's reasoning is logical, intelligible, and defensible on the law and the facts.

[14] The appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division