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

Citation: *H. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 769

Tribunal File Number: AD-17-492

BETWEEN:

H. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

HEARD ON: December 18, 2017

DATE OF DECISION: December 28, 2017

Canada

DECISION AND REASONS

PERSONS IN ATTENDANCE

Appellant	H. W.
Representative for the Appellant	Jim Farrell
Representative for the Respondent	Penny Brady, Department of Justice

Also present as observers were Pierre Sarrazin, of the Department of Justice, and F. W., the Appellant's sister.

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] This case has a long and circuitous history. The Appellant, H. W., who is now 57 years old, worked for nearly 30 years as a dietary aid at Woodstock General Hospital. She developed numerous health problems in the 1990s and, after sustaining a work-related injury, went on long term disability in 2007. She has not worked since, and the hospital terminated her employment in 2009, having determined that she was no longer able to meet the demands of her job. In March 2013, Ms. H. W. applied for Canada Pension Plan (CPP) disability benefits claiming that she could no longer work because of chronic pain syndrome (CPS) and chronic fatigue syndrome (CFS). The Respondent, the Minister of Employment and Social Development (Minister), refused her application because it did not find her disability "severe and prolonged," as defined by the legislation, as of her minimum qualifying period (MQP), which ended on December 31, 2007.

[2] Ms. H. W. appealed the Minister's determination to the Office of the Commissioner of Review Tribunals (OCRT). In April 2013, pursuant to the *Jobs, Growth and Long-Term Prosperity Act*, the OCRT transferred the appeal to the General Division of the Social Security Tribunal (Tribunal). In a decision dated September 30, 2014, the General Division found insufficient evidence that Ms. H. W.'s medical condition prevented her from performing

substantially gainful employment during the relevant period. It also found that she had residual capacity to pursue lighter sedentary work within her restrictions.

[3] In January 2015, Ms. H. W. requested leave to appeal from the Tribunal's Appeal Division on multiple grounds, alleging various legal and factual errors on the part of the General Division. In a decision dated January 28, 2015, another member of the Appeal Division granted leave to appeal because she saw at least a reasonable chance of success on two grounds— specifically that the General Division may have (i) focused on the absence of a diagnosis, rather than on Ms. H. W.'s actual functional capacity and (ii) displayed bias in how it assessed evidence from alternative health care providers. In June 2015, the Appeal Division held a full hearing on the merits of the matter and ultimately allowed Ms. H. W.'s appeal. The Minister then applied to the Federal Court for judicial review of the Appeal Division's decision.

[4] In a decision dated April 4, 2016, the Federal Court, on consent, sent the case back to the Appeal Division for reconsideration, having agreed with the Minister that the Appeal Division applied a standard of bias that was impermissibly low.

[5] October 25, 2016, a second member of the Appeal Division considered Ms. H. W.'s appeal and issued a decision refusing leave to appeal, finding no reasonable chance of success. This led to another court challenge, although this time, it was Ms. H. W. who applied for judicial review.

[6] In a decision dated June 14, 2017, the Federal Court of Appeal found that the second member of the Appeal Division had erred in failing to realize that the Appeal Division was *functus officio* on the issue of whether to grant leave to appeal—in other words, its jurisdiction on that question had been extinguished after the Appeal Division's January 2015 leave to appeal decision went unchallenged. Once again, the matter was referred back to the Appeal Division, where it was assigned to me.

[7] I am now the third Appeal Division member to see this file. Having considered the merits of the parties' submissions on the two grounds of appeal for which the first member granted leave in January 2015, I have come to the conclusion that the General Division's decision must stand.

PRELIMINARY MATTER

[8] In the past three months, Ms. H. W.'s legal representative has submitted to the Tribunal four packages[1] of documents containing, variously, written arguments, medical reports from Drs. Kathleen Kerr and Manfred Harth, and background material on CFS and Chinese medicine, none of which, it appears, were ever presented to the General Division. On each occasion, the Minister followed with letters arguing that these documents should be given no consideration.

[9] On reflection, I decided not to admit the medical documents for the purposes of this appeal, although I did consider Ms. H. W.'s written arguments where they were germane to the issues at hand. According to the Federal Court's decision in *Belo-Alves v. Canada*,[2] the Appeal Division is not ordinarily a forum in which new evidence can be introduced, given the constraints of subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), which do not give the Appeal Division authority to consider new evidence or entertain arguments on the merits of an appellant's disability claim.

ISSUES

[10] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division extend to General Division decisions?

Issue 2: Did the General Division misapply the test for severity by focusing on the absence of a diagnosis, rather than on Ms. H. W.'s actual functional capacity?

Issue 3: Did the General Division breach a principle of natural justice by displaying bias in the way it assessed evidence from alternative healthcare providers?

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[1] Labelled AD12 (submitted on November 3, 2017), AD13 (November 7, 2017), AD15 (December 1, 2017) and AD18 (December 14, 2017).
[2] *Belo-Alves v. Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100.

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[11] 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.[3] The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or vary the General Division's decision in whole or in part.[4]

[12] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[5] Where errors of law or failures to observe principles of natural justice were alleged, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. Where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[13] The Federal Court of Appeal decision *Canada v. Huruglica*[6] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role. This premise led the Court to determine that the appropriate test flows entirely from an administrative tribunal's governing legislation: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent […]"

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[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[4] Subsection 59(1) of the DESDA.
[5] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[6] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

[14] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the tribunal's home statute. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) 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, but 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.

Issue 2: Did the General Division focus on diagnosis, rather than on functional capacity?

[15] Ms. H. W. alleges that the General Division based its decision, in part, on the fact that she was never diagnosed with any condition during the MQP. She relies on the Pension Appeals Board (PAB) decision, *Curnew v. MHRD*,[7] which held that chronic pain is a progressive disability, and it cannot be said that it first occurs only when a medical practitioner actually puts a name on it. The Appellant also refers to *Klabouch v. Canada*,[8] in which the Federal Court of Appeal stated that it is not the diagnosis of a condition, but its effect on a claimant's ability to work that determines the severity of the disability.

[16] I am not convinced that this ground of appeal has merit. In this case, Ms. H. W. implicitly conceded that none of her treatment providers offered a definite diagnosis for her health problems prior to December 31, 2007. In December 2009, Dr. Pop offered diagnoses of CPS and CFS, but he did not see her until that year. In paragraph 38, the General Division wrote:

> [Dr. Pop] noted he was able to obtain a report form [*sic*] Dr. Boyd which indicated the Appellant suffered from a multitude of symptoms since 1995 however, Dr. Boyd has not reached a final diagnosis. Dr. Pop concluded by indicating in his professional opinion the Appellant's condition is chronic and severe and unlikely to improve with any type of medical treatment. The Tribunal does not put a lot of weight on this report. Dr. Pop noted there was not a final diagnosis by Dr. Boyd, and Dr. Pop began treating the Appellant well after the date of the MQP.

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[7] *Curnew v. Minister of Human Resources Development* (June 25, 2001), CP12886 (PAB).
[8] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

[17] I agree with Ms. H. W. that chronic pain is a progressive disease and that the date of onset can be found to have occurred prior to the MQP date even if no medical practitioner labelled it as such until afterwards. However, no two cases are the same, and all the circumstances of a claimant's clinical history must be taken into consideration. I will go further and say that, just as a retrospective diagnosis is possible, so is a retrospective finding of disability, but that is not the same thing as saying it is *mandatory*.

[18] A trier of fact is entitled to assess the evidence before it as long as it arrives at a defensible conclusion. The absence of a diagnosis until after the MQP was a relevant factor that logically supported the General Division's finding that Ms. H. W.'s disability fell short of the severity threshold before December 31, 2007. As the General Division noted, the only firm diagnosis was made by a family practitioner nearly two years after the MQP in the context, not of treatment, but of a disability claim. *Curnew* is superficially similar to this case in that both involved retrospective diagnoses of CPS, but there is a critical difference. In *Curnew*, the PAB made a definitive finding that the claimant did in fact suffer from CPS and was severely disabled as a result of it—the issue then became the date of onset. In this case, the General Division made no such finding and never conceded that Ms. H. W. became disabled at any point. With a progressive medical condition, it is possible in some circumstances to reach back before the diagnosis to find that the disability was severe before the label was formally attached. However, there must first be some recognition that a claimant actually suffers from a progressive disability.

[19] Similarly, the Appellant's use of *Klabouch* in this setting misses the mark. That case is typically invoked to caution claimants not to base their case on a mere diagnosis, since the test for CPP disability ultimately demands an analysis of their functionality. However, the predominant fact in this case is not the Appellant's reliance on the *existence* of diagnoses but the Respondent's (and the General Division's) reliance on their *absence*. I know of no precedent that forbids the latter and, in this case, the General Division appears to have discharged its responsibility to consider Ms. H. W.'s capabilities in a vocational environment as of the MQP.

Issue 3: Did the General Division display bias toward alternative healthcare providers?

[20] Ms. H. W. submits that the General Division failed to observe a principle of natural justice by disregarding all reports written by non-traditional healthcare practitioners. She argues that it did so without considering their qualifications, simply dismissing their reports as non-objective medical evidence. Ms. H. W. also argues that the General Division erred by disregarding the reports written by Dr. Pop and Dr. Harth because they were prepared pursuant to her application for disability benefits. She argues that, contrary to the General Division's assertion, these doctors did not act as advocates for her, but confirmed that she had suffered from unresolved, longstanding pain, despite treatment.

[21] Natural justice is concerned with ensuring that claimants are able to present their case fully, answer the arguments of the other party, and have the decision made by an impartial and unbiased decision-maker. The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[9] has stated that test for bias is, "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough. Not every favourable or unfavourable disposition attracts the label of impartiality. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues.

[22] I do not think that a case can be made that the General Division displayed bias—either toward the Appellant herself or toward alternative medicine as a category. It is true that the General Division gave little weight to reports from practitioners of homeopathy, osteopathy, acupuncture and Reiki, but it is equally true that it discounted opinions from a family practitioner, registered nurse and internal medicine specialist.

[23] As noted, the General Division's assessment of the evidence in pursuit of the facts is to be afforded a degree of deference and is subject to challenge only if a finding is "capricious, perverse or without regard for the material." I do not see how, in analyzing Ms. H. W.'s medical records, the General Division committed an error that fell to the level described in

[9] *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.

paragraph 58(1)(*c*) of the DESDA. While she may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the evidence, assess its quality and decide what it chooses to accept or disregard.[10]

[24] The General Division's decision indicates that it discussed the significant items of documentary evidence individually but, in each instance, found logical and defensible reasons to assign them limited weight, dismissing reports that, as the Minister put it, were unverifiable or of dubious origin.

Ellen Kingston's Reports

[25] At paragraph 33, the General Division found that the reports of Ellen Kingston of the Complementary Healthcare Clinic had not disclosed any qualifications or degrees. The record indicates that this happens to be true, and I see no reason to fault the General Division for giving Ms. Kingston's evidence less weight than that of a credentialed medical practitioner. In his oral submissions, Ms. H. W.'s representative suggested that the General Division had overlooked an invoice containing Ms. Kingston's letterhead,[11] which read:

> COMPLEMENTARY HEALTHCARE CLINIC
> 638 Victoria St. London, On., N5Y 4C1 Canada.
> 519 432 6004
> Iridology, Homeopathy, Acupuncture Therapy
> —Ellen M. Kingston

[26] In my view, this document, even assuming it was overlooked, does not help the Appellant. First, the listed disciplines appear to be associated with the clinic as a whole, and it remains unclear whether Ms. Kingston received training in any of them. Second, the General Division was certainly cognizant that Ms. Kingston offered some form of alternative medicine, since its decision repeated and explicitly referred to her clinic, whose approach is contained in its name. Third, the General Division provided other reasons for discounting Ms. Kingston's written evidence, not least the fact that most of it merely relayed Ms. H. W.'s accounts of her subjective symptoms.

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[10] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[11] Seen at GT3-22.

[27] In the absence of an audio recording of the hearing before the General Division, I thought it appropriate to permit Ms. H. W. to give evidence about what, if any, attempts she made to apprise the presiding member about Ms. Kingston's qualifications. On cross examination, Ms. H. W. insisted, under oath, that she, or her representative, did describe Ms. Kingston's specific degrees, although she could no longer remember what they were. I found this testimony less than credible and am satisfied that the General Division did not overlook a material fact when it discounted Ms. Kingston's reports.

Mary Wang's Report

[28] At paragraph 35, the General Division wrote:

> Ms. Mary Wang, Acupuncturist who noted she was a doctor in China, confirmed the Appellant attended her clinic for acupuncture and Chinese herbal medicine treatments on three occasions in 2007. Ms. Wang recommended the Appellant take nutritional products. No other observations were noted in her report. The Tribunal does not place weight on this report as the credentials of the Acupuncturist as a "doctor in China," is questionable and there is no objective medical opinion regarding diagnosis.

[29] Some of the wording of this passage is unfortunate because it suggests that the General Division discounted Ms. Wang's report merely because she was from China. However, closer examination indicates that the General Division had substantive and defensible concerns with this evidence.

[30] It is clear that the General Division accepted that Ms. Wang is an acupuncturist and did not question her standing to offer an opinion about the Appellant's condition. It did, however, object to Ms. Wang's apparent attempt to burnish her credentials by including the notation "MD China" under her signature. In the absence of information about what it means to be an medical doctor in China, or how Chinese standards differ from Canadian, the General Division had a rational basis to question Ms. Wang's authority. Moreover, as the General Division noted, Ms. Wang's report contained little information other than a summary of Ms. H. W.'s subjective symptoms and a list of treatments provided for them. Given the absence of any clinical findings, I do not see how the General Division erred in placing minimal weight on this report.

Drs. Pop and Harth

[31] Ms. H. W. argues that the General Division erred in discounting Dr. Pop and Dr. Harth's evidence because it was generated pursuant to the disability claims process. It is true that, in discussing reports from both physicians, the General Division mentioned that Ms. H. W. saw them at the behest of her union. My review of the record indicates that this statement was not inaccurate and was made to further the point that neither Dr. Pop nor Dr. Harth have ever been the Appellant's treating physicians. I do not regard it as an error of either fact or law to place more weight on the opinions of professionals who are responsible for a claimant's regular care and who, presumably, have a deeper knowledge of their medical history and status.

[32] As it happens, the General Division had other reasons to discount Dr. Pop's opinion, including the fact that he did not see her until after the MQP had ended. Worse, the General Division noted a disconnect between the lack of diagnostic medical evidence that was available to Dr. Pop and his conclusion that Ms. H. W. suffered from a severe disability. It was in this context that the General Division labelled Dr. Pop an "advocate," and I see no reason to interfere with this finding.

[33] As for Dr. Harth, his letter did little to help Ms. H. W.'s cause. Although he diagnosed her with fibromyalgia, he did not do so until nearly four years after the MQP and then remarked that it was "difficult to know how disabled she is."

CONCLUSION

[34] My review of the General Division's decision indicates that it put forth rational and defensible reasons for assigning weight to the various items of evidence before it. The General Division found that Ms. H. W.'s "use of alternative medical providers [did] not substantiate a severe disability," but this does not mean it systematically discriminated against alternative healthcare providers *per se*. Rather, it conveyed the General Division's finding that none of the alternative healthcare providers consulted by Ms. H. W. offered much to support her case, whether because of doubtful credentials, post-MQP assessment or pronouncements outside their ostensible area of expertise. I saw nothing that amounted to a blanket dismissal of alternative medicine.

[35] Ms. H. W. has failed to demonstrate how the General Division erred in finding that her disability fell short of severe. This appeal is therefore dismissed.

Member, Appeal Division