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

Citation: *V. H. v. Minister of Employment and Social Development*, 2018 SST 808

Tribunal File Number: AD-17-501

BETWEEN:

V. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: August 14, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] V. H. (Claimant) is a doctor and practised medicine for a number of years. She abused alcohol and drugs and as a result has lost her licence to practise medicine. She has also been involved in criminal and family court processes. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by her addictions and mental illness. The Minister of Employment and Social Development (Minister) approved the application and granted the Claimant 15 months of retroactive payments. The Claimant requested further retroactivity of the disability pension, to 2009 when she stopped working, on the basis that she was incapable of forming or expressing an intention to apply for the pension.

[3] The Minister refused the Claimant's request for further retroactive payment. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. The Claimant's appeal from this decision is dismissed because the General Division did not make an error in law or fail to observe a principle of natural justice.

PRELIMINARY MATTERS

[4] The Tribunal's practice is to make an audio recording of all hearings. Due to a technical failure, it was not possible to record this hearing. Both parties consented to proceed with the hearing without it being recorded.

[5] The Claimant filed a transcript of the General Division hearing.[1] The Minister agreed that it was accurate and could be relied on. I read the transcript before making this decision.

[6] The Claimant filed documents that suggested that she would argue that the General Division was biased. At the start of the hearing, the Claimant abandoned this ground of appeal. Therefore it was not considered.

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[1] AD19

[7] The Claimant also sought to introduce new evidence, a medical report penned by Dr. Isler,[2] for the appeal. However, new evidence generally is not permitted on an appeal under the *Department of Employment and Social Development Act* (DESD Act).[3] The question to be answered at an appeal before the Appeal Division is not whether a claimant should succeed on the merits of their case, but whether the General Division made an error under the DESD Act such that the Appeal Division should intervene. New evidence of the type the Claimant wishes to introduce is not necessary for this question to be answered. Therefore I have not considered the new evidence submitted by the Claimant.

ISSUES

[8] Did the General Division apply the incorrect legal test for incapacity when it made its decision?

[9] Did the General Division fail to observe a principle of natural justice by failing to allow the Claimant to fully present her case?

ANALYSIS

[10] The DESD Act governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. 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.[4] The Claimant's assertion that the General Division made two such errors is considered below.

Issue 1: Error of law

[11] The *Canada Pension Plan* (CPP) states that a person cannot be deemed to be disabled more than 15 months before they applied for the disability pension.[5] The Claimant applied for

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[2] AD9-27
[3] *Canada (Attorney General) v. O'Keefe*, 2016 FC 503
[4] DESD Act, s. 58(1)
[5] CPP s. 42(2)(*b*)

the disability pension in June 2015. She was found to be disabled in March 2014, which is 15 months before she applied.

[12] The CPP provides a narrow exception to this 15-month retroactivity rule. It states that, where a claimant was incapable of forming or expressing an intention to make an application before the day on which the application was made, further retroactivity may be granted.[6] This is correctly set out in the General Division decision.[7] The issue before the General Division was whether the Claimant was incapable of forming or expressing an intention to make an application before she did so in 2015. To decide this, the General Division considered evidence regarding the Claimant's activities and decision making, including that she managed her household and consented to treatment for her conditions.

[13] The Claimant contends that this exception to the retroactivity rule is precise and focussed. She argues that the Federal Court of Appeal decision in *Morrison*[8] teaches that a claimant's activities may be relevant to this determination, but only if the medical evidence is not precise about their capacity. She contends that the medical evidence in this case refers specifically to her capacity to form or express an intention, so it is not necessary to consider her other activities, and that the General Division made an error in law when it did so.

[14] However, the decision in *Morrison* states:

> [Incapacity] is a narrow question, albeit difficult to answer. It is one the answer to which may involve expert medical opinion related in particular to the period between the claimed date of commencement of the disability and the date of eventual application for disability benefits, and very importantly, the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of application which cast light on the capacity of the person concerned during that period of so "forming and expressing" the intent. The activities of the individual concerned during that period will be particularly significant if the expert medical opinions are of a general, varied or equivocal nature and perhaps not fully or adequately supported by medical evidence.

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[6] CPP s. 60(9)
[7] General Division decision, paras. 5 and 6
[8] *Morrison v. Canada (Minister of Human Resources Development)*, 1997 CarswellNat 3378

The decision does not state that the claimant's activities are not relevant when there is medical evidence that is not general, varied or equivocal. It states that evidence of a claimant's activities **is of particular importance** if there is general or equivocal medical evidence. Therefore, the General Division did not make an error in law when it considered the Claimant's activities.

[15] In fact, the General Division specifically considered that the Claimant was able to manage her household and consent to and attend treatment during the time that she claimed to be incapable of forming or expressing an intention to apply for the disability pension. In addition, the Claimant testified that she had the intention to apply probably starting in 2011[9] and that she had thought about it but had a "block" to actually making the application.[10] The General Division made no error in law when it considered the Claimant's activities during the period of claimed incapacity.

[16] The Claimant also argues that she could not have been capable of forming or expressing an intention to apply for the disability pension from 2009 to 2015 because, as part of her addiction illness, she was in denial about being disabled. As a result of this denial, she could not form or express an intention to apply for the pension. The Claimant further argues that the General Division made an error in law because it failed to consider this.

[17] The Pension Appeals Board decided, in one case, that because a claimant could not accept a diagnosis of schizophrenia, he could not form or express an intention to apply for a disability pension.[11] In that case, there was evidence that the claimant was not cognizant or aware of the extent or nature of his illness or that he was in fact suffering from a serious illness.

[18] However, the facts of that case are quite different from those of the matter before me. The Claimant testified that she was addicted and that this was affecting her ability to work. She was aware of her illness. She testified that she intended to apply for the pension but had a "block of pride" that prevented her from actually doing so, and also that she believed that she could obtain five years of retroactivity.[12] The General Division turned its mind to the argument that the Claimant's denial regarding her condition prevented her from being able to form or express the

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[9] AD19-20, line 9
[10] AD19-23, line 16
[11] *Gallant v. Canada (Minister of Human Resources Development)*, 2001 CarswellNat 4425
[12] AD19-19, AD19-22

intention to apply for a pension,[13] considered the evidence, and concluded that the Claimant's belief that she could get five years of retroactivity more likely demonstrated that she could form the intention to apply for the pension but chose to wait.[14] The General Division therefore made no error in law because it considered and applied the law to the facts before it. This ground of appeal fails.

Issue 2: Natural justice

[19] The principles of natural justice are concerned with ensuring that the parties to an appeal have the opportunity to present their full case to the Tribunal, know and answer the case against them, and have the appeal decided by an impartial decision maker based on the law and the facts.

[20] The Claimant's last ground of appeal is that the General Division failed to observe a principle of natural justice because the issue of her incapacity to apply for the pension arose during the General Division hearing and she was not able to fully present her case on this issue. However, during the hearing, the Tribunal Member offered the Claimant further time to present more evidence on the issue of her incapacity.[15] The Claimant failed to file any further material until after the General Division made its decision. She was not prevented from doing so. The General Division therefore observed the principles of natural justice, and the appeal fails on this basis.

CONCLUSION

[21] I have great empathy for the Claimant and her very difficult circumstances. I applaud her for persevering through her legal and health struggles. However, I am not satisfied that the General Division made an error in law or failed to observe any of the principles of natural justice.

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[13] General Division decision, para. 23
[14] *Ibid*., para. 26
[15] Beginning at AD19-37, line 16

[22] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	August 7, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	Peter Rumscheidt, Counsel for the Appellant Julien Leger, Representative for the Respondent