Federal Court  Cour fédérale

Date: 20220728

Docket: T-1558-20

Citation: 2022 FC 1132

Ottawa, Ontario, July 28, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

MARK GOLDHAGEN

Applicant

and

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 ("SST") dated October 15, 2020, who refused leave to appeal a decision by the General Division. The General Division's decision is dated January 24, 2021 with a corrigendum dated April 5, 2019 that was integrated into the main text of the original decision. The corrigendum determined without input or notice to the Applicant that the purposes of the

Applicant's disability pension, his date of disability onset, was April 2014 instead of September 2011.

II. Background

[2] I will not outline all the personal facts that have lead to this point given that it is determined on a point of law and will only set out the facts at the crux of this decision.

[3] In June 2016, the Applicant applied for a Canada Pension Plan ("CPP") disability pension. His application was denied in December 2016. It was reconsidered by the General Division on January 22, 2019. This reconsideration decision granted the disability pension, found that the Applicant met the test for disability in September 2011, and found that the disability pension was payable from July 2015 (11 months prior to the application date).

[4] Then without notice or input from the Applicant (confirmed by the Respondent) on April 5, 2019, the General Division issued a corrigendum decision. This corrigendum decision changed the date from September 2011 to April 2014.

[5] The Applicant applied for leave to appeal the decision, seeking a return to September 2011 as the date of disability onset. On October 15, 2020, the Appeal Division of the SST refused the Applicant permission to appeal because the appeal had no reasonable chance of success. The Appeal Division's decision is the subject of this judicial review.

III. Issue

[6] The issue in this judicial review is whether it was reasonable for the Appeal Division of the Social Security Tribunal to refuse leave to appeal the decision of the General Division.

IV. Standard of Review

[7] It is settled law that the standard of review when reviewing a decision of the Appeal Division of the SST is reasonableness (see, e.g. *Balkanyi v Canada (Attorney General),* 2021 FCA 164).

[8] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Canada (CIC) v Vavilov*, 2019 SCC 65 at para 13 [*Vavilov*]). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99). A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

V. Analysis

[9] It is clear that the Appeal Division is not a forum for parties to reargue the issues decided by the General Division. It is their role to decide whether to grant permission to appeal, and then intervene only if the General Division has made certain types of errors as enumerated in s. 58(1) of the *Department of Employment and Social Development Act* (S.C. 2005, c. 34) [*DESDA*]. That is, that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; that the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[10] As Justice Roy wrote in *Canada (Attorney General) v Theriault*, 2017 FC 405 at paragraph 14, "An individual who wishes to appeal the decision must therefore cite one of the three grounds of appeal, and the Appeal Division must be satisfied that leave to appeal should not be refused because the appeal has no reasonable chance of success. S. 58(2) is clearly a safety valve to prevent an appeal from being heard. Even though it has no reasonable chance of success, due to the presence of a ground of appeal. But the refusal to allow the appeal despite the presence of a ground of appeal shall only be allowed if there is no chance of success. As soon as there is a reasonable chance of success, the appeal must be heard." The Appeal Division considered two possible grounds of appeal.

[11] First, whether the General Division made an error by not considering whether the Applicant was disabled by December 2003, and thus refused to exercise their jurisdiction in the manner described in s. 58(1)(a). They concluded that this was not the case, as the General Division considered whether the Applicant met the test for disability before this time, and concluded that he did not. They also noted that none of the evidence adduced pointed towards 2003 as the date of disability. The Applicant has not made persuasive arguments on this ground, and I find this conclusion by the Appeal Division to be reasonable.

[12] Second, whether the General Division made an error of fact by changing the date of disability from September 2011 (as was determined in the reconsideration decision issued January 22, 2019) to April 2014 (by corrigendum on April 5, 2019). The Appeal Division noted that there is an arguable case that this was an error of fact, given that all of the evidence pointed to September 2011, not April 2014. Yet, they concluded that the appeal would be bound to fail. They reached this conclusion on the basis that "success" constitutes the Applicant attaining the remedy he sought – receiving disability pension retroactive to September 2011. Since the Applicant had not, as of 2011, met the requirements to be insured for disability under s. 44 of the *Canada Pension Plan* (R.S.C., 1985, c. C-8), he could not receive it at that time, his appeal was thus bound to fail.

A. *Corrigendum*

[13] I will focus on the second issue the Appeal Division dealt with: the corrigendum.

[14] The Appeal Division concluded that there was no error in the corrigendum decision, and refused leave to appeal.

[15] The Respondent discussed in submissions the reasonableness of the corrigendum decision. They note that it is generally used to correct minor errors, such as the appearance of an erroneous date or misspelling, or when writers err in expressing their clear and obvious intentions. The Respondent submitted that their power to use corrigendum to correct mistakes comes from a "type of gap regulation."

[16] Corrigendum is also known as "the slip rule" (*Dhillon v Jaffer*, 2016 BCCA 119), and is used to correct clerical errors, accidental slips, omissions, or ambiguity (*Minister of Employment and Social Development v R. N.*, 2016 CanLII 58998 (SST) [*R N*] at para 16). Beyond this, it is clearly inappropriate to use (*R N*, above). In applying this rule, the SST must follow guidance from the Supreme Court of Canada in *Chandler v Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 that "once a judge or adjudicator has issued a final decision, the case cannot be reopened unless there was a slip in writing it up, or the writer made an error in expressing their clear or obvious intention."

[17] A corrigendum is meant to correct mistakes or typos. This Court itself has a rule in which to correct inadvertent clerical mistakes errors or omissions (Federal Courts Rule 397(2)). The jurisprudence is clear that it is not to make a new decision or change reasoning. To do other than correct typos or small inadvertent mistakes would be wrong in law given that a decision had been rendered.

[18] To examine this further, we must look closely at the particular facts of this corrigendum. I disagree that this corrigendum "corrected a mistake," as I find the corrigendum decision in this case was a new decision and far more than a correction of a typo or small mistake or syntax correction. To make a substantial change like this by corrigendum – even though it did not, in the view of the General Division, change the date disability pension was payable to the Applicant – is an error of law. This is not a clerical error, or any sort of error which ought to be corrected by corrigendum. It would be quite another thing for the decision to have been corrected from, for instance, "2211" to "2011" (with 2 having accidentally been typed in place of a 0). That would constitute a clear correction of a clerical error, which is common practice to correct and would not change the substance of the decision. In this case, the change from September 2011 (as noted, the year that the submissions pertained to) to April 2014 constituted a change in a major part of the decision itself and affects the Applicant's remuneration. This corrigendum was a re-determination that involved a meaningfully different conclusion.

[19] At first glance, and given the complex web of CPP eligibility, contributions, and entitlements, this matter is deeply complicated. Yet, on a level, it is rather simple. The General Division reached a conclusion on the substance of the matter, issued a decision, and then revised this decision on the substance of the matter by way of corrigendum a few months later. This was done without any notice to the Applicant, nor providing him the ability to give further information. There had been a hearing and a decision, then months later the SST simply changed their decision. This is unthinkable, and not the way proceedings ought to work.

[20] As noted by the Appeal Division, this change is an error of fact. All of the evidence before the General Division pointed to his inability to work starting in September 2011, and this is noted throughout the General Division decision. To change a finding of fact – the date of disability – while flying in the face of the evidence is an error of fact. This is one of the appeal grounds noted by the Appeal Division.

[21] The Appeal Division itself considered similar facts in *VN v Minister of Employment and Social Development*, 2020 SST 894 (CanLII), writing:

> [25] I cannot change the date of disability through a corrigendum. In my view, corrigendum is a vehicle for fixing the kinds of minor errors that the Supreme Court was referencing as a "slip up" or an error in the way I expressed a clear or obvious intention.
>
> [26] The Claimant uses language that suggests that perhaps the date of disability I selected was the type of slip up that simply requires correcting. However, the date of disability was part of my initial decision and I provided reasons for selecting that date specifically. It was not a minor error like the spelling of a person's name. It was not a slip up in the writing or an example of making an error in expressing my clear or obvious intention. The Chairperson's Directive does mention the notion of correcting a date. However, in this case I did not write the wrong date in error. I communicated the date I intended to communicate.

[22] The General Division's use of corrigendum, and the Appeal Division's decision not to grant leave thereon, that in my view render this decision unreasonable. I am mindful of the fact that the Appeal Division concluded that the appeal had no possibility of success on the basis that the Applicant would not be able to obtain the remedy he is seeking from an appeal, but in my view, this is not necessarily the case; there is at least some prospect of success. This error is so egregious that the matter must be sent back. The idea of using corrigendum to change the substance of a decision is an error of law.

[23] The Appeal Division was correct that there are complex issues pertaining to the Applicant's eligibility for the CPP disability pension that must be settled, and which may preclude his success on an appeal. Yet, I am of the view that the situation is so obscured at present by errors that it is not possible to view the underlying facts in a way that will allow the true picture to be glimpsed. I hope that at some point the merits of the matter is heard with the ability of the parties to present their fulsome case. But of course this is not a direction or in anyway binding to any of the parties.

[24] This is a clear error of law, which is a ground of appeal before the Appeal Division as enumerated under s. 58(1)(b) of *DESDA*, and the Appeal Division's failure to conclude this rendered their decision unreasonable.

[25] I will grant this application.

[26] Neither party sought costs and none are awarded.

[27] The style of cause will be amended, with the Respondent now being the Attorney General of Canada.

JUDGMENT IN T-1558-20

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to substitute the Attorney General of Canada instead of the Social Security Tribunal of Canada;

2. The matter is sent back to be re-determined by a different decision-maker;

3. No costs are ordered.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1558-20
STYLE OF CAUSE:	MARK GOLDHAGEN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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APPEARANCES:

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Sandra Doucette	FOR THE RESPONDENT

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