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

Citation: *Minister of Employment and Social Development v. B. H.*, 2018 SST 186

Tribunal File Number: AD-16-1283

BETWEEN:

Minister of Employment and Social Development

Appellant

and

B. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: ~~February 7, 2017~~

CORRIGENDUM DATE: February 27, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the disability claim is dismissed.

OVERVIEW

[2] B. H. (Claimant) completed Grade 12 and began to work. She last worked as a collator until 1997. She first applied for a Canada Pension Plan disability pension in 1998. She claimed that she was disabled by fibromyalgia, multiple sclerosis, depression, and bladder control issues. The Minister of Human Resources and Skills Development refused the application. The Claimant appealed this decision to the Office of the Commissioner of Review Tribunals, and a Review Tribunal dismissed her appeal on April 13, 1999.

[3] The Claimant applied again for a disability pension in October 2013. The Minister of Employment and Social Development (Minister) refused this application as well. The Claimant appealed this decision to the Social Security Tribunal. On July 6, 2016, the Tribunal's General Division allowed the appeal and decided that the Claimant was disabled in December 1997. The Minister's appeal of this decision is allowed and the disability claim is dismissed because the General Division erred and there is no evidence upon which the disability pension could be granted to the Claimant.

PRELIMINARY MATTER: THE HEARING PROCEEDED ALTHOUGH THE CLAIMANT DID NOT HAVE THE COMPLETE RECORD WITH HER

[4] When the Minister's counsel began her submissions, she wished to refer specifically to certain paragraphs of the General Division decision. The Claimant had not brought a copy of the decision to the hearing. She insisted that the hearing proceed despite her not having this document.

ISSUES

[5] Did the General Division make an error because the issue before it had already been decided?

[6] Did the General Division base its decision on an erroneous finding of fact made without regard for all of the evidence that was before it when it decided that the disability was severe and prolonged?

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It states that there are only three narrow grounds of appeal that can succeed, namely, that the General Division failed to observe principles 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 that was before it.[1] The Minister presents two grounds of appeal, which must be considered in this context.

Issue 1: Had the Issue Before the General Division Already Been Decided?

[8] There is a basic rule of law called *res judicata*. It provides that if a matter has already been decided by one quasi-judicial decision maker, it cannot be re-argued in another legal proceeding. In order for this rule to apply, three conditions must be met. They are that:

a) the parties to both proceedings are the same;

b) the prior decision was final; and

c) the legal issue was the same in both legal proceedings.

These conditions are clearly met in this case. The parties are the Claimant and the Minister (although the Minister's title has changed, it is the same party as it is the minister responsible for the Canada Pension Plan disability pension).

[9] The prior decision was final. The Review Tribunal made its decision on April 13, 1999. The Claimant requested leave to appeal to the Pension Appeals Board, which was refused. No further legal action could be taken.

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

[10] The legal issue was also the same in both cases. In each case, the Claimant had to prove that she was disabled under the *Canada Pension Plan* (CPP) on or before December 31, 1999 (this is her minimum qualifying period, which is calculated based on when she made contributions to the CPP through employment earnings). The Claimant based her claim on the same medical conditions in both cases.

[11] There is no legal reason to exercise discretion and not apply the *res judicata* rule in this case.

[12] However, because the Review Tribunal decided that the Claimant was not disabled on or before its April 1999 decision, the Claimant would be entitled to a disability pension if she established that she had become disabled after the date of the Review Tribunal decision— April 13, 1999—and by the MQP of December 31, 1999.

[13] The General Division set this out correctly in its decision. It also summarized the medical evidence and testimony that was presented. This included reports by Dr. Hader and Dr. Voll. On April 1, 1999, Dr. Hader wrote that the Claimant retained the ability to perform sedentary and lighter types of work.[2] On April 29, 1999, Dr. Voll reported that the Claimant's multiple sclerosis was benign at that time, with no recurrent episodes since 1996. This information was available to the Review Tribunal.

[14] I am satisfied that the General Division made a legal error when it decided that the Claimant was disabled in December 1997. The Review Tribunal had already decided that the Claimant was not disabled as of this date.[3] This decision was final. The General Division had no legal authority to change or overturn this decision. This was an error of law.

[15] The wording of the DESD Act does not qualify errors of law, so the Appeal Division should afford no deference to the General Division's interpretations. The appeal must succeed on this basis.

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[2] Paragraph 10 of the General Division decision.
[3] Review Tribunal decision of April 13, 1999.

Issue 2: The General Division Made an Error When it Decided that the Claimant's Disability Was Severe and Prolonged

[16] In addition, for a claimant to be disabled under the CPP, they must have a disability that is both severe and prolonged. The CPP defines a severe disability as one that renders a claimant incapable regularly of pursuing any substantially gainful occupation.[4] The General Division relied on Dr. Voll's reports of September 2013[5] and May 2014[6] to support its conclusion that the Claimant was disabled. However, these reports are contrary to reports he penned in 1999, which was the relevant time. In addition, Dr. Hader also reported in 1999 that the Claimant had some capacity for sedentary or lighter work, and the Claimant underwent a functional abilities assessment at that time, which concluded that she retained some capacity to work. Therefore, the General Division's finding of fact that the Claimant was incapable regularly of pursuing any substantially gainful occupation by December 31, 1999, was made erroneously and without regard for all of the material that was before it.

[17] The CPP defines a prolonged disability as one that is likely to be long continued and of indefinite duration or is likely to result in death. There was no evidence that the Claimant's condition changed such that she became disabled between April 14, 1999, and December 31, 1999. There was insufficient evidence to establish that it was of indefinite duration at that time. The General Division therefore erred when it found that the disability was prolonged.

[18] The General Division decision was based on these erroneous findings of fact. This is another error under the DESD Act, and the appeal succeeds on this basis as well.

CONCLUSION

[19] The appeal is allowed for these reasons.

[20] The DESD Act sets out what remedies the Appeal Division can give.[7] In this case, it is appropriate to give the decision that the General Division should have given. The Claimant states that she is disabled by the same medical conditions that existed when the Review

[4] Paragraph 43(2)(*a*) of the CPP.
[5] GD2-143.
[6] GD2-114.
[7] Section 59 of the DESD Act.

Tribunal made its decision on April 13, 1999. There is no evidence that this condition changed between April 14, 1999, and December 31, 1999, such that the Claimant became disabled. The medical reports written around 1999 all state that the Claimant had some capacity to work at that time.

[21] Although I accept that the Claimant may not be able to work now, and am sympathetic to her current condition, the decision of whether she became disabled between April 14, 1999, and December 31, 1999, cannot be based on sympathy or extenuating circumstances.

[22] The Claimant's claim for a disability pension is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	February 5, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	B. H., Respondent Sylvie Doire, Counsel for the Appellant