Federal Court of Appeal | Cour d'appel fédérale

Date: 20180301

Docket: A-201-17

Citation: 2018 FCA 48

CORAM: **STRATAS J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

SANTOSH SHARMA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 8, 2018.

Judgment delivered at Ottawa, Ontario, on March 1, 2018.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: STRATAS J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] The applicant, Santosh Sharma, applies for judicial review of an order of the Social Security Tribunal (Appeal Division) dated May 24, 2017. The Appeal Division dismissed the applicant's appeal from a decision of the Social Security Tribunal (General Division) which found that the applicant does not suffer a severe disability.

II. Background

[2] The applicant stopped working due to various medical conditions including sleep apnea, asthma, hypertension, diabetes, depression, and chronic pain in his hip and ankle. He applied for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Act). Paragraph 42(2)(*a*) of the Act provides that a person is disabled for the purposes of the Act if the disability is both severe and prolonged:

When person deemed disabled	**Personne déclarée invalide**
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; and	(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;

The Minister of Employment and Social Development denied the application initially and on reconsideration. Then the applicant appealed the decision to the General Division.

III. General Division Decision

[3] The General Division found that the applicant was not eligible for a disability pension because he had not established a severe disability. It explained that the evidence did not establish on the balance of probabilities that he lacked the capacity to pursue sedentary, non-physically demanding employment and so the applicant had an obligation to seek alternative employment but did not do so. Further, the General Division explained that the applicant did not meet his duty to mitigate because he did not follow medical advice and did not provide a reasonable explanation for his failure to do so. Therefore, the disability was not severe. The applicant sought leave to appeal this decision to the Appeal Division. The only issue for which leave to appeal was granted was whether the General Division applied the proper legal test on the issue of whether the disability was severe.

IV. Appeal Division Decision

[4] The Appeal Division dismissed the appeal. It found that the General Division did not apply the proper test for severity as it did not analyze how the applicant's personal characteristics impacted his capacity to pursue any substantially gainful occupation in a "real world" context in accordance with *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C.R. 130 (*Villani*). It found, however, that this error is moot because the General Division also found that the applicant did not make reasonable efforts to follow medical advice to alleviate his conditions or provide a reasonable explanation why he did not do so (*Lalonde v. Canada*, 2002 FCA 211, 299 N.R. 229). The Appeal Division explained that it should not intervene in the General Division's assessment of whether non-compliance was reasonable as this is a question for the trier of fact and that the General Division considered this question.

[5] The applicant filed an application for judicial review in this Court.

V. Issues

[6] I would characterize the issues for us to determine in this judicial review as follows:

1. Can the applicant submit new evidence?
2. Did the General Division breach the applicant's right to procedural fairness?
3. Was the decision of the Appeal Division reasonable?

VI. Analysis

A. *The applicant cannot submit new evidence.*

[7] The applicant submits new evidence regarding his language proficiency, work experience, and reasons for not following treatment recommendations in the form of multiple affidavits. Generally, a party cannot submit new evidence on an application for judicial review: *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189; ***Delios v. Canada (Attorney General)***, 2015 FCA 117, 472 N.R. 171. The role of this Court is to decide whether the decision of the Appeal Division was reasonable based on the evidence that was before it (*Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44). The respondent argues that a judicial review should not be an opportunity to correct the deficiencies of the applicant's testimony at the hearing before the General Division. I agree.

[8] The rule against permitting new evidence in a judicial review proceeding respects the differing roles played by judicial review courts and administrative decision-makers (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access*

Copyright), 2012 FCA 22 at para. 16, 428 N.R. 297 (*Access Copyright*)). Parliament gave the Social Security Tribunal the power to decide facts relating to disability status and this Court the power to review that decision based on the facts before the Tribunal (*Access Copyright* at para. 17). The three enumerated exceptions for when new evidence can be introduced in a judicial review proceeding respect these differing roles—as must any potential additional exceptions. New evidence may be admitted where (1) it provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits (2) it highlights the complete absence of evidence before the administrative decision-maker on a particular finding, or (3) it brings to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker: *Access Copyright* at para. 20; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116. As this Court explained in *Access Copyright* at paragraph 20, "[i]n fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker".

[9] Our role is to review the decision of the Appeal Division based on the facts before it. It is not to consider new evidence that should have been placed before the General Division and the Appeal Division. The new evidence in this matter does not provide general background information, highlight the complete lack of evidence before the decision-maker on a particular finding, or point out defects not evident in the record. Ultimately, the new evidence tendered by the applicant here provides additional information that was available at the time of the hearing

before the General Division and that goes to the merits. Thus, the new evidence is inadmissible and so it must be struck from the record.

B. *The General Division did not breach the applicant's right to procedural fairness.*

[10] It is not necessary to set out the standard of review for procedural fairness because there was no breach of procedural fairness in this case on any standard.

[11] The applicant argues that his right to procedural fairness was breached because he was not provided an opportunity to have an interpreter at the hearing before the General Division. I disagree. The General Division's Notice of Hearing informed the applicant that he could request an interpreter. The applicant, who was represented by a fluent paralegal at the General Division hearing, chose not to make this request. The applicant has a duty to raise issues of procedural fairness at the earliest opportunity. If the applicant felt that there was a breach of procedural fairness by the General Division, he or his paralegal should have raised this issue before the General Division. This, however, is the first time that the applicant has raised this argument and, in my view, it is not open to this Court to review this issue of procedural fairness.

C. *The Appeal Division's decision that the applicant does not suffer from a severe disability is reasonable.*

[12] In my view, the question before this Court is not whether the Appeal Division applied the correct legal test. It did. Rather the question is whether the Appeal Division properly applied that legal test. This is a question of mixed fact and law and should be reviewed on the standard of reasonableness: *Dunsmuir v. New Brunswick* 2008 SCC 9 at para. 53, [2008] 1 S.C.R. 190

(*Dunsmuir*). As long as the decision of the Appeal Division is justifiable, transparent, and intelligible and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", this Court will not intervene (*Dunsmuir* at para. 47).

[13] It is not for this Court to re-weigh evidence that was before the Appeal Division. The Appeal Division upheld the General Division's finding that the applicant did not make reasonable efforts to follow medical advice and that this makes any analysis of the applicant's personal characteristics as outlined in *Villani* moot. This was reasonable based on the evidence before it. In my view, the analysis to establish a severe disability under paragraph 42(2)(*a*) of the Act requires an analysis of both the personal characteristics outlined in *Villani* and the duty to mitigate outlined in *Lalonde*. If either aspect fails, the applicant does not establish a severe disability.

[14] The Appeal Division cited paragraphs 72 and 73 of the decision of the General Division where the General Division found that the applicant did not make reasonable efforts to follow medical advice because he did not use his sleep mask as instructed and left the hospital against medical advice. The Appeal Division explained its approach to these findings at paragraph 16 of its decision:

> [16] The Appeal Division should not be conducting its own assessment of whether an appellant's non-compliance is reasonable, provided that the General Division is aware of and considers whether an appellant's non-compliance with treatment recommendations is reasonable, and what impact that refusal has on an appellant's disability status. I am satisfied that, in this case, the General Division considered whether the Appellant's non-compliance with treatment recommendations was reasonable and what impact that had on his disability status.

[15] In my view, given that the Appeal Division found that the applicant did not meet his duty to mitigate, it was reasonable for it to find that any error on the part of the General Division to adequately consider the personal characteristics outlined in *Villani* was moot. This decision is reasonable in light of the evidence that was before the Appeal Division.

VII. Conclusion

[16] For the foregoing reasons, I would dismiss the application for judicial review with costs in the amount of $250.00.

"David G. Near"
J.A.

"I agree.
David Stratas J.A."

"I agree.
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE SOCIAL SECURITY TRIBUNAL OF CANADA APPEAL DIVISION, DATED MAY 24, 2017.

DOCKET:	A-201-17
STYLE OF CAUSE:	SANTOSH SHARMA v. AGC
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 8, 2018
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	STRATAS J.A. WOODS J.A.
DATED:	MARCH 1, 2018

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