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

Citation: *Minister of Employment and Social Development v. J. M.*, 2018 SST 701

Tribunal File Number: AD-16-1215

BETWEEN:

Minister of Employment and Social Development

Appellant

and

J. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 27, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent, J. M., applied for a disability pension in 2013 under the Canada Pension Plan (Plan). She maintains that a number of conditions, including a back injury, fibromyalgia, and a herniated disc resulting from a car accident prevent her from working.

[3] The Appellant, the Minister of Employment and Social Development, denied her request because, while the Respondent did have certain restrictions due to her medical condition, the information available did not show that those limitations continuously prevented her from doing some type of work in the foreseeable future.

[4] The General Division found that the Respondent was incapable regularly of pursuing any substantially gainful occupation from December 22, 2010, until November 2014, when her condition was no longer "severe." It also found that that her condition was likely to be long-continued and of indefinite duration from December 2010 to November 2014.

[5] The Appellant is appealing the General Division decision on the grounds of errors of law and serious errors in the findings of fact. The Tribunal's Appeal Division granted leave to appeal on the basis that the appeal had a reasonable chance of success.[1]

[6] The appeal hearing was held by videoconference. Both parties participated and were represented by legal counsel.

[7] The Appeal Division finds that the General Division committed a reviewable error. The General Division erred in law in making its decision. The matter is referred back to the General Division for reconsideration.

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[1] Leave to appeal decision dated March 20, 2017.

ISSUES

[8] The Appellant raises many grounds of appeal. After addressing the standards of review that the Appeal Division must apply when it reviews a General Division decision, I will address the specific issues raised by the Appellant as follows:

Issue 1: Did the General Division err in law by misapplying binding jurisprudence?

Issue 2: Did the General Division base its decision on a serious error in its findings of fact, specifically that the Respondent had a severe and prolonged disability when the evidence did not support such a finding?

Issue 3: If it did, should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[9] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, or 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.[2]

Standards of Review (or Deference to the General Division)

[10] When the Appeal Division reviews a General Division decision, must it apply the standards of review as adopted in *Dunsmuir v. New Brunswick*[3] or the statutory tests that the *Department of Employment and Social Development Act* (DESD Act) associates with issues of natural justice, issues of law, and issues of fact? The applicable approach also determines whether the Appeal Division owes deference to the General Division on these issues.

[11] The Appellant submits that the language of the Tribunal's governing statute, the DESD Act, is binding on the Appeal Division and that the standards of reasonableness and correctness

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[2] *Department of Employment and Social Development Act* at s. 58(1).
[3] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.

should not apply to the Appeal Division's review of the General Division decision. Furthermore, the Appellant argues that the Appeal Division is not required to show deference to the General Division's decisions on questions of natural justice, jurisdiction, and law. The Appeal Division's role in reviewing these types of questions is to ensure that the decision is correct. As for erroneous findings of fact, the Appeal Division may intervene in a General Division decision only if the Appellant establishes that the decision was based on an erroneous finding of fact that the General Division made in a perverse or capricious manner or without regard for the material before it.

[12] The Respondent, on the other hand, submits that the standard of review for a decision made by the General Division is that which is described in *Dunsmuir*.

[13] While the parties agree that the Appeal Division is not required to show deference to the General Division's decisions on questions of natural justice, jurisdiction, and law—i.e. that the Appeal Division's role is to ensure that the decision is correct—they disagree on the Appeal Division's role on findings of fact. The Appellant submits that s. 58(1)(*c*) of the DESD Act suggests that the Appeal Division should show deference to the General Division's findings of fact. The Respondent frames the issues on appeal before the Appeal Division using the language in *Dunsmuir* of "reasonableness."

[14] There appears to be a discrepancy in relation to the approach that the Appeal Division should take when reviewing appeals of decisions rendered by the General Division[4] and, if the standards of review must be applied, whether the standard of review for questions of law and natural justice differs from the standard of review for questions of fact and questions of mixed fact and law.

[15] Given that the courts have yet to resolve or provide clarity on this apparent discrepancy, I will consider this appeal by first applying the language of the DESD Act and then applying the standard of reasonableness to questions of fact.

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[4] *Canada (Attorney General) v. Paradis* and *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274; *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147; *Canada (Attorney General) v. Peppard*, 2017 FCA 110; *Quadir v. Canada (Attorney General)*, 2018 FCA 21.

[16] The Appeal Division does not owe any deference to the General Division's conclusions on questions of law and natural justice.[5] In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record.[6]

[17] The appeal before the General Division turned on the question of whether the Appellant had a severe and prolonged disability on or before the end of the minimum qualifying period (MQP), a question of mixed fact and law. The Appellant's MQP is February 28, 2014.

[18] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under s. 58(1) of the DESD Act.[7]

[19] The appeal before the Appeal Division rests on distinct questions of errors of law and serious errors in the findings of fact, each of which discloses an extricable legal issue.

Issue 1: Did the General Division err in law by misapplying binding jurisprudence?

[20] I find that the General Division erred in law by not applying binding Federal Court of Appeal jurisprudence.

[21] The General Division referred to the Federal Court of Appeal decisions *Canada (Minister of Human Resources Development) v. Henderson*[8] and *Litke v. Canada (Minister of Human Resources Development)*.[9] It concluded that "[t]hese cases clearly state that there may be circumstances where a temporary condition is prolonged under the Plan. Their facts can be distinguished from the present case."

[22] In concluding that these cases clearly state that there may be circumstances where a temporary condition is prolonged under the Plan, the General Division erred in law.

[23] In *Henderson*, the Pension Appeals Board (PAB) had allowed an appeal by the claimant and had held that he was entitled to a disability pension from November 1997 to October 2000, a period of about 35 months. The Minister had conceded that, from 1997 until after his surgery, the

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[5] *Paradis*, *supra* note 4 at para. 19.
[6] DESD Act at s. 58(1)(*b*).
[7] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.
[8] *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309.
[9] *Litke v. Canada (Minister of Human Resources Development)*, 2008 FCA 366.

claimant's disability was "severe;" however, it also argued that the finding that his disability was "prolonged" was unreasonable because it was not determined to be of "indefinite duration." The Federal Court of Appeal reviewed the matter on a standard of correctness and set aside the PAB's decision because it had misapplied s. 42(2)(*a*) of the Plan to the facts.[10] It noted that other PAB cases that had found claimants' disability to be prolonged prior to their recovery from treatment were distinguishable. It concluded its reasons and decision by holding that "[t]he restrictive language of section 42 indicates that the purpose of the *Plan* is to provide a pension to those who are disabled from working on a long-term basis, not to tide claimants over a temporary period where a medical condition prevents them from working."

[24] In *Litke*, the Federal Court of Appeal was invited to revisit its decision in *Henderson* by the claimant, who argued that disability pensions should be available in cases of temporary disability. Ms. Litke was capable of returning to work following cancer treatment, notwithstanding her other health issues. The Court held that "[t]here are no circumstances here that would justify this court reversing its own precedent. The use of the word 'indefinite' in subparagraph 42(2)(*a*)(ii) of the Plan makes clear that Parliament did not intend that disability pensions would be available in cases of temporary disability."

[25] The General Division concluded that these two cases "clearly state that there may be circumstances where a temporary condition is prolonged under the [Plan]." With respect, I disagree. My reading of this jurisprudence is that Parliament did not intend that disability pensions would be available in cases of temporary disability. While the Federal Court of Appeal did not define "temporary disability" or "temporary period," in *Henderson*, the claimant was disabled for about 35 months and, in *Litke*, the claimant had had successful cancer treatment, notwithstanding other health issues. The Federal Court of Appeal held that s. 42 of the Plan is not meant to cover claimants over a temporary period or in the case of temporary disability.

[26] In the current matter, the General Division found the Respondent to be disabled from December 2010 to November 2014, a period of 47 months. It distinguished the facts here from *Henderson* and *Litke*, stating:

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[10] *Henderson*, *supra* note 8 at paras. 6 to 8.

> A review of the medical reports here indicates uncertainty as to when or if the Appellant would recover, even if she was able to implement all the recommendations that were made to her. There was no path to recovery laid out for her. She had to overcome significant hurdles in order to be able to return to work, and her success was due to her singular persistence. As late as February 2014 she was still reporting lack of progress and significant pain and limitations. These continued until November 2014, when she determined that she was able to re-enter the workforce and she was hired by Sobeys.[11]

[27] The General Division distinguished binding Federal Court of Appeal jurisprudence on the basis that in *Henderson* and *Litke*, there was a path laid out for recovery and more certainty on when and whether the claimant would recover. Again, I disagree with the General Division's interpretation of the jurisprudence. In *Henderson*, the claimant had knee surgery. In *Litke*, the claimant had cancer treatment. It cannot be said that there was certainty as to when or whether Mr. Henderson or Ms. Litke would recover and be able to work.

[28] In the present case, the Appellant does not concede that the Respondent was disabled during the period claimed, unlike the *Henderson* case. The Appellant submits that the Respondent was recovering from her car accident, had surgery, lost weight, discontinued narcotic use, followed longstanding treatment recommendations, and was able to recover sufficiently to return to work.

[29] I find that the General Division erred in law by misinterpreting binding jurisprudence.

[30] In the past, the Appeal Division has dealt with appeals from General Division decisions granting a disability pension in situations of temporary disability. While an earlier Appeal Division decision is not binding on me, it might have persuasive value. I note also that, "while it is true that later tribunal panels are not bound by the decisions of earlier tribunal panels, it is equally true that later panels should not depart from the decisions of earlier panels unless there is good reason."[12] Therefore, I will briefly discuss two of these decisions.

[31] In the *D.Z.* case, the Appeal Division allowed an appeal where the General Division had determined that the claimant was entitled to a disability pension because of a temporary

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[11] General Division decision at para. 69.
[12] *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257 at para. 44.

disability.[13] The General Division had not properly considered the legal issue to be addressed and had not applied the *Henderson* case. My colleague allowed the appeal and returned the matter to the General Division for reconsideration because evidentiary and credibility issues needed to be determined.

[32] In the *J.J.* case, the Appeal Division's decision noted that the medical opinions were consistently that the claimant was unable to work at any job, that she had tried many treatments without resolution of her condition, and that no other treatments were contemplated.[14] In the current matter, the medical opinions do not consistently state that the Respondent was unable to work; in fact, her personal insurer, based on medical opinion, terminated her long term disability payments prior to her MQP on the grounds that she was capable of performing some type of work. In addition, here the Respondent underwent bariatric surgery in 2012 and began to lose weight, a longstanding treatment recommendation. Her significant weight loss over the next two years allowed her to reduce the pain medication she used and that allowed her to begin exercising, which was another consistent treatment recommendation. Therefore, the *J.J.* case is distinguishable from the present matter.

[33] Neither of these previous Appeal Division decisions is sufficiently similar to the present one to be of persuasive value on the issue of error of law.

[34] Having found a reviewable error, I will consider what the appropriate remedy is before discussing the other errors alleged.

Issue 3: If the General Division did err in such a way, should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

[35] I have found that the General Division erred in law in making its decision.

[36] The Appellant submits that while the Appeal Division has the legislative authority to substitute its own decision, it should not do so in the present case because the Appeal Division member was not present to observe the Appellant's testimony, which was given "live" at the

[13] *Minister of Employment and Social Development v. D. Z.*, 2016 SSTADIS 65.
[14] *Minister of Employment and Social Development v. J. J.*, 2017 SSTADIS 753.

General Division videoconference hearing. The Appellant submits that credibility is at issue, in addition to contradictory evidence in the record. Only an audio recording is available, and the Respondent argues that this is insufficient for the Appeal Division to assess the Appellant's testimony. In addition, the trier of fact must look at the issues in light of the *Henderson* and *Litke* cases properly applied.

[37] The Respondent made no submissions on this issue. She maintains that the General Division properly considered and applied *Henderson* and *Litke*.

[38] I find that in misapplying and misinterpreting binding jurisprudence, the General Division's approach to the fact finding was not sufficiently complete for me to render the decision that the General Division should have rendered.

[39] In addition, in order to render a decision on whether the Appellant had a severe and prolonged disability on or before February 28, 2014, that considers and applies relevant jurisprudence, it will be necessary to consider the evidence and credibility, find the facts, and weigh the evidence. These tasks are better suited to the General Division than to the Appeal Division.

[40] Further, a previous Appeal Division decision returned an appeal on a temporary disability matter to the General Division for reconsideration because evidentiary and credibility issues needed to be determined.[15] I see no reason, in the present matter, to depart from what was done in an earlier Appeal Division decision.

Summary of Alleged Errors

[41] I have found that the General Division erred in law in making its decision and that this matter should be referred back to the General Division for reconsideration.

[42] Having done so, I need not address issue 2.

[15] *MESD v. D. Z., supra* note 12.

CONCLUSION

[43] The appeal is allowed. The matter is referred back to the General Division for reconsideration in accordance with these reasons and decision.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	November 28, 2017
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	David Green, counsel for the Appellant Jennifer Hockey, counsel for the Respondent Matthew Vens, observer on behalf of the Respondent