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

Citation: *Minister of Employment and Social Development v. R. M.*, 2018 SST 388

Tribunal File Number: AD-17-512

BETWEEN:

Minister of Employment and Social Development

Appellant

and

R. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 6, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] R. M. (Claimant) worked for over 25 years as an executive assistant. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by anxiety and depression. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to the Social Security Tribunal. The Tribunal's General Division allowed the appeal and decided that the Claimant was disabled in April 2013. The Minister appeals this decision. The appeal is allowed because the General Division based its decision on an erroneous finding of fact that the family physician supported the Claimant's decision to refuse to take antidepressant medication.

ISSUES

[3] Did the General Division base its decision on an erroneous finding of fact that Dr. Barnes supported the Claimant's decision to refuse to take antidepressant medication?

[4] Did the General Division err in law by not considering the legal principles from the *Inclima*[1] decision?

ANALYSIS

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides only three grounds of appeal: that the General Division failed to observe a principle 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. The Minister's arguments on this appeal must be considered in this context.

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

Issue 1: Erroneous finding of fact

[6] In order to succeed on the basis that the General Division based its decision on an erroneous finding of fact, the Minister must establish three things: that the finding of fact in question was erroneous; that it was made perversely, capriciously or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.

[7] The General Division found as fact the following:

> The [Claimant] resisted the physician's suggestions for antidepressant medication. It appears that her family physician was supportive of that position to not [*sic*] take the risk, however small, to develop seizures due to the drug interactions. Despite the psychiatrist also suggesting medication, the Tribunal finds that the [Claimant] had a real fear of the effects any medication would have on her seizures. The Tribunal accepts the [Claimant's] explanation, supported by her Family Physician to not [*sic*] take the prescribed medication. [2]

The Minister argues that the General Division's finding of fact that the family physician supported the Claimant's refusal to take antidepressant medication was erroneous. In June 2013, the family physician wrote that he had not initiated any medication at that time "because of underlying seizure disorder" and that a psychiatric opinion would "be very beneficial in supporting her absence from work."[3] He later noted that the Claimant was reluctant to take medication, seizure disorder and "await psych" [4]. Also in November 2013 this doctor completed forms for the Claimant's healthcare insurer where he indicated that no treatment was ongoing and that a psychiatric consultation was pending.[5]

[8] When this evidence is read as a whole, it does not support the finding of fact made by the General Division that the family physician supported the Claimant's refusal to try antidepressant medication because of her underlying seizure disorder. At best, this doctor did not prescribe medication in June 2013 or November 2013 because a psychiatric referral was pending and he wanted to know what the specialist thought before initiating this treatment.

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[2] General Division decision, at paragraph 48
[3] Dr. Barnes' report dated June 14, 2013, GD1-108
[4] Dr. Barnes' clinical notes dated November 2013, GD1-35
[5] GD1-116

[9] This finding of fact was made without regard for all of the material that was before the General Division, including that a psychiatric consultation was pending.

[10] The decision was based on this erroneous finding of fact. The decision states, "The Tribunal accepts the [Claimant's] explanation, supported by her family physician not to take the prescribed medication."[6] This may be an error under the DESD Act.[7] The appeal must be allowed.

[11] There was no evidence before the General Division regarding any potential impact of taking an antidepressant on the Claimant's underlying seizure disorder or the treatment of this disorder. It is therefore impossible to determine whether the Claimant's refusal to try antidepressant medication was objectively reasonable or not. However, this is a different issue from whether the General Division's error of stating that the family physician supported her decision.

[12] The Minister also contends that the requirement to follow treatment recommendations includes an obligation for the Claimant to inform herself about medication proposed by her doctors. It referred to Dr. Okoronkwo's note[8] that the Claimant had not read information provided about a medication. However, this is the only statement in the written record that refers to an instance in which the Claimant did not read or consider a proposed treatment. It is not conclusive evidence that the Claimant never informed herself about this; it simply describes one visit when she had not read the material. The General Division decision does not mention this evidence and did not make any finding of fact with respect to it. As a result, I am not persuaded that the Claimant's failure to read about one medication at one doctor's visit establishes that she refused to follow a treatment recommendation.

[13] The Minister's representative also argues that the General Division erred because the psychiatrist consistently recommended that the Claimant take medication while he was treating her. The General Division made no erroneous finding of fact in this regard. The General Division

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[6] General Division decision, at paragraph 48
[7] DESD Act at s. 58(1)(*c*)
[8] Clinical note dated February 2014

summarized the psychiatrist's evidence—including that the Claimant resisted his recommendation to take antidepressants[9]—and considered this in its analysis of the evidence.[10]

Issue 2: Error in law

[14] The Minister also contends that the General Division erred in law. The Federal Court of Appeal decision in *Inclima* teaches that where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of their health condition. This is correctly stated in the decision.[11] The General Division, after weighing the evidence, determined that the Claimant did not have any capacity to work, so this legal principle did not apply.[12] This is an error in law. *Inclima* does not stand for the proposition that a claimant must demonstrate that their efforts to obtain and maintain work failed due to their disability only if they have capacity to work, but if there is some evidence that this capacity exists. The General Division decision does not refer to any evidence of work capacity. Consequently the General Division erred in law because it did not apply the correct legal principle to the facts before it.

[15] The Minister contends that the Claimant's statement on the disability pension application form that she was willing to undergo a rehabilitation assessment was evidence of work capacity. It is not for the Appeal Division to reweigh the evidence that was before the General Division.[13] The Minister's invitation to reweigh this evidence and to conclude that the statement on the application was evidence of work capacity so that the legal principles from *Inclima* should be applied in this case has no merit.

[16] The Minister also argues that the psychiatrist never stated that the Claimant could not work. However, the Claimant was not working when he treated her. In addition, his role was not to assess her capacity to work. Therefore, the fact that he made no statement regarding her capacity to work cannot be relied on by either party with regard to this appeal.

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[9] General Division decision at paragraphs 23, 24, and 26
[10] *Ibid*. at paragraph 48
[11] *Ibid*. at paragraph 44
[12] *Ibid*. at paragraph 45
[13] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

CONCLUSION

[17] The appeal is allowed because the General Division based its decision on an erroneous finding of fact under the DESD Act and it erred in law.

[18] The DESD Act[14] sets out what remedies the Appeal Division can give on an appeal. In this case, evidence will have to be weighed. This is at the heart of the General Division's mandate. The appeal is therefore referred back to the General Division for reconsideration. To avoid any possibility of an apprehension of bias, it should be reconsidered by a different General Division member.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	April 3, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. M., Respondent Kathleen Erin Cullin, Counsel for the Respondent Nathalie Pruneau, Representative for the Appellant

[14] DESD Act at s. 59