Federal Court  Cour fédérale

Date: 20200205

Docket: T-1145-19

Citation: 2020 FC 206

Ottawa, Ontario, and St. John's, Newfoundland and Labrador

February 5, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GAIL DEAN

Respondent

JUDGMENT AND REASONS

[1] The applicant, the Attorney General of Canada, seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal [SST] dated June 14, 2019. The Appeal Division granted the respondent, Miss Gail Dean, leave to appeal a decision of the General Division of the SST, which had denied her appeal with respect to her application for a disability pension benefit under the *Canada Pension Plan*, RSC 1985, c C-8 [*CPP*].

[2] The Attorney General asks the Court to set aside the Appeal Division's decision and refer the matter back to a different member of the Appeal Division for redetermination with such directions as the Court considers appropriate. This request for relief requires the Court to determine if it was reasonable for the Appeal Division to grant leave to appeal.

[3] For the following reasons, this application will be granted.

I. Background

[4] Miss Dean, who represents herself in this matter, applied for a disability benefit under the *CPP* in September 2016 on the basis that she was unable to work because of various medical conditions, including almost total blindness in her left eye and diabetic foot ulcers that affected her ability to stand and walk. In response to her application, Service Canada sent Miss Dean a letter in late December 2016 requesting medical information.

[5] This letter explained that, based on her earnings and contributions to the *CPP*, she last met the earnings and contributions criteria in December 1993. It also informed Miss Dean that to qualify for a *CPP* disability benefit, Service Canada would have to find her unable to do any type of work in 1993 to the date of her application and into the future. Specifically, the letter asked Miss Dean who her doctors were in 1993, what her main medical condition was then, and how it prevented her from working. Miss Dean responded by telling Service Canada that this information was unknown to her.

[6] Service Canada refused Miss Dean's application for a disability pension benefit in January 2017 because she did not qualify under the *CPP*. Miss Dean applied for reconsideration of Service Canada's decision. Upon reconsideration, Service Canada upheld its position that Miss Dean did not qualify for disability benefits because she had made insufficient contributions to the *CPP*.

[7] In a letter dated May 1, 2017, Service Canada determined that Miss Dean only had *CPP* contributions in two of the last six years; that she did not have *CPP* contributions for at least 25 years, including three of the last six years; and, that she did not qualify under the "late applicant" or the child-rearing provisions of the *CPP*. This letter noted that a medical adjudicator had considered the employment and medical information in her file from December 1993 to the date of her application for disability benefits, and that her work activity and employment earnings in 2003, 2004, 2015 and 2016 showed that she was able to work during those years.

[8] Miss Dean appealed the reconsideration decision to the General Division of the SST in early June 2017. A year or so later in June 2018, the General Division dismissed the appeal. The General Division agreed with the determination by the Minister of Employment and Social Development that Miss Dean did not qualify for a disability pension because she failed to provide medical evidence to show she had a condition that was severe and prolonged at or before the relevant time, known as the minimum qualifying period [MQP].

[9] Miss Dean appealed the General Division's decision to the Appeal Division of the SST in early August 2018.

II. The Appeal Division Decision

[10] After summarizing the background to the appeal, the Appeal Division noted that under the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*], an appeal to the Appeal Division is not a rehearing of a claim. The Appeal Division further noted that under subsection 58(1) of the *DESDA,* there are only three kinds of errors that can be considered: the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error 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 it.

[11] The Appeal Division observed that leave to appeal is refused if the appeal has no reasonable chance of success under subsection 58(2) of the *DESDA*. The Appeal Division remarked that to be granted leave to appeal there must be at least one ground of appeal that falls under the *DESDA* and on which the appeal has a reasonable chance of success.

[12] In response to Miss Dean's argument that leave to appeal should be granted because of her medical conditions, the Appeal Division noted that this information had been presented to the General Division and considered by that division. The Appeal Division determined that repetition of this information was not a ground of appeal under the *DESDA* and leave to appeal could not be granted on this basis.

[13] The Appeal Division continued by stating:

> [10] However, the General Division may have made an error in law. The decision states that a claimant must provide some

> objective medical evidence of their disability, and that the medical evidence must relate to the date of the MQP as well as continuously since. However, the Federal Court of Appeal teaches that a claimant must provide some objective medical evidence of their disability.[6] [*Warren v Canada (Attorney General)*, 2008 FCA 377]. It does not require that this evidence points to the MQP or thereafter. Therefore, the General Division may have erred in law, and the appeal has a reasonable chance of success on this basis.
>
> [11] Leave to appeal is therefore granted.

III. Analysis

A. *What is the Standard of Review?*

[14] The Supreme Court of Canada has recently recalibrated the framework for determining the applicable standard of review for administrative decisions on the merits.

[15] The starting point is the presumption that a standard of reasonableness applies in all cases and a reviewing court should derogate from this presumption only where required by a clear indication of legislative intent, or when the rule of law requires the standard of correctness to be applied (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16 and 17 [*Vavilov*]; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27). Neither circumstance is present in this case to justify a departure from the presumption of reasonableness review.

[16] Reasonableness review is concerned with both the decision-making process and its outcome. It tasks the Court with reviewing an administrative decision for the existence of internally coherent reasoning and the presence of justification, transparency and intelligibility. 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. The reasonableness standard requires that a reviewing court defer to such a decision". *Vavilov* at paras 12, 85, 86 and 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[17] If the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome; nor is it the function of the reviewing court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[18] The standard of review of Appeal Division decisions is reasonableness (*Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 1; *Sjogren v Canada (Attorney General)*, 2019 FCA 157 at para 6; *Canada (Attorney General) v Hoffman*, 2015 FC 1348 at paras 26 and 27). This pre-*Vavilov* jurisprudence continues to offer insight into the applicable standard of review (*Vavilov* at para 143).

B. *The Parties' Submissions*

(1) The Attorney General's Submissions

[19] The Attorney General contends that the Appeal Division unreasonably found Miss Dean's appeal had a reasonable chance of success because the General Division found the statutory scheme and jurisprudence require objective medical evidence of a disabling condition at the time of the MQP. In the Attorney General's view, the Appeal Division's decision is

unreasonable and does not fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

(2) Miss Dean's Submissions

[20] Miss Dean did not file written submissions or a respondent's record. She did however, during the hearing of this matter, express frustration with the process thus far and informed the Court that she has been unable to obtain copies of her medical records from 1993.

C. *The Decision is Unreasonable*

[21] Subsection 58(2) of the *DESDA* requires the Appeal Division to grant leave to appeal a General Division decision if the appeal has a reasonable chance of success. A reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12). The only grounds of appeal are prescribed in subsection 58(1) of the *DESDA*: the General Division committed a breach of natural justice, made an error of law, or made an erroneous finding of fact in a perverse and capricious manner or without regard for the material before it (*Cameron v Canada (Attorney General)*, 2018 FCA 100 at para 2).

[22] In this case, the Appeal Division granted leave to appeal because it determined that the appeal had a reasonable chance of success since the General Division made an error in law. In the Appeal Division's view, the General Division may have erred in law in finding that Miss Dean was required to provide objective medical evidence of her disability and that such evidence

must relate to the date of the MQP as well as continuously since. The Appeal Division stated that, while *Warren v Canada (Attorney General)*, 2008 FCA 377 [*Warren*] says a claimant must provide some objective medical evidence of their disability, the Federal Court of Appeal does not require this evidence to correlate with the MQP or thereafter.

[23] The Appeal Division's interpretation of *Warren* is flawed.

[24] First, *Warren* does not stand for the proposition that objective evidence does not need to point to the MQP. The Court of Appeal in *Warren* judicially reviewed a Pension Appeals Board decision that found an applicant did not have a disability as defined in the *CPP* at the relevant MQP. The Court of Appeal found that the Board made no error in law in requiring objective medical evidence of the applicant's disability, noting that it was well established in law that an applicant must provide some objective medical evidence (*Warren* at paras 1 and 4).

[25] Second, the Appeal Division's interpretation of *Warren* does not align with the *CPP* legislative scheme. I agree with the Attorney General that the clear and unambiguous wording of the legislation states that a disability benefit is payable only if an applicant has made the required contributions to the *CPP* and has been found disabled within the meaning of the legislation. The clear wording in the *Canada Pension Plan Regulations*, CRC, c 385 [*Regulations*] required documentary evidence from Miss Dean about her claimed medical condition at her MQP.

[26] Third, the Appeal Division's interpretation of *Warren* runs counter to jurisprudence which has upheld the statutory requirement for medical evidence of the disabling condition at the

MQP. For example, in *Gilroy v Canada (Attorney General)*, 2008 FCA 116 at para 3, the Federal Court of Appeal determined that it could not overturn a decision denying a disability benefit as there was no evidence the applicant could not undertake employment at or before her MQP.

[27] This Court has held that medical evidence dated after an applicant's MQP is irrelevant. In *Canada (Attorney General) v Hoffman*, 2015 FC 1348, the Court allowed an application for judicial review of a decision of the Appeal Division which had granted leave to appeal, finding that:

> [48] Evidence subsequent to the end of the MQP is not relevant, given the Applicant did not appear to prove her disability prior to the MQP, and it is unclear on what basis or evidence the Member found that the Respondent has a reasonable chance of success on appeal.

[28] The purpose of disability benefits is to replace the incomes of Canadians with disabilities unable to work on a long-term basis. It is not a social welfare scheme; rather, it is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement (*Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 9 [*Granovsky*]).

[29] Paragraph 44(1) (b) of the *CPP* says a disability pension shall be paid to a contributor under the age of 65, to whom no retirement pension is payable, who is "disabled" as defined under the *CPP* and has contributed or is deemed to have contributed to the *CPP* for a specified number of years within the contributory period. Subsection 2(1) defines a contributor as a person who has made an employee's contribution in a prescribed manner. Eligibility is based on contributions made to the *CPP*. Based on those contributions, an applicant establishes an MQP.

[30] Applicants establish eligibility for disability benefits only if they satisfy both statutory tests at the time of application: first, the severe and prolonged mental or physical disability test under subsection 42(2) of the *CPP*; and second, the recency of contribution test under paragraphs 44(1) (b) and 44(2) (a) of the *CPP* (*Granovsky* at para 10).

[31] With respect to the first branch of the test, subsection 42(2) says a disability pension is payable to an applicant who is determined in the prescribed manner to have a severe and prolonged mental or physical disability. Subparagraph 42(2) (a)(i) prescribes that a disability is severe only if, by reason of the disability, the person cannot regularly pursue any substantially gainful occupation.

[32] Subsection 68.1(1) of the *Regulations* defines "substantially gainful" as an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. It is not the employment that must be "regular" but, rather, the contributor's incapacity to work (*Atkinson v Canada (Attorney General),* 2014 FCA 187 at para 37).

[33] Employability is the key measure of a severe disability under the *CPP* (*Canada (Attorney General) v Fink*, 2006 FCA 354 at para 2; leave to appeal refused *Lorena Fink v Attorney General of Canada*, SCC No 31917). Employability occurs in the context of commercial realities and an applicant's circumstances; it is not determined only by reference to an applicant's chosen occupation. Rather, employability under the *CPP* is in relation to any substantially gainful occupation (*Villani v Canada (Attorney General),* 2001 FCA 248 at para 45 [*Villani*]). The

statutory test for severity requires an "air of reality" in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation (*Villani* at para 46).

[34] A disability is prolonged under subparagraph 42(2) (a) (ii) of the *CPP* only if it is likely to be long continued and of indefinite duration or is likely to result in death. The "severe" and "prolonged" statutory requirements are cumulative, so that if an applicant does not meet one or the other condition, the application for a disability pension fails. It is not an error for the SST to make a negative determination on one branch of the test and not make a finding on the other branch (*Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33 at para 10).

[35] Subsection 68(1) of the *Regulations* stipulates that where applicants claim they are disabled, they must provide a report of their physical or mental disability detailing the nature, extent and prognosis of the disability, the findings upon which the diagnosis or prognosis was made, and any other relevant details about the disability.

[36] The second branch of the test (the recency of contribution) is that an applicant must have made contributions to the *CPP* for the MQP. Paragraph 44(2) (b) defines the start and end date of an individual's contributory period; that is, the timespan during which an individual may contribute to the *CPP*. A person's contributory period starts with the inception of the *CPP* on January 1, 1966 or the month following the person's 18th birthday, whichever is later, and ends with the month in which the applicant is determined to have become disabled under the *CPP*.

[37] Within the contributory period, paragraph 44(2) (a) stipulates that an applicant must have made *CPP* contributions on earnings above a year's basic exemption amount for at least four of the previous six calendar years, either in whole or in part, or where *CPP* contributions were made for 25 years or more at least three of the last six years. The record shows that Miss Dean had *CPP* contributions in only two of the last six years prior to her application (in 2015 and 2016) and that she did not have *CPP* contributions for at least 25 years, including three of the last six years.

[38] Subparagraph 44(1) (b) (ii) affords eligibility protection for late applicants. This provision stipulates that applicants who do not meet the MQP requirement at the time of application may still qualify for benefits if they can establish they were disabled at an earlier time when they last met the contributory requirements, and continued to be disabled at the time of the application (*Kaminski v Canada (Attorney General)*, 2014 FC 238 at para 16). Miss Dean could not avail herself of this provision because there was no medical information relating to her MQP of December 31, 1993.

IV. Conclusion

[39] The *CPP* legislative scheme clearly requires medical evidence of a disabling condition at the time of the MQP. The Appeal Division unreasonably found Miss Dean's appeal had a reasonable chance of success.

[40] The Appeal Division's reasons for granting Miss Dean's application for leave to appeal the General Division's decision are unreasonable and cannot be justified. This application for judicial review is therefore granted.

[41] The Appeal Division's decision is set aside, and the matter returned to the Appeal Division to be redetermined by a different member of the Appeal Division.

[42] The Attorney General does not seek costs; so, there will be no order as to costs.

JUDGMENT in T-1145-19

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; and there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Gail Dean	FOR THE RESPONDENT (ON HER OWN BEHALF)

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