Federal Court of Appeal | Cour d'appel fédérale

Date: 20220606

Docket: A-90-21

Citation: 2022 FCA 104

CORAM: **RIVOALEN J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

SHELDON JAMES BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry

on May 25, 2022.

Judgment delivered at Ottawa, Ontario, on June 6, 2022.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: MACTAVISH J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] On November 29, 2018, the applicant, Mr. Sheldon James Brown, applied for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP). His application was denied at every administrative level.

[2] From the age of 12 until the age of 44, Mr. Brown worked in various trades. His last job in 2011 was as a tiles setter. He has at most a grade 10 level of education and does not have technical training or hold any certificates of qualification. In 2003, he injured his back at work and requested workers' compensation benefits, but his request was denied. He returned to work in the trades but has not worked since 2014. He bases his current application for CPP disability benefits on being unable to work because of chronic back pain and osteoarthritis in both knees. Because of his pain, he is unable to walk more than a block, unable to sit for more than a few minutes, stand for more than a few minutes, bend or lift. His doctor advised that he had to wait until he was 50 years of age before he could proceed with surgery to his left knee. In April 2018, at the age of 51, he underwent a complete left knee replacement.

[3] In order to manage his pain, Mr. Brown received injections in his knees and underwent surgery. He uses a cane and a walker, and takes various prescription and non-prescription pain and anti-inflammatory medication.

[4] In 2008, along with taking pain medication, Mr. Brown's doctor recommended that he lose weight and maintain conditioning. In 2018, a different doctor discussed with Mr. Brown the importance of weight loss in managing chronic back pain and osteoarthritis of the knees.

[5] In a decision dated October 21, 2020 (2020 SST 1206), the General Division of the Social Security Tribunal (the General Division) determined that the maximum qualifying period for Mr. Brown was December 31, 2013. This is the date by which Mr. Brown must be found to be disabled, in order to qualify for CPP disability benefits. The General Division found that

while Mr. Brown had significant impairment by December 2013, he did not make reasonable efforts to follow the treatments recommended by his physicians (General Division Decision at para. 7). The General Division held that Mr. Brown's doctors had advised him to lose weight for 12 years but he had not attempted to follow this medical treatment until 2020. Specifically, the General Division stated "[i]t is reasonable for a Claimant to attempt exercise… but to not succeed in reducing his functional impairments. However, it is not reasonable for a Claimant to fail to follow medical treatment for a 12-year period" (General Division Decision at para. 23). In coming to this decision, the General Division considered factors such as age, level of education, language proficiency and past work and life experience (General Division Decision at paras. 8-9).

[6] The General Division relied on the doctors' advice to Mr. Brown that he lose weight and maintain conditioning when it made the factual finding that Mr. Brown failed to follow medical treatment for a 12-year period (General Division Decision at paras. 18, 20, 21 and 22).

[7] On March 12, 2021, the Appeal Division of the Social Security Tribunal (the Appeal Division) found that the General Division committed no errors of fact and that there was no procedural unfairness, and accordingly upheld the decision of the General Division (2021 SST 95).

[8] Mr. Brown is now before this Court seeking a review of the decision of the Appeal Division.

II. The Law

[9] To qualify for a CPP disability pension, the applicant must satisfy three criteria: (1) meet the contributory requirements; (2) be found disabled within the meaning set out in the CPP; and (3) continue to be disabled (*Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703 at para. 10).

[10] Subsection 42(2) of the CPP sets out that a claimant is disabled if they have a severe and prolonged mental or physical disability. A disability is severe if the person is "incapable regularly of pursuing any substantially gainful occupation" and is prolonged if it is "likely to be long continued and of indefinite duration or is likely to result in death" (subparagraphs 42(2)(*a*)(i) and (ii)). The definition of "severe" in the CPP has been further interpreted by this Court in *Villani v. Canada (Attorney General)*, 2001 FCA 248, 275 N.R. 324 [*Villani*]. It applied a large and liberal interpretation of the definition of "severe" in the CPP, given the benefits-conferring purpose of the CPP, and tried to resolve any ambiguity in favour of the claimant (*Villani* at paras. 28 and 29). This Court applied what it termed a "real world approach" to the application of the severity requirement, such that the applicant's age, skills level, life experience, past work, education and language proficiency, should be taken into account when deciding whether the claimant is able to find "substantially gainful occupation" (*Villani* at paras. 31, 32 and 38).

[11] This Court has added a requirement that a claimant make efforts to treat their disability, where this is possible, and to seek employment that accommodates their limitations. This

principle was first outlined in *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, 299 N.R. 229 at paragraph 19 as follows:

> The 'real world' context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable.

[12] It was further applied in *Kambo v. Canada (Minister of Human Resources Development)*, 2005 FCA 353, 344 N.R. 140; *Klabouch v. Canada (Attorney General)*, 2008 FCA 33, 372 N.R. 385; *Sharma v. Canada (Attorney General)*, 2018 FCA 48, 288 A.C.W.S. (3d) 790; and in *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, 275 A.C.W.S. (3d) 658.

III. Standard of Review

[13] In the present review, the standard of review of the Appeal Division's decision is reasonableness (*Canada* (*Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1) [*Vavilov*]). On questions of procedural fairness and natural justice, the Court must assess the procedures and safeguards required, and if there is a breach, the Court must intervene (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 54). For want of a better description, the approach is sometimes referred to as the "correctness standard".

[14] Therefore, having regard to the standard of review and the arguments put forward by Mr. Brown, I would suggest that this application for judicial review raises three questions:

A. Was there a breach of Mr. Brown's rights according to the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter)?

B. Was it reasonable for the Appeal Division to find that the hearing before the General Division was procedurally fair to Mr. Brown?

C. Was it reasonable for the Appeal Division to find that the General Division had not 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?

IV. Analysis

A. *Was there a breach of Mr. Brown's Charter rights?*

[15] Starting with the alleged breach of Charter rights, Mr. Brown did not specify in his Memorandum of Fact and Law which section of the Charter was at play, but I gather he is alleging a breach of his rights under section 15 of the Charter based on his claims of inequality. Mr. Brown did not add to this argument during his oral submissions before us. Moreover, this argument was never raised before the General Division or the Appeal Division.

[16] The reasonableness of the administrative decision cannot normally be impugned on an issue not put before the decision-maker (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 22-29; *Gordillo v. Canada (Attorney General)*, 2022 FCA 23 at para. 99). Therefore, Mr. Brown should have made this Charter argument first to the General Division. He cannot raise it now at this late stage in the proceedings.

B. *Was it reasonable for the Appeal Division to find that the hearing before the General Division was procedurally fair to Mr. Brown?*

[17] Turning next to the alleged breach of procedural fairness, Mr. Brown submits that he was blind-sided at the hearing before the General Division because he was expecting assistance from his "helper". His helper did not show up and he proceeded without her.

[18] Before this Court, the role of the "helper" was clarified. Mr. Brown had been referring to a staff person called a "navigator" employed by the Social Security Tribunal who had been assigned to his case in order to assist him with the appeals, help him prepare for the hearings and explain the process. The correspondence from the Social Security Tribunal to Mr. Brown in which the navigator is identified and contact information is provided specifically confirms that navigators cannot provide legal advice to Mr. Brown, speak for him, represent him or be at the hearing (Respondent's Record, letter to applicant dated June 9, 2020, p. 617; Telephone Conversation Log dated January 21, 2021, p. 295).

[19] After reviewing the record, listening to the audio recordings of the proceedings before the General Division and the Appeal Division, and hearing Mr. Brown's submissions, I am satisfied that the process before both Tribunals was fair. Before the General Division, Mr. Brown did not raise the fact that he was waiting for his helper to attend in order to assist him with the hearing. Before the Appeal Division, he specifically agreed that he did not require the assistance from his helper. In any event, it is clear, given the specific role of the navigator, she would not have been permitted to assist Mr. Brown at either hearing.

[20] Most importantly, Mr. Brown had the opportunity to fully participate and present his case to the General Division and the Appeal Division. Both Tribunals gave him the time to think before he had to respond to their questions. The administrative decision-makers were polite, respectful, and did not rush Mr. Brown.

[21] I see no breach of procedural fairness. It was reasonable for the Appeal Division to find that the hearing before the General Division was procedurally fair to Mr. Brown.

C. *Was it reasonable for the Appeal Division to find that the General Division had not 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?*

[22] In order for Mr. Brown to succeed on the argument that the General Division made an error of fact, it is important to be reminded of the meaning of "perverse or capricious" as set out in the grounds for appeal at subsection 58(1) of the *Department of Employment and Social Development Act,* S.C. 2005, c. 34. This Court recently considered this meaning in the context of a judicial review of an Appeal Division decision involving an application for CPP benefits in *Walls v. Canada (Attorney General)*, 2022 FCA 47 at paragraph 41 and stated:

> This Court has held that a perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence (*Garvey v. Canada (Attorney General)*, 2018 FCA 118, [2018] FCJ No 626 (QL) at para. 6). In the recent decision of *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, at paragraphs 122 and 123, referring to paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and to *Rohm & Haas Canada Limited v. Canada (Anti-Dumping Tribunal)* (1978), 22 N.R. 175, 91 D.L.R. (3d) 212, this Court considered the meaning of "made in a perverse or capricious manner or without regard to the material before [the decision maker]" in a similar context of determining whether there was a basis for intervention of erroneous factual findings from an administrative decision-maker. In this passage, this Court

> explained that the notion of "perversity" has been interpreted as "willfully going contrary to the evidence". The notion of "capriciousness" or of the factual findings being made without regard to the evidence would include "circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings."

[23] Regarding the question of the reasonableness of the Appeal Division's decision, Mr. Brown alleges that the General Division made an error of fact when it found that he had not made reasonable efforts to follow the treatments recommended by his doctors over the years. Specifically, Mr. Brown takes issue with the wording of paragraphs 7, 10 and 23 of the General Division Decision where it states that he failed to follow or has not followed the reasonable recommendations for treatment of his impairments.

[24] Mr. Brown argues that nowhere in the record do his doctors say that he refused or failed to follow their treatment recommendations.

[25] The Appeal Division dealt with this argument at paragraph 17 of its reasons. It acknowledged that no single doctor wrote that Mr. Brown was non-compliant with treatment. However, the Appeal Division held that the General Division did not err when it evaluated all of the evidence before it to make a factual finding that Mr. Brown did not follow the treatment recommendations to lose weight and exercise.

[26] Our role as a reviewing Court is not to reassess the evidence in a new light in order to come to a conclusion that is favorable to Mr. Brown (*Vavilov* at para. 125). Indeed, our role is not to interfere in the factual findings of a decision-maker, absent exceptional circumstances.

The burden is on the party challenging the decision to show that it is unreasonable. In order to set aside the decision, I must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws must be more than superficial (*Vavilov* at para. 100).

[27] While the factual findings of the General Division are not necessarily the findings I might have made, nonetheless, I do not find that the General Division made factual findings that were contrary to the evidence before it. There was medical evidence to support the findings that Mr. Brown was advised to lose weight and exercise, as this would assist him with his chronic back pain. Mr. Brown's oral testimony before the General Division suggested that he was still struggling with his weight and that he did not exercise regularly.

[28] Mr. Brown argued before the Appeal Division that he was unable to exercise and bike ride because of the osteoarthritis in his knees. His statement before the Appeal Division that requiring him to exercise with a bad back and two bad knees was akin to asking him to drive a car with two flat tires was certainly compelling. However, having regard to the standard of review I must apply, I do not find that the General Division committed an error of fact when it found that Mr. Brown failed in his duty to mitigate his condition. While he may have mitigated his disability by taking pain medications and undergoing knee replacements, the General Division was entitled to find that he had not followed his doctors' recommendations to exercise and lose weight. This finding of fact was supported by the record and Mr. Brown's testimony.

[29] Therefore, it was reasonable for the Appeal Division to determine that the General Division did not err when it found that the Mr. Brown did not meet the requirements for establishing he had a severe and prolonged disability. Mr. Brown had a duty to mitigate the severity of his ailments by following the treatment recommendations, and did not provide a reasonable explanation for failing to do so.

V. Conclusion

[30] For these reasons, I would dismiss the application for judicial review. The respondent did not ask for costs, and therefore, none should be awarded.

"Marianne Rivoalen"
J.A.

“I agree.
Anne L. Mactavish J.A.”

“I agree.
K. A. Siobhan Monagan J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
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CONCURRED IN BY:	MACTAVISH J.A. MONAGHAN J.A.
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APPEARANCES:

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