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

Citation: *Minister of Employment and Social Developmen v. Z. Y.t*, 2018 SST 145

Tribunal File Number: AD-17-232

BETWEEN:

Minister of Employment and Social Development

Appellant

and

Z. Y.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 13, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for reconsideration.

OVERVIEW

[2] Z. Y. (Claimant) moved to Canada from Turkey in 2001. She does not speak or write English. She made valid contributions to the Canada Pension Plan (CPP) from 2005 to 2009 inclusive. She applied for a CPP disability pension in September 2014 and claimed that she was disabled by a number of conditions including back and leg pain, chronic headaches, cognitive issues and mobility limitations. The Minister of Employment and Social Development (Minister) refused the application and she appealed this decision to the Social Security Tribunal. The Tribunal's General Division allowed the appeal and decided that the Claimant was disabled in 2001 when she came to Canada. The appeal is allowed because the General Division erred in law and based its decision on erroneous findings of fact under the *Department of Employment and Social Development Act* (DESD Act).

PRELIMINARY MATTER: EVIDENCE FILED WITH THE APPEAL DIVISION

[3] The DESD Act governs the Tribunal's operation. It sets out only three narrow grounds of appeal that can be considered. They are that the General Division failed to observe the principles of natural justice or made a jurisdictional error, 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.[1] Consequently, an appeal before the Appeal Division is not a new hearing, or a rehearing of the matter, so new evidence of the Claimant's condition is irrelevant. The Claimant filed approximately nine pages of new medical information with the Appeal Division in support of her disability claim. This evidence was not considered since new

[1] Subsection 58(1) of the DESD Act.

evidence generally is not permitted on an appeal under the DESD Act,[2] and its presentation does not support a claim that the General Division made an error under the DESD Act.

ISSUES

[4] Did the General Division err in law by finding that the Claimant was disabled in 2001, or by basing its decision on subjective evidence, rather than objective medical evidence?

[5] Did the General Division base its decision on one of the following erroneous findings of fact?

a) That the Claimant had leg and lower back problems in 2001;

b) That the medical evidence supported that the Claimant had a severe disability at the minimum qualifying period (MQP); or

c) That the Claimant's symptoms, reported by her doctors in 2014 and 2015, existed in 2001.

ANALYSIS

[6] For the Minister to succeed in this appeal, I must be satisfied that the General Division erred 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 that was before it.[3] Each of the Minister's arguments is considered below in this context.

Issue 1: Did the General Division err in finding the Claimant disabled in 2001?

[7] For a claimant to be eligible to receive a CPP disability pension they must have made contributions to the CPP from employment earnings for at least four out of six years in their contributory period. The contributory period starts when the contributor reaches 18 years of age.[4]

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[2] *Canada (Attorney General) v. O'keefe*, 2016 FC 503.
[3] Subsection 58(1) of the DESD Act.
[4] Paragraph 44(2)(*b*) of the CPP.

The contributory period ends when different events occur. One event is the month that the contributor is determined to have become disabled.[5]

[8] In this case, the Claimant contributed to the CPP from 2005 to 2009 inclusive. This means that her MQP (the date by which the Claimant must be found to be disabled in order to receive the disability pension) was December 31, 2011. The General Division decided that she was disabled in 2001. So, the Claimant's contributory period ended in 2001. Her later contributions to the CPP could not be considered as they were made after the contributory period ended. This results in the Claimant not having made sufficient contributions to be eligible for the disability pension.

[9] By deciding that the Claimant was disabled in 2001, it was legally impossible for her to be able to receive the pension. Therefore, deciding that the Claimant was disabled in 2001 was an error in law. The appeal must succeed on this basis.

Issue 2: Did the General Division err in relying on subjective evidence?

[10] To be found disabled under the CPP a claimant must establish that he or she has a disability that is severe and prolonged. To do this, he or she must provide medical evidence that supports the claim.[6] This evidence must include a report of any physical or mental disability including the nature, extent and prognosis of the disability, the findings upon which the diagnosis and prognosis were made, limitations resulting from the disability, and any other pertinent information.[7] The Minister argues that the General Division erred in law because it based its decision on the Claimant's testimony and not on the objective medical reports that were filed with the Tribunal. However, the legal requirement is for a Claimant to provide medical information, not medical information pertinent only to the claimed disabling condition at the relevant time (the MQP in most cases).

[11] The General Division summarized the oral and written evidence, which included a number of medical reports written after a November 2014 car accident, and reports that set out

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[5] Subparagraph 44(2)(*b*)(ii) of the CPP.
[6] Section 68.1 of the CPP Regulations; *Warren v. Canada (Attorney General)*, 2008 FCA 377.
[7] Section 68.1 of the CPP Regulations.

the Claimant's report of her medical history, including an assault and stroke or brain injury before she came to Canada.

[12] The medical reports that consider the Claimant's condition only after the car accident are of little relevance, since her MQP was long before the accident. However, Dr. Spooner completed the medical report that accompanied the Claimant's application.[8] Dr. Spooner states that he began to treat the Claimant's main medical condition in October 2010, which was before the car accident and the MQP. He reports that the Claimant had a brain injury of unknown etiology, generalized weakness, limited mobility and walks with a cane. He describes her functional limitations and that she had a poor response to rehabilitation/physiotherapy. He provides a poor prognosis, with symptoms present for many years. This report complies with the CPP requirements for medical evidence.

[13] The General Division summarized this report.[9] It also considered the other medical evidence and the Claimant's testimony. The Tribunal is not required to place greater weight on medical evidence, or on medical evidence penned close to the MQP. It is for the Tribunal to receive the evidence and weigh it. The General Division did not err in this regard.

[14] Even if there was insufficient medical evidence for the General Division to make a decision, the Tribunal is not obliged to request or require any information from any party. It is for the parties to choose what evidence and legal argument they will present. The General Division did not make an error by failing to request further evidence from the Claimant.

Issue 3: Did the General Division base its decision on an erroneous finding of fact?

[15] In order for an appeal to succeed on the basis of an erroneous finding of fact, three criteria must be satisfied. The finding of fact must be erroneous, it must have been made in a perverse or capricious manner or without regard for the material before the General Division, and the decision must be based on this finding of fact.[10]

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[8] GD1-79.
[9] Paragraph 15 of the decision.
[10] Rahal v. Canaada (Citizenship and Immigration), 2012 FC 319. Although this is not a decision made by this Tribunal, it considers legislation with the same wording as s. 58(1)(c) of the DESD Act.

a) The Claimant's back and leg problems

[16] The Minister contends that the General Division's finding of fact that the Claimant had leg and lower back problems in 2001 was erroneous because there is no mention of these conditions in any medical report prior to 2014, except that the Claimant used a cane to walk. First, the undisputed fact that the Claimant required a cane is a strong indication that she had a back and/or leg problem. Second, the Claimant testified that she had injured her back in Turkey. I am therefore satisfied that this finding of fact was not erroneous. I am also satisfied that it was not made perversely, capriciously or without regard for the material that was before the General Division. This finding of fact is consistent with the Claimant's testimony.

b) The medical evidence supported a disability at the MQP[11]

[17] The General Division decision states that the medical evidence supports that the Claimant was disabled in 2001, and refers to a 2014 CT scan to support this. The decision does not refer to any medical evidence that was available in 2001. There is no such evidence in the record. The Federal Court instructs that a finding of fact is made without regard for the material that was before the Tribunal if it is a finding for which there is no evidence.[12] Accordingly, this finding of fact was made erroneously and without regard for the material before it because there was no evidence to support it. I am also satisfied that the General Division based its decision, in part, on this finding of fact. Therefore, the General Division made an error under the DESD Act, and the appeal must be allowed on this basis.

c) The Claimant's symptoms existed in 2001

[18] In addition, the General Division relied on Dr. Spooner's 2014 report that says he began treating the Claimant in 2010, to conclude that her symptoms existed and were of the same severity in 2001. Although Dr. Spooner's report states that the Claimant has had the same symptoms for many years, he did not specify when these symptoms appeared. The other medical evidence in the record refers to the Claimant's condition in 2014 or 2015. Therefore, the General Division's finding of fact that the Claimant had all of her symptoms, and that they

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[11] Paragraph 31 of the decision.
[12] Rahal v. Canada (Citizenship and Immigration)m 2012 FC 319

were such that her disability was severe in 2001 was erroneous and at odds with the record. The decision was also based on this finding of fact, at least in part. This was also an error under the DESD Act.

CONCLUSION

[19] The appeal is allowed because the General Division made an error in law, and based its decision on erroneous findings of fact under the DESD Act.

[20] The DESD Act sets out what remedies the Appeal Division can give. It is appropriate that the matter be referred back to the General Division for reconsideration. The Claimant's evidence and the medical reports will have to be weighed to reach a decision.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	February 8, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Z. Y., Appellant Philipe Sarazin, Counsel for the Respondent