Federal Court of Appeal | Cour d'appel fédérale

Date: 20221128

Docket: A-104-21

Citation: 2022 FCA 203

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

BETWEEN:

LAURA-LEE PINKERTON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at by online videoconference hosted by the Registry on November 10, 2022.

Judgment delivered at Ottawa, Ontario, on November 28, 2022.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this application for judicial review, the applicant seeks to set aside the decision of the Appeal Division of the Social Security Tribunal (the Appeal Division) in *L.P. v. Minister of Employment and Social Development*, 2021 SST 116, dismissing the appeal from the General Division of the Social Security Tribunal (the General Division) in *L.P. v. Minister of Employment and Social Development*, 2020 SST 1146. In that decision, the General Division

dismissed the applicant's appeal, seeking disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8.

[2] The applicant also seeks to put before us an affidavit, attaching a letter from her treating psychiatrist, Dr. Pityk, dated May 5, 2021, that was not before the General Division or the Appeal Division and that appears to expand upon the testimony that Dr. Pityk provided before the General Division.

[3] I agree with the respondent that the letter from Dr. Pityk is not admissible because the record on a judicial review application is generally limited to the materials that were before the administrative decision-maker, and none of the limited exceptions to that general rule would apply so as to allow for the admission of the May 5, 2021 letter from Dr. Pityk (see *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at paras. 13–28, 261 A.C.W.S. (3d) 441). I would therefore decide this application without reference to the May 5, 2021 letter from Dr. Pityk.

[4] Turning to the merits of the applicant's application, the General Division found that the applicant failed to establish that she met the statutory criteria for entitlement. These required her to show that she suffered from a severe and prolonged disability as of December 31, 2012, the minimum qualifying period date (MQP) established under paragraphs 44(1)(b) and 44(2)(a) of the *Canada Pension Plan*.

[5] The General Division evaluated the medical evidence submitted, including the testimony and reports from Dr. Pityk. The General Division concluded that the evidence failed to establish

that the applicant suffered from a severe and prolonged disability as of the MQP even though it was readily apparent that she was completely disabled as of the date of the hearing.

[6] The General Division noted in this regard that Dr. Pityk did not start seeing the applicant until June 2017. It also noted that there was no medical evidence from between June 2009 and June 2017. While Dr. Pityk offered the opinion that the applicant likely was severely disabled as of the MPQ date, the General Division did not give this evidence much weight because Dr. Pityk had not seen her until 2017, there was no medical evidence from between 2009 to 2017, and the doctors who saw the applicant in 2009 indicated that she was then capable of working.

[7] The applicant appealed to the Appeal Division, and it upheld the decision of the General Division. The Appeal Division determined that the General Division did not make any error that would come within the scope of section 58 of *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA), which governs appeals to the Appeal Division.

[8] More specifically, the Appeal Division held that the General Division did not err in law as it correctly set out the principles applicable to establishing entitlement to disability benefits under the *Canada Pension Plan*. The Appeal Division also held that the General Division did not make an error of fact within the meaning of section 58 of DESDA because the General Division was entitled to accord little weight to Dr. Pityk's evidence regarding the complainant's condition as of the MQP. The Appeal Division further found that the General Division did not misinterpret the applicant's employment history, based on the applicant's testimony. The Appeal Division therefore concluded that it was open to the General Division to have decided that the applicant

had failed to establish that her condition was sufficiently severe as of the MQP to show an entitlement to benefits.

[9] As noted, the authority of the Appeal Division to interfere with decisions of the General Division is governed by section 58 of DESDA. It limits the grounds of appeal to situations where the General Division:

- failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- erred in law; or
- based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before the General Division.

[10] As held by this Court in *Garvey v. Canada (Attorney General)*, 2018 FCA 118 at paragraph 5, 293 A.C.W.S. (3d) 198, the test for factual error set out in section 58 of DESDA is "[…] a more stringent test than evidentiary reweighing and asks the [Appeal Division] to consider whether the factual findings of the General Division were unreasonable, not whether they were incorrect."

[11] In *Walls v. Canada (Attorney General)*, 2022 FCA 47, 2022 A.C.W.S. 742 [*Walls*], this Court further described the test for the factual errors falling within section 58 of DESDA, stating as follows at paragraph 41:

> This Court has held that a perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence (*Garvey v. Canada (Attorney General)*, 2018 FCA 118, [2018] FCJ No 626 (QL) at para. 6). In the recent decision of *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021

> FCA 161, at paragraphs 122 and 123, referring to paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and to *Rohm & Haas Canada Limited v. Canada (Anti-Dumping Tribunal)* (1978), 1978 CanLII 2028 (FCA), 22 N.R. 175, 91 D.L.R. (3d) 212, this Court considered the meaning of "made in a perverse or capricious manner or without regard to the material before [the decision maker]" in a similar context of determining whether there was a basis for intervention of erroneous factual findings from an administrative decision-maker. In this passage, this Court explained that the notion of "perversity" has been interpreted as "willfully going contrary to the evidence". The notion of "capriciousness" or of the factual findings being made without regard to the evidence would include "circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings."

[12] Before this Court, the applicable standard of review is reasonableness (see, *e.g.*, *Walls* at para. 7; *Canada (Attorney General) v. Burke*, 2022 FCA 44 at para. 25, 468 D.L.R. (4th) 165). Therefore, we cannot intervene unless the decision or reasons of the Appeal Division are unreasonable.

[13] Factual determinations made by administrative tribunals are only unreasonable if they are made in a perverse or capricious manner or without regard to the evidence, as stipulated in paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 72, 304 D.L.R. (4th) 1; and *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 at para. 122, [2021] F.C.J. No. 848 (QL). This is precisely the same test as is set out in section 58 of DESDA. Thus, in a reasonableness review like the present, it is not the role of this Court to reweigh the evidence or to second-guess either the General Division or the Appeal Division.

[14] Before us, the applicant's various arguments all amount to a challenge to the factual determination that the General Division made regarding the severity of her disability as of the

MQP. The applicant more specifically says that the General Division should have accorded greater weight to the evidence of Dr. Pityk and the Appeal Division erred in failing to so find.

[15] However, as noted, a disagreement with the weight accorded to evidence is not tantamount to an unreasonable decision. Administrative decision-makers like the General Division are accorded a broad margin of appreciation for their factual findings, which will not be set aside in a reasonableness review if there is evidence capable of supporting the conclusions reached by the decision-maker.

[16] Here, there was ample evidence to support the General Division's decision to not accord much weight to Dr. Pityk's testimony about the applicant's condition as of the MQP because he had no firsthand knowledge of it. Indeed, in his letter of June 1, 2020 upon which the applicant relies, Dr. Pityk states that he did "[…] not have any specific evidence about how [the applicant] was doing between 2009 to 2017 […]". While Dr. Pityk appears to have testified before the General Division that he believed the applicant had been told by her doctors in 2009 that she should not then work, he did not provide the source of that information to the General Division. Contrary to what the applicant asserted before us, it was not incumbent on the General Division to inquire from Dr. Pityk as to the source of his belief. The burden was on the applicant before the General Division to establish her entitlement to disability benefits.

[17] Given the above statement in Dr. Pityk's June 1, 2020 letter, the opinions from the doctors who saw the applicant in 2009, as well as the fact that Dr. Pityk did not start treating the applicant until 2017, it was open to the General Division to have reached the conclusion that it

did and to the Appeal Division to have declined to interfere with it. The decision of the Appeal Division accordingly is reasonable.

[18] I would therefore dismiss this application, without costs as, appropriately, none were sought by the respondent.

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

“I agree.
John B. Laskin J.A.”

“I agree.
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
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CONCURRED IN BY:	LASKIN J.A MACTAVISH J.A
DATED:	NOVEMBER 28, 2022

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