Federal Court of Appeal | Cour d'appel fédérale

Date: 20200519

Docket: A-9-19

Citation: 2020 FCA 91

CORAM: **NEAR J.A.**
RIVOALEN J.A
LOCKE J.A.

BETWEEN:

KIMBERLEY PARKS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by video-conference
at Ottawa, Ontario, Winnipeg, Manitoba and Montreal, Quebec on May 5, 2020.

Judgment delivered at Ottawa, Ontario, on May 19, 2020.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: RIVOALEN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] The applicant, Ms. Kimberley Parks, seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal dated December 14, 2018, which dismissed her appeal from a decision of the General Division. The General Division had found that the applicant was

not entitled to the CPP disability benefit on the basis that she retained some capacity regularly to pursue a substantially gainful occupation and that she had failed to establish that her efforts to obtain and maintain employment were unsuccessful because of her health. The Appeal Division allowed the applicant's appeal on the basis that the General Division had made errors, but elected to render the decision the General Division should have made and ultimately dismissed the appeal.

II. Background

[2] The applicant was employed as a call centre agent in New Brunswick until July 2014. She had previously worked in retail from 2004 to 2013. The applicant suffered a slip and fall on ice in March 2014. She had also previously been involved in motor vehicle accidents in 2000 and 2002 and had been admitted to hospital following an overdose in 2009. Following the slip and fall, the applicant returned to work with modified duties. However, in July 2014, she went on medical leave due to lower back pain. In 2015, she learned that her position at the call centre had been eliminated. She has not returned to the workforce since. Her minimum qualifying period (MQP) ended on December 31, 2016. During the time that the applicant says she was unable to work, she spent periods of time in Alberta which required her to take several airplane trips. Four months prior to the end of her MQP, in the summer of 2016, the applicant also attempted to ride a jet ski, which ended in her suffering a back spasm which resulted in a collision and a concussion for the applicant.

[3] The applicant applied for the disability benefit available under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). In her application, she listed medical conditions including herniated discs, right leg spasms and numbness, right arm numbness, migraines, and pain. Her application also noted tissue damage in her shoulder and back from a prior motor vehicle accident and functional limitations including an inability to bend. The Minister of Employment and Social Development (the Minister) denied the application on the basis that the applicant had failed to establish that she had a severe and prolonged disability on and before the end of her MQP on December 31, 2016. The applicant requested reconsideration of the Minister's decision and was denied again.

[4] The applicant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division found that from the time the applicant left her position at the call centre in 2014 through to the end of her MQP on December 31, 2016, she retained the capacity to work. It concluded that she had failed to return to her position once she was medically cleared to do so. The General Division also found the applicant had failed to make efforts to obtain and maintain alternative employment within her limitations. On this basis, the General Division dismissed the appeal. The applicant appealed the decision of the General Division.

III. Decision of the Appeal Division

[5] The Appeal Division allowed the applicant's appeal on the basis of two errors committed by the General Division. First, it found the General Division had erred in law in failing to consider the totality of the applicant's health conditions in light of her capacity for work. Second,

it found the General Division had erred in fact in failing to demonstrate that it had adequately considered the medical evidence in support of the applicant's experience of pain. The Appeal Division found that the record was complete. It therefore exercised its authority under sections 59 and 64 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, and gave the decision, which it found the General Division should have given.

[6] After conducting its own analysis, the Appeal Division agreed with the General Division that the applicant had not demonstrated that her condition was severe and prolonged, and that her combined medical conditions (including her mental health) did not render her incapable regularly of pursuing any substantially gainful employment by the end of her MQP on December 31, 2016. It therefore concluded that the applicant was not disabled within the meaning of the CPP.

IV. Issues

[7] The issue before this Court on judicial review is whether the Appeal Division could reasonably conclude that at the time of the MQP, the applicant was not disabled under the CPP. Whereas the role of the Appeal Division is to assess whether the General Division erred in law or fact, this Court's role is to see if that Appeal Division's decision is reasonable in terms of the outcome and the process (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83 [*Vavilov*]; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6 at para. 34 [*Stojanovic*]).

V. Standard of Review

[8] The applicable standard of review is reasonableness. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para. 83). This Court must not pre-empt the Appeal Division by making our own assessment of the General Division's decision and measuring the Appeal Division's decision against our own conclusions (*Vavilov* at para. 83; *Stojanovic* at para. 34; *Canada (Attorney General) v. Hong*, 2017 FCA 46 at para. 4).

VI. Analysis

[9] The applicant submits that the Appeal Division erred in law by failing to consider the "real world" circumstances in which the applicant found herself and by failing to apply the test for disability set out in s. 42(2)(a)(i) CPP, which requires that a person who is disabled be incapable regularly of pursuing any substantially gainful occupation. The applicant submits that the Appeal Division should have applied a "material duties" test or a "substantial disability" test. The applicant further submits that the Appeal Division erred in requiring her to demonstrate that she had made efforts to obtain and sustain employment and that such efforts were unsuccessful because of her health. The applicant additionally submits that the Appeal Division erred in improperly weighing several elements of the evidence, including a report by Dr. Brennan dated October 5, 2017, a report by Dr. Finnamore, and activities undertaken by the applicant including travel to Alberta and the jet ski accident.

[10] At the hearing in this matter, counsel for the applicant submitted that the Appeal Division made a serious error when it wrote, at paragraph 26(h) of its decision, that it was not disputed that “the Claimant's family physician did not state that the Claimant was unable to work until after the MQP.” The applicant submitted that this statement was not supported by any of the medical evidence before the Appeal Division. The applicant suggested that this Court should review all of the medical evidence and determine that the Appeal Divison’s conclusion could not be reasonable.

[11] It is not the role of this Court to re-hear and re-weigh the evidence in this matter. However, even a cursory review of the medical evidence makes clear that the position of the applicant's family physician, Dr. Brennan, was not unequivocal until her letter of October 5, 2017 (Applicant’s Book of Authorities, vol. 1, page 280). The MQP ended on December 31, 2016. Consistent with the finding of the Appeal Division at paragraph 26(h) of its decision, Dr. Brennan’s letter of October 5, 2017 was written after the end of the MQP. At page 944 of the Applicant’s Book of Authorities, vol.1, Dr. Brennan seems to agree that as of November, 2015, the applicant was not disabled within the meaning of the CPP disability provisions. In my view, the Appeal Division considered all of the evidence in this matter as it was required to do. Its decision cannot be said to be unreasonable in this regard.

[12] Counsel for the applicant further submitted that the General Division erroneously made, and the Appeal Division erroneously relied on, findings regarding the applicant’s credibility. At paragraph 61 of its decision, the General Division found the applicant’s travels between New Brunswick and Alberta in the fall of 2015 and her attempt to ride a jet ski in August 2016 raised

concerns about the credibility of the applicant's testimony that she was unable to sit or stand for more than ten to fifteen minutes without pain. The Appeal Division held at paragraph 23 of its decision that the General Division had not erred in discounting the applicant's subjective reports about her condition.

[13] Counsel for the applicant argued that whereas the General Division was entitled to consider the applicant's travel and jet ski attempt when determining her ability to function, it was not entitled to make adverse assessments of credibility since the applicant had been forthright about her activities. I am unconvinced that this constitutes an error. In my view, the General Division was properly weighing the available evidence, as is its role. The General Division was entitled to accord minimal or no weight to the applicant's testimony, and the Appeal Division was entitled to agree.

[14] Despite the able arguments put forward by counsel for the applicant, I am not persuaded that the Appeal Division's analysis or conclusion was unreasonable. The Appeal Division applied the appropriate legal test, and did so reasonably. Its chain of analysis is rational and internally coherent and is defensible in light of both the facts and the law.

VII. Conclusion

[15] For these reasons, I would dismiss this application for judicial review without costs.

"D. G. Near"
J.A.

“I agree
Marianne Rivoalen J.A.”

“I agree
George R. Locke J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	RIVOALEN J.A. LOCKE J.A.
DATED:	MAY 19, 2020

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