Federal Court of Appeal  Cour d'appel fédérale

Date: 20180614

Docket: A-394-17

Citation: 2018 FCA 118

CORAM: **NEAR J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

CHRISTOPHER GARVEY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on May 29, 2018.

Judgment delivered at Ottawa, Ontario, on June 14, 2018.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: NEAR J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this application for judicial review, Mr. Garvey seeks to set aside the September 22, 2107 decision of the Appeal Division of the Social Security Tribunal (SST-AD) in *C. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 482 denying his appeal from the January 19, 2016 decision of the General Division of the Social Security Tribunal (the SST-GD or the General Division). In that decision, the SST-GD upheld the denial of disability benefits to Mr. Garvey by reason of his failure to establish that he suffered from a severe and

prolonged disability within the meaning of section 42 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8. It is common ground between the parties that the SST-AD's decision may be set aside only if it is unreasonable, that being the applicable standard of review to be applied by this Court as was held in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 at paras. 24-32.

[2] In this application, Mr. Garvey raises two grounds for intervention. He first submits that the SST-AD erred in holding that it was not empowered to reweigh the evidence before the General Division, suggesting that this holding conflicts with what the Federal Court held in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 (*Karadeolian*), *Griffin v. Canada (Attorney General)*, 2016 FC 874 (*Griffin*) and *Murphy v. Canada (Attorney General)*, 2016 FC 1208 (*Murphy*). Second, he submits that the SST-AD committed a reviewable error in improperly applying the holding in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 (*Martin*) by failing to recognize that chronic pain may be debilitating, despite the lack of objective medical evidence to support the condition, as was held in *Martin*.

[3] In my view, neither of these arguments has merit.

[4] Insofar as concerns what the Federal Court said in *Karadeolian*, *Griffin* and *Murphy*, those cases do not state what Mr. Garvey alleges. Rather, they involve the test for leave to appeal to be applied by the SST-AD and indicate that leave should be granted if the SST-GD arguably overlooked or misconstrued key evidence. Where this occurs, the SST-GD's decision might be subject to being overturned by the SST-AD.

[5] Under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the DESDA), the SST-AD may intervene in factual findings or findings of mixed fact and law (which do not disclose an extricable error of law) made by the General Division only where those findings were made in a perverse or capricious manner or without regard to the evidence. This is a more stringent test than evidentiary reweighing and asks the SST-AD to consider whether the factual findings of the General Division were unreasonable, not whether they were incorrect.

[6] Where a tribunal makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to be made in a perverse or capricious manner or without regard to the evidence. Thus, all the Federal Court indicated in *Karadeolian*, *Griffin* and *Murphy* is that leave should be granted by the SST-AD if the SST-GD arguably overlooked or misconstrued key evidence because such a finding might warrant intervention under section 58 of the DESDA as it might be said to have been made in a perverse or capricious manner or without regard to the evidence. The cases do not stand for the proposition that the SST-AD may re-weigh the evidence that was before the General Division.

[7] As this Court held in *Quadir v. Canada (Attorney General)*, 2018 FCA 21 (*Quadir*), a disagreement with the application of settled principles to the facts of a case does not afford the SST-AD the basis for intervention. Such a disagreement does not constitute an error of law or a factual finding made in a perverse or capricious manner or without regard to the evidence.

[8] The respondent suggests that *Quadir* is at odds with the prior decisions of this Court in *Canada (Attorney General) v. Bellil*, 2017 FCA 104 (*Bellil*), *Sharma v. Canada (Attorney General)*, 2018 FCA 48 (*Sharma*), *Budhai v. Canada (Attorney General)*, 2002 FCA 298 (*Budhai*) and *Stone v. Canada (Attorney General)*, 2006 FCA 27 (*Stone*), which it submits stand for the proposition that the SST-AD may review erroneous findings of mixed fact and law. With respect, I disagree for two reasons.

[9] First, *Quadir* does not say that all erroneous findings of mixed fact and law made by the General Division are unreviewable by the SST-AD, but, rather, only that where such errors merely involve a disagreement on the application of settled law to the facts, they do not constitute errors reviewable under subsection 58(1) of the DESDA. As already noted, where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the SST-AD may intervene under subsection 58(1) of the DESDA.

[10] Secondly, in none of *Bellil*, *Sharma*, *Budhai* or *Stone*, did this Court indicate that mere disagreement with the application of settled law to the facts affords the basis for intervention under subsection 58(1) of the DESDA (or under similar language previously contained in the *Employment Insurance Act*, S.C. 1996, c. 23). Rather, in *Bellil*, *Budhai* and *Stone*, the basis for intervention was found to arise from errors of law and, as concerns this issue, *Sharma* dealt with the standard of review to be applied by this Court to errors of mixed fact and law claimed to have been committed by the SST-AD.

[11] It accordingly was not unreasonable for the SST-AD to have concluded that it was not open to it to reweigh the evidence before the General Division.

[12] Insofar as concerns the *Martin* case, it does not stand for the proposition that Mr. Garvey advances. Proof that a claimant suffers from chronic pain syndrome does not automatically mean that a claimant is entitled to disability benefits under the *Canada Pension Plan* or that the lack of medical evidence to support a claimed disability must be disregarded. Rather, entitlement to disability benefits depends on whether a claimant meets the definition of disability set out in section 42 of the *Canada Pension Plan*, which requires consideration of whether the claimed disability is severe and prolonged. Both the SST-AD and GD recognised this to be the controlling principle.

[13] Moreover, they committed no reviewable error in their assessment of Mr. Garvey's claim as there were facts, including some of the medical evidence, to support the conclusion that he did not meet the statutory definition of disability. More specifically, no medical professional (other than a massage therapist) offered the opinion that Mr. Garvey suffered from a severe and prolonged disability at the relevant time, and the neurologist whom he saw opined that Mr. Garvey would improve over time. It was accordingly open to the SST-AD to decline to interfere with the General Division's decision and to find that the holding in *Martin* did not mandate a different result.

[14] The SST-AD's decision was therefore reasonable and this application must accordingly be dismissed. I would not make any award of costs as none were sought by the respondent, and it would not be appropriate to award them.

"Mary J.L. Gleason"
J.A.

"I agree.
D. G. Near J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 29, 2018
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	NEAR J.A. LASKIN J.A.
DATED:	JUNE 14, 2018

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