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

Citation: *T. C. v. Minister of Employment and Social Development*, 2018 SST 698

Tribunal File Number: AD-17-216

BETWEEN:

T. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 26, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, T. C., was off work between April 2014 and September 2014 due to illness. She returned to the workforce as a sales clerk and as a data entry operator, but on experiencing pain, as well as other symptoms, left again after three weeks. In early 2016, an internist and a rheumatologist diagnosed her as having fibromyalgia with psychological symptoms. A nurse practitioner subsequently diagnosed her as also having chronic fatigue syndrome.

[3] In November 2014, the Appellant applied for a Canada Pension Plan disability pension, but the Respondent, the Minister of Employment and Social Development, denied her application. She appealed the decision to the General Division but it also determined that she was ineligible for a Canada Pension Plan disability pension, as it found that her disability had not been "severe" by the end of her minimum qualifying period on December 31, 2016. The minimum qualifying period is the date by which an applicant is required to be disabled to qualify for a Canada Pension Plan disability pension.

[4] The Appellant sought leave to appeal the General Division's decision, primarily on the ground that the General Division had erred in law. I granted leave to appeal on the basis of another ground, namely, that the General Division may have misapprehended or misunderstood the evidence or may have based its decision on an erroneous finding of fact that it made without regard for the evidence before it. In this appeal, I must determine whether the General Division either misapprehended the evidence or based its decision on an erroneous finding of fact that it made without regard for the evidence before it.

ISSUES

[5] Based on the parties' submissions, the issues before me are as follows:

(a) Did the General Division either misapprehend the evidence or 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 when it found that the Appellant had not received any advice against working?

(b) Did the General Division err by requiring "proof of a definite statement from a medical professional that T. C. must refrain from working"[1] in order to find that she had a severe disability?

(c) Did the General Division fail to consider whether the Appellant's disability was prolonged?

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[7] The Appellant submits that the General Division erred under ss. 58(1)(*b*) and (*c*) of the DESDA.

[1] Submissions of the Appellant, at AD4-6.

Issue 1: Did the General Division misapprehend the evidence or base its decision on an erroneous finding of fact when it found that the Appellant had not received any advice against working?

[8] As I noted in the leave decision, in the proceedings before the General Division, the Appellant testified that Heather Livingston, a nurse practitioner with Integrated Chronic Care Service (ICCS), had advised the Appellant against working because it would exacerbate her symptoms. The General Division found that the ICCS reports did not confirm that advice and therefore found that the Appellant remained capable of working.

[9] The October 25, 2016 ICCS report,[2] prepared close to the end of the Appellant's minimum qualifying period, reads as follows:

> [The Appellant] meets the American College of Rheumatology criteria for the diagnoses [*sic*] of Fibromyalgia. She reported 19 of the 19 widespread pain areas and reported fatigue and waking unrefreshed as a severe pervasive continuing life disturbing problem. Cognitive symptoms were a moderate considerable problem for [the Appellant]. She had 14 of the 18 tender points for the diagnosis of fibromyalgia.
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> . . .
>
> [The Appellant] has been off work since April 2014. **At this time she remains unable to work due to these conditions**. She reports no change in her symptoms which affects her functional ability. Her conditions are chronic and disabling. [My emphasis]

[10] The Appellant submits that the General Division member made two significant errors:

(1) She misinterpreted the Livingston report; and
(2) She required a definitive statement from a medical professional that the Appellant was to refrain from working to make a finding that the Appellant's disability was severe.

[11] The Appellant contends that her testimony (that the nurse practitioner advised her to refrain from working as it would exacerbate her symptoms) is consistent with Ms. Livingston's opinion that "[the Appellant] remains unable to work due to these conditions." She claims that this opinion clearly implies that the Appellant should not work. She argues that, after all, it is

[2] Integrated Chronic Care Service report, dated October 25, 2016, at GD8-2 to 3.

inconceivable that a medical professional would hold the opinion that a patient is unable to work but should work.

[12] In this regard, the Appellant further argues that the General Division erred by requiring that she produce evidence that a practitioner had recommended outright that she not work, in order to be found severely disabled under the *Canada Pension Plan*. The Appellant submits that this would otherwise place an overly high burden on the Appellant, when the test, she claims, is whether she has an inability to tolerate work in a real-world context due to the disability. She claims that it is sufficient for her to demonstrate intolerance for engaging in substantially gainful employment due to her disability. She relies on *Villani*[3] where the Federal Court of Appeal held that the words contained within s. 42(2)(*a*)(i) of the *Canada Pension Plan*, which defines a severe disability, must be construed in a "large and liberal manner" and that any ambiguity flowing from the words be resolved in favour of a claimant, like her. She claims that there has been some precedence for this approach.[4]

[13] The Respondent submits that the General Division properly interpreted all of the relevant evidence and considered the appropriate test to apply to qualify for disability benefits. The Respondent argues that the Appellant has failed to identify any specific findings of fact that could be considered to be made "in a perverse or capricious manner or without regard to the material before" the General Division, contrary to paragraph 58(1)(*c*) of the DEDSA. The Respondent claims that the General Division properly considered the ICCS intake assessment report,[5] as well as the occupational therapy report, dated September 28, 2016.[6] The Respondent argues that, although the General Division may not have directly addressed Ms. Livingston's opinion that the Appellant "remains unable to work due to these conditions," the General Division determined that the Appellant retained capacity to work on the basis of other evidence in the record before it.

[14] The Respondent asserts that the independent medical advice "does not say the Appellant's condition prevents her from securing part-time sedentary work suitable to her conditions" or, in other words, the Livingston report could also be interpreted to mean simply

[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[4] *B.B. v. Minister of Employment and Social Development*, 2016 CanLII 106369 (SST).
[5] Intake Assessment Report dated August 29, 2016, at GD9-48 to 50.
[6] ICCS Occupational Therapy Report, dated September 28, 2016, at GD9-30.

that, while the Appellant was unable to return to her usual occupation, she could have performed other work that was suitable for her.

[15] The Respondent suggests that it would be an error to interpret the Livingston report in isolation, without regard to the preponderance of the evidence. In this regard, the Respondent contends that the General Division's conclusions were based on a preponderance of the evidence before it. The Respondent argues that, overall, the General Division record provides little basis to conclude from the ICCS reports or other medical evidence that the Appellant was incapable of working in a suitable job before the end of her minimum qualifying period on December 31, 2016. The Respondent also cites the Appellant's testimony before the General Division.[7]

[16] I agree with the Respondent that Ms. Livingstone's statement that the Appellant "remains unable to work due to [her] conditions" was not necessarily dispositive or conclusive of the outcome, because the General Division was required to consider all of the evidence before it. It had to come to a determination regarding the severity of the Appellant's disability based on a preponderance of the evidence. The General Division may have considered all of the evidence, but it is unclear from its decision. After all, the General Division did not acknowledge Ms. Livingston's statement and did not decide whether the statement represented the Appellant's perception of her own capacity, or whether it represented Ms. Livingston's opinion.

[17] The General Division was required to address any conflicting evidence that would seem to support a finding that the Appellant was severely disabled. The General Division should have squarely addressed this conflicting evidence, without leaving me to guess or assume that the General Division had concluded from Ms. Livingstone's statement that "at this time [the Appellant] remains unable to work due to these conditions" necessarily meant that, while the Appellant could not work at her usual occupation and hours, she retained the capacity for sedentary, part-time or alternate duties. Neither the ICCS Assessment Report nor the ICCS Occupational Therapy Report, dated August 29 and September 28, 2016, respectively, addressed the Appellant's capacity regularly of pursuing any substantially gainful occupation. The reports documented the Appellant's complaints, limitations, diagnoses and treatment history but did not

[7] Appellant's submissions, time stamp from approximately 1:34 to 1:41 of audio recording of the General Division hearing on January 23, 2017.

indicate whether the Appellant exhibited any capacity regularly of pursuing any substantially gainful occupation.

[18] Similarly, other 2016 narrative reports and records fell short of addressing the capacity issue:

- The rheumatologist's consultation report dated February 24, 2016,[8] provided a diagnosis of fibromyalgia "with a lot of psychological symptoms." The rheumatologist was of the opinion that the Appellant might benefit from Cymbalta or other treatment based on antidepressant medication.

- The internist's consultation report dated March 2, 2016,[9] listed diagnoses and medications currently being taken by the Appellant. He suggested that the Appellant should continue with psychotherapy, start on antidepressants and be referred to fibromyalgia clinic.

- In the internist's referral of April 8, 2016,[10] to the Integrated Chronic Care Service, the internist noted that the Appellant had been having a lot of symptoms and was in need of some intervention and guidance.

- The rheumatologist's letter dated September 22, 2016,[11] indicated that she had seen the Appellant on only two occasions. The rheumatologist confirmed that she had diagnosed the Appellant with fibromyalgia and had referred her back to her primary care provider for treatment. The rheumatologist was unable to comment on the Appellant's ability to work.

- Ms. Livingston's letter dated October 31, 2016,[12] stated that the Appellant had undergone a multidisciplinary assessment on October 26, 2016. Recommendations included dietary assessment and seeing an occupational therapist to pace her

[8] Rheumatologist's consultation report dated February 24, 2016, at GD3-2 and GD9-62.
[9] Internist's report dated March 2, 2016, at GD3-3 to 4 and GD9-63 to 64.
[10] Internist's referral dated April 8, 2016, at GD9-61.
[11] Rheumatologist's letter dated September 22, 2016, at GD5-2.
[12] Ms. Livingston's letter dated October 31, 2016, at GD9-4.

activities. The Appellant would be trying Cipralex and following up with the nurse practitioner to determine its effect.

- The nurse practitioner's progress note dated November 28, 2016,[13] stated that the Appellant was reporting that medications were helping with anxiety and that she was not experiencing any side effects. The Appellant and the nurse practitioner reviewed multidisciplinary assessment recommendations and discussed anxiety-related psychotherapy in the community. The note stated that the Appellant would self-refer herself to a mental health group. The Appellant expressed interest in reviewing medications for pain.

[19] Without addressing Ms. Livingston's statement that the Appellant "remains unable to work due to [her] conditions," I find that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it.

Issue 2: Did the General Division err by requiring "proof of a definite statement from a medical professional that T. C. must refrain from working" in order to find that she had a severe disability?

[20] The Appellant further submits that the General Division erred by placing an overly high burden on her to prove that she was severely disabled by the end of her minimum qualifying period by requiring her to provide evidence that a medical professional advised her to stop working.

[21] In its summary of the evidence, the General Division noted that neither the ICCS reports nor reports from other health professionals included any advice that the Appellant should avoid work because it would increase her symptoms. The General Division made this observation when the Appellant testified that Ms. Livingston advised her to avoid work because it would increase her symptoms.

[22] Apart from this, I do not see that the General Division specifically required the Appellant to produce evidence that a medical professional advised her against working, or that this

[13] Progress note, dated November 28, 2016, at GD9-23 to 24.

evidence was crucial to proving the severity of a disability. In fact, the General Division wrote that medical certainty does not preclude a finding of disability.

[23] The General Division referred to the test for a severe disability at paragraph 5. It cited s. 42(2)(*a*) of the *Canada Pension Plan.* At paragraphs 29 to 35, the General Division also described how one assesses the severe criterion. It cited *Villani*[14] and *Klabouch v. Canada (Social Development*)[15] when declaring that the severe criterion had to be assessed in a real-world context, that medical evidence and evidence of employment efforts were necessary, and whether her disability prevented her from earning a living.[16] The General Division also cited *Bungay v. Canada (Attorney General)*[17] when assessing the Appellant's condition in its totality. It is unclear, however, whether the General Division also assessed the cumulative impact of the various medical conditions. If not, this would constitute an error.

[24] The General Division determined that there was insufficient evidence to support a finding that the Appellant's health conditions rendered her incapable regularly of pursuing any substantially gainful occupation but it did not specifically require the Appellant to produce any evidence advising her against working. In short, I do not find that the General Division committed an error as alleged by the Appellant (although it may have erred if it did not conduct a cumulative assessment).

[25] The Appellant further submits that an attempt to return to work in September 2014 failed because of her health condition. She claims that this shows that she has no residual capacity and shows that her condition is severe such that it prevents her from being "sufficiently reliable to earn a substantially gainful income" or to "pursu[e] regular work." The General Division addressed this evidence. It acknowledged that the Appellant had returned to work but found that there was no evidence to document why she stopped working and whether her health condition played a role in that decision. The Appellant's submissions in this regard do not allege any error on the part of the General Division. Rather, they suggest that I should undertake a reassessment

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[14] *Villani*, *supra.*
[15] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.
[16] *Klabouch*, *supra*, citing *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, paragraphs 28 and 29.
[17] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

of the evidence. However, ss. 58(1) of the DESDA provides for only limited grounds of appeal; it does not allow for a reassessment of the evidence.[18]

Issue 3: Did the General Division fail to consider whether the Appellant's disability was prolonged?

[26] The Appellant suggests that the General Division also erred in law by "refusing" to determine whether her disability was prolonged.

[27] However, the test for disability has two parts, and if a claimant does not meet one aspect of this two-part test, then they will not meet the disability requirements under the *Canada Pension Plan*. As the General Division indicated, it is unnecessary to undertake an analysis of the prolonged criterion when a claimant has not established that they are severely disabled. In *Klabouch*,[19] the Federal Court of Appeal stated that "[t]he two requirements of paragraph 42(2)(*a*) of the [*Canada Pension Plan*] are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the [*Canada Pension Plan*] fails."

[28] In *McCann*,[20] the Federal Court stated that "the fact of concentrating on one feature of the test and of not making any findings regarding the other […] does not constitute an error." The Federal Court determined that Mr. McCann's argument that the Appeal Division should have granted leave to appeal on the basis of the General Division's failure to consider the "prolonged" part of the disability test was bound to fail.

[29] As the General Division found that the Appellant did not meet the severity test, it was unnecessary under those circumstances to conduct an analysis on the prolonged criterion. I find that the General Division did not err in this regard.

RELIEF SOUGHT

[30] Section 59 of the DESDA empowers me to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for

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[18] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[19] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.
[20] *McCann v. Canada (Attorney General)*, 2016 FC 878.

reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the General Division in whole or in part.

[31] The Appellant requests that the appeal of this matter be allowed and that Canada Pension Plan disability benefits be declared payable to her. However, this remedy presupposes that there is a sufficient evidentiary record before me to make a determination on the severity of the Appellant's disability.

[32] The General Division, however, also failed to address the issue of whether the Appellant had exhausted her treatment recommendations and if not, whether her refusal to undergo treatment was unreasonable and what impact that might have on her disability status if her refusal was considered unreasonable. In *Lalonde v. Canada (Minister of Human Resources Development)*,[21] the Federal Court of Appeal determined that a "real world" assessment of the severity criterion requires a decision-maker to consider whether a claimant's refusal to undergo treatment is unreasonable and what impact that might have on their disability status should the refusal be considered unreasonable.

[33] I note that the General Division described the Appellant's current treatment. In 2016, the Appellant had received several recommendations for treatment, including that she continue with psychotherapy, be referred to a fibromyalgia clinic, undergo a trial of anti-anxiety medications, undertake dietary changes, attend occupational therapy and participate in a multidisciplinary setting. The General Division noted that the Appellant's treatment at that time was somewhat limited; the Appellant expected that she would continue consulting the nurse practitioner, but would not be seeing her family physician for her mental health issues, fibromyalgia or chronic fatigue since she was not confident that he had the appropriate level of expertise to assist her.

[34] It is not readily apparent from paragraph 37 whether the General Division considered if the Appellant had been compliant with treatment recommendations and, if not, whether it had questioned the Appellant about why she would not be pursuing some of the other treatment recommendations.

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[21] *Lalonde v. Canada (Minister of Human Resources Development*), 2002 FCA 211.

[35] I would be compounding any errors if I were to assess whether the Appellant could be found severely disabled, without providing the Appellant with an opportunity to address the issues raised by *Lalonde* and to explain why any refusal to comply with any treatment recommendations was not unreasonable.

[36] Accordingly, the appropriate remedy in this case is to refer the matter to a different member of the General Division for a new hearing.

CONCLUSION

[37] The appeal is allowed and the matter returned to a different member of the General Division for a new hearing.

Janet Lew
Member, Appeal Division

HEARD ON:	
METHOD OF PROCEEDING:	On the record
APPEARANCES:	T. C., Appellant Laura H. Veniot (Counsel), Representative for the Appellant Laura Dalloo (Counsel), Representative for the Respondent