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

Citation: *K. M. v. Minister of Employment and Social Development,* 2018 SST 136

Tribunal File Number: AD-17-128

BETWEEN:

K. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 8, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, K. M., who is now 54 years old, has a high school education and a lengthy work history, including jobs in both factory and clerical settings. Her last regular work was five years as an attendant at a casino operated by Ontario Lottery and Gaming (OLG). She claims that, by December 2010, she was no longer able to meet the physical demands of the job because of increasing back pain. After her employment was terminated, she obtained a licence to drive a taxicab, and she has done so sporadically ever since.

[3] In June 2014, Ms. K. M. applied for Canada Pension Plan (CPP) disability benefits. 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, 2012.

[4] Ms. K. M. appealed the Minister's determination to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated November 29, 2016, dismissed Ms. K. M.'s appeal because, among other reasons, it found that she had not attempted alternative work within her restrictions.

[5] On February 9, 2017, Ms. K. M. requested leave to appeal from the Tribunal's Appeal Division, alleging nine errors of fact and law on the part of the General Division. In my decision dated August 18, 2017, I granted leave to appeal because I saw a reasonable chance of success on at least two grounds: The General Division may have (i) based its decision on an erroneous finding that Ms. K. M. was a "vague historian" and (ii) failed to adequately consider the possibility that her job as a taxicab driver constituted a genuine, if failed, attempt to mitigate her impairments as a means of remaining in the workforce.

[6] Having reviewed the parties' oral and written submissions against the record, I have concluded that one of the grounds for which I granted leave has sufficient merit to warrant overturning the General Division's decision.

ISSUES

[7] 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 base its decision on an erroneous finding that Ms. K. M. was a "vague historian"?

Issue 3: Did the General Division misconstrue Ms. K. M.'s work as a taxicab driver as evidence of capacity, rather than as a failed attempt to mitigate her impairments?

ANALYSIS

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

[8] Under the *Department of Employment and Social Development Act* (DESDA), 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.[1] 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.[2]

[9] 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*.[3] Where errors of law or failures to observe principles of natural justice were alleged, the

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[1] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[2] Subsection 59(1) of the DESDA.
[3] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

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.

[10] The Federal Court of Appeal decision *Canada v. Huruglica*[4] 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…."

[11] 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 erroneously label Ms. K. M. a "vague historian"?

[12] The General Division convened an oral hearing, presumably because it wanted to hear from Ms. K. M. herself. However, it came away unimpressed with Ms. K. M.'s testimony and assigned it little evidentiary weight. Paragraph 66 of the General Division's decision reads as follows:

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[4] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

> The Appellant was a vague historian who had great difficulty recalling and providing evidence concerning significant events. The Tribunal accepted that this was to a large extent because of her present condition, and that she was not attempting to be evasive and/or to avoid what she may have considered to be troubling questions. This does, however, make the Tribunal's task more challenging, and in such circumstances the Tribunal is require [*sic*] to place greater reliance on the medical evidence.

[13] Ms. K. M. maintains that, contrary to the General Division's finding, she did not have difficulty recalling significant events—only specifics about them. She provided examples of details that she could not remember:

- The names of all the pain management clinics she attended;
- The exact date when she applied for CPP disability benefits;
- Her income from her time as a taxi driver;
- The names of medications that she was prescribed in December 2012; and
- The number of pain flare-ups she had in December 2012.

Ms. K. M. argues that the General Division should not be permitted to "place greater reliance on the medical evidence" than on her testimony simply because her cognitive problems impeded her memory for details.

[14] My review of the General Division's decision indicates that it was careful not to impute dishonesty to Ms. K. M., but it did suggest that her testimony *as a whole* was unreliable because of "vagueness" and "difficulty" in recall. The General Division noted Ms. K. M.'s difficulty in recalling her pain medications[5] and how often she drove a taxicab,[6] but it otherwise offered few specific examples of memory lapse. Indeed, the decision contains a three-page section summarizing her testimony in considerable detail, suggesting that Ms. K. M. did not, as the General Division put it, have "great difficulty" in providing evidence about her work and medical history. I have also reviewed the audio recording of the hearing and, although it is true that Ms. K. M.'s memory was at times less than perfect, I did not hear anything to suggest that her powers of recall were unusually poor.

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[5] Paragraph 51 of the General Division's decision.
[6] Paragraph 58 of the General Division's decision.

[15] That said, although the General Division questioned the reliability of Ms. K. M.'s oral evidence, it did not dismiss it in its entirety. As the Minister notes, there are numerous instances in the General Division's analysis where it referred to Ms. K. M.'s testimony:

- Paragraph 67, in which the General Division noted Ms. K. M.'s testimony that her diabetes was controlled with medication and that she did not have trouble with carpal tunnel syndrome;
- Paragraph 73, in which the General Division noted Ms. K. M.'s testimony that (i) she took chiropractic treatments, physiotherapy, and massage therapy; (ii) she did not visit her doctor for back pain because there was nothing he could do; (iii) she did not feel it necessary to follow up with the diabetes clinic in 2014 because she had alternate sources of information about diet; (iv) she chose not to have bariatric surgery but made two efforts, in 2012 and 2016, to lose weight; and (v) she did not follow medical recommendations about medication and did not take pool therapy because she was self-conscious;
- Paragraph 76, in which the General Division noted Ms. K. M.'s testimony that full-time work was never offered to her, although she believed that she was capable of it when she started at OLG; and
- Paragraph 77, in which the General Division noted Ms. K. M.'s testimony that (i) she had pursued a human rights case against her employer because it did not provide her with a more sedentary job and (ii) she did not look for other work after leaving OLG other than driving a cab.

[16] There is no one formula that prescribes how a trier of fact is to weigh evidence, but case law has consistently held that all evidence must be considered, and no particular form of evidence is inherently worthy of lesser or greater weight.[7] The General Division has wide discretion to assign weight to evidence, and its judgment in this sphere must be afforded a measure of deference. I disagree with Ms. K. M.'s representative that oral and written evidence must be given equal weight, but it is clear that both must be considered, and if one or the other

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[7] *Canada (Attorney General) v. MacRae*, 2008 FCA 82; *Arthurs v. Canada (Minister of Social Development)*, 2006 FC 1107; and *Grenier v. Canada (Minister of Human Resources Development)*, 2001 FCT 1059.

is to be discounted to any significant degree, then the trier of fact must put forward defensible reasons for doing so. In this case, the General Division fulfilled its responsibility to consider all evidence. It chose to give Ms. K. M.'s testimony less weight than the documentary evidence, but it provided reasons for doing so. Those reasons were subjective and depended on the General Division's perception of what constitutes a reliable memory. One may disagree with the General Division's finding that Ms. K. M.'s recollection was unusually poor, but I do not think it was made perversely, capriciously, or without regard for the material.

Issue 3: Did the General Division misconstrue Ms. K. M.'s work as a taxicab driver as evidence of capacity, rather than as a failed attempt to mitigate her impairments?

[17] Ms. K. M. criticizes the General Division's treatment of her final years of work, alleging that it failed to conform to case law that governs vocational mitigation. In particular, she submits that the General Division failed to consider evidence that she is able to drive a taxicab only through the benevolence of her employer. She claims to otherwise lack residual capacity and argues that the General Division should not have drawn an adverse inference from her purported failure to pursue alternative work during the MQP.

[18] This submission turns on whether Ms. K. M.'s ongoing taxicab driving was best characterized as evidence of residual capacity or as a genuine, if failed, attempt to mitigate her impairments as a means of remaining in the workforce. I will begin my analysis by dismissing any suggestion that the General Division disregarded evidence that Ms. K. M. has benefitted from a so-called "benevolent employer." In *Atkinson v. Canada*,[8] The Federal Court of Appeal held that merely accommodating an individual does not imply that an employer is benevolent; in order to be considered a benevolent employer, it must make accommodations that go beyond what would be expected of an employer in the marketplace. In this case, Ms. K. M. did not produce any evidence that her performance was held to a lesser standard than her peers.

[19] Ms. K. M. testified that she was drawn to taxicab driving because it was easier on her back and permitted unusual flexibility in her working hours, yet the General Division regarded

[8] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

it as evidence of capacity, rather than as a fulfillment of her obligation under *Inclima v. Canada*[9] to seek work better suited to her limitations:

> [76] […] While optimism is not the same thing as work capacity, the Appellant clearly had some residual work capacity. This is evidenced by her intermittent work as a taxi driver, which, incidentally, appears not to respect her restrictions against prolonged sitting.

[20] There are only two brief references in the General Division's analysis to the post-MQP taxi driving job, which the General Division took as evidence of residual capacity, even though the thrust of Ms. K. M.'s submissions was that it showed the opposite—that is, her *lack* of capacity. While I see no reason to question its finding that Ms. K. M. had residual capacity, the General Division appears to have acknowledged that her taxi driving was not "regular," as indicated by its use of the qualifier "intermittent" in paragraph 76. In the following paragraph, the General Division described the work as "occasional." The test for disability, as set out in subparagraph 42(2)(*a*)(*i*) of the CPP, obliges consideration of "regularity," which has been defined in *D'Errico v. Canada* and associated cases[10] as the capacity to attend work predictably or with consistent frequency. If nothing else, *D'Errico* stands for the proposition that a trier of first instance in CPP disability cases must make at least a serious attempt to grapple with the concept of regularity. The General Division mentioned the word "regularly" once in its analysis, but otherwise I saw no meaningful consideration of how Ms. K. M. could offer consistent or predictable service. This strikes me as an oversight in discussing an individual who was apparently fired from her last "regular" job at a casino because she could not meet its physical demands—and who sought out an alternative occupation as a taxicab driver specifically because it was not "regular."

[21] The General Division also hinted that Ms. K. M. harboured untapped reserves of capacity by noting an apparent disconnect between her claimed restrictions on extended sitting and her choosing to drive a taxicab in shifts of up to 12 hours. Ms. K. M.'s representative argued, and I agree, that this remark ignored a reality about her client's occupation: Taxicab

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[9] *Inclima v. Canada (Attorney General),* 2003 FCA 117.

[10] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; *Atkinson v. Canada (Attorney General)*, [2014] FCJ 840 (QL); *Canada (Minister of Human Resources Development) v. Gallant*, CP 06612; *Eddy v. Minister of Human Resources Development* (2000) 8586 PAB; and *M. T. v. Minister of Human Resources and Social Development* 28161.

drivers are generally not confined to their seats from the beginning of shifts to their end but have ample opportunity between fares to stretch their muscles, should they wish. Although the General Division drew an adverse inference from the length of Ms. K. M.'s irregular and infrequent shifts, it does not appear, from my review of the audio recording of the hearing, that it ever put the issue to her and asked how she managed to complete shifts despite her sciatic lower back pain.

[22] Above all, in ascribing residual capacity to Ms. K. M.'s taxicab driving, the General Division did not address an essential fact—that Ms. K. M. apparently never derived substantially gainful earnings from her chosen alternative occupation. Her Record of Employment[11] indicates that she has never earned more than the year's basic exemption for the disability benefit since 2010 (following nearly two decades of earnings above it), meaning that her income as a taxicab driver has not exceeded a range of $4,700 to $5,500 in the seven years since she left OLG. According to the formula set out in section 68.1 of the *Canada Pension Plan Regulations*, these amounts would be significantly below the statutory threshold for "substantially gainful."

[23] Nevertheless, the General Division seems to have taken for granted that Ms. K. M.'s taxicab driving was *prima facie* evidence that she had residual capacity. It went on to find that she had not discharged her duty, under *Inclima*, to mitigate her impairments by attempting to remain in the workforce:

> [77] […] As it is, the Appellant testified that she did not look for other work after leaving OLG, apart from occasional work as a cab driver since about 2012. Accordingly, she does not meet the terms of the *Inclima* test.

[24] In this statement, as in the decision in its entirety, the General Division did not squarely address Ms. K. M.'s submission that driving a taxicab—which demands few skills yet offers autonomy and flexibility—constituted a genuine attempt on her part to find an alternative occupation that suited her physical impairments.

[11] Found at GD8-4.

CONCLUSION

[25] I find that the General Division erred in law by failing to adequately consider whether Ms. K. M. was capable *regularly* of pursuing any substantially gainful occupation. The General Division also based its decision on an erroneous finding that Ms. K. M.'s sporadic shifts as a taxicab driver were evidence of residual capacity, rather than of a failed attempt to remain engaged in the labour market.

[26] 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 11, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Bozena Kordasiewicz, for the Appellant Viola Herbert, for the Respondent Dale Randall, for the Respondent (observer)