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

Citation: *G. W. v. Minister of Employment and Social Development*, 2018 SST 171

Tribunal File Number: AD-16-777

BETWEEN:

G. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jennifer Cleversey-Moffitt

DATE OF DECISION: February 18, 2018

Canada

DECISION AND REASONS

OVERVIEW

[1] On May 12, 2016, the General Division of the Social Security Tribunal of Canada determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable as the Appellant did not have a "severe disability within the meaning of the CPP" before his minimum qualifying period (MQP) date of December 31, 2013. The Appellant filed an application for leave to appeal with the Tribunal's Appeal Division on June 2, 2016. Leave to appeal was granted on May 2, 2017.

[2] The Appellant argues that certain medical reports were omitted from the General Division's decision and that this resulted in the decision being based on an erroneous finding of fact. Leave to appeal was granted on the basis that the appeal had a reasonable chance of success because the General Division's decision included reference to every medical report except for three. One of those reports did comment on the Appellant's condition prior to the expiry of the MQP.

[3] The Respondent provided submissions in support of the General Division decision.

[4] As per paragraph 3(*a*) of the *Social Security Tribunal Regulations*, I see no need for a further hearing. In the interest of proceeding as informally and quickly as circumstances, fairness and natural justice permit, I have decided this appeal on the basis of the existing documentary record.

ISSUES

[5] When leave to appeal was granted, the parties were invited to make submissions. The Appellant provided new evidence as part of his submissions. This issue will be dealt with prior to the analysis of the issues on appeal.

[6] The issues with respect to the appeal before me are as follows:

a) What degree of deference should be given to the General Division?

b) Did the General Division base its decision on an erroneous finding of fact because it did not consider all of the evidence before it?

PRELIMINARY MATTER—NEW EVIDENCE

[7] In submissions provided by the Appellant, which the Tribunal received on May 15, 2017, a new document was filed. In response, the Respondent filed submissions, which were received by the Tribunal on May 24, 2017, arguing that new evidence cannot be accepted by the Tribunal's Appeal Division.

[8] I agree with the Respondent on this point. New evidence cannot be considered by the Appeal Division because the Appeal Division does not conduct *de novo* hearings. It is the General Division's role to review the evidence and make findings of fact. In *Canada (Attorney General) v. O'keefe*, 2016 FC 503, the Federal Court confirmed the following:

> Under sections 55 to 58 of the *DESDA*, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former [Pension Appeals Board], which was de novo, an appeal to the [Social Security Tribunal – Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58.

[9] Additionally, Roussel J. wrote in *Tracey v. Canada (Attorney General)*, 2015 FC 1300, that "[u]nder the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (Belo-Alves, at para 108)."

[10] This was further enunciated in *Marcia v. Canada (Attorney General)*, 2016 FC 1367, where it was determined that new evidence does not constitute a ground of appeal. As the Federal Court stated at paragraph 34,

> New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing de novo. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[11] The medical information submitted by the Appellant, which was received on May 15, 2017, is new evidence. Therefore, I cannot accept it and as such have not considered it.

ANALYSIS

Issue 1: What degree of deference should be given to the General Division?

[12] The Respondent submits that the degree of deference afforded to the General Division is determined by the wording of the enabling legislation and, in cases of alleged erroneous findings of fact, the Appeal Division should show deference to the General Division's findings of fact.

[13] The Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93, held that administrative tribunals should not use standards of review that were designed for appellate courts. Instead, one must look to the words used in the legislation.

[14] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are the following:

a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) 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.

[15] So, for the purposes of determining whether there is an error of law or a breach of natural justice, *Huruglica* would suggest the words show that Parliament intended no deference to be owed to the General Division. However, in contrast, as to questions of fact, the test contains specific language to guide the Appeal Division—"made in a perverse or capricious manner or without regard for the material before it." This would suggest that the Appeal Division is to intervene only when the error is quite severe or at odds with the record.

Issue 2: Did the General Division base its decision on an erroneous finding of fact because it did not consider all of the evidence before it?

[16] Leave to appeal was granted based on the potential that three pieces of medical evidence, although produced after the expiry of the MQP, spoke to the Appellant's condition prior to the MQP.

[17] In the Respondent's submissions, it is noted that the Federal Court of Appeal has succinctly explained that the General Division need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82, at paragraph 10). However, this presumption can be rebutted if the Appellant can establish that the evidence was of such importance that it should have been analyzed.

[18] In the General Division decision, more emphasis was given to medical evidence produced prior to the MQP; however, the General Division did reference medical reports and tests produced after the MQP. All reports and tests were cited except for three specific reports: the January 5, 2015, report from the Allin Clinic; the January 7, 2015, letter from Dr. Giddey; and the January 17, 2015, imaging of the Appellant's thoracic spine.

[19] The Appellant submits that these reports spoke to his condition prior to the MQP and should have been analyzed more closely. In particular, the January 5, 2015, report from the Allin Clinic noted that the pain started about "3 years ago," which indicates that the report spoke to the Appellant's health prior to the expiry of the MQP.

[20] The Respondent submits that the reports do not assist the Appellant is establishing disability on or before his MQP and in its submissions argued the following:

> The General Division decision makes clear that the member both analysed the objective medical evidence on record and was fully aware of the Appellant's testimony about his pain. The member took the Appellant's experience of his symptoms and functional limitations into consideration in his analysis of severity. In fact, the Appellant's pain is mentioned more than 10 times in the General Division decision. For that reason, the phrase in the Allin Clinic report noting that the Appellant described symptoms of pain dating back to before his MQP was not new information.

[21] In support of the General Division decision, the Respondent argues that, in this particular case, the relevant medical evidence that spoke to the Appellant's condition prior to the expiry of the MQP was conducted appropriately. The Respondent notes:

> The General Division noted that the evidence did not support a severe disability and that there was evidence on file of residual work capacity both in the medical evidence and in the Appellant's own testimony respecting his functional limitations:
>
> > • Paragraph 45: Dr. Gigg, the Appellant's family physician, in an April 7, 2014 report, noted that the Appellant had no suggestion of radiculopathy in his back, that his MRIs did not show anything significant, and that his foot appeared fine;
> >
> > • Paragraph 46: Dr. Gigg, in an October 12, 2014 report, confirmed that he had nothing further to add, and that although the Appellant's symptoms had been extensively investigated there were no objective reasons to explain his symptoms;
> >
> > • Paragraph 47: An MRI report dated December 17, 2014, noted only minimal transiting nerve root compression;
> >
> > • Paragraph 48: Evidence of work capacity was found in the medical evidence, in that Dr. Gigg did not report that the Appellant was completely unable to perform any type of work, and instead reported that the Appellant subjectively complained about an inability to return to any form of work. The distinction was important to the member, as it illustrated that Dr. Gigg did not fully endorse a finding of complete disability from working; and
> >
> > • Paragraph 49: Further evidence of work capacity was found in the Appellant's testimony, in that the Appellant indicated that he could function for about an hour at a time before needing to stretch and relax for ten minutes.

[22] As was mentioned above, the presumption that the General Division did in fact consider all of the medical evidence before it can be rebutted. However, to rebut the presumption, the Appellant must establish that the evidence had such a probative value that the General Division member had to have mentioned it. And, in this case, that the medical evidence produced after the expiry of the MQP is relevant in determining the Appellant's condition prior to the expiry of the MQP.

[23] Much of the information provided in the January 5, 2015, report from the Allin Clinic, the January 7, 2015, letter from Dr. Giddey and the January 17, 2015, imaging of the Appellant's thoracic spine does reference the Appellant's condition after the expiry of the MQP. The only information provided with respect to the Appellant's condition prior to the expiry of the MQP was provided in the January 5, 2015, report, which noted that pain started about "3 years ago." In submissions from the Appellant, no particular argument was presented, nor was there an explanation as to the probative value of the evidence allegedly overlooked by the General Division.

[24] The Appellant's submissions on this point were received by the Tribunal on May 19, 2017, and stated, "These medical conditions cause great pain and discomfort 24/7 making daily living extremely difficult such as standing walking and sitting. I have no quality of life at this point and no further submissions at this time."

[25] The submissions failed to detail how the medical evidence that was allegedly not considered was of such a probative nature that it rebutted the presumption that the General Division has considered all of the evidence before it.

[26] I am not satisfied that the General Division failed to consider the January 5, 2015, report from the Allin Clinic, the January 7, 2015, letter from Dr. Giddey and the January 17, 2015, imaging of the Appellant's thoracic spine, although the member may not have expressly referred to them. Additionally, the Appeal Division is to intervene only when the error is quite severe or at odds with the record. Without establishing that the evidence was of such probative value that the General Division member ought to have analyzed it, I am not satisfied that the presumption has been rebutted.

CONCLUSION

[27] Given the above, the appeal is dismissed.

Jennifer Cleversey-Moffitt
Member, Appeal Division