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

Citation: *J. N. v. Minister of Employment and Social Development*, 2018 SST 831

Tribunal File Number: AD-18-249

BETWEEN:

J. N.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 23, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, J. N., who is now 51 years old, was born in Nigeria, where she attended law school and worked as a lawyer. In 1995, she immigrated to Canada and enrolled in a community college program for training as a court and tribunal agent, although she never worked in that field. Instead, she took a series of jobs in administration and customer service, most recently with a telecommunications company. In December 2011, she injured her neck and back in a motor vehicle accident. She subsequently made several attempts to return to work but was unable to keep up with the demands of her job. She has neither worked nor looked for work since June 2015.

[3] In February 2016, the Appellant applied for a Canada Pension Plan (CPP) disability pension, claiming that she could no longer work because of chronic pain and related conditions. The Respondent, the Minister of Employment and Social Development (Minister), refused the application after determining that her disability was not “severe and prolonged” as of the minimum qualifying period (MQP), which ended on December 31, 2016.

[4] The Appellant appealed the Minister’s refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by videoconference and, in a decision dated February 8, 2018, dismissed the appeal, finding that the Appellant had failed to demonstrate that she was “incapable regularly of pursuing any substantially gainful occupation” as of the MQP. The General Division also found that she had failed to pursue reasonable treatment recommendations for her mental health issues.

[5] On April 13, 2018, the Appellant's legal representative requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed various errors in the course of rendering its decision.

[6] In my decision of June 11, 2018, I granted leave to appeal, finding an arguable case that the General Division:

(i) failed to observe a principle of natural justice by dismissing specialists' reports without providing a comprehensible reason for doing so; and

(ii) based its decision on an erroneous finding that the Appellant failed to follow recommended treatment for her mental health conditions.

[7] On August 14, 2018, the Minister conceded that the General Division had erred in rendering its decision and recommended that the matter be returned to the General Division for a rehearing.

[8] In view of the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit, I have decided to dispense with an oral hearing and consider this appeal on the basis of the existing documentary record.

ISSUES

[9] According to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[10] I must consider the following issues:

Issue 1: Did the General Division fail to observe a principle of natural justice by dismissing specialists' reports because they were commissioned by the Appellant's legal counsel?

Issue 2: Did the General Division base its decision on an erroneous finding that the Appellant failed to follow mental health treatment recommendations?

[11] Having reviewed the parties' submissions against the record, I have concluded that this appeal must succeed.

ANALYSIS

Issue 1: Did the General Division fail to observe a principle of natural justice by dismissing specialists' reports because they were commissioned by the Appellant's legal counsel?

[12] The Appellant alleges that the General Division acted unfairly by dismissing specialist reports merely because they were commissioned by her legal counsel. She specifically mentions two items of documentary evidence—a psychology report dated April 27, 2016, by Betty Kershner and an addendum, dated November 14, 2016, to a multidisciplinary chronic pain assessment report by Edward Shane and Jack Lefkowitz—both of which she says the General Division "wholly discounted" for no good reason.

[13] In my decision granting leave to appeal, I expressed doubt that the General Division had, in fact, discounted the Kershner report. Now that I have reviewed the record again, doubt has been replaced with outright disagreement. I note that the General Division did not, contrary to the Appellant's allegations, ignore Dr. Kershner's findings but rather summarized them in its decision, later relying on her treatment recommendations to conclude that the Appellant was not compliant. In this context, even if the General Division did not accept those elements of the Kershner report preferred by the Appellant, I do not see how the General Division can be said to have given it no weight at all. In paragraph 33, the General Division wrote: "The [Minister] also noted that Dr. Kershner only saw the Appellant on one occasion in the context of completing a medical legal psychological report at the request of her lawyer." In documenting the Minister's position, the General Division was not necessarily endorsing it. Even if it was, the quoted passage does not discount the Kershner report because it is a medical-legal opinion *per se* but because it was prepared by a medical practitioner who had seen the Appellant only once and who presumably lacked intimate knowledge of her clinical history. In my view, that was a defensible reason to give the report less weight.

[14] On the other hand, I have now concluded that the Appellant had good cause to object to the General Division's treatment of the Shane-Lefkowitz addendum.[1] In paragraph 16 of its decision, the General Division wrote:

> There is an addendum dated November 14, 2016 to a multidisciplinary chronic pain assessment report dated June 23, 2016 by Dr. Shane, chiropractor, and Dr. Lefkowitz, chiropractic rehabilitation. The addendum diagnoses chronic pain syndrome and fibromyalgia and opines that the Appellant remains unfit to work. I did not give any weight to this addendum because the initial June 23, 2016 report was not included in the hearing file.

[15] In an endnote, the General Division indicated that it had questioned the Appellant's representative about why the initial assessment report was missing. She replied that she did not know, because she had not compiled the file, which her office had received from the Appellant's previous lawyer. The General Division did not indicate whether it accepted the representative's answer and, if not, why not. I have listened to the audio recording of the videoconference hearing that took place on January 25, 2018, and I note that the presiding member gave no hint that he was about to disregard the addendum because it was part of an "incomplete" whole.[2] Had he done so, the representative might have been prompted to argue for its relevance.

[16] As it is, the addendum is a four-page document that contains a substantive discussion about the Appellant's diagnoses and prognoses. It answers three questions that I assume were put to Drs. Shane and Lefkowitz by the Appellant's legal representative and explicitly states that all the information in it was drawn from the original multidisciplinary chronic pain assessment report. Although the addendum was prepared for the Appellant's claim for motor vehicle accident benefits, it contains what I would regard as relevant information about her ability to work:

> She previously worked full-time at X as a Customer Service Representative. Following the subject accident, although she returned to work with no time off, she did so "off and on" with "a lot of pain" until she was finally unable to continue, so she took a leave of absence in June 2015 and has not gone back to work since then. According to her, while she was working she had multiple poor evaluations from

[1] GD3-2.
[2] Recording of hearing, 1:35:30.

> customers, who complained that she was not providing good service including not understanding their problems, not being able to come up with solutions or not explaining the solutions adequately. Her family physician recommended that she stay off work as she was still unfit; her perception is that she remains unable to work until now due to her pain and impairments including severe problems with memory and concentration that affect her ability to do her prior job or work in any other capacity.
>
> In our opinion, she remains unfit to work.

[17] The addendum is a document that would appear to stand on its own, and I see no reason to dismiss its findings merely because the initial assessment report was, for whatever reason, excluded from the hearing file. While the General Division, as trier of fact, is to be afforded deference in how it weighs the evidence, there must be some rational basis—whether explicitly stated or implicitly understood—for discounting an expert report that contains a clear and on-point statement supporting the Appellant's position.

Issue 2: Did the General Division base its decision on an erroneous finding that the Appellant failed to follow mental health treatment recommendations?

[18] The Appellant alleges that the General Division concluded, in error, that she had not pursued recommended treatment for her psychological issues. In particular, the Appellant objects to the General Division's finding that she had failed to pursue "a course of supportive psychotherapy as recommended by both Dr. Kershner and Dr. Rudky." The Appellant says that this finding contradicted the documentary and testimonial evidence that showed that she followed all psychological treatment advice, including daily pharmacotherapy, weekly group psychotherapy, monthly individual psychotherapy, and biannual psychiatric treatment.

[19] I note that the General Division made explicit findings that (i) the Appellant failed to follow up with Dr. Rudky, a psychiatrist; (ii) she never joined a supportive psychotherapy group; and (iii) church counselling is no substitute for psychological treatment. The recording of the hearing indicates the Appellant testified that (i) she sees Dr. Rudky every six months;[3] (ii) she

[3] Recording of hearing, 47:25 to 50:40.

attends weekly psychological support counselling offered through her church;[4] and (iii) she had monthly meetings with her pastor, who she said is a psychologist.[5]

[20] I am satisfied that the General Division based its decision on an erroneous finding of fact without regard for the material before it when it found no evidence that the Appellant had received regular treatment from a trained mental health professional.

CONCLUSION

[21] I find that the General Division (i) failed to observe a principle of natural justice by dismissing a relevant expert report for an insupportable reason and (ii) based its decision on an erroneous finding that the Appellant had not followed mental health treatment recommendations.

[22] Section 59 of the DESDA sets out the remedies that the Appeal Division can give on appeal. The Appellant has asked the Appeal Division to simply "give the decision that the General Division should have given" and grant her the CPP disability pension. By contrast, the Minister recommends a fresh hearing before the General Division.

[23] On reflection, I think the Minister is right. This is a case that largely stands or falls on its factual evidence, which was abundant, and I am reluctant to step outside my usual mandate and assess its merits. In *Housen v. Nikolaisen*,[6] the Supreme Court of Canada suggested that an appellate court is free to substitute its opinion for the trial judge's only on a pure question of law. Moreover, I cannot say with certainty in this case that, had the General Division avoided the errors described above, the outcome would have been different.

[4] Recording of hearing, 50:40 to 52:15.
[5] Recording of hearing, 52:15 to 52:50.
[6] *Housen v. Nikolaisen*, 2002 SCC 33.

[24] This matter shall be returned to the General Division for a new hearing.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	Stacy Koumarelas, for the Appellant Christian Malciw, for the Respondent