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

Citation: *D. P. v. Minister of Employment and Social Development*, 2018 SST 487

Tribunal File Number: AD-17-292

BETWEEN:

D. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: May 2, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] D. P. (Claimant) completed high school and some college courses before she joined the workforce. She last worked as a supervisor at a casino. She applied for a Canada Pension Plan disability pension and claimed that she was disabled by physical and mental conditions caused by a car accident. The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to this Tribunal. The Tribunal's General Division dismissed her appeal, finding that her disability was not severe because she had not attempted alternate work. The Claimant's appeal of the General Division decision is allowed because the decision was based on erroneous findings of fact made without regard for all of the material that was before the General Division and an error in law regarding the Claimant's compliance with treatment.

ISSUES

[3] Did the General Division err in law by failing to consider the Claimant's financial circumstances when deciding whether she was unreasonably non-compliant with medical treatments?

[4] Did the General Division base its decision on any of the following erroneous findings of fact made without regard for the material before it:

a) that the Claimant did not provide any information regarding her injuries, limitations, etc. and relied on her family physician to do so, and that she provided no details regarding the car accident;

b) that the Claimant was not credible;

c) that the assessor stated that the information given to him was incomplete because the Claimant declined to confirm certain things;

d) that the Claimant only attempted to return to work once; or

e) That the Claimant's completion of college courses demonstrated work capacity.

ANALYSIS

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that can be considered. They are 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.[1] The grounds of appeal are examined in this context below.

Issue 1: Did the General Division err in law?

[6] The Federal Court of Appeal teaches that when deciding whether a disability pension claimant is disabled the decision maker must consider whether their refusal to undergo treatment is unreasonable and what impact that refusal might have on the claimant's disability status if the refusal is unreasonable.[2] In this case, the Claimant underwent a number of different treatments after the car accident, including physiotherapy, psychological treatment, and occupational therapy, in addition to academic retraining. She stopped each of these when funding from her insurer ended. The General Division stated:

> In order to meet the definition of severe and prolonged, a claimant must follow her physicians recommended treatment recommendations (*sic*). A claimant who unreasonably refuses to undergo recommended treatment, due to her own research or financial hardship which is not relevant, may not be eligible to receive a disability pension. The Tribunal determined that the appellant is not compliant with recommended treatment and also lacks credibility.[3]

The General Division is correct when it states that a claimant who unreasonably refuses to undergo recommended treatment may not be eligible to receive a disability pension. However, it

[1] DESD Act, s. 58(1)
[2] *Lalonde v. Canada (Pension Plan)*, [2002] F.C.J. No. 809
[3] General Division decision, paragraph 44

is an error in law to state that a claimant's financial hardship is not relevant to the determination of whether such a refusal is unreasonable.

[7] The Federal Court of Appeal teaches that the economic conditions in the area where a claimant would look for work must not be considered.[4] This principle applies to a claimant's capacity to find work, not to their obligation to follow treatment recommendations.

[8] There is no binding court decision regarding whether a claimant's financial circumstances are a relevant consideration when deciding whether a refusal to undergo treatment is reasonable. However, since the Federal Court of Appeal teaches that a real-world approach is to be used when considering whether a claimant is disabled,[5] this would include their ability to pay for ongoing or recommended treatment. It is unreasonable to require a claimant to exhaust all of their financial resources so that all treatment recommendations can be followed, especially when numerous different treatments have been initiated by an insurer and they are likely to continue for a long time.

[9] The General Division therefore erred in law when it found that the claimant's ability to pay for continued treatment was irrelevant to the determination of her compliance with treatment. The appeal must therefore be allowed on this basis.

Issue 2: Did the General Division base its decision on an erroneous finding of fact?

[10] One ground of appeal in the DESD Act is that the General Division 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.[6] In order for an appeal to succeed on this basis, three criteria must be satisfied. The finding of fact must be erroneous, it must have been made in a perverse or capricious manner or without regard for the material before the General Division, and the decision must be based on this finding of fact.[7]

[11] The DESD Act does not define the terms "perverse" or "capricious." However, guidance is given by court decisions that have considered the *Federal Courts Act*, which has the same

---

[4] *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47
[5] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[6] DESD Act, s. 58(1)(*c*)
[7] *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319

wording. In that context, perverse has been found to mean "willfully going contrary to the evidence." Capricious has been defined as being "so irregular as to appear to be ungoverned by law."[8] Finally, a finding of fact for which there is no evidence before the Tribunal will be set aside because it has been made without regard for the material before the Tribunal. I accept that these definitions apply when considering the DESD Act.

a) The Claimant's compliance with treatment

[12] The Claimant contends that the General Division's conclusion that the Claimant was non-compliant with treatment was erroneous because she underwent recommend treatments. She stopped only when insurance funding was no longer available and she did not have money to continue treatment. I agree.

[13] The General Division found as fact that the Claimant was non-compliant with treatment because she failed to continue with recommended treatment due to her financial circumstances. When funds were available to pay for treatment, the Claimant attended. None of the medical practitioners suggested that she was not compliant. This finding of fact that the Claimant was not compliant with treatment was made without regard for the medical evidence that confirmed the Claimant had undergone numerous treatments over a long period of time. The decision was based, at least in part, on this finding of fact. Therefore it is an error under the DESD Act, and the appeal must be allowed.

b) The Claimant's failure to provide evidence regarding her accident, injuries or limitations

[14] The General Division decision states that the Claimant did not provide any information about her injuries, limitations, medical conditions or activities of daily living and relied on her family doctor to do so.[9] It relied on this finding of fact when it decided that she lacked credibility. However, the Claimant filed detailed written submissions with the Tribunal that include these details.[10] The General Division does not refer to this document in its summary of the evidence or when analyzing the evidence to reach its decision. While a decision need not

[8] *Ibid*.
[9] General Division decision, paragraphs 9 and 43
[10] GD6

refer to each and every piece of evidence that was before it,[11] the statement in this decision that the Claimant failed to provide evidence of her injuries, limitations, etc. is erroneous and contrary to the evidence. This finding of fact was clearly made without regard for the material that was before the General Division. The decision was based, in part, on this finding of fact. Therefore, the General Division made an error under the DESD Act upon which the appeal must be allowed.

c) The Claimant's credibility

[15] The General Division found that the Claimant lacked credibility. This was based on its finding of fact that she had not provided evidence regarding the car accident, her injuries, etc. and her failure to continue with recommended treatment. The General Division is entitled to deference regarding findings of credibility because it is the trier of fact. However, this credibility finding was based in part on erroneous findings of fact, so it is also erroneous under the DESD Act, and the appeal must also be allowed on this basis.

d) The information before the assessor was incomplete

[16] The General Division decision states that Dr. Zakzannis repeatedly stated that information about the Claimant's activities of daily living may be incomplete because she refused to confirm whether all aspects of these activities were covered in the examination.[12] The Claimant argues that this is also an erroneous finding of fact. However, on six occasions, Dr. Zakzannis wrote that the Claimant declined to confirm certain things, including whether she had any other symptoms and whether all aspects of activities of daily living or her personal history had been covered. There was a solid evidentiary basis for this finding of fact. It was not erroneous.

e) The Claimant's attempts to return to work

[17] The decision states that the Claimant worked as a supervisor at a casino from May 17, 2005, until January 2, 2014.[13] The General Division also finds that she attempted to return to her

[11] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[12] General Division decision, paragraph 17
[13] General Division decision, paragraph 3

job at the casino after the car accident but was unable to perform her duties successfully[14] However, the Claimant's evidence was that she attempted to return to work in 2011, 2012, 2013 and 2014. The decision fails to refer to these additional attempts to return to work. Therefore, the General Division's finding of fact that she continued to work until 2014 was erroneous. It was made without consideration for all of the material that was before the Tribunal. The General Division concluded, based in part on this evidence, that it could not determine that the Claimant was unsuccessful in obtaining or maintaining employment by reason of her health condition.[15] The decision was therefore based on this erroneous finding of fact. The appeal must be allowed on this basis also.

f) The Claimant's attendance at college

[18] In its decision, the General Division states, "[the Claimant] has returned to school since 2012 and was successful in completing several courses with an 80% average."[16] The decision also explains that she received accommodations for exams.[17] The General Division's statement that she attended college and completed the courses is not erroneous as it is based on the evidence.

[19] The General Division concluded, based on this evidence, that the Claimant's attendance at college demonstrates her capacity to successfully upgrade her skills,[18] and it is reasonable to assume that, if she had continued, she would have attained the capacity to be able to find alternate suitable work.[19] The General Division, as the trier of fact, is entitled to draw reasonable conclusions from the evidence presented to it. These conclusive findings of fact are reasonable based on the General Division's examination of the evidence that was before it. The appeal fails on this basis.

---

[14] *Ibid*., paragraph 54
[15] *Ibid*.
[16] *Ibid*., paragraph 45
[17] *Ibid*., paragraph 38
[18] *Ibid*., paragraph 47
[19] *Ibid*., paragraph 53

CONCLUSION

[20] The appeal is allowed.

[21] The DESD Act sets out what remedies the Appeal Division can give.[20] In this case, all of the evidence must be weighed, and the Claimant's credibility determined. This is at the heart of the General Division's mandate.

[22] The matter is therefore referred back to the General Division for reconsideration.

[23] To avoid any possibility of an apprehension of bias, the matter should be referred to a different General Division member.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	Written questions and answers
SUBMISSIONS:	Lucianna Saplywy, Counsel for the Appellant Jean-Francois Cham, Counsel for the Respondent

[20] DESD Act, s. 59(1)