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

Citation: *Minister of Employment and Social Development v. R. Z.*, 2018 SST 26

Tribunal File Number: AD-17-66

BETWEEN:

Minister of Employment and Social Development

Appellant

and

R. Z.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

HEARD ON: January 5, 2018

DATE OF DECISION: January 10, 2018

REASONS AND DECISION

DECISION

[1] The appeal is allowed in part and the decision that the General Division should have given regarding the date of the application is made. The balance of the appeal is dismissed.

PRELIMINARY MATTER

[2] In the application for leave to appeal, the Appellant argued that the General Division erred when it set out the date that the Respondent had applied for the disability pension. At the hearing, both parties agreed that the disability pension application was made in March 2015. The General Division erred regarding this date. The date is corrected below.

INTRODUCTION

[3] The Respondent obtained a Master of Science in Engineering degree and worked as an engineer for a number of years. He was laid off from his last job in early 2004 due to a downturn in the economy. He was later hired back, but subsequently laid off again and his work was given to other employees. The Respondent later attended teachers college but did not complete the program. In March 2015, he applied for a Canada Pension Plan disability pension and claimed that he was disabled by Parkinson's disease. The Appellant refused the application and the Respondent appealed this decision to the Social Security Tribunal of Canada (Tribunal). On October 26, 2016, the Tribunal's General Division allowed the appeal and found that he was disabled. The Appellant requested leave to appeal this decision to the Appeal Division, and leave to appeal was granted on August 4, 2017.

STANDARD OF REVIEW AND ANALYSIS

[4] 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 to a decision under review. The *Department of Employment and Social Development Act* (DESD Act) is the home statute for this Tribunal.

[5] 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 in 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.

[6] Based on the unqualified wording of paragraphs 58(1)(*a*) and (*b*) of the DESD Act, no deference is owed to the General Division on questions of natural justice, jurisdiction, or errors in law.

[7] Paragraph 58(1)(*c*) directs the Appeal Division to intervene if the General Division 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." This language suggests that the Appeal Division should intervene only when the General Division bases its decision on an error that is clearly egregious or at odds with the record (see *R. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 58).

[8] The Appellant argues that the General Division erred in law and based its decision on erroneous findings of fact under subsection 58(1) of the DESD Act. For the reasons set out below, I am not satisfied that the decision contained any such errors such that the Appeal Division should intervene.

Errors of Law

[9] First, the Appellant argues that the General Division erred in law as it misapplied the reasoning in *Klabouch v. Canada (Social Development)*, 2008 FCA 33, and applied the wrong test for "severe" under section 42 of the *Canada Pension Plan* (CPP). In *Klabouch*, the Federal Court of Appeal stated that the measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether their disability prevents them from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform their regular job, but rather on their inability to perform any work. This was correctly set out in paragraph 29 of the General Division decision. Paragraph 42(2)(*a*) of the CPP states that a person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation, which is also correctly stated in paragraph 6 of the decision.

[10] The Appellant argues, however, that since the decision states in paragraph 38 "… the [Respondent] was not able to work in his chosen career," it did not apply the correct legal test for a severe disability as it only considered whether the Respondent could work as an engineer and not whether he could perform any substantially gainful occupation. However, paragraph 38 must be read in its entirety. This paragraph discusses that the Respondent was not able to complete work tasks and that he thought this was due to symptoms that were not yet diagnosed as Parkinson's disease. Paragraph 38then states:

> The Tribunal finds it believable that even with the recessionary environment the [Respondent] was not able to work at his chosen career. When the [Respondent] attempted to retrain by enrolling in the school of education his symptoms were such that he was unable to complete even the first semester of the program.

This demonstrates that the General Division did not only consider whether the Respondent was able to work as an engineer, but also his attempt to retrain for other work.

[11] After reading the decision as a whole, I am satisfied that the General Division correctly stated the legal test for "severe" under the legislation and applied it to the facts before it. The General Division considered not only whether the Respondent could return to work as an engineer, but also his attempt to retrain and his failure to complete that course. It made no error in law.

[12] Second, the Appellant contends that the General Division erred in law as it misapplied the legal principle from *Inclima v. Canada (Attorney General)*, 2003 FCA 117. Paragraph 30 of the decision correctly sets out this principle—where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition. I am also satisfied that it was applied correctly to the facts in this case. The Respondent obtained a master's degree and worked successfully as an engineer. He testified that he was recruited to his last job from another engineering firm. He was first laid off in 2004 due to the poor economy, but was re-hired. He was laid off again shortly after that and testified that all of his work was given to other engineers. The Respondent also testified that at that time, he was not able to complete projects in a timely way, and his motor skills were slowing. He met with a career counsellor and agreed to return to school to

become a teacher. He attended this program for approximately three months, before withdrawing because he was told he had a hypophonic voice, which was not conducive to teaching effectively.

[13] The Appellant argues that the General Division erred when it concluded that this was sufficient to meet the obligation set out in *Inclima*. It argues that although the Respondent could not teach effectively, he had capacity to pursue some other substantially gainful occupation and should have attempted to do so. I am not persuaded that this is so. The legal obligation in *Inclima* is correctly set out in the decision. The evidence that the Respondent had symptoms of Parkinson's disease in 2004 is not disputed. He consulted with a career counsellor and determined that teaching would be an appropriate alternate career path. This did not succeed in 2007, shortly after the minimum qualifying period (MQP) (the date by which a claimant must be found to be disabled in order to be eligible to receive a disability pension). Also, the Respondent testified that he unsuccessfully looked for work in 2007 and 2008, and admitted that he really had a "faint hope" that he would be able to do any work offered to him. The Respondent is not required to try every job imaginable before the Tribunal can conclude that he has met his obligation under *Inclima*. I am satisfied that the evidentiary basis for concluding that the Respondent had met this obligation is clear, logical, and reasonable. The General Division made no error in law in this regard.

[14] In argument at the hearing of the appeal, counsel for the Appellant also contended that the General Division erred because there was no medical evidence at the MQP that examined the Respondent's functionality at that time. The law is clear that medical evidence is required to support a disability pension claim (see *Villani v. Canada (Attorney General)*, 2001 FCA 248). However, the CPP does not require that the medical evidence be contemporaneous with the MQP. In many cases, medical evidence provided at precisely the time of the MQP will not be available. In *Wieler v. Minister of Human Resources Development*, CP 20466 (PAB), the Pension Appeals Board decided that it is not necessary that a claimant provide a medical opinion at the time of the MQP, and the Tribunal is entitled to draw reasonable inferences from the evidence presented. This reasoning is persuasive. I am satisfied that the General Division drew reasonable inferences from all of the evidence before it, including the medical evidence that was available and the Respondent's testimony. Therefore, it made no error.

Erroneous Findings of Fact

[15] Paragraph 58(1)(*c*) of the DESD Act does not state that the Appeal Division should intervene in any case where the General Division has made an error of fact. The Appeal Division is to intervene only if the General Division decision is based on an erroneous finding of fact made perversely, capriciously, or without regard for the material before it. This wording indicates that the General Division is entitled to deference regarding factual findings.

[16] In *Hussein v. Canada (Attorney General)*, 2016 FC 1417, the Federal Court held that "the weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference." Also, 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. The Appellant's arguments based on findings of fact must be considered in this context.

[17] First, in this regard, the Appellant argues that the General Division erred in fact when it relied on the 2011 diagnosis of Parkinson's disease to indicate the severity of the Respondent's condition at the MQP, which ended on December 31, 2006. Paragraph 44 of the decision reaches this conclusion. However, the entire General Division decision must be read together with the record. It is correct that the Respondent was not diagnosed with Parkinson's disease until he saw his mother's family physician in 2011. He was then immediately referred to a specialized clinic for treatment. One medical report written in 2015 states that the Respondent's symptoms developed approximately five years prior to this, which would have been after the MQP.

[18] However, the Respondent testified and the medical reports demonstrate that the Respondent had suffered from various symptoms for many years, including gait issues, slow speech, slow thinking, and a mobility issue that was diagnosed as a frozen shoulder. The Respondent testified that he did not have a family physician, so he sought treatment for various symptoms from "walk-in clinics." At these clinics, they examined only the presenting symptom, not his entire condition. The Respondent also testified about his inability to complete work tasks in a timely way in 2004 and his failed attempt to retrain as a teacher. The General

Division considered all of the evidence, and weighed it. Its finding that the Respondent had a severe condition in December 2006 is logical, based on the evidence, and not at odds with the record.

[19] The Appellant also suggests that the General Division made an erroneous finding of fact when it disregarded the Respondent's testimony that he was laid off from work in 2004 due to the economy. However, paragraph 37 of the decision states that after the Respondent was first laid off in 2004 for economic reasons, he was re-hired to continue his duties and was able to do so for nine months, then was laid off and his work was given to a colleague. The Respondent felt that by this time, his performance was impacted by his undiagnosed disease. Clearly, the General Division did not disregard this evidence. No erroneous finding of fact was made.

[20] In summary, I am not satisfied that the General Division decision was based on any erroneous finding of fact. By advancing these arguments, the Appellant has essentially asked this Tribunal to reweigh the evidence to reach a different conclusion. This is not the mandate of the Appeal Division.

CONCLUSION

[21] The appeal is allowed with respect to the date that the Respondent's application for the disability pension was made. The correct date of application was agreed to at the hearing. It is therefore appropriate that I make the decision that the General Division should have made on this issue.

[22] The balance of the appeal is dismissed.

[23] Therefore, I find that the Respondent was disabled in December 2006. For payment purposes, a person cannot be deemed disabled more than 15 months before the Appellant received the application for a disability pension (paragraph 42(2)(*b*) of the CPP). The application was received in March 2015; therefore, the Respondent is deemed disabled in December 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will be retroactive to April 2014.

Valerie Hazlett Parker
Member, Appeal Division

APPEARANCES

Stephanie Pilon	Appellant's counsel
Randy Zapototsky	Respondent
Keith Poulson	Respondent's representative
Faiza Ahmad-Hassan	Observer