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

[TRANSLATION]

Citation: *Minister of Employment and Social Development v. L. F.*, 2018 SST 164

Tribunal File Number: AD-17-459

BETWEEN:

Minister of Employment and Social Development

Appellant

and

L. F.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: February 16, 2018

Canada

REASONS AND DECISION

INTRODUCTION

[1] The General Division of the Social Security Tribunal (Tribunal) determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP). The Tribunal's Appeal Division granted leave to appeal to the Minister of Employment and Social Development (Minister).

[2] The Minister's representative provided her written submissions. The Respondent did not make any submissions, and the deadline has passed.

[3] The appeal is decided on the basis of the written record. It is not necessary to hold a hearing because no testimony must be given and because both parties have had an opportunity to provide written submissions. This method of proceeding respects the Tribunal's obligation under s. 3(1) of the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

ISSUE

[4] Did the General Division base 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?

ANALYSIS

[5] One of the grounds of appeal permitted under s. 58(1)(*c*) of the *Department of Employment and Social Development Act* (DESD Act) is that 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." I agree with the Appellant's submission that s. 58(1)(*c*) requires a certain deference from the Appeal Division regarding errors of fact (*Canada (Attorney General) v. Jean*, 2015 FCA 242; *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93). In order for the appeal to succeed on this ground, the finding of fact in question must not only be material ("based its decision on") and incorrect ("erroneous"), but the General Division must have made it in a perverse or capricious manner or without regard for

the material before it. In *Hussein v. Canada*, 2016 FC 1417, the Federal Court declared the following: "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."

[6] In this case, the Minister argues that the General Division based its decision on erroneous findings of fact regarding two particular points:

> [translation]
>
> The SST-GD concluded that the Respondent was disabled without objective medical evidence. There was actually no valid documentary evidence to support the claims of fibromyalgia and chronic fatigue; they were established only through hearsay.
>
> The SST-GD also failed to take into account evidence that was contrary to its conclusion without providing any justification for disregarding it. The Respondent received regular Employment Insurance benefits after the date of onset of disability, which presumes capacity to work.

Objective medical evidence

[7] The General Division accepted the diagnoses of fibromyalgia and chronic fatigue on the basis of the nurse practitioner's medical report. An excerpt follows:

> [partial translation]
> **Diagnosis:** - fibromyalgia - chronic fatigue syndrome
>
> **Relevant/significant medical history relating to the main medical condition:**
> Since 27 years old
> - dx by Dr. Byron Hyde for chronic fatigue in ~ 1986-1987 (seen in Ottawa)
> - dx by Dr. René Laflèche for fibromyalgia in ~ 2008 (seen in Geraldton)
>
> **Please describe relevant physical observations and functional limitations:**
> - fatigue
> - ↓ energy
> - shoulder, neck, hand pain
> - Strength↓ S.M. & I.M.
>
> **Prognosis regarding the patient's main medical condition:**
> - Chronic condition
> - Permanent impairments, unable to work (= disabled)

[8] The Minister argues that this evidence, in the absence of prior reports, is not valid:

> [translation]
>
> Through mention is made of a diagnosis of chronic fatigue by Dr. Byron Hyde in 1986 and a diagnosis of fibromyalgia by Dr. René Laflèche in 2008, no reports prepared by these doctors have been produced. The Respondent's testimony and a mention by a nurse practitioner in a 2015 report cannot suffice to establish the objective medical evidence required to demonstrate that the Respondent experienced these conditions in 1986 and 2008.
>
> […]
>
> The SST-GD took the nurse practitioner's 2015 report into account in its finding of disability. However, even though said report mentions diagnoses of fibromyalgia and chronic fatigue syndrome, these diagnoses are not at all supported by appropriate tests or specialist opinions. Furthermore, the report indicates that no other consultation or medical evaluation regarding the Respondent's main medical condition was scheduled.
>
> […]
>
> In the absence of valid objective medical evidence, the SST-GD based its decision on an erroneous finding of fact that it made in a perverse or capricious manner.

[9] I agree with the Minister that case law has established that objective medical evidence must be produced to demonstrate disability (*Warren v. Canada (Attorney General)*, 2008 FCA 377). However, I disagree with the statement that a medical report from a nurse practitioner, without copies of prior reports, does not constitute objective medical evidence.

[10] The adjective "objective" means [translation] "the reality of which exists outside of any interpretation" and [translation] "undistorted by emotion or personal bias";[1] its meaning is the opposite of the word "subjective." In the field of medicine, "objective" can mean [translation] "of symptoms observable by a practitioner, as opposed to subjective symptoms, which are perceptible only to the patient," [2] as well as the results obtained by an examination, a test, or diagnostic imaging. In *Warren*, the Federal Court of Appeal referred to the requirements of s.

[1] Translation of the definition found in the *Larousse* French dictionary
[2] Translation of the French definition found in *Le grand dictionnaire terminologique*, Office québécois de la langue française

68(1)(*a*) of the *Canada Pension Plan Regulations* as examples of objective medical evidence: this includes a report indicating the nature, extent, and prognosis of the disability; the findings; any limitation; recommendations; and any other pertinent information. As a result, I do not interpret "objective medical evidence" as being limited to diagnostic images, laboratory tests, or specialist opinions. In my opinion, objective medical evidence can also include, for example, physical observations, clinical symptoms, established functional limitations; and diagnoses made by a health professional. This latter category includes a nurse practitioner who is authorized, in Ontario, to make diagnoses, among other things: *Nursing Act, 1991*. I note that the latest version of the form produced by the Minister says that the medical report must be completed by a doctor [translation] "or a nurse practitioner" who must [translation] "give an objective factual opinion."

[11] In this case, the medical report does not simply mention the diagnoses of previous doctors: it also includes the diagnosis, observations, and the prognosis produced by the nurse practitioner herself. I find that the nurse practitioner's medical report is objective medical evidence and valid evidence. Furthermore, nothing forbids hearsay evidence before the Tribunal. It is for the General Division to assess the medical report and other evidence, such as testimony. It is not the Appeal Division's role to re-evaluate and reweigh evidence. When making its finding of fact on the diagnoses, the General Division took the evidence into account and weighed it; it did not make this finding of fact in a perverse or capricious manner or without regard for the material before it. I see no error of fact within the meaning of s. 58(1)(*c*) of the DESD Act.

[12] The Minister also argued that the General Division based its decision on a condition of depression that was not established by objective medical evidence. Paragraph 24 of the General Division decision states that the Respondent experienced symptoms of depression, based on her testimony. I see that this testimony was supported by the nurse practitioner's medical report, in which she notes that the Respondent takes Citalopram, which is an antidepressant. Therefore, I do not accept the Minister's submission that there was no objective medical evidence. In any event, the General Division concluded that the Respondent "[was] incapable of working in a professional setting with her physical symptoms" and that her "physical problems" had been

present for years. In other words, the General Division did not base its decision on the condition of depression. There is no error of fact within the meaning of s. 58(1)(*c*) of the DESD Act.

The importance of regular Employment Insurance benefits paid to the Respondent

[13] The General Division found that the Respondent had a severe and prolonged disability in February 2014. Its decision did not reference the Employment Insurance benefits paid to the Respondent between February 2014 and February 2015. The Minister argues that receiving such benefits means that the Respondent was capable of working during this period. The Minister argues that the General Division should have provided "justification for setting aside this important contradictory evidence" and that, as a result, it reached its decision without taking into account the evidence before it.

[14] Case law holds that an administrative tribunal charged with fact finding is presumed to have considered all of the evidence before it and is not required to mention every piece of evidence in its reasons (See, for example, *Simpson v. Canada (Attorney General)*, 2012 FCA 82). Nonetheless, as the Minister argued, factual errors are possible when the decision-maker neglects to analyze contradictory evidence:

> Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.[3]

[15] The problem that I find with the Minister's submission is that, based on the facts of the appeal, the Respondent's receiving Employment Insurance benefits does not contradict the finding of disability starting in February 2014. Yes, the Respondent indicated a certain work capacity between 2014 and 2015 by collecting these benefits. She then made efforts to return to work in 2016. However, the legal criterion is not to determine whether the Respondent was unable to work at all, nor is it whether the Respondent was available for work, wanted to work, or believed that she could work. Under s. 42(2)(*a*)(*i*) of the *Canada Pension Plan*, a person is

[3] *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration*), 1998 CanLII 8667 (FC)

considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. In this case, the General Division determined that the Respondent could not work in a substantially gainful occupation; this conclusion is not incompatible with collecting Employment Insurance benefits. It may have been preferable for the General Division to address the Employment Insurance benefits in its decision, but *Cepeda-Gutierrez* states that "the reasons given by administrative agencies are not to be read hypercritically" and "nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it."

[16] Given that the evidence that the General Division did not mention was not contradictory to its conclusion, I do not find that the General Division reached its decision of disability without regard for the material before it. There is no error of fact within the meaning of s. 58(1)(*c*) of the DESD Act.

CONCLUSION

[17] The appeal is dismissed.

Shirley Netten
Member, Appeal Division