Federal Court Cour fédérale

Date: 20200402

Docket: T-1481-18

Citation: 2020 FC 476

Ottawa, Ontario, April 2, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

ZIGGY ZBIGNIEW RATMAN

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ziggy Zbigniew Ratman, has applied for judicial review of a decision of the Appeal Division of the Social Security Tribunal [SST]. In its decision dated June 29, 2018, the Appeal Division refused him leave to appeal a decision of the General Division of the SST.

[2] Mr. Ratman asks the Court to set aside the Appeal Division's decision and refer the matter back to the Appeal Division for redetermination with a direction that leave to appeal be granted. Alternatively, he requests reversal of the initial decision to deny him entitlement to

disability benefits under the *Canada Pension Plan*, RSC, 1985, c C-8 [*CPP*]. The issue therefore is whether the Court should grant the requested relief.

[3] For the following reasons, this application for judicial review will be dismissed.

I. Background

[4] Mr. Ratman immigrated to Canada in 1991 from Poland. He worked as a general labourer after his arrival in Canada. He suffered a workplace injury to his back in February 1994 while working for a construction company in Ontario.

[5] Mr. Ratman says he tried to rejoin the workforce from July to September 1994 but was unable to do so because his symptoms became aggravated. From September 1996 to October 2001, he took part in a market re-entry program sponsored by the Ontario Workplace Safety and Insurance Board. He attended a 12-month academic English language upgrade program, followed by successful completion of a three-year computer programming diploma. Mr. Ratman notes he was able to complete these programs despite suffering from serious mental and physical limitations, including lower back pain, difficulties with concentration, and depression.

[6] In October 1995, a doctor performed a non-economic loss [NEL] assessment on Mr. Ratman's lower back. Another doctor performed a physical and mental assessment of Mr. Ratman in May 2003 and opined that, without intervention, he was unemployable and would remain so.

[7] An April 2004 medical report confirmed that Mr. Ratman had sustained a severe lower back strain superimposed upon pre-existing degenerative changes in his lumbar spine as a direct result of the work-related accident in February 1994. This report reviewed Mr. Ratman's medical history, including the NEL assessment, and further noted that the doctor who had conducted the NEL assessment did not expect any changes to Mr. Ratman's condition during the two years following the assessment. The report concluded that Mr. Ratman's residual impairments made him unemployable and difficult to partake in normal activities of daily living.

[8] In September 2017, Mr. Ratman's family doctor reported that he suffered from failed back syndrome, chronic pain, depression, and hypertension, and that, following his accident, he was unfit for any gainful employment since October 1995.

[9] The Ontario Disability Support Program recognized Mr. Ratman's disability and he has received financial aid since 2013. Mr. Ratman applied for *CPP* disability benefits in February 2013 on the basis that he could no longer work as of September 2002 because of disc herniation, chronic lower back pain, depression, and hypertension. He said in his *CPP* disability application that his limited mobility, mood changes, difficulty in focusing, learning, sleeping, sitting, and standing, prevented him from returning to work.

[10] Service Canada denied Mr. Ratman's application for disability benefits in May 2013 and, upon reconsideration, again in October 2013. The initial decision determined he had insufficient earnings and contributions to qualify for *CPP* disability benefits. Service Canada also considered whether Mr. Ratman was eligible under the *CPP*'s late application provision. This provision

required Mr. Ratman to show he had a severe, prolonged, and continuous disability when he made enough contributions to the *CPP* to qualify for disability benefits.

[11] Service Canada determined that Mr. Ratman's minimum qualifying period [MQP] was December 1995, but he did not have a severe and prolonged disability that had been continuous since then. Service Canada recognized Mr. Ratman's limitations but found these had not prevented him from working at all types of jobs in December 1995. Service Canada noted that Mr. Ratman's academic upgrading after his MQP demonstrated the equivalent of work activity and that, while he may be unable to perform his usual work in construction, he should have been able to do some type of work in December 1995. Service Canada concluded that he was able to do part-time sedentary work since the last time he qualified for a disability benefit in December 1995.

[12] Mr. Ratman appealed Service Canada's reconsideration decision to the General Division of the SST in mid-January 2014. He did not provide a copy of the reconsideration decision within the 90-day timeframe to appeal, and in May 2015 the General Division refused to grant an extension of time to appeal. The Appeal Division denied Mr. Ratman's application to seek leave to appeal in early December 2015. Mr. Ratman applied for judicial review of the Appeal Division's decision and this Court granted his application on consent in December 2016. The Court sent the matter back to the Appeal Division, which granted leave to appeal and later allowed the appeal in April 2017. The matter was returned to the General Division for a fresh reconsideration, and in June 2017 the General Division allowed the extension of time to appeal.

II. The General Division Decision

[13] In a decision dated March 28, 2018, the General Division determined that Mr. Ratman was not eligible for a *CPP* disability pension because, as of December 31, 1995, he did not suffer from a severe disability as defined by the *CPP*. The General Division based its decision on the limited corroborative medical evidence from the time of his MQP, discrepancies between the oral testimony, and evidence in the hearing file. The General Division noted that Mr. Ratman had yet to exhaust all viable treatment options.

[14] The General Division remarked that paragraph 42(2)(a) of the *CPP* defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable of regularly pursuing any substantially gainful occupation; a disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. After finding that Mr. Ratman's disability was not severe, the General Division decided it was unnecessary to make a finding on the prolonged criterion.

III. The Appeal Division Decision

[15] Mr. Ratman sought leave to appeal the General Division's decision to the Appeal Division in early May 2018. In his application for leave, he claimed the General Division had breached natural justice and made errors of fact and law. Specifically, he claimed the medical evidence and his testimony were sufficient to find he was disabled under the provisions of the *CPP* and the General Division's conclusion was partially based on assumptions founded on errors.

[16] Following receipt of Mr. Ratman’s application for leave, the Appeal Division sent him and his counsel a letter saying that an Appeal Division member would review the file and determine how to proceed. This letter also stated that a member may issue a decision on the basis of the information already on file and that, in this event, the next correspondence from the Appeal Division may be the final decision. The letter confirmed that Mr. Ratman had authorized a representative to act on his behalf in the appeal and that the Appeal Division would send a copy of any notices of the hearing and the final decision to him and to his representative. The letter further noted that the Appeal Division would send all other correspondence only to Mr. Ratman’s representative.

[17] A subsequent letter from the Appeal Division requested clarification from Mr. Ratman’s representative on his grounds of appeal. This letter also said that if the Tribunal was unable to contact a party, the appeal may go ahead in absence of the party. Mr. Ratman’s representative did not respond to this letter.

[18] In a decision dated June 29, 2018, the Appeal Division refused leave to appeal. The Appeal Division noted that Mr. Ratman’s application for leave to appeal stated that the General Division had failed to adhere to the duty of fairness, erred in law, and based its decision on an erroneous finding of fact made in perverse and capricious manner or without sufficient regard for the material before it. The Appeal Division noted Mr. Ratman’s representative’s failure to give specifics about the grounds of appeal.

[19] The Appeal Division noted that under subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*], there are only three narrow grounds of appeal it can consider: the General Division (i) failed to observe a principle of natural justice or made a jurisdictional error, (ii) made an error in law, or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[20] The Appeal Division additionally noted that, under subsection 58(2) of the *DESDA*, leave to appeal is refused if the appeal has no reasonable chance of success. The Appeal Division remarked that to be granted leave to appeal there must be at least one ground of appeal that falls under subsection 58(1) of the *DESDA* which has a reasonable chance of success.

[21] The Appeal Division referenced *Pantic v Canada (Attorney General)*, 2011 FC 591, for the proposition that a ground of appeal cannot be said to have a reasonable chance of success if it is not clear. It found Mr. Ratman's bare allegations in his application for leave to appeal did not present any clear ground of appeal. The Appeal Division therefore concluded that leave to appeal could not be granted.

[22] The Appeal Division further concluded, after having reviewed the General Division's decision and the written record, that the General Division had not overlooked or misconstrued any important evidence, made no errors in law, and had not failed to observe the principles of natural justice and fairness.

IV. The Parties' Submissions

A. *Mr. Ratman's Submissions*

[23] Mr. Ratman submits that the Appeal Division was unreasonable to conclude that the General Division applied the correct legal test. He says the Appeal Division appropriately noted that the severity criterion must be assessed in a real-world context, but that it erred in its application of the test. According to Mr. Ratman, the Appeal Division did not fully consider his circumstances and medical condition to determine if he is capable of regularly pursuing any substantially gainful occupation.

[24] Mr. Ratman contends that the Appeal Division did not apply the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) of the *CPP*. In his view, when the words in this subparagraph are read in the context of the real world, a severe disability is one which renders an applicant incapable of pursuing with consistent frequency any remunerative occupation.

[25] Mr. Ratman further contends that the Appeal Division erred in adopting the General Division's mistaken finding of fact made in a perverse and capricious manner without regard to the medical evidence. He says it was clear he met the threshold of disability during his MQP. In his view, the Appeal Division's scope of analysis on the General Division's decision was minimal. He notes that the Appeal Division did not mention the MQP and the medical evidence relating to the MQP.

B. *The Respondent's Submissions*

[26] The respondent says without indication of how the principles of natural justice were breached, what legal error was made, or what finding of fact was erroneous and formed the basis of the decision, the Appeal Division reasonably determined that Mr. Ratman's arguments could not establish that the appeal had a reasonable chance of success.

[27] The respondent notes that the letter dated May 23, 2018 sent by the Appeal Division requested Mr. Ratman's counsel to specify what principle of natural justice was not observed or what error of law or facts were made. Mr. Ratman claims his counsel did not receive this letter. The respondent points out that the letter was addressed to Mr. Ratman's lawyer and not to Mr. Ratman. The respondent further notes that under paragraph 19(1)(a) and subsection 19(2) of the *Social Security Tribunal Regulations*, SOR/2013-60, a document sent by the SST by ordinary mail is deemed to have been communicated to a party ten days after the day on which it was mailed to the party.

[28] The respondent contends that, despite the lack of further submissions from Mr. Ratman or his counsel, the Appeal Division did not take the position that the appeal was abandoned. According to the respondent, the Appeal Division denied Mr. Ratman's application for leave because he did not raise a ground of appeal under subsection 58(1) of the *DESDA*.

[29] The respondent notes that the Appeal Division was wary of mechanistically applying the language of section 58 of the *DESDA* and was not trapped by the precise grounds of appeal

advanced by Mr. Ratman. The respondent says the Appeal Division's determination that the General Division had not overlooked or misconstrued any important evidence, did not make errors in law, and did nothing to suggest that it failed to observe the principles of natural justice and fairness, was reasonable.

[30] The respondent contends it was reasonable for the Appeal Division to deny leave to appeal because Mr. Ratman showed capacity to work after 1995. According to the respondent, the General Division did not err in concluding that at the time of his MQP, Mr. Ratman retained the capacity for alternative accommodated work within his limitations and for successful retraining. The respondent points out that corroborative medical evidence suggestive of a severe disability precluding regular participation in all substantially gainful work around the time of the MQP is limited.

V. Analysis

A. *What is the Standard of Review?*

[31] The standard of review for the Appeal Division's decision to deny leave to appeal with respect to an error in law or an erroneous finding of fact, under paragraphs 58(1)(b) and (c) of the *DESDA*, is reasonableness (*Sherwood v Canada (Attorney General),* 2019 FCA 166 at para 7; *Quadir v Canada (Attorney General)*, 2018 FCA 21 at para 9).

[32] The standard of review for a breach of a principle of natural justice or fairness under paragraph 58(1)(a) is correctness (*Sjogren v Canada (Attorney General)*, 2019 FCA 157 at para 6).

[33] Mr. Ratman raises no issues or concerns that the Appeal Division acted unfairly or breached a principle of natural justice. Rather, his arguments center on findings of fact and on whether the Appeal Division misconstrued the evidence. Therefore, the applicable standard of review is reasonableness.

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

[35] 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 arises in this case to justify a departure from the presumption of reasonableness review.

[36] 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. It

also tasks the Court with determining whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision maker (*Vavilov* at paras 85, 86 and 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[37] 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; *Vavilov* at para 125).

B. *Was the Appeal Division's Decision Reasonable?*

[38] 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 an arguable ground upon which the proposed appeal might succeed (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12).

[39] Subsection 58(1) of the *DESDA* prescribes the only grounds of appeal: a breach of natural justice, an error of law, or an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before the General Division (*Cameron v Canada (Attorney General)*, 2018 FCA 100 at para 2).

[40] The Appeal Division's obligation to give reasons arises from subsection 58(4) of the *DESDA*. The Appeal Division concluded that Mr. Ratman's arguments did not raise a ground of

appeal with a reasonable chance of success because neither he nor his counsel provided any clear grounds or specifics regarding the allegations. The Appeal Division's reasons are transparent and justifiable in this regard. I agree with the respondent that the Appeal Division was alive to the jurisprudence preventing it from mechanistically applying the test for leave (*Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10).

[41] I disagree with Mr. Ratman that the Appeal Division was unreasonable to conclude that the General Division applied the correct "real world" context test when assessing the severity criterion. The General Division noted the legal test and appropriately applied it to the facts.

VI. Conclusion

[42] The Appeal Division's decision to refuse leave to appeal is coherent, transparent, intelligible, and justified. It is an acceptable outcome defensible in respect of the facts and law.

[43] Mr. Ratman's application for judicial review is therefore dismissed. There is no order as to costs.

JUDGMENT in T-1481-18

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

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Hossein Niroomand	FOR THE APPLICANT
Hilary Perry	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hossein Niroomand Niroomand Law Professional Corporation	FOR THE APPLICANT
Hilary Perry Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT