Federal Court  Cour fédérale

Date: 20170530

Docket: T-538-16

Citation: 2017 FC 531

Ottawa, Ontario, May 30, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

CHERYL FLAIG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Appeal Division of the Social Security Tribunal [Appeal Division], dated February 24, 2016, in which the Appeal Division denied the Applicant leave to appeal a decision of the General Division of that same Tribunal [General Division] on the issue of the retroactivity of benefits the Applicant was

otherwise found entitled to receive under the *Canada Pension Plan*, RSC, 1985, c C-8, (the *CPP*).

II. Background

[2] The Applicant is a 46 year old widow and a mother a two young children. Her husband - and father of the two children - died tragically on July 31, 2007. As result of her husband's death, she became eligible to receive survivor benefits under the *CPP*.

[3] However, the Applicant only applied for these benefits in January 2012. Her application was accepted with payments to be commenced retroactively to February 2011. The Applicant requested the *CPP* authorities to reconsider the date of her eligibility so that payments be retroactive to the date of her husband's death. She explained that due to the trauma of that tragic event, she had been unable to manage the paperwork of applying for these benefits. She added that her situation was further exacerbated in 2009 when she, her children and her mother were involved in a serious car accident.

[4] Her request for reconsideration was denied, so was her subsequent appeal to the General Division. Before the General Division, the Applicant testified about the difficulties she encountered following her husband's death. She stated that she suffers from an attention deficit disorder and that one of her children, diagnosed with a neurodevelopmental disorder, requires her care and attention. She explained that she hired a lawyer and an accountant to close the business she co-owned with her deceased spouse and to sell their home. She had assumed that

either the lawyer or the accountant would have applied for the benefits on her behalf and only realized in 2011 that she had to apply herself.

[5] The Applicant also submitted a report from her family doctor, Dr. R. Arthur Harpur, stating that she "has had a great deal of difficulty focusing on matters that needed completion including those that had an attendant emotional content" and that he believed that "these factors have been major contributors to her inability to complete the required documentation of her Canada Pension Plan Survivor's Benefits application".

[6] The General Division held that the Applicant had failed to establish, as required by paragraph 60(9) of the *CPP*, that she was incapable of forming or expressing an intention to make an application for survivor benefits before the day her application was actually made. As a result, it dismissed her appeal.

[7] The Applicant then sought leave to appeal that decision to the Appeal Division, claiming that the General Division had erred in a number of ways, namely, as summarized by the Appeal Division at paragraph 3 of its reasons, by:

> a) Violating the doctrine of legitimate expectations and by failing to observe a principle of natural justice, in not accepting the Applicant's physician's certificate of incapacity;
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> b) Failing to observe a principle of natural justice by failing to give notice to the Applicant that it would follow *Attorney General v. Danielson*, 2008 FCA 78. Counsel submits that the General Division also erred in misinterpreting *Danielson* as authority to disregard medical evidence;
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> c) Following *Danielson*, as it is factually distinguishable from the circumstances of the Applicant's case;

> d) Acting beyond its jurisdiction, by rendering its own medical opinion in the place of the Applicant's physician's opinion, Counsel submits that the General Division was unqualified to make any findings about the Applicant's medical condition;
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> e) Interpreting the incapacity provisions of the *Canada Pension Plan* in a restrictive manner;
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> f) Applying the incorrect onus of proof. Counsel submits that in concluding that there was insufficient evidence of incapacity, despite the expert opinion before it, the General Division effectively required a higher burden of proof. Counsel submits that the only test that was requested of the Applicant was that she obtain a certificate of incapacity, and having done so, she met the onus of proof;
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> g) Improperly weighing the evidence. Counsel submits that the General Division placed an inordinate amount of weight on the evidence of the Applicant's activities. Counsel submits that the assignment of weight was misplaced, as the General Division should have placed more weight on the evidence of the medical practitioner, who had access to the Applicant's entire medical history. Counsel submits that the General Division fettered its own discretion by improperly weighing the evidence;
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> h) In basing its decision on an erroneous finding of fact that the Applicant had the capacity to form and express the intention to apply for a survivor's pension, despite the medical certificate of incapacity; and
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> i) In infringing the Applicant's equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*. Counsel submits that "mothers and their children who survives the suicide of fathers are disproportional [sic] affected in an adverse manner by overly restrictive legislation limiting their recovery of survivor's benefits.

[8] The Appeal Division dismissed the Applicant's leave application as it was not satisfied that her appeal had a reasonable chance of success, as required by paragraph 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34, on any of the three grounds of appeal opened to someone who wishes to challenge a decision of the General

Division, that is (i) a breach of natural justice; (ii) an error of law; or (iii) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it (see also: *Canada (Attorney General) v O'Keefe*, 2016 FC 503, at paras 36-37 [*O'Keefe*]):

III. Issue

[9] The Applicant claims that the Appeal Division erred on a key fact when it found that the requisite Declaration of Incapacity had been provided, weighed and considered by the General Division but found insufficient, in and of itself, to meet the legal test of incapacity. She specifies that this error occurred through no fault of the Appeal Division but rather because the Appeal Division was led to believe by counsel for the Respondent that the Declaration of Incapacity was before the General Division when it was not. The Applicant contends that this is fatal to the Appeal Division's decision.

[10] This is the sole basis of the Applicant's challenge to the Appeal Division's decision although she seeks a number of declaratory reliefs in relation to alleged systemic problems in the workings of the Social Security Tribunal which she finds too long and complex and in need of simplification. As I indicated to counsel for the Applicant at the hearing, even assuming it is open to the Court to embark on such a stand-alone operational review of the functioning of that Tribunal, there are at least three problems with what the Applicant is seeking in that regard. First, this issue was raised before neither the Appeal Division nor the General Division and, as such, falls outside the ambit of the present judicial review application. Second, given the above, this issue is raised in a complete factual vacuum with the result that it would be wholly counterintuitive for the Court to undertake such review. Third, the Applicant has failed to show

that this issue, if resolved in her favor, would be dispositive, in whole or in part, of her judicial review application.

[11] It is trite law that the Court's supervisory authority under sections 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, is discretionary in nature (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 40). In other words, this Court, on judicial review, has discretion to grant or withhold relief, provided of course that discretion is exercised judicially and in accordance with proper principles. Here, for the reasons I have just outlined, this is a case where the reliefs sought in connection with the Applicant's claim that the process before the Social Security Tribunal of Canada is cumbersome ought to be withheld. Counsel for the Applicant did not press the issue at the hearing.

IV. Analysis

[12] Paragraph 72(1) of the *CPP* provides, as a general rule, that survivor benefits can be paid retroactively up to 11 months prior to the date the application for the benefits is made. Yet, according to paragraphs 60(9) and (10) of the *CPP*, where the Minister responsible for the *CPP* [the Minister] is satisfied that the applicant has been incapable of forming or expressing an intention to apply for the benefits, the benefits can be paid retroactively to the month preceding the month the incapacity commenced, provided the period of incapacity is continuous.

[13] In *Canada (Attorney General) v Danielson*, 2008 FCA 78 [*Danielson*], the Federal Court of Appeal agreed with the approach taken by the then Pension Appeals Board in the matter of *Morrison v The Minister of Human Resources Development* (Appeal CP 04182, March 7, 1997).

In that case, the Board held that section 60 of the *CPP* "does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity, quite simply, of forming or expressing an intention to make an application". It further held that in determining this issue, both the medical evidence and "the relevant activities of the individual concerned between the claimed date of commencement of disability and the date of application which cast light on the capacity of the person concerned during that period of so 'forming and expressing the intent'" need to be considered (*Danielson*, at paras 5-6).

[14] As indicated previously, the General Division, in accordance with *Danielson*, considered both the evidence of Dr. Harpur's Medical Certificate, dated June 18, 2012, and the relevant activities of the Applicant during the alleged period of incapacity. The General Division's main findings in this respect read as follows:

> [35] In his report, Dr. Harpur notes that the Appellant has attention deficit disorder and that she had a great deal of difficulty focusing on matters; this was a major contribution in her ability to complete the documentation to apply. However, the wording of the Act is that a person must not be able to form the intent or express the intent to apply. […]
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> [36] In the Appeal before the Tribunal, there is no question that the Appellant underwent a very difficult time. She underwent tragedy and had significant family responsibilities. She had to rebuild her life. The Tribunal is sympathetic to all of the challenges faced by the Appellant. However, it must consider that the test before it is not whether she could fill in the forms; it was whether she could form the intent and express the intent to apply for the benefit. And the Tribunal must consider the evidence of her activities from 2007 to 2011 when considering this test.
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> [37] With these considerations in mind, the Tribunal notes that while Dr. Harpur wrote that the Appellant had difficulties to complete the documentation to apply, the test is whether she could form an intent or express the intent. There is insufficient evidence to conclude that she could not do so. The Tribunal must consider the fact that she was able to form the intent and express the intent

> to make the necessary and major decisions during that period. She dissolved a business and sold a house. While she had the assistance of a lawyer, accountant and real estate guide, it is evidence that she had the capacity to form and express an intent to take these steps. The Tribunal accepts that the Appellant did not apply for different benefits during that period for which she was entitled. However, the threshold for incapacity is more than not being to complete forms or to make the application, it is simply to form or express the intent to do make the application.

[15] The Applicant claims that the General Division's decision is fatally flawed because Dr. Harpur's Declaration of Incapacity, dated November 13, 2012, was not put before it, a fact that only came to light in the course of the present judicial review proceedings after she and the Appeal Division were led to believe that this document was indeed before, considered and weighed by the General Division. She contends that to the extent such a Declaration is a prerequisite step to a finding of incapacity, the General Division could not make such a finding in the absence of that document.

[16] This results, according to her, in the whole process being vitiated and justifies, in and of itself, that the Appeal Division's decision be set aside as it would be improper to advance arguments as to the weight given to the Declaration of Incapacity and whether or not that weight was appropriate in law now that it is apparent that this document was not in fact considered by the General Division at all. In other words, the Applicant claims that the factual foundation for those arguments is not present because of that error and that the matter must therefore be sent back to the General Division for redetermination on the basis of the proper facts.

[17] With all due respect, and recognizing the very difficult times the Applicant had to go – and is without a doubt still going – through as a result of the tragic loss of her husband, that argument cannot succeed for a number of reasons.

[18] First, I do not believe that there is any basis to the allegation that the Appeal Division was somehow led into thinking that Dr. Harpur's Declaration of Incapacity was before - and considered by - the General Division and that this alleged misrepresentation was instrumental in the Appeal Division's decision to dismiss the leave application. The Respondent does refer to that Declaration in its written submissions to the Appeal Division by specifying that it was received by the "Respondent" - meaning the *CPP* authorities - on November 30, 2012 but it does also specify that while it did specifically refer to that document in its submissions to the General Division, it was unable to locate a coded copy of that document within the General Division's material in its possession.

[19] I am satisfied that a fair reading of the Respondent's submissions to the Appeal Division tends to show that the message conveyed by the Respondent was rather that Dr. Harpur's Declaration of Incapacity may not have been before the General Division and therefore, not considered by it. I also agree with the Respondent that these submissions explain that it was not important that the Declaration of Incapacity may not have been before the General Division since it provided similar but less detailed information than that provided in the Medical Certificate signed by Dr. Harpur a few weeks prior.

[20] Furthermore, there is nothing in the Appeal Division's reasons that supports the Applicant's contention that its decision was largely influenced by the fact the Declaration of Incapacity was considered by the General Division. What is at the heart of the Appeal Division's decision is rather that medical opinions, be it in the form required by the *CPP* authorities, that is in the form of a Declaration of Incapacity or of a Medical Certificate, or otherwise, is not conclusive of incapacity within the meaning of section 60 of the Act since the legal test, as set out in *Danielson*, requires the decision-maker to look beyond them at the applicant's relevant actions or activities during the alleged period of incapacity. In particular, the Appeal Division held that providing such Declaration or Certificate does not, alone, meet that legal test nor does it discharge the burden of proof of an applicant to prove his or her case or create a legitimate expectation that such evidence is to be accepted as conclusive of incapacity.

[21] In sum, nothing in the Appeal Division's decision turns on whether the General Division considered Dr. Harpur's Declaration of Incapacity and I see no reprehensible conduct on the part of the Respondent in this respect.

[22] Second, there is no basis to the Applicant's claim that a Declaration of Incapacity is a prerequisite step for the General Division to make a finding of incapacity under section 60 of the Act. Such Declaration is a requirement of the *CPP* authorities, not the Social Security Tribunal or the Act for that matter. It is purely administrative. It is one of a number of factors that is considered in order to determine whether a *CPP* beneficiary lacks capacity. Again, the legal test is that medical evidence is not conclusive of incapacity as it is open to the decision-maker to measure that evidence against the relevant actions or activities of that person during the alleged

period of incapacity. Therefore, a Declaration of Incapacity is just one factor in such an analysis, not the determinative factor.

[23] Third, this is not a case where the General Division ignored or disregarded the medical evidence that was before it. The General Division did consider Dr. Harpur's Medical Certificate of July 2012 which provided a more detailed account of the Applicant's condition than did the subsequent Declaration of Incapacity which is essentially a one-page page form filled out by Dr. Harpur. As the Appeal Division indicated, it appears that the General Division accepted Dr. Harpur's evidence but being mindful that the Applicant had been able, during the alleged period of incapacity, to make major decisions, found it insufficient to conclude to a lack of capacity within the meaning of section 60.

[24] I agree with the Respondent's submission that in such context, the fact that Dr. Harpur's Declaration of Incapacity might not have been before the General Division is inconsequential since the information contained in that Declaration was, for all intents and purposes, already before the General Division and was considered by it.

[25] In order to receive the survivor benefits from the date of her husband's death to the date she actually filed her application in 2012, the Applicant needed to show that during this entire period, she was continuously incapable of "forming or expressing an intention to make an application" as opposed to making, preparing processing or completing such application (*Danielson*, at paras 5-6). The General Division found that the Applicant had failed to meet that threshold as there was evidence that during that period of time, she had been able to make

important decisions such hiring a real estate agent to sell her home, a lawyer to make an insurance claim on her behalf and both a lawyer and an accountant to close the family business. Her leave application before the Appeal Division was dismissed as the Appeal Division was satisfied that the Applicant's appeal has no reasonable chance of success.

[26] Decisions of the Appeal Division to grant or deny leave to appeal are reviewable by this Court against the standard of reasonableness (*O'Keefe*, at para 17). This means that such decisions are owed substantial deference and that the Court will only interfere with them if they fall outside the range of possible, acceptable outcomes in respect of the law and the facts (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

[27] The Appeal Division's decision in this case is detailed, thorough and well-reasoned and I see no basis to interfere with it. But most importantly, I see no reason to intervene on the basis that Dr. Harpur's Declaration of Incapacity might not have been before the General Division, something the Appeal Division was made aware of by the Respondent and which, as I said before, is inconsequential in the circumstances of this case.

[28] I note that in support of her judicial review application, the Applicant provided an affidavit from her father showing how instrumental he was in supporting her in all the major decisions she had to make in the wake of her husband's death. In light of the position she has put forward before the Court, which essentially revolves around the Declaration of Incapacity not being before the General Division and the alleged misrepresentations made by the Respondent in that regard, the relevancy of that evidence in such context is somewhat blurred. But even if it

was not, this evidence would be inadmissible as it was not before the General Division. As it is well settled now, save for a few exceptions which are not applicable here, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker. In other words, evidence that was not before the decision-maker and that goes to the merits of the matter before it is not admissible in an application for judicial review in this Court (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22, at para 19).

[29] The Applicant's judicial review application will therefore be dismissed. The Respondent is seeking its costs whereas the Applicant is seeking leave to make submissions on this issue. Leave is granted. The Applicant is given a week from the date of theses Reasons to serve and file her submissions. The Respondent is given a week from the date the Applicant's submissions are served to it to file and serve its response. The parties' submissions on costs are to be provided in the form of a letter not exceeding two pages. In the spirit of the Court's Notice to the Parties and the Profession issued on April 30, 2010, the parties are invited to make every reasonable effort to agree on the disposition and/or quantum of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;
2. Costs to be awarded on the basis of the parties' submissions to be served and filed in accordance with paragraph 29 of these Reasons.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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