Federal Court of Appeal  Cour d'appel fédérale

Date: 20190125

Docket: A-52-18

Citation: 2019 FCA 18

CORAM: **PELLETIER J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

HELEN WACHOWIAK

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 16, 2019.

Judgment delivered at Ottawa, Ontario, on January 25, 2019.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The Appeal Division of the Social Security Tribunal of Canada dismissed the applicant's appeal because it found that the General Division of the Tribunal had made no error when it found that the applicant had not demonstrated that she suffered from a severe and prolonged disability as of December 31, 2007 (2017 SSTADIS 769). This is an application for judicial review of the decision of the Appeal Division.

[2] A single issue is raised on this application: has the applicant established that the decision of the Appeal Division was unreasonable? While the applicant points to evidence, particularly evidence from the Women's College Hospital, that she says demonstrates that she is disabled, the issue before this Court is not whether the applicant is currently disabled. She is required to establish disability as of the minimum qualifying period, in this case December 31, 2007. Accordingly, as previously explained, the issue is whether the Appeal Division unreasonably concluded she had not.

[3] In my view, the applicant has not shown that the decision of the Appeal Division was unreasonable. I reach this conclusion for the following reasons.

[4] First, while the December 13, 2009, report of Dr. Pop states that the applicant suffers from chronic fatigue and chronic pain syndrome, and while the May 9, 2012, report of Dr. Pop describes this condition to be chronic, severe and unlikely to improve, Dr. Pop provides no evidence that this condition existed as of December 31, 2007. Dr. Pop first saw the applicant on October 4, 2009, and she does not have access to the records of the applicant's previous family physician.

[5] Similarly, Dr. Parnes' report of November 14, 2012, and Dr. Harth's report of August 31, 2011, do not establish disability as of December 31, 2007. While Dr. Harth's report expressed his opinion as of that date that the applicant was "work disabled", this evidence falls short of demonstrating disability in 2007.

[6] I now turn to the second reason for my conclusion. The applicant argues that the Appeal Division failed to give proper weight to reports provided by alternate healthcare providers. The applicant provided reports from an Osteopath, a Reiki practitioner, a clinic that offered Iridology, Homeopathy and Acupuncture Therapy and an Acupuncturist. She argues that these reports were improperly given little or no weight. However, when one looks at the content of the reports they either did not speak to the applicant's condition in 2007, or provided no real diagnosis, treatment plan or prognosis. Rather, with the exception of the report of the Osteopath (who did not begin to treat the applicant until 2013) the reports generally listed the various symptoms described by the applicant without providing any professional opinion or evaluation about the applicant's recitation of her symptoms.

[7] I am satisfied that on the evidentiary record before it, the Appeal Division's conclusion that the applicant had failed to establish disability as of December 31, 2007, was reasonable.

[8] Finally, the applicant argues that the hearing before the General Division was unfair, and not consistent with the principles of natural justice, because no audio record of the hearing was available. The applicant says that without the recording she could not demonstrate that she had given evidence about the qualifications of one of her healthcare practitioners. While the applicant was not given permission to raise this issue before the Appeal Division, the Appeal Division allowed the applicant to give evidence about her testimony before the General Division about the qualifications of the healthcare practitioner. The Appeal Division did not find the applicant's testimony to be credible (reasons, paragraph 27).

[9] In my view, the Appeal Division provided a reasonable remedy to the applicant to enable her to compensate for the unavailability of a record of her testimony before the General Division. In circumstances where that testimony was found not to be credible the applicant has failed to demonstrate that the Appeal Division proceeded in a manner that was unfair.

[10] For these reasons I would dismiss the application for judicial review without costs.

"Eleanor R. Dawson"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-52-18
STYLE OF CAUSE:	HELEN WACHOWIAK v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 16, 2019
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	PELLETIER J.A. WEBB J.A.
DATED:	JANUARY 25, 2019

APPEARANCES:

Helen Wachowiak	FOR THE APPLICANT ON HER OWN BEHALF
Penny Brady	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT