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

Citation: *J. N. v Minister of Employment and Social Development*, 2019 SST 933

Tribunal File Number: AD-19-472

BETWEEN:

J. N.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: October 25, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] J. N. (Claimant) completed her education and worked as a lawyer in her country of origin before she moved to Canada. In Canada, the Claimant completed a college program and worked in administrative positions. The Claimant was in a car accident, and stopped working in 2015 due to ongoing pain that resulted from this. The Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by chronic pain, mental health issues, and other conditions.

[3] The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal because it decided that the Claimant did not have a severe disability before the end of the minimum qualifying period.

[4] The Claimant appealed this decision to the Tribunal's Appeal Division. It decided that the General Division had made an error under the DESD Act and referred the matter back to the General Division for reconsideration. The General Division held another hearing and again dismissed the appeal because the Claimant did not have a severe disability.

[5] I granted leave to appeal this decision to the Tribunal's Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division made an error in law by not considering all of the Claimant's conditions. However, after considering the written record, the parties' written answers to my questions[1] and the recording of the General Division hearing I am not persuaded that the General Division made any errors under the DESD Act. The appeal is therefore dismissed.

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[1] AD0 provides reasons for proceeding by written questions and answers

ISSUES

[6] Did the General Division make an error in law by failing to consider the impact of the Claimant's eating problem or medication side effects on her capacity to work?

[7] Did the General Division based its decision on at least one of the following erroneous findings of fact under the *Department of Employment and Social Development Act* (DESD Act)?

a) It failed to consider a number of medical reports that supported the Claimant's legal position;

b) It ignored evidence that supported the Claimant's legal position; or

c) It failed to consider the steps that the Claimant took to follow treatment recommendations

[8] Did the General Division fail to observe a principle of natural justice because:

a) It was biased;

b) It took on the role of an advocate during the hearing; or

c) It refused to permit the Claimant to make reply submissions or dispute the Minister's legal arguments?

ANALYSIS

[9] The DESD Act governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim, but a determination of whether the General Division made an error under the DESD Act. The Act also states that there are only three kinds of errors that can be considered. They are that that the General Division failed to observe a principle of natural justice, 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.[2] If at least one of these errors was made, the Appeal Division can intervene. Each of the Claimant's grounds of appeal is considered below in this context

Issue 1: Failure to consider eating problem or medication side effects

[10] The first ground of appeal that I will consider is whether the General Division made an error in law. The Federal Court of Appeal teaches that to decide whether a claimant is disabled, all of their conditions must be considered.[3] This is correctly set out in the General Division decision.[4] The decision summarizes the written and oral evidence regarding each of the Claimant's conditions, including pain in various areas of her body, headaches, that she had no appetite and has lost over 50 lbs., anxiety and depression, difficulties with sleep, memory and concentration, and how she addresses these conditions.[5]

[11] The decision specifically refers to the Claimant's testimony at both General Division hearings regarding her eating problem, including that she lost weight as a symptom of depression, and that her weight has been stable since 2016.[6] The General Division decision does not specifically refer to the Claimant's testimony that she has to log what she eats each day and ensure that she eats.[7] However, the failure to mention this in the decision is not fatal. The General Division is presumed to have considered all of the evidence before it, and need not set out each and every piece of evidence in the written decision.[8] Nothing before me rebuts this presumption regarding the Claimant's eating problem.

[12] Regarding the side effects that the Claimant has from her medication, the Claimant testified about these side effects. This also is not specifically mentioned in the decision. However, the failure to refer to this evidence is an error under the DESD Act that requires intervention by the Appeal Division. The General Division found as fact that the Claimant did not take medication for pain or her mental health in 2017.[9] There is an evidentiary basis for these

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[2] DESD Act s. 58(1)
[3] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[4] General Division decision at para. 8
[5] *Ibid*. at para. 10
[6] *Ibid*. at para. 14
[7] General Division hearing recording Part I at approximate time 46:25, although the exact time may differ depending on what device is used to listen to the recording
[8] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[9] General Division decision at paras. 20, 22

findings of fact - the pharmacy records did not demonstrate that the Claimant was using these medications. Since the General Division found that the Claimant was not using medications at the relevant time, it was not necessary for it to specifically consider what side effects these medications may have caused.

[13] Therefore, the appeal fails on the basis that the General Division erred in law by failing to consider all of the Claimant's medical conditions.

Issue 2: Erroneous findings of fact

[14] Another ground of appeal is that the General Division based its decision on an erroneous finding of fact. To succeed on this basis, the Claimant must prove three things: that a finding of fact was erroneous (in error); that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.[10]

[15] The DESD Act does not define the terms "perverse" or "capricious." However, the *Federal Courts Act* has the same wording. In that context, perverse means "willfully going contrary to the evidence." Capricious has been defined as being "so irregular as to appear to be ungoverned by law." Finally, a finding of fact for which there is no evidence before the Tribunal will be set aside because it is made without regard for the material before it. I accept that these definitions apply when considering the DESD Act.

[16] The Claimant argues that the findings of fact that her disability was not severe and that she failed to follow reasonable treatment recommendations were erroneous under the DESD Act. To support this, the Claimant argues that the General Division failed to consider a number of medical reports that supported her position. However, the General Division decision summarizes the evidence that was before it. Specifically, the decision refers to reports by Dr. Mula,[11] Dr. Matthews,[12] Dr. Kershner,[13] and the Shane/Lefkowitz report.[14] The General Division weighed

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[10] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319
[11] General Division decision at paras. 16 and 23
[12] *Ibid.* at paras. 16 and 30
[13] *Ibid.* at para. 28
[14] *Ibid.* at paras. 17, 23, 24, 26 and 31

this evidence, along with the other written and oral evidence to make its decision.

[17] The General Division also considered evidence that supported the Claimant's legal position and explained why it gave this evidence the weight it did. For example, the General Division decision states that the addendum to the Shane/Lefkowitz report made conclusions based largely on the Claimant's self-reports, and did not consider her failure to comply with their prior treatment recommendations.[15]

[18] Finally in this regard, the Claimant argues that the General Division failed to consider the steps she took to follow treatment recommendations. However, the General Division did consider this. It carefully considered the written and oral evidence about the Claimant's use of prescribed medication.[16] It considered that Dr. Mula recommended that the Claimant exercise, and the Shane/Lefkowitz report recommended pool exercise as well as a comprehensive rehabilitation program including a pain management program.[17] The decision also carefully considered that the Claimant attended physiotherapy for a time, and then walked around the house for exercise.[18] The decision reports that Dr. Rudke recommended that the Claimant attend a particular psychotherapy group, but that the Claimant attended a church program with her Pastor who is also a psychotherapist.[19] The General Division decision then gives clear reasons for finding that the Claimant failed to follow reasonable treatment recommendations, and considered the impact of this failure on her disability status.

[19] It is clear that the General Division carefully considered and weighed the evidence that was before it. The findings of fact that the Claimant's disability was not severe and that she failed to follow treatment recommendations had evidentiary bases. They were not erroneous. Therefore, the appeal fails on this basis.

Issue 3: Failure to observe principles of natural justice

[20] The last ground of appeal is that the General Division failed to observe a principle of

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[15] General Division decision at para. 31
[16] *Ibid*. at paras. 18-22
[17] *Ibid*. at para. 23
[18] *Ibid*. at para. 24
[19] *Ibid*. at para. 25

natural justice. These principles are concerned with ensuring that parties to an appeal have the opportunity to present their case to the Tribunal, to know and answer the other party's legal case, and to have a decision made by an unbiased decision maker based on the law and the facts.

[21] This ground of appeal should be raised at the earliest practical time, which the Minister argues was at the hearing. However, even though the Claimant has some legal training and was represented by counsel and so should perhaps have been aware of this rule, I am not convinced that the earliest practical time to raise this issue was during the hearing itself. The Claimant's argument that the General Division member was biased is based not only on the alleged aggressive questioning by the General Division member, but also on the alleged inability to respond to the Minister's oral submissions at the end of the hearing. Since the complaint is regarding what happened at the end of the hearing, the earliest practical time for the Claimant to raise it would be when she applied to the Appeal Division for relief. She raised the issue of bias at that time. Therefore, she is not prevented from doing so.

[22] The legal test to establish bias is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".[20] For the reasons set out below, I am not persuaded that the General Division met this test.

[23] The Claimant argues that the General Division must have been biased because its decision was sent out on her birthday. However, that the decision was issued on a particular date that is special to a claimant does not show bias. The decision's date is in no way connected to its reasons or the outcome of an appeal.

[24] In addition, the Claimant argues that the General Division must have been biased because it read the prior General Division decision and relied on evidence given at that hearing (by listening to the audio recording). However, the General Division member is presumed to be impartial. That she had access to the recording of the prior hearing does not rebut this presumption. In addition, the General Division member held a further hearing and allowed the

[20] *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369

Claimant to present additional evidence and legal argument. By doing so, both parties had the opportunity to address any parts of the prior hearing and persuade the General Division of its case. Bias is therefore not demonstrated.

[25] The Claimant also argues that the General Division was biased because it questioned the Claimant aggressively and cut off her answers during the hearing. However, a Tribunal member is permitted latitude in how they conduct a hearing as they are the master of the proceedings and have to balance priorities of informality, speed and fairness. The Federal Court has also set out the following guiding principles:

a) Within limits, adjudicators have the right to cross-examine the witnesses they hear;

b) Adjudicators can interrupt witnesses during their examination-in-chief for the purpose of clarifying the answers given;

c) The tone and content of an adjudicator's questions must be judicious; and

d) Harassing comments and unfair questions to a witness are not acceptable.

Whether a Tribunal member has followed these principles will depend on the facts and circumstances of each case.[21]

[26] The Claimant alleges that on three occasions the Tribunal Member interrupted and questioned her aggressively. I have listened to the General Division hearing recording around each of these times. First, the Tribunal Member asked the Claimant about her eating problems. The General Division Member summarized the medical evidence about the Claimant's weight and asked her whether her weight was consistent. The General Division member allowed the Claimant to give a full answer and explanation.[22]

[27] Second, the General Division Member asked the Claimant about her attendance at the Rothbart Clinic for pain management. She interrupted the Claimant's answer to clarify that the

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[21] *Mohammad v. Canada (Minister of Citizenship & Immigration)* (2000), 4 Imm. L.R. (3d) 152; *S. B. v. Minister of Employment and Social Development*, 2018 SST 405

[22] General Division hearing recording Part I at approximate time 46:45

Claimant's evidence was that this clinic had nothing more to offer than the treatment she received elsewhere.[23]

[28] Finally, the Claimant complains about when the General Division Member began to ask questions. However, the hearing recording reveals that the Claimant's lawyer finished asking questions and stated that she had no more questions for the Claimant. The General Division Member then said that she had some questions, and began to ask questions to clarify the evidence.[24]

[29] At no time did the General Division member question the Claimant in an overbearing or aggressive manner. The Claimant was able to fully answer questions posed. The General Division member's questions were relevant to the issues it had to decide. The Claimant's counsel did not object to any of the questions posed, or the manner in which they were posed. Therefore, the General Division member acted appropriately when questioning the Claimant.

[30] The fact that the Minister's representative did not question the Claimant does not demonstrate bias. It is up to each party to decide how or if they will participate in a hearing; the Tribunal Member cannot compel a party to do so.

[31] The Claimant's last argument is that the General Division was biased because it did not allow her to respond to the Minister's oral submissions. However, the Minister's legal position was presented in writing approximately one month prior to the hearing. Therefore, the Claimant had plenty of time to understand and respond to it. In addition, at the hearing, the Claimant's counsel made oral submissions. The Minister's representative then did the same. The General Division member then offered the Claimant's counsel an opportunity to present submissions in reply. When counsel then stated that the Claimant wanted to say something, the General Division member replied that the Claimant's time was over, but counsel's was not.[25] This was correct. The time to present evidence was over; it was time for legal argument. The Claimant, through counsel, was able to present legal argument in reply.

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[23] *Ibid*. at approximate time 48:00
[24] *Ibid*. at approximate time 40:45
[25] General Division hearing recording Part II at approximate time 15:46

[32] For these reasons, an informed person, viewing the matter practically, would not conclude that it was more likely than not that the General Division would decide the appeal unfairly. The appeal fails on the basis that the General Division failed to observe a principle of natural justice.

CONCLUSION

[33] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
APPEARANCES:	J. N., Appellant Nathalie Pruneau, Representative for the Respondent