Federal Court  Cour fédérale

Date: 20210407

Docket: T-456-19

Citation: 2021 FC 298

Fredericton, New Brunswick, April 7, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

PAULA ANNE HICKS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] On this judicial review, Paula Anne Hicks, argues that the Social Security Tribunal (SST) made an error regarding the date of the onset of her disability. Ms. Hicks seeks review of the SST Appeal Division (AD) decision of February 8, 2019, denying her request to appeal the SST General Division (GD) decision. The SST GD found that August 2017 was when her disability became severe and prolonged.

[2] Ms. Hicks, who represents herself on this matter, argues that the GD relied solely on a handwritten note from Dr. Hamid dated August 30, 2017, to find that she was disabled effective August 2017. She argues that there was a failure to consider all of her medical evidence.

[3] I have determined that medical evidence was properly considered and that the decision of the AD is reasonable, therefore this judicial review is dismissed.

Background

[4] In February 2016, Ms. Hicks applied for a disability pension under the *Canada Pension Plan* (CPP). The GD determined that Ms. Hicks' minimum qualifying period (MQP) was December 31, 2017, meaning she had to establish disability on or before that date.

[5] At the first level of consideration, the Minister refused her application on the basis that her disability was not "severe and prolonged".

[6] Ms. Hicks appealed the Minister's decision to the SST GD who, on March 20, 2018, concluded that Ms. Hicks did not provide sufficient evidence to establish that she was regularly incapable of performing substantially gainful work as of the MQP and continuously afterward.

[7] Ms. Hicks filed an application to rescind or amend with new evidence. On November 11, 2018, based upon this new evidence, the GD found that she did have a severe and prolonged disability effective August 2017.

[8] Ms. Hicks sought to appeal the GD decisions as she disagrees with the determination of the effective date of her disability. According to Ms. Hicks, her disability began in March 2015 rather than August 2017 as found by the GD.

Appeal Division Decision

[9] Ms. Hicks requested leave to appeal from two decisions of the GD - the March 20, 2018 decision and the November 11, 2018 decision.

[10] The grounds of appeal are outlined in section 58 of the *Department of Employment and Social Development Act, (DESDA)* as follows:

58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) the General Division 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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[11] The AD concluded that there was no arguable case for the leave to appeal regarding the March 20, 2018 decision as the GD found in its second decision of November 11, 2018, that Ms. Hicks did have a severe and prolonged disability. The AD determined that Ms. Hicks had therefore received the remedy she sought.

[12] The AD concluded that the second leave to appeal application, regarding the November 11, 2018 decision of the GD, did not have a reasonable chance of success as Ms. Hicks was not able to establish that the GD disregarded the evidence of her medical history. The AD states "in this case, having heard testimony and reviewed the medical file, the General Division changed its mind about the Applicant's disability once it saw that Dr. Hamid no longer believed her impairments to be temporary. It seems to me that this was a rational basis on which to establish the date of onset."

[13] The AD concluded that neither of Ms. Hicks' leaves to appeal had a reasonable chance of success on appeal and on February 8, 2019, the AD refused Ms. Hicks' requests to appeal.

Issues

[14] The following are the issues that require determination:

a. Who is the proper Respondent?
b. Has Ms. Hicks filed evidence that the Court cannot consider?
c. Is the AD decision reasonable?

Standard of Review

[15] The applicable standard of review of a decision of the AD denying leave to appeal is reasonableness (*Hurtubise v Canada (Attorney General)*, 2016 FCA 147 at para 5; *Bossé v Canada (Procureur général)*, 2019 FC 137 at para 32).

[16] When reviewing a decision for reasonableness, the Court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, *2019 SCC 65* at para 99). A reasonable decision is internally coherent, and displays a rational chain of analysis (*Vavilov* at para 85).

Analysis

a. *Who is the proper Respondent?*

[17] The Respondent points out that the Social Security Tribunal of Canada (SST) is not the proper party to name as the Respondent pursuant to *Rule* 303(1)(a) of the *Federal Courts Rules*, SOR/98-106. Because government departments, like the Social Security Tribunal, are not legal entities, they are not the proper party to name as a Respondent (*Hideq v Canada (Attorney General)*, 2017 FC 439 at para 12.)

[18] The Attorney General of Canada is the proper Respondent. Accordingly, the style of cause shall be amended to name The Attorney General of Canada as the Respondent.

b. *Has Ms. Hicks filed evidence that the Court cannot consider?*

[19] The Respondent objects to the Court considering two letters from medical doctors filed by Ms. Hicks. The first is a letter of March 4, 2019, from Dr. Hamid and the second is a letter of February 28, 2019, from Dr. Natha. Both letters post-date the decision of the AD and were therefore not before the AD when it refused to grant leave to appeal on February 8, 2019.

[20] In my view, the medical letters sought to be relied upon by Ms. Hicks contain information which could have been provided to the AD. Dr. Hamid's March 4, 2019 letter states that Ms. Hicks has been unable to work since March 2015. However, Dr. Hamid provides no explanation as to why this opinion could not have been provided earlier to either the AD or the GD. Similarly, Dr. Natha's February 28, 2019 letter also states that Ms. Hicks has been unable to work since March 2015. Again, Dr. Natha's letter does not explain why this evidence could not have been provided earlier. Ms. Hicks also did not explain why the information provided in these letters was not available to submit to the AD.

[21] As a general rule, on judicial review the Court only considers the evidence that was before the decision-maker (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-18; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42.)

[22] As noted by the Court in *Delios* at paragraph 41, the reason courts cannot accept new evidence is because Parliament has given the fact-finding responsibility to the administrative decision maker (here the SST) and not the reviewing court.

[23] New evidence can be considered on judicial review in limited circumstances, such as when: the evidence is necessary to highlight or summarize background information; the evidence is necessary to explain the absence of evidence on a certain subject matter; or, the evidence is necessary to explain an improper purpose or fraud (*Bernard* at paras 19-25).

[24] Ms. Hicks does not argue that there is an absence of evidence or that there was improper purpose or fraud. Therefore, the only potential exception in this case would be the background information exception. However, this exception is restricted to circumstances where there is procedural and factual complexity and the background information is provided in a neutral manner (*Delios* at para 45).

[25] What Ms. Hicks seeks to introduce on this judicial review are new medical reports on her medical condition in 2015. In my view, this does qualify as admissible evidence under the background information category.

[26] Filing new medical evidence was addressed in *Daley v Canada (Attorney General)*, 2017 FC 297 at a paragraph 14 where the Court states, “the new medical evidence was not before the decision maker and it goes to the merits of the matter; accordingly, it is not admissible in this application for judicial review [citations omitted]”.

[27] Accordingly the letter of March 4, 2019 from Dr. Hamid and the letter of February 28, 2019 from Dr. Natha are not admissible.

c. *Is the AD decision reasonable?*

[28] To establish an entitlement to long term disability, Ms. Hicks had to establish, on a balance of probabilities, that it is more likely than not, that she was disabled, as defined in the CPP, on or before the end of the MQP. Section 42 (2)(a) of the CPP defines disability as follows:

42 (2) For the purposes of this Act,	**42 (2)** Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	**a)** une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[29] In support of her argument that she was disabled as of March 2015, Ms. Hicks relies upon the fact that on two previous occasions she has been unable to work. Namely, she was unable to work from April to November 2013, and then in March 2015 she stopped working.

[30] In the decision of March 20, 2018, the GD states, "while the tribunal acknowledges that [Ms. Hicks] stopped working in 2015…the medical evidence filed with the Tribunal does not demonstrate that [Ms. Hicks] has been considered unable to earn a living indefinitely or unable to work for another employer, although the medical evidence does support a finding that [Ms. Hicks] was not recommended to return to her previous employer." The GD decision also notes that Ms. Hicks was enrolled in full-time studies in late 2016.

[31] In the November 11, 2018 decision, the GD found as follows:

> …as of August 2017 Dr. Hamid had not exhausted all treatment and was hopeful that the Applicant could return to some form of employment. However, once therapies and treatments were largely exhausted Dr. Hamid felt confident concluding that the Applicant's symptoms were chronic and that the Applicant was not improving to allow her to return to any employment.

[32] Based upon this, the GD determined that "the Applicant had a severe and prolonged disability in August 2017 when Dr. Hamid placed the Applicant on sick leave for 6 months and subsequently concluded she would be off work indefinitely."

[33] In considering the totality of the evidence, the GD concluded as follows in paragraph 34 of the November 11, 2018 decision:

> I rely on the evidence as set out in the original general division decision. With the added evidence of Dr. Hamid's June and

> September 2018 letters I find that the applicant's severe anxiety and other mental health related issues had become chronic as of at least August 2017 such that the applicant was at the time incapable of regularly pursuing any substantially gainful employment. Where the evidence at the February 2018 hearing fell short of establishing that the applicant had a severe disability, I am satisfied on the supporting evidence of Dr. Hamid in his June and September 2018 letters, that the applicant had a severe disability as of December 31, 2017 and continuously thereafter.

[34] It is clear from the above that the GD acknowledged Ms. Hicks' medical history of severe anxiety and mental health issues and the fact that she had been off work. However, it was not until her condition became chronic and she was incapable of gainful employment that she qualified for disability benefits within the meaning of the CPP legislation. Based upon the medical evidence of Dr. Hamid, that date was August 2017.

[35] During oral submissions, and relying upon paragraph 28 of her written submissions, Ms. Hicks states that the GD erred by relying solely on Dr. Hamid's report of August 30, 2017. However, as indicated above, the GD accepted and relied upon Dr. Hamid's reports of June 2018 and September 2018. I therefore disagree with Ms. Hicks' submission that the GD relied upon only one report to conclude that August 2017 was the effective date of her disability.

[36] In considering Ms. Hicks' leave to appeal applications, the AD was to assess if the appeals have a reasonable chance of success on one or more of the grounds identified in subsection 58(1) (outlined above) (*Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 32).

[37] In my view, the AD reasonably concluded that Ms. Hicks' leave to appeal applications did not have a reasonable chance of success as the GD thoroughly reviewed and considered the evidentiary record before it. Although I acknowledge Ms. Hicks' frustration with the process, it is not the role of this Court to reassess or revaluate the evidence considered by the GD and the AD. As long as this Court is satisfied that the evidence was reasonably considered, the Court will not interfere with the decision of the AD.

[38] Ms. Hicks' assertion that she was unable to work as of March 2015 was considered by the GD. The first decision of the GD concluded that the medical evidence suggested that her condition may improve with treatment. The second decision of the GD, with the benefit of new evidence, concluded that Ms. Hicks had exhausted treatment options and her disability was "severe and prolonged". On the basis of the new evidence provided by Dr. Hamid, the GD determined that Ms. Hicks' "severe and prolonged" disability began August 2017 when Dr. Hamid placed her on sick leave. The GD relied upon Dr. Hamid's statement that he could not have found that Ms. Hicks was unable to return to work indefinitely until he had exhausted all therapies and treatment. Based upon the evidence, the GD concluded that Ms. Hicks' condition had evolved such that she did have a "severe and prolonged" disability within the meaning of the legislation.

[39] The AD considered and assessed both of Ms. Hicks' leave to appeal applications and noted her assertion that the onset of her disability was prior to August 2017. However, the AD concluded that the evidence Ms. Hicks' relied upon for this assertion "was on the record when

the General Division considered the Applicant's disability claim, and [the Member saw] nothing in its decision to indicate that it disregarded her medical history."

[40] In conclusion, while I understand that Ms. Hicks disagrees with the AD decision, she has not demonstrated that the GD failed to consider the medical evidence on record. Based upon that evidence, the AD reasonably concluded that neither of Ms. Hicks' leave to appeal applications had a reasonable chance of success considering the available grounds of appeal.

[41] For the above reasons, I conclude that the decision of the Appeal Division to not allow the appeals to go forward is reasonable and there are no grounds for the Court to intervene with the decision. No costs are awarded.

JUDGMENT IN T-456-19

THIS COURT'S JUDGMENT is that:

1. The Attorney General of Canada is herewith named as the Respondent.

2. This judicial review of the Social Security Tribunal Appeal Division decision of February 8, 2019 is dismissed.

3. No costs are awarded.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-456-19
STYLE OF CAUSE:	PAULA ANNE HICKS v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN CALGARY, ALBERTA AND FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	FEBRUARY 15, 2021
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	APRIL 7, 2021

APPEARANCES:

Paula Hicks	APPLICANT ON HER OWN BEHALF
Sandra Doucette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- Nil -	SELF-REPRESENTED APPLICANT
Attorney General of Canada Department of Justice Canada ESDC/VAC Legal Svcs Gatineau, Quebec	FOR THE RESPONDENT