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

Citation: *Minister of Employment and Social Development v. W. W.*, 2018 SST 505

Tribunal File Number: AD-17-606

BETWEEN:

Minister of Employment and Social Development

Appellant

and

W. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: May 8, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] W. W. (Claimant) completed college training in administration. She last worked in a retail setting as a merchandiser, then briefly as an auditor before she stopped working in December 2013. She was diagnosed with fibromyalgia and degenerative discs in her spine. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by these conditions. The Minister of Employment and Social Development (Minister) refused the application.

[3] The Claimant appealed this decision to this Tribunal. The Tribunal's General Division allowed the appeal and decided that the Claimant was disabled in June 2013 by fibromyalgia and its associated symptoms. The Minister appeals this decision, arguing that the General Division made errors in law and based its decision on erroneous findings of fact. The appeal is allowed because the General Division made these errors. The matter is referred back to the General Division because the evidentiary record is incomplete.

ISSUES

[4] Did the General Division err in law in one of the following ways?

a) By misunderstanding the proration provisions of the *Canada Pension Plan*;

b) By failing to apply relevant legal principles from court decisions; or

c) By finding that the Claimant continued to work for a benevolent employer.

[5] Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it in one of the following ways?

a) By finding that Dr. Collins was trying to manage the Claimant's expectations, not comment on her capacity to work; or

b) By finding that there was no evidence of work capacity.

[6] Did the General Division fail to observe a principle of natural justice by failing to provide sufficient reasons for its decision?

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three narrow 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 Minister's arguments must be examined in this context.

Issue 1: Errors in law

a) Proration

[8] In order to qualify for a disability pension, a claimant must have made contributions to the Canada Pension Plan for a minimum period of time, and have earnings greater than a minimum amount (Year's Basic Exemption). There is an exception to this: the Year's Basic Exemption can be prorated for the year in which the claimant's contributory period ends by reason of disability.[2] This allows a claimant with insufficient contributions for a year to still qualify for the disability pension if their contributions for the part of the year prior to their becoming disabled meet the proportionate amount of the Year's Basic Exemption.

[1] DESD Act, s. 58(1)
[2] *Canada Pension Plan*, ss. 19, 44(2.1), and 52(3)

[9] In this case, the Claimant had sufficient contributions for a minimum qualifying period (MQP) of December 31, 2012. She also made some contributions in 2013, but they were below the Year's Basic Exemption. However, if the Claimant became disabled during 2013, her contributions could be prorated such that she could still qualify for the disability pension. Therefore, to succeed in her disability pension claim, the Claimant had to establish that she was disabled on or before December 31, 2012, or that she became disabled in 2013, in which case her contributions could be prorated.

[10] The General Division decision correctly states that the Claimant's MQP was December 31, 2012.[3] It also states that the Claimant's contributions could be prorated if she became disabled between January 1, 2013, and June 30, 2013.[4] It made no error in these statements.

[11] However, the General Division concluded that the Claimant had a severe and prolonged disability in June 2013 when she was first assessed by Dr. Collins,[5] and that her earnings for that year could be prorated. This was an error. There was no disabling event in 2013. The Claimant's examination by a doctor did not establish that a disabling event occurred at that time. The Claimant testified that she was diagnosed with fibromyalgia a number of years before that, and that her symptoms worsened after she began taking prednisone medication. She began taking this medication prior to 2013, although the evidence does not clearly show when this treatment began. There was no evidence that proved that the Claimant's contribution period ended in 2013 because she became disabled. Therefore, the General Division erred in law when it concluded that her income could be prorated.

[12] The appeal must be allowed on this basis.

b) Relevant legal principles

[13] The Minister also contends that the General Division erred in law because it failed to consider a number of legal principles set out in court decisions.

---

[3] General Division decision, para. 7
[4] *Ibid*.
[5] *Ibid*., para. 51

Legal principle from the *Inclima*[6] decision

[14] In *Inclima*, the Federal Court of Appeal teaches that where there is evidence of work capacity, a claimant must show that efforts to obtain and maintain employment were unsuccessful because of their health condition. The General Division decision states that any efforts by the Claimant to comply with this legal requirement would have been fruitless, and excused her from it.[7] However, there was evidence that the Claimant had some capacity to work. She continued to work part time until the end of December 2013. The General Division therefore made an error in law when it failed to consider whether her efforts to maintain her employment after the MQP were unsuccessful because of her health.

[15] For this reason as well, the appeal must be allowed.

Legal principle from the *Villani*[8] decision

[16] In *Villani*, the Federal Court of Appeal teaches that when deciding whether a claimant is disabled, the decision maker must consider their personal circumstances, including age, education, language skills, and work and life experience. The General Division did so. The decision states that the Claimant was between 52 and 53 years old between the MQP and the prorated MQP, and that she had broad work experience.[9] The General Division considered these factors. The Minister argues that some of these factors would not bolster the Claimant's claim, including that she had a post-secondary education and broad work experience. This may be true. However, the Minister's disagreement with how the General Division weighed the evidence related to these factors does not point to an error of law.

Legal principle from the *Klabouch*[10] decision

[17] In *Klabouch*, the Federal Court of Appeal instructs that a person is not disabled if they have a diagnosis of a condition; rather, they are disabled if their health condition prevents them from earning a living at a substantially gainful occupation, which may be a job different from

---

[6] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[7] General Division decision, para. 46
[8] *Villani v. Canada (Attorney General)*, 2001 FCA 248
[9] General Division decision, para. 47
[10] *Klabouch v. Canada (Social Development)*, 2008 FCA 33

what they last did.[11] This is correctly set out in the decision.[12] The General Division then accepted the Claimant's evidence about her limitations, and concluded that she could no longer perform her work as a merchandiser.[13] The decision does not conclude that the Claimant was unable to perform any substantially gainful occupation. This is also an error of law and a basis upon which the appeal must be allowed.

c) The Claimant continued to work because of the benevolence of her employer

[18] The Federal Court of Appeal teaches that if a claimant works for a benevolent employer, this may not preclude them from being found disabled. The term "benevolent employer" is not defined in the *Canada Pension Plan*. However, the Federal Court of Appeal teaches that the following should be considered when deciding whether an employer is benevolent:[14]

a) Have the job conditions been varied?

b) Have performance or other job expectations been modified?

c) Is performance, output, or product expected from the employee less than what is expected from other employees?

d) How does the employee's remuneration compare to that of other employees?

[19] The decision states that the Claimant's employer accommodated her limitations by reducing her hours and shifting her job duties. It then states that the Claimant was able to continue to work only because of the benevolence of her former employer and the timing of the job duties that were available to her. The General Division failed to consider the totality of the Claimant's work environment, including productivity expectations, and her remuneration in coming to this conclusion. This finding of fact that the Claimant was able to continue to work only because of the benevolence of the employer was erroneous because the General Division failed to consider all of the relevant factors before reaching this conclusion. This is also an error in law.

---

[11] *Klabouch v. Canada (Social Development)*, 2008 FCA 33
[12] General Division decision, para. 40
[13] *Ibid*., para. 41
[14] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

Issue 2: Erroneous Findings of Fact

[20] One ground of appeal under the DESD Act is that the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[15] To succeed on this ground, the Minister must show three things: that the finding of fact was erroneous, that it was made perversely, capriciously, or without regard for the material, and that the decision was based on this finding of fact. The DESD Act does not define the term "perverse." However, guidance is given by court decisions that consider the *Federal Courts Act*, which has the same wording. In that context, "perverse" has been found to mean "willfully going contrary to the evidence." I accept this definition in the context of the DESD Act. The Minister's arguments in this regard are examined below.

a) Dr. Collins' opinion

[21] On March 26, 2014, Dr. Collins wrote, "I discourage patients with Fibromyalgia to go on disability but she was hoping to apply for short term. I pointed out that Fibromyalgia is completely subjective so often difficult for disability to be awarded but filled out her papers anyways [*sic*]. Ideally she should transition to a less physically demanding job."[16] The General Division considered this evidence and concluded that it did not show that Dr. Collins felt the Claimant was capable of gainful employment, but that he felt she was unlikely to be awarded a disability pension, and that this statement was an attempt to manage her expectations.[17] The Minister argues that this finding of fact is erroneous because it is at odds with the plain reading of the statement.

[22] I am also satisfied that this finding of fact—that Dr. Collins' statement was not a statement of work capacity but an attempt to manage expectations—was erroneous. It was made perversely. Dr. Collins wrote a number of reports that were before the General Division. He never stated that the Claimant was not able to work. In the March 2014 letter, his opinion is clear on its face: the Claimant should try a less physically difficult job. The decision was based, at

---

[15] DESD Act, s. 58(1)(*c*)
[16] GD2-93
[17] General Division decision, para. 44

least in part, on the erroneous finding of fact. Therefore, the appeal must be allowed on this basis as well.

b) Evidence of work capacity

[23] The General Division decision states that there was no objective evidence before the MQP that demonstrated that the Claimant could not work.18 It also states that there was no evidence that the Claimant was functionally affected by fibromyalgia or back pain before the MQP. It then relies on the Claimant's testimony to find that she had no capacity to work as at June 2013, despite evidence that she worked part time until December 2013. The Claimant's testimony is an evidentiary basis for this finding of fact. However, the General Division failed to analyze the evidence that the Claimant continued to work until December 2013. Therefore, its finding of fact that the Claimant had no capacity to work in June 2013 was erroneous. It was made without regard for all of the evidence that was before it. The decision was based on this erroneous finding of fact. The appeal must be allowed on this basis.

[24] The Claimant's statement that she was willing to undergo a vocational assessment is not evidence of work capacity or lack thereof. It is evidence of a preparedness to undergo an examination.

Issue 3: Failure to Provide Sufficient Reasons

[25] The Supreme Court of Canada teaches that a decision maker must provide reasons for a decision. The reasons must be sufficient for the parties to understand why the decision was made, and must satisfy a reviewing body that it grappled with the substantive issues necessary to dispose of the matter.[19] I am persuaded that the General Division's reasons for its decision in this case are insufficient. The General Division failed to grapple with the live issues before it, including whether the Claimant's employer was benevolent, and whether the Claimant's continued work after the MQP was a substantially gainful occupation.

[26] In addition, there was evidence, including medical opinions, that the Claimant had some capacity to work at the relevant time, and that she continued to work until December 2013. The

[18] General Division decision, para. 38
[19] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62

General Division did not clearly explain how this evidence was weighed or why it was given less weight than evidence that suggested that the Claimant was disabled.

[27] The failure to provide sufficient reasons is a breach of natural justice. The appeal must therefore be allowed.

CONCLUSION

[28] The appeal is allowed.

[29] The DESD Act sets out what remedies the Appeal Division can give.[20] I have reviewed the documents filed and listened to the recording of the General Division hearing. There is very little evidence regarding the Claimant's condition at the MQP. The Tribunal record is not complete. It is therefore appropriate that the appeal be referred back to the General Division for reconsideration.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	April 27, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	W. W., Respondent Ashley Silcock, Representative for the Respondent Laura Dalloo, Counsel for the Appellant

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