Federal Court of Appeal | Cour d'appel fédérale

Date: 20200529

Docket: A-260-19

Citation: 2020 FCA 98

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JOCELYN POIRIER

Respondent

Heard by online video conference hosted by the registry on May 21, 2020.

Judgment delivered at Ottawa, Ontario, on May 29, 2020.

REASONS FOR JUDGMENT BY: LOCKE J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200529

Docket: A-260-19

Citation: 2020 FCA 98

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JOCELYN POIRIER

Respondent

REASONS FOR JUDGMENT

LOCKE J.A.

[1] The Attorney General of Canada (the Crown) seeks to set aside a decision of the Social Security Tribunal – Appeal Division (Appeal Division) which allowed an appeal by Jocelyn Poirier from a decision of the Social Security Tribunal – General Division (General Division) denying Mr. Poirier's application for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP).

[2] For the reasons given below, I would allow the Crown's appeal.

I. Facts

[3] Mr. Poirier was a heavy equipment operator employed by Suncor in Alberta in 2014 when back injury made it impossible for him to continue that work. Suncor assigned Mr. Poirier to modified duties: a sedentary office position. For a time, Mr. Poirier tolerated this work with the assistance of painkillers. Importantly, this office position involved regular business hours, as distinct from the shift work that Mr. Poirier had enjoyed as a heavy equipment operator. The shift work had permitted Mr. Poirier to go home to New Brunswick on a regular basis. Such regular trips were no longer feasible under his modified duties with regular business hours. This change may have contributed to Mr. Poirier's decision to leave Suncor and return home. Another factor in his departure may have been his concerns about continued use of painkillers (their effect on him and their potential to cause addiction) and his ability to tolerate his modified duties without them. Yet another issue for Mr. Poirier appears to have been that the modified duties had no purpose, and were basically "pushing you aside."

[4] Upon his return to New Brunswick, Mr. Poirier tried working as a line cook. This effort failed after a few months because it required him to be on his feet for long periods, which caused increased back pain. The General Division concluded that this type of work was not suitable for Mr. Poirier in view of his limitations, and hence could not be considered a serious attempt to find alternative employment.

[5] Mr. Poirier also attempted work in catering as well as computer repair, but the General Division found these to be no more than hobbies, likewise insufficient to represent serious attempts at alternative employment.

[6] Based on conclusions that Mr. Poirier had residual work capacity, but had failed to show an unsuccessful attempt at alternative employment, the General Division denied Mr. Poirier's request for a disability pension, citing *Inclima v. Canada (Attorney General)*, 2003 FCA 117, [2003] F.C.J. No. 378.

II. Decision of the Appeal Division

[7] The Appeal Division appropriately acknowledged that its power to intervene in an appeal from a decision of the General Division is limited by subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA):

Appeal Division	**Division d'appel**
Grounds of appeal	**Moyens d'appel**
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	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de

fact that it made in a perverse or capricious manner or without regard for the material before it.	façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[8] The only ground of appeal that is relevant in this case is the third. The Appeal Division concluded that the General Division had made an error of fact by failing to have regard for some of the evidence when it decided that Mr. Poirier had residual work capacity. Specifically, the Appeal Division found that the General Division had reached that conclusion without having regard for the sedentary work Mr. Poirier had done as modified duties at Suncor.

[9] The Appeal Division noted that the General Division had clearly indicated what evidence it considered on the issue of residual capacity to work: the reports of Drs. McMillan and Manolescu (see paragraph 13 of the General Division's decision and paragraph 18 of the Appeal Division's decision). The Appeal Division acknowledged that the General Division did consider Mr. Poirier's sedentary work at Suncor in assessing his efforts to obtain alternative employment, but noted that it failed to mention this work in its consideration of the issue of residual capacity to work (see paragraph 19 of the Appeal Division's decision).

[10] The Appeal Division also acknowledged the presumption that the General Division considered all of the evidence, but found that this presumption was rebutted because the importance of the evidence of Mr. Poirier's sedentary work at Suncor was such that it should have been discussed on the issue of residual capacity to work, and not merely in relation to attempts to find work. Evidence noted by the Appeal Division that might have been discussed by the General Division included (i) Dr. Robichaud's statement that Mr. Poirier had tried a desk job

but was “unable to tolerate prolonged sitting [due to increased] back pain”, and (ii) Mr. Poirier’s own testimony that he had discontinued the use of the painkillers that had made his desk work at Suncor tolerable, and that he could not do that work without the painkillers (see paragraphs 13 and 23 of the Appeal Division’s decision).

[11] Having found that the General Division had failed to have regard for important evidence and that there was hence a proper ground for the appeal, the Appeal Division proceeded to give the decision that the General Division should have given. The Appeal Division concluded that Mr. Poirier was entitled to a pension because he had proven on a balance of probabilities that his disability was both severe and prolonged (as defined in the CPP) before the end of his minimum qualifying period.

III. Issues

[12] In the present application for judicial review, the Crown argues that the Appeal Division erred in two respects:

a) There was no ground of appeal under subsection 58(1) of the DESDA that permitted the Appeal Division to intervene; and
b) Having decided to intervene, the Appeal Division should not have found that Mr. Poirier’s condition was either severe or prolonged.

[13] Because of my conclusion on the first issue, it is not necessary for me to address the second.

IV. Analysis

A. *Standard of Review*

[14] The parties agree, and I concur, that the standard of review on the issues in dispute is reasonableness. That is to say that, on the issue of whether there was a proper ground of appeal, the task of this Court is to determine whether the Appeal Division's conclusion that it was permitted to intervene was reasonable.

[15] Neither party devoted much of its argument to the question of the standard of review, and both parties' memoranda of fact and law were submitted prior to the recent landmark decision of the Supreme Court of Canada on this question in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*). For this reason, I feel compelled to say just a few words on the subject. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, as well as with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Vavilov* at para. 86, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. To be reasonable, a decision must be based on reasoning that is both rational and logical. The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived: *Vavilov* at para. 102.

B. *Ground of Appeal: Decision Based on Error of Fact Made Without Regard for the Evidence*

[16] As indicated above, the Appeal Division concluded that it had the power to intervene on the basis that the General Division had failed to consider evidence of Mr. Poirier's sedentary work at Suncor when it determined that Mr. Poirier had residual work capacity. Though this evidence was considered in assessing his efforts to obtain alternative employment, the Appeal Division found that "[f]ailing to consider that evidence before finding that [Mr. Poirier] had a residual capacity for work was an error of fact."

[17] In my view, the ground of appeal relied on by the Appeal Division was unreasonable. The fact that certain evidence was discussed earlier or later in the General Division's decision does not alter the fact that it was considered. Moreover, though a finding of residual work capacity is a prerequisite for the relevance of efforts to obtain alternative employment, these two issues are not so distinct that one can reasonably conclude that evidence that was considered for one could have been ignored for the other. Both issues relate to the key question of the severity of Mr. Poirier's disability. To reach the conclusion it did, the Appeal Division cited the importance of the evidence of Mr. Poirier's desk work at Suncor to the residual work capacity issue, and the General Division's reference only to the reports of Drs. McMillan and Manolescu on this issue. However, the General Division did not indicate that it had considered no other evidence on this issue.

[18] The General Division discussed one of the reports of Dr. Robichaud in its decision, and was clearly aware that Dr. Robichaud had been Mr. Poirier's family physician since September 2014 and started treating him for his main medical condition at that time (see paragraph 8 of the General Division's decision). Therefore, it would appear that, in making its decision (including

the conclusion that Mr. Poirier had residual work capacity), the General Division was aware of Dr. Robichaud's statement that Mr. Poirier had tried a desk job but was unable to tolerate prolonged sitting due to increased back pain. I see no reason to conclude that the General Division failed to take this statement into account, and I see no clear finding to that effect by the Appeal Division.

[19] The other evidence that the Appeal Division indicated was inadequately considered by the General Division on the issue of residual work capacity was Mr. Poirier's own testimony (see paragraphs 23 and 24 of the Appeal Division's decision). Indeed, Mr. Poirier did testify that he had stopped taking painkillers and that he could not do the desk work at Suncor without them. However, the General Division was entitled to weigh Mr. Poirier's testimony against the evidence of medical practitioners. At paragraph 15 of its decision, the General Division did just that, stating as follows: "I acknowledge [Mr. Poirier's] testimony regarding his functional limitations, however, his doctors do not preclude lighter, more sedentary work." There is no error in that passage. Though the passage does not enter into the details of Mr. Poirier's testimony to the extent that the Appeal Division felt was warranted, the real issue was whether the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. In my view, the Appeal Division's conclusion that the General Division erred in this respect on the issue of residual work capacity was unreasonable in that it appears to fault the General Division for the extent to which the evidence was discussed and the order in which it was presented. Neither of these, in this case, was a reasonable basis for the Appeal Division's conclusion.

[20] I conclude that the Appeal Division's finding of an error of fact does not fall within a range of possible, acceptable outcomes in this case. Its reasoning lacks the qualities of rationality and logic required of a reasonable decision leading to the conclusion that evidence was overlooked. It follows that the Appeal Division's conclusion that there was a valid ground of appeal in this case should be set aside.

V. Conclusion

[21] For the foregoing reasons, I would allow the present appeal, set aside the decision of the Appeal Division, and remit this matter for re-consideration by a differently-constituted panel of the Appeal Division. Because the Crown does not seek costs, I would award none.

"George R. Locke"
J.A.

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

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-260-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. JOCELYN POIRIER
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	MAY 21, 2020
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	NEAR J.A. RIVOALEN J.A.
DATED:	MAY 29, 2020

APPEARANCES:

Marcus Dirnberger	FOR THE APPLICANT ATTORNEY GENERAL OF CANADA
Duncan Allison	FOR THE RESPONDENT JOCELYN POIRIER

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT ATTORNEY GENERAL OF CANADA
Resolute Legal Fredericton, New Brunswick	FOR THE RESPONDENT JOCELYN POIRIER