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

Citation: *Z. B. v. Minister of Employment and Social Development*, 2018 SST 66

Tribunal File Number: AD-17-120

BETWEEN:

Z. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 24, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The question in this appeal is whether the General Division of the Social Security Tribunal gave due consideration to key items of evidence when it assessed the Appellant's disability.

[3] The Appellant, Z. B., was trained as an electrical engineer in Serbia and arrived in Canada in 2008. After working in various jobs, he succeeded in meeting Canadian professional licensing standards and, in January 2013, he took a full-time position as a technician at Bombardier.

[4] In May 2013, he broke his right ankle in a motorcycle accident. He was taken to hospital where he underwent reparative surgery. After six months of recovery, he returned to work on modified duties. His employment was terminated in June 2014 for reasons that were not made clear to him. He has not worked since and is now 42 years old.

[5] In August 2014, Mr. Z. B. applied for Canada Pension Plan (CPP) disability benefits, but the Respondent, the Minister of Employment and Social Development (Minister), refused his application because it found that his disability fell short of "severe" and "prolonged," according to the legislation, as of his minimum qualifying period (MQP), which was to end on December 31, 2016.

[6] Mr. Z. B. appealed the Minister's determination to the General Division. In a decision dated November 28, 2016, the General Division found insufficient evidence that Mr. Z. B.'s medical conditions—which now included chronic pain and depression—prevented him from performing substantially gainful employment during the relevant period. It also found that he had residual capacity to pursue lighter sedentary work within his restrictions. In February 2017, Mr. Z. B. requested leave to appeal from the Appeal Division. In my decision dated August 23,

2017, I granted leave to appeal because I saw at least an arguable case that the General Division may have

(i) disregarded medical reports supporting Mr. Z. B.'s claim that he was disabled by depression, anxiety and mental illness;

(ii) disregarded Mr. Z. B.'s testimony about the circumstances that led to his departure from Bombardier; and

(iii) breached a principle of natural justice by failing to give reasons for rejecting evidence that Mr. Z. B. was incapable of performing less physically demanding work.

[7] Having heard the parties' submissions and reviewed the record in detail, I have come to the conclusion that the General Division's decision cannot stand.

Preliminary Matter—New Documents

[8] Since my leave to appeal decision, Mr. Z. B.'s representative has periodically submitted medical documents[1] to the Appeal Division that were not available to the General Division—either because they were never previously submitted or because they were not prepared until after the November 2016 hearing.

[9] On reflection, and for reasons explained at the hearing, I decided not to admit the medical documents for the purposes of this appeal, although I did consider Mr. Z. B.'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.

---

[1] Contained in the packages labelled as AD1D (submitted by the Appellant on August 22, 2017), AD2 (August 25, 2017), AD3 (October 2, 2017) and AD5 (December 22, 2017).
[2] *Belo-Alves v. Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100.

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 disregard medical evidence about Mr. Z. B.'s mental health?

Issue 3: Did the General Division disregard Mr. Z. B.'s testimony about the circumstances surrounding his departure from Bombardier?

Issue 4: Did the General Division breach a principle of natural justice by failing to give reasons for rejecting evidence of Mr. Z. B.'s incapacity for sedentary work?

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

---

[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.

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 […]"

[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 ignore evidence about Mr. Z. B.'s mental health?

[15] The Minister is correct to note that a trier of fact is presumed to have considered all of the evidence before it and need not refer to every note, letter and report on file.[7] I am ordinarily reluctant to challenge the General Division's authority to weigh the evidence but, in this case, I see good reason to make an exception. I am convinced that the General Division disregarded medical evidence that mental illness contributed to Mr. Z. B.'s disability.

[16] There is no question that depression and anxiety were a significant component of Mr. Z. B.'s CPP disability claim. They were listed in the August 2014 medical questionnaire, prepared

---

[6] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.
[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

by Dr. Midha, that accompanied his application for benefits, and the file contains multiple reports from mental health professionals, including Dr. Ramandeep Chahal, a treating psychiatrist, and Iva Keighley, a social worker and psychotherapist, as well as a lengthy and detailed insurance company-sponsored psychological assessment report, dated August 20, 2013, by Muhammad Ali and Joanna Mitsopulos.

[17] Mr. Z. B. submitted numerous documents—medical and otherwise—in support of his disability claim, but the General Division referred to only a handful of them in its decision. Despite the prominence of depression and anxiety in the file, neither condition plays much of a role in the General Division's analysis of Mr. Z. B.'s disability. It is true that the General Division referred to Dr. Chahal's report (at paragraph 12), but it did no more than summarize the psychiatrist's findings without any further comment. Similarly, a drily factual summary of Ms. Keighley's report was simply dropped into the analysis (at paragraph 31), without any attempt to assess the interplay, if any, between Mr. Z. B.'s physical injuries and his psychological condition. The Ali and Mitsopulos report was not mentioned at all.

[18] A review of the General Division's analysis in its entirety indicates that, notwithstanding the aforementioned insertion of the Keighley report summary, it was focused almost entirely on Mr. Z. B.'s physical capacity. It is not my role to assess whether Mr. Z. B.'s anxiety and depression were significant contributors to a severe disability, but I am required to determine whether the General Division assessed the evidence available to it according to the law. In this case, I am guided by *Villani v. Canada*,[8] which requires the Tribunal, when assessing disability, to consider the "whole person" in a "real-world" context. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." This last point was amplified by *Bungay v. Canada*,[9] which held that all of a claimant's possible impairments affecting employability are to be considered in their totality, not just the biggest impairments or the main impairment. This approach is consistent with subsection 68(1) of the *Canada Pension Plan Regulations*, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

---

[8] *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 FCR 130.
[9] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

Issue 3: Did the General Division disregard Mr. Z. B.'s testimony?

[19] Although some of Mr. Z. B.'s testimony was duly summarized in the decision, I nevertheless think that the General Division ignored, or unduly discounted, significant aspects of it. Paragraph 28 suggests that the General Division dismissed the appeal because it found no indication that Mr. Z. B. was unable to perform his modified duties at Bombardier:

> […] The Appellant stated that he had an assistant who helped with the physical duties of the job. It appears to the Tribunal that the Appellant was able to complete many elements of his job except for the physical aspect that required him to climb and do various physical tasks. To the Tribunal it appears that the Appellant was able to maintain a relatively consistent work schedule and there does not appear that the Appellant missed any significant period of time due to the symptoms that he had from his accident. While the Tribunal is unable to ascertain the reason for the Appellant's dismissal it appears to the Tribunal that while the Appellant was limited in his abilities to perform the physical aspects of his job there is no indication that he was limited in all aspects of his ability to complete the requirements of the job.

[20] Mr. Z. B. testified that, although he was not given formal reasons for his termination, he believed that Bombardier wanted him gone for performance-related issues, which he attributed to limitations caused by his injuries. While he testified that he was able to perform modified duties, he also said that they were not sustainable and that he was made to feel like he was a burden to the company. At the 18:05 mark of the audio recording of the hearing, Mr. Z. B. testified:

> Once they figured out that I cannot recover myself completely, and the outcome—the expected time of recovery—was unknown, which clearly could be seen always, all of this led them to make a final decision. They were giving me pretty much a hard time, new management at the beginning of 2014, that came, literally was not satisfied with doctors' reports and functional ability forms filled out by doctor specialists. So basically HR department started treating me like I was faking the reports, besides the already horrible situation … Once they had to accept that my situation is even worse than it could be described in their short forms, all this thing led them to a final decision and terminate my employment even though I was still on modified duties.

[21] At no point in its decision did the General Division acknowledge that modified duties of the kind offered by Bombardier were likely never going to be a realistic long-term option for Mr. Z. B. In fact, it seemed to take for granted, despite Mr. Z. B.'s evidence to the contrary, that he was let go for reasons that had nothing to do with his impairments:

> [33] […] The evidence shows that the Appellant did not leave his previous employment due to his symptoms but rather was terminated from his employment. There is no evidence that the Appellant was unable to perform his modified duties at his previous employer rather it appears that the Appellant was successful at performing the necessary duties of his modified job.

[22] The General Division did not specify what evidence it found that Mr. Z. B. was terminated for performance issues, but it was likely alluding to a handwritten note on Bombardier's letter of termination[10] informing him that he did not fit into the company's organizational structure. However, there was evidence, in the form of Mr. Z. B.'s testimony, that indicated otherwise. The General Division made no attempt reconcile these competing items of evidence, but rather implied that it still expected Mr. Z. B. to be capable of, if not climbing and extended standing, purely sedentary work—in short, a desk job:

> [29] The Tribunal notes that the Appellant stated that after being let go from his employer the Appellant attempted to find alternate employment. The Appellant stated that he tried to find alternate employment however no one could accommodate his needs as he could not sit or stand for more than 20 minutes at a time. The Appellant testified that while he had tried looking for other jobs he did not get hired for any of them therefore the Tribunal was unable to determine if the Appellant would have been successful at more sedentary work as his Orthopedic surgeon had indicated in his November 2013 report.

[23] In the above passage, the General Division conceded that it did not know whether Mr. Z. B. would have been more successful at sedentary work. The difficulty is that the General Division apparently drew an adverse inference from Mr. Z. B.'s supposed failure to try sedentary work without making findings on two important questions: (i) whether he was, in fact, subject to restrictions in sitting and (ii) whether he had made sufficient effort to seek suitable work. The General Division "did not know" about Mr. Z. B.'s potential capacity as a

[10] Seen at GD2-95.

sedentary worker, yet he testified that (i) he could not sit or stand for more than 20 minutes and (ii) he had searched for jobs, but no employer could accommodate his limitations. In neglecting to consider this evidence, the General Division based its decision on an erroneous finding of fact without regard for the material before it.

Issue 4: Did the General Division give adequate reasons for rejecting evidence?

[24] I touched on this issue in the previous section, when I noted that the General Division had failed to make a finding about Mr. Z. B.'s capacity to sit for extended periods but then appeared to draw an adverse inference from his purported failure to explore alternative work options. I say "appeared," because there General Division's analysis contained no chain of logic that linked factual premise to applicable law to defensible conclusion.

[25] In *R. v. Sheppard*,[11] the Supreme Court of Canada considered the decision-maker's duty to provide sufficient reasons for a decision. It concluded that reasons must be given for findings of fact made upon disputed and contradicted evidence, and upon which the outcome of the case is largely dependent. In *Giannaros v. Canada*,[12] the Federal Court of Appeal concluded that in omitting to explain why it rejected a body of credible evidence, the Pension Appeals Board had failed to provide adequate reasons for its decision.

[26] There is also the issue of natural justice, which demands that a decision be accompanied by an intelligible explanation. As Mr. Z. B.'s counsel notes, the Supreme Court of Canada has repeatedly held that decisions at trial must be accompanied by meaningful reasons. In *R. v. R.E.M.*,[13] the Supreme Court set out the test for sufficiency of reasons in the context of criminal law, quoting with approval an earlier Ontario Court of Appeal decision:[14]

> In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what"—the verdict—and the "why"—the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at

[11] *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26.
[12] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187.
[13] *R. v. R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51.
[14] *R. v. Morrissey*, 1995 CanLII 3498 (ON CA).

> in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[27] For its part, the Minister submits that the outcome of the appeal was logically driven by its facts: Mr. Z. B.'s dismissal from Bombardier resulted from his inability to perform all of the duties of a Field Service Technician. Dr. Midha found that he was subject to physical restrictions, such as walking or standing for prolonged periods, but able to complete a full work shift, drive a company vehicle, work with both upper limbs (writing, keyboard use, gripping, twisting, reaching) and perform duties requiring cognition, alertness, concentration, attention, judgment and memory. Dr. Ogilvie-Harris, an orthopedic specialist, found that Mr. Z. B.'s ongoing pain and functional limitations restricted only his mobility.

[28] While the Minister presents a logical rationale for denying Mr. Z. B. CPP disability benefits, the problem is that no such rationale can be found in the General Division's decision. As mentioned, the General Division focused on Mr. Z. B.'s ability to perform modified duties at Bombardier, but it did not ask why he was dismissed. The General Division implicitly acknowledged that Mr. Z. B.'s mobility would be limited, but it did not address in any substantive way his submission that he could not sit or stand for extended periods. The General Division may have mentioned Dr. Veljkovic's December 15, 2014, report in its decision, but it ignored the orthopedic surgeon's most pertinent remark, "I am not sure he can get back to his work at all." Nor did the General Division refer to a subsequent report dated March 20, 2015, in which Dr. Veljkovic concluded that Mr. Z. B. was "extremely unlikely to be able to return to any kind of work requiring a high level of physical activity or prolonged standing."

[29] The file indicates that medical professionals had varying opinions about Mr. Z. B.'s capabilities. The outcome of his appeal was dependent, at least in part, on how this evidence was weighed, but the General Division decision offered no explanation for discounting medical evidence that cast doubt on Mr. Z. B.'s capacity to perform sedentary work.

CONCLUSION

[30] The appeal succeeds because the General Division disregarded material aspects of Mr. Z. B.'s submissions without adequately explaining why it did so.

[31] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different member.

Member, Appeal Division

HEARD ON:	January 8, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. B., Appellant Letitia Webley, Representative for the Appellant Sandra Doucette, Representative for the Respondent