Federal Court Cour fédérale

Date: February 2, 2016

Docket: T-1221-15

Citation: 2016 FC 115

Toronto, Ontario, February 2, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

XHEMAJL OSAJ

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Osaj asks the Court to set aside the decision of the Appeal Division of the Social Security Tribunal [Appeal Division] denying him leave to appeal a decision of the General Division of that Tribunal [General Division]. At the General Division, Mr. Osaj succeeded in establishing his entitlement to a disability pension under the *Canada Pension Plan*, RSC 1985, c C-8 [CPP]. His application for leave to appeal did not challenge the granting of the pension, but its date of commencement. The General Division had found that he was disabled as of April 13,

2011, but he maintains that he was disabled 17 months earlier, when he was injured as the result of a workplace accident on November 27, 2009.

[2] For the reasons that follow, this application must be allowed.

[3] On November 27, 2009, Mr. Osaj sustained injuries as the result of a serious fall on a job site and he has not returned to work since then.

[4] The General Division found that Mr. Osaj became disabled within the meaning of the CPP on April 13, 2011:

> [57] After considering all the evidence, the Tribunal finds it more likely than not that the Appellant had a severe and prolonged disability in April 2011 which is before his [Maximum Qualifying Period] of December 31, 2011. The Tribunal makes this finding particularly in light of the assessment of Dr. Matthews who reported on April 13, 2011, that the Appellant had reached maximal medical recovery and was "permanently disabled."
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> [58] In short the Tribunal finds that on a balance of probabilities the Appellant was incapable regularly of pursuing any substantially gainful occupation as of April 2011. The Tribunal makes this finding based on medical reports and assessments of Dr. Mihic, Dr. Matthews, and Dr. Bringleson. The Tribunal also makes this finding based on the Appellant's oral testimony about his disability which was consistent, forthright, and credible.
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> …
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> [61] The Tribunal finds that the Appellant had a severe and prolonged disability in April 2011 when Dr. Matthews reported that the Appellant was "permanently disabled." According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of August 2011.

[5] Mr. Osaj submitted that the General Division applied the wrong test when it found that his disability only became “severe” once he had reached “maximal medical recovery” and had become “permanently disabled.” He submitted there, as here, that these concepts form no part of the test for severity under paragraph 42(2)(a)(i) of the CPP, which instead requires that a disability render a person “incapable regularly of pursuing any substantially gainful occupation.”

[6] The Appeal Division noted that the General Division had set out the correct test (at paragraphs 7, 9, 40, and 58 of its decision and not paragraphs 52 and 57 as the Appeal Division stated) and further found that when the General Division referred to the concepts of “maximal medical recovery” and “permanent disability,” it was not departing from the test for severity that it had previously articulated, but was quoting the language used in the medical reports upon which its determination of severity was made.

[7] Mr. Osaj further submitted that the General Division had failed to provide adequate reasons for its selection of the date of onset of disability. In particular, he pointed out that there was other medical evidence, including an earlier report from Dr. Matthews, that spoke of him being disabled much earlier than April 2011.

[8] The Appeal Division noted the General Division’s statement that it had considered all of the medical reports before it. It held that the General Division was not unreasonable to identify April 13, 2011, as the date of onset of disability, based on Dr. Matthews’ report of that date.

[9] The only issue raised is whether it was reasonable for the Appeal Division to hold that Mr. Osaj had failed to raise a ground of appeal with a reasonable chance of success.

[10] In large measure, Mr. Osaj challenges the Appeal Division's decision on the same grounds on which he challenged the General Division's decision. First, he submits that it was unreasonable for the Appeal Division to find that the General Division had applied the correct test for determining severity. Second, he submits that it was unreasonable for the Appeal Division to find that the General Division had given adequate reasons for selecting April 13, 2011, as the date of onset of his disability.

[11] I agree with the Respondent that the test this Court must use when considering both issues is reasonableness: see *Atkinson v Canada (Attorney General)*, 2014 FCA 187, [2015] 3 FCR 461 and *Thibodeau c Canada (Procureur géneral)*, 2015 CAF 167.

[12] Subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 sets out the permissible grounds of appeal from a decision of the General Division. It is not disputed that the grounds raised by Mr. Osaj fell within these accepted grounds. Leave is required to appeal a decision to the Appeal Division and subsection 58(2) of the Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." It is accepted that having a "reasonable chance of success" in this context means having some arguable ground upon which the proposed appeal might succeed.

[13] In my assessment, the two issues raised by Mr. Osaj are intertwined in that the General Division's decision that his disability commenced on April 13, 2011, may be said to be based on an improper test because the General Division fails to explain why, on the evidence before it, it picked that date and not an earlier one.

[14] I agree with the Respondent that the General Division states the correct test for severe disability in its reasons, namely "incapable [of] regularly pursuing any substantially gainful occupation." However, the Appeal Division fails to properly and reasonably address whether that was the test that the General Division actually used when it concluded that Mr. Osaj had a severe disability as at April 13, 2011.

[15] The Appeal Division asserts that the General Division's choice of April 13, 2011, was based on the assessment by Dr. Matthews on that date, and that this choice was reasonable when read in the context of the other medical evidence. Frankly, I find that statement to be perverse.

[16] The Appeal Division does address an earlier report from Dr. Mihic dated June 8, 2010, (on which the General Division stated it "places weight … as it was forthright about the Appellant's medical condition and how it affects his capacity to work") in which he opined that "the applicant will not be able to return in the foreseen future to any kind of temporary and or permanent job." According to the Appeal Division, this report differs from the April 2011 report by Dr. Matthews because it is "not an unequivocal statement of disability." In my view, it is unreasonable to describe as equivocal a medical opinion that states that the patient is unable to work, even on a temporary basis, but leaves open the <u>possibility</u> of recovery at some point

<u>beyond the foreseeable future</u>. The Appeal Division fails to explain why Dr. Mihic's opinion is not an opinion of severe disability nor does it explain why it saw it as equivocal when, on its face, it appears not to be.

[17] The Appeal Division views a statement that Mr. Osaj had reached "maximal recovery" and was "permanently disabled" as an unequivocal statement of disability, even though neither term is the test for a severe disability. However, the Appeal Division fails to address how it can be said that the April 2011 report of Dr. Matthews is unequivocal but not his earlier report of February 1, 2011, in which he says that "Osaj Xhemail has now permanent and serious impairment of all physical capabilities," "[h]e has reached maximal medical recovery," "[h]e is permanently disabled from work or looking for work," "[h]is prognosis remains poor," and "[h]e will remain disabled permanently." While Dr. Matthews' two reports are not identical, the language in both strikes me as equally forceful and I therefore can see no reason for concluding that only the latter report represents an "unequivocal statement of disability."

[18] Lastly, neither the General Division nor the Appeal Division address the following statement in Dr. Matthews' report dated June 2, 2011: "Mr. Osaj has a permanent disability with a very poor prognosis. <u>All of the above are as of June 16 2010</u>" [emphasis added]. I cannot but note that the date of June 2010 coincides with the date of Dr. Mihic's report which the Appeal Division found to be equivocal.

[19] I short, I find the decision of the Appeal Division to be unreasonable because it failed to adequately and carefully consider whether it was arguable that the General Division erred or

made an unreasonable finding as to the onset date of Mr. Osaj's disability, in light of the record before it and the proper test to be applied.

[20] Neither party sought costs. None are ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, without costs, and the application by Mr. Osaj for leave to appeal to the Appeal Division is remitted back to it for redetermination by a different member in keeping with these Reasons.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1221-15
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