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

Citation: *Minister of Employment and Social Development v. D. M.*, 2018 SST 722

Tribunal File Number: AD-16-1199

BETWEEN:

Minister of Employment and Social Development

Appellant

and

D. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: July 7, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent, D. M., applied for a disability pension in 2014 under the Canada Pension Plan (Plan). She maintains that anxiety, depression and fibromyalgia prevent her from working. She last worked in 2013.

[3] The Appellant, the Minister of Employment and Social Development, denied her request because, while the Respondent had 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 had been incapable regularly of pursuing any substantially gainful occupation and that her disability had been prolonged since July 2013.

[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 teleconference. Both parties participated.

[7] The Appeal Division finds that the General Division committed reviewable errors. The General Division erred in law when making its decision. It also based its decision on serious errors in the findings of facts. The matter is referred back to the General Division for reconsideration.

[1] Leave to appeal decision dated July 5, 2017.

ISSUES

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

Issue 1: Did the General Division err in law by not conducting the *Villani* analysis?

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*[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 only intervene in a General Division decision 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 made no submissions on standards of review. She argued that there were errors in the medical reports in the appeal record that she would like to correct.

[13] There appears to be a discrepancy regarding the approach that the Appeal Division should take when reviewing appeals of decisions given 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.

[14] Given that the courts have yet to resolve or provide clarity on this apparent discrepancy, I will consider this appeal by applying the language of the DESD Act.

[15] 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]

[16] The appeal before the General Division turned on the question of whether the Respondent had a severe and prolonged disability at or before the end date of the minimum qualifying period (MQP), a question of mixed fact and law. The Respondent's MQP end date is December 31, 2015.

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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*.
[5] *Paradis, supra*, at para. 19.
[6] DESD Act, at para. 58(1)(*b*).

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

[18] 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 not conducting the *Villani* analysis?

[19] I find that the General Division erred in law by not conducting the *Villani* analysis and in so doing failed to apply binding jurisprudence.

[20] There is no dispute that the Federal Court decision in *Villani v. Canada (Attorney General)*[8] is binding jurisprudence.

[21] The General Division referred to *Villani* in its decision.[9] It mentioned some of the *Villani* factors in two sentences: "The Tribunal has taken into account the characteristics of the [Respondent] including the fact that she has a grade 12 education and university degree; and she was 33 years of age at the time of her application. Her prior work was as a crisis team supervisor."[10] There is no other assessment or explanation of whether the Respondent's disability is severe keeping in mind these factors or how these factors impacted on her ability to perform any substantially gainful employment.

[22] Did the General Division conduct a complete (or sufficient) *Villani* real-world assessment?

[23] In *Murphy v. Canada (Attorney General)*, 2016 FC 1208,[11] the Federal Court determined that the General Division's failure to reasonably determine a claimant's workforce attachment means that the *Villani* real-world assessment was incomplete. An incomplete *Villani* assessment is an established reason for the Federal Court to grant judicial review. Therefore, it is a reviewable error in the context of an appeal before the Appeal Division.

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[7] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.
[8] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[9] General Division decision, at para. 41.
[10] *Ibid.*, at para. 41.
[11] *Murphy v. Canada (Attorney General)*, 2016 FC 1208.

[24] In the present matter, the General Division assessment was incomplete at best. It merely mentioned the Respondent's age, education and prior work, but it did not explain how these factors impacted on her ability to perform any substantially gainful employment. It did not consider whether the Respondent was capable of pursuing other employment, such as part-time work, sedentary work or modified activities. It simply recited evidence of her medical conditions and concluded that the Respondent "has no capacity to work given her conditions."[12]

[25] I find that the General Division erred in law by failing to apply 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?

[26] I find that the General Division based its decision on serious errors in the findings of facts: specifically that the Respondent had incapacitating migraines, that she received treatment for them, and that the Respondent has no capacity to work.

[27] I also conclude that the General Division's finding that contradictory evidence in the medical reports on improvements in the Respondent's conditions should be dismissed or assigned little or no weight at all, without explaining the reasons for this finding, was capricious.

[28] While the Respondent testified that she suffered from migraine headaches all the time and under no circumstances could she possibly work, there is no medical documentation supporting these assertions.

[29] A claimant's oral evidence is to be taken into account. However, there should be some objective medical evidence of the claimant's disability.[13] The General Division based its decision on the oral evidence given at the hearing about the Respondent's "incapacitating migraines," but it did not refer to any supporting medical documentation on her migraines.

[30] I reviewed the medical documentation in the appeal record. The only mention of migraines is in the Respondent's questionnaires.

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[12] General Division decision, at para. 39.
[13] *Pantic v. Canada (Attorney General)*, 2011 FC 591, at para. 21.

[31] The medical documentation includes medical reports diagnosing the Respondent with fibromyalgia, depression, anxiety and reflux, with developed chronic pain secondary to depression and anxiety. This documentation does not confirm that the Respondent received treatment for migraines.

[32] Therefore, the finding of fact that the Respondent had received treatment for incapacitating migraines (and that it was unsuccessful) was made in a perverse or capricious manner or without regard for the material before the General Division.

[33] The General Division also found that the Respondent "has no capacity to work given her conditions."[14] However, there is only the Respondent's assertion that she has no capacity to work in evidence on this issue. The General Division did not consider whether the Respondent was capable of pursuing other employment, such as part-time work, sedentary work or modified activities, based on any other evidence in the appeal record.

[34] In 2014, Dr. Hargrove reported that the Respondent's conditions (depression and anxiety) were improving and that slow improvement was expected with medication, physiotherapy and other therapy. The General Division accepted contradictory evidence in the Respondent's testimony that her conditions have not improved.

[35] The General Division preferred the testimonial evidence to the medical evidence, but it did not adequately explain its reasons for affording more weight to this evidence than to the documentary evidence. If the General Division decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision.[15] A failure to do so presents a risk that its decision will be marred by an error of law or that it will be qualified as capricious.

[36] Having found reviewable errors, I will consider what the appropriate remedy is.

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[14] General Division decision, at para. 39.
[15] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13.

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?

[37] I have found that the General Division erred in law in making its decision and that it based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it.

[38] 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 Respondent's testimony, which was given in person at the General Division hearing. The Appellant submits that credibility is at issue in addition to contradictory evidence on the record. Only an audio recording is available, and the Appellant argues that this is insufficient for the Appeal Division to assess the Respondent's testimony.

[39] The Respondent made no submissions on this issue. She maintains that the medical reports contained errors and that Dr. Hargrove was "hostile" towards her seeking Plan disability benefits. She argues that the General Division properly considered her testimony and understood that the medical reports contained errors.

[40] I find that, by misapplying binding jurisprudence, the General Division's approach to the fact finding was not sufficiently complete for me to give the decision that the General Division should have given.

[41] In order to give a decision on whether the Appellant had a severe and prolonged disability on or before December 31, 2015, that considers and applies relevant jurisprudence, it will be necessary to consider the evidence and the credibility of the witness(es), find the facts, and weigh the evidence (which is contradictory in some important respects). These tasks are better suited to the General Division than to the Appeal Division.

Summary of alleged errors

[42] I have found that the General Division based its decision on erroneous findings of fact and erred in law when making its decision and that this matter should be referred back to the General Division for reconsideration.

CONCLUSION

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

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	November 30, 2017
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Stephanie Pilon, Counsel for the Appellant Faiza Ahmed-Hasan, Observer for the Appellant D. M., Respondent, self-represented