Federal Court of Appeal  Cour d'appel fédérale

Date: 20191209

Docket: A-26-19

Citation: 2019 FCA 305

CORAM: **WEBB J.A.**
NEAR J.A.
LOCKE J.A.

BETWEEN:

BRYAN BISSESSAR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 13, 2019.

Judgment delivered at Ottawa, Ontario, on December 9, 2019.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Overview

[1] This is a judicial review of a December 3, 2018 decision of the Social Security Tribunal – Appeal Division (SST-AD) dismissing an appeal of a May 31, 2016 decision of the Social Security Tribunal – General Division (SST-GD) which denied Bryan Bissessar's (the

applicant's) April 13, 2012 application for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP).

[2] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for a CPP disability pension. These include that the recipient be disabled and have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[3] Paragraph 42(2)(a) of the CPP defines when a person is disabled:

When person deemed disabled	**Personne déclarée invalide**
(2) For the purposes of this Act,	**(2)** Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	**a)** une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	**(i)** une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; …	**(ii)** une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[4] Accordingly, an applicant for a disability pension must establish that his disability is both severe (in the sense that he is incapable regularly of pursuing any substantially gainful occupation) and prolonged (in the sense that it is likely to be long continued and of indefinite duration or is likely to result in death).

[5] The parties agree that the MQP in this case ended on December 31, 2009. This is therefore the date by which the applicant had to establish that he had a severe and prolonged disability.

[6] Where an applicant for a CPP disability pension is dissatisfied with the decision of the SST-GD, an appeal to the SST-AD is available on limited grounds as set out in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34:

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) 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.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[7] The only ground of appeal that is relevant in the present case is the last: that the SST-GD 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.

[8] The standard of review to be applied by this Court on review of the decision of the SST-AD is reasonableness: *Cameron v. Canada (Attorney General)*, 2018 FCA 100 at para. 3. In other words, we must consider whether the SST-AD's decision dismissing the appeal from the SST-GD's decision meets the criteria for reasonableness as discussed in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47:

> … In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

II. SST-GD's Decision

[9] The applicant's 2012 application for a disability pension cited evidence of at least eight medical professionals. In addition to the applicant's family physician, these medical professionals included a physiatrist, an internist, a physiotherapist, a gastroenterologist, and a psychiatrist.

[10] Based on the amount of discussion of the medical evidence by the SST-GD, it appears that it considered the evidence of the internist (Dr. Samuel Silverberg) to be the most important. The SST-GD devoted several paragraphs of its discussion of the medical evidence to Dr.

Silverberg's reports, and discussed these reports in analysis of the severity of the applicant's disability. Only two other medical professionals' opinions are mentioned in the severity analysis (the applicant's family physician and his physiotherapist), and these opinions are not given as much weight as Dr. Silverberg's. The record contains four reports from Dr. Silverberg. They are dated January 4, 2008, June 24, 2009, July 5, 2010 and April 18, 2012. It is also notable that two of these reports bookend the MQP date of December 31, 2009. None of the other cited medical evidence was closer in time to that date.

[11] In his first report, dated January 4, 2008, Dr. Silverberg concluded that the applicant's lower back pain would persist and increase if he returned to a bending and lifting job, and that he should retrain for a sedentary job. By the time of his second report, dated June 24, 2009, Dr. Silverberg found that the applicant's pain had persisted and he anticipated no improvement in the future. He concluded that that applicant was unable to stand, sit or walk without pain and was therefore not employable in the workplace in any capacity. Dr. Silverberg's third report, dated July 5, 2010, was equally pessimistic, finding that the applicant had attended physiotherapy for three years without improvement. In that report, Dr. Silverberg concluded, "I do not anticipate complete improvement in the future and he is unable to return to any job which requires standing, sitting, walking or bending, and he is therefore not employable in the workplace." Dr. Silverberg's final report, dated April 18, 2012, was similar, concluding, "I do not anticipate improvement in the future. He is unable to return to any job in the workplace."

[12] As indicated above, the SST-GD appears to have accepted that Dr. Silverberg's evidence was particularly important. However, the SST-GD seems to have misunderstood some of that

evidence in a significant way. For example, at paragraph 36 of its decision, the SST-GD stated that "[p]rior to the MQP date, Dr. Silverberg did not rule out sedentary work." That is incorrect. As indicated in the previous paragraph, Dr. Silverberg's June 24, 2009 report (the last one prior to the MQP date) clearly indicated that the applicant was not employable in the workplace in any capacity. This error was repeated in paragraph 38 of the SST-GD decision, which states, "[a]s of December 2009, [the applicant's] health care professionals other than [his family physician] believed that he could work in a sedentary job if he retrained."

[13] The SST-GD also seems to have misunderstood Dr. Silverberg's July 5, 2010 report. At paragraph 34, the SST-GD stated that this report did not rule out sedentary work. While it is true that that report did not specifically address the issue of sedentary work, the statement that the applicant was "not employable in the workplace" amounts to the same thing, especially when put beside the similar wording in Dr. Silverberg's June 24, 2009 report.

[14] For the foregoing reasons, I conclude that the SST-GD misunderstood some of the evidence. Further, it is apparent that this evidence was among the most important before it, both in the sense that Dr. Silverberg was treated as an important source of evidence, and in the sense that the timing of his June 24, 2009 and July 5, 2010 reports was the closest to the MQP date.

III. SST-AD's Decision

[15] The applicant appealed the SST-GD decision to the SST-AD. There were a number of intervening steps before the SST-AD ruled on the merits of the appeal because it initially refused

leave to appeal. That refusal was set aside on judicial review by the Federal Court, and the SST-AD later granted leave to appeal. For the purposes of the present appeal, it is not necessary to discuss these intervening decisions.

[16] On the merits of the appeal, the SST-AD noted correctly that it was concerned with whether the SST-GD decision was based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[17] At paragraph 9 of its decision, the SST-AD noted that Dr. Silverberg's June 24, 2009 report was only one of many reports that were before the SST-GD. It then noted that Dr. Silverberg's January 4, 2008 report had suggested that the applicant retrain for a sedentary job, and that his July 5, 2010 report concluded that the applicant was unable to return to any job that required standing, sitting, walking or bending. Still in the same paragraph 9 of its decision, the SST-AD stated, "[o]nly the [applicant's] family physician consistently stated that the [applicant] could not work." When considered together, these statements by the SST-AD indicate that, like the SST-GD, it failed to recognize that:

(i) Dr. Silverberg concluded on July 5, 2010 that the applicant was not employable in the workplace, much as he had on June 24, 2009; and

(ii) at least around the time of the MQP, Dr. Silverberg consistently stated that the applicant could not work.

[18] In my view, it was unreasonable for the SST-AD to fail to recognize that the SST-GD had misunderstood key evidence, and hence based its decision on an erroneous finding of fact made without regard for the material before it.

[19] If the SST-AD placed significant weight on Dr. Silverberg's earlier January 2008 suggestion that the applicant retrain for sedentary work, and such weight was sufficient to displace his more timely later statements that the applicant was not employable, there is no indication to this effect in its decision. For this reason, I conclude that this was not the SST-AD's reasoning. Moreover, any such weighing of the evidence, if it happened, was not justified, transparent or intelligible, and hence was not reasonable.

IV. Remedy

[20] The applicant requests that, rather than simply setting aside the decision of the SST-AD and remitting the matter for reconsideration, we order the SST-AD to allow the appeal of the SST-GD decision and grant the applicant's April 13, 2012 application for a disability pension. The respondent opposes this proposed remedy.

[21] Normally, the remedy proposed by the applicant is not available. Parliament has tasked the SST, not this Court, with dealing with applications for disability pensions under the CPP. If the SST has erred, it should normally be allowed an opportunity to reconsider the matter. However, there are two recognized exceptions where this Court may issue an order that amounts to *mandamus*:

(i) where the outcome on the merits is a foregone conclusion; and

(ii) where there has been substantial delay and the additional delay caused by remitting the matter for reconsideration threatens to bring the administration of justice into disrepute.

(see *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 at para. 16 [*D'Errico*]; see also *Canada (Attorney General) v. Philps*, 2019 FCA 240 at paras. 41-42).

[22] The facts in this case are similar to those in *D'Errico*. The applicant in *D'Errico* had applied for a disability pension under the CPP some six years before. In this case, the delay is seven and a half years. In *D'Errico*, this Court was concerned that remitting the matter for reconsideration could result in substantial additional delay: *D'Errico* at para. 18. This Court also noted that disability benefits are meant to address a very serious condition, one that prevents the earning of meaningful income to sustain oneself, and that Parliament could not have intended the final disposition of disability benefits to take so long: *D'Errico* at para. 19.

[23] For the same reasons as discussed in *D'Errico*, I am of the view that it is appropriate for this Court to make its own assessment on the record before it in this case and direct the result that should follow. I am also mindful that the SST-AD has already dealt with this matter twice (once on leave to appeal and once on the merits), and its decision has been found to be erroneous both times.

[24] Accordingly, I turn to a consideration of whether the applicant has established that his disability was both "severe" and "prolonged" by the MQP date of December 31, 2009.

[25] In the present case, part of the problem seems to be that determining the cause of the applicant's disability has proved elusive. Much of the evidence relied upon by the respondent before the SST-GD concerned conditions that the applicant did not have. However, considering the evidence as a whole, I am satisfied that the applicant has shown that his disability was both severe and prolonged.

[26] The last three of Dr. Silverberg's reports stated that the applicant was not employable in the workplace. His first report, which was about two years before the MQP date, suggested that the applicant could do sedentary work, but the subsequent reports seem to indicate that the applicant's condition had worsened by the MQP date. In his subsequent reports, Dr. Silverberg stated consistently that the applicant could not work.

[27] Reports from the applicant's physiotherapist begin in November 2007, noting certain work restrictions, and continue until September 2010. By March 2008, the physiotherapist recognized that the prognosis for recovery was poor, and recommended that the applicant retrain for sedentary work, as did Dr. Silverberg in January 2008. In September 2008, the physiotherapist maintained work restrictions and the suggestion to retrain for sedentary work. However, by the time of her last report in September 2010 (three years after beginning physiotherapy), the physiotherapist recognized that the aim of therapy going forward would be management and promoting independence. Read together, the physiotherapist's reports

corroborate my conclusion from Dr. Silverberg's reports that the applicant's condition worsened in the time leading up to the MQP date.

[28] Perhaps the strongest evidence against the applicant was his own admission before the SST-GD that he was capable of part-time work. However, without more, this statement is insufficient to overcome the other evidence suggesting that the applicant was "incapable regularly of pursuing any substantially gainful occupation." In *D'Errico*, the pension claimant had actually worked part-time as a yoga instructor; but this Court found that that work was neither regular nor substantially gainful (see para. 25). Similarly, I conclude that any part-time work the applicant might have been able to do as at the MQP date would likely not have been regular or substantially gainful.

[29] I am also satisfied that that applicant's disability is prolonged, given that his condition had endured for several years and, to the extent that it was changing, appeared to be deteriorating.

V. Proposed Disposition

[30] I would grant the present application for judicial review, set aside the decision of the SST-AD and direct it to grant the applicant's appeal of the SST-GD's decision and make an order granting his April 13, 2012 application for a disability pension.

[31] The applicant did not request costs in his notice of application or in his memorandum of fact and law, but his counsel did make an oral request for costs at the end of the hearing. The respondent never sought costs, and argued at the hearing that costs should not be awarded on the basis of the applicant's last-minute request. The respondent's counsel argues that these circumstances would deny him the opportunity to seek instructions in light of that request. I agree that no costs should be awarded.

"George R. Locke"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	WEBB J.A. NEAR.J.A.
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