Federal Court of Appeal | Cour d'appel fédérale

Date: 20220322

Docket: A-155-21

Citation: 2022 FCA 47

CORAM: **GAUTHIER J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

DOUGLAS WALLS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by online teleconference hosted by the Registry

on February 24, 2022.

Judgment delivered at Ottawa, Ontario, on March 22, 2022.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: GAUTHIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] The applicant, Mr. Douglas Walls, applied for a Canada Pension Plan disability pension in November 2018. By letter dated July 8, 2019, the Minister of Employment and Social Development granted his application with retroactive payments to start in August 2017, in

accordance with the 15-month deeming provision set out in paragraph 42(2)(*b*) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the CPP).

[2] In the same letter, the Minister explained that she did not consider Mr. Walls to have met the definition of incapacity set out in subsection 60(8) of the CPP. The result of this conclusion was that Mr. Walls could not receive disability benefits retroactively to November 2011, the date on which Mr. Walls says his period of incapacity started.

[3] Mr. Walls contested the Minister's conclusions regarding his incapacity. Before the General Division of the Social Security Tribunal, Mr. Walls, with the assistance of his legal counsel, provided medical and other evidence which he argued supported a factual finding of incapacity within the definition set out in subsections 60(8) to 60(10) of the CPP. In particular, Mr. Walls submitted that from November 2011, up to November 2018, he was incapable of forming or expressing an intention to make an application for a continuous period before submitting his application on November 9, 2018.

[4] The General Division rendered its decision on September 30, 2020. It dismissed Mr. Walls' appeal, and found that the evidence provided by Mr. Walls did not support a finding of incapacity within the meaning of subsections 60(8) to 60(10) of the CPP. Mr. Walls then appealed to the Appeal Division of the Social Security Tribunal.

[5] The Appeal Division rendered its decision (the AD Decision) on April 1, 2021 (2021 SST 132). The Appeal Division upheld the decision of the General Division, finding that Mr. Walls

did not meet the requirements for incapacity set out in subsections 60(8) to 60(10) of the CPP. In accordance with its role, as prescribed in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the DESD Act), the Appeal Division confirmed that it could only interfere with the decision of the General Division if it was satisfied that the General Division: (1) failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction; (2) erred in law in making its decision; or (3) 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. The Appeal Division found no such errors.

[6] Mr. Walls is now before this Court and seeks judicial review of the AD Decision.

II. Standard of Review and Issues before this Court

[7] The standard of review in this application for judicial review is reasonableness. This Court need only consider whether the Appeal Division's reasons and conclusion are reasonable (*Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109, [2020] F.C.J. No. 738 (QL) at para. 11, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 83, 86 [*Vavilov*]; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6, [2020] F.C.J. No. 15 (QL) at para. 34).

[8] Having regard to the statutory scheme set out in the DESD Act and the specific and distinct roles of the General Division and Appeal Division, the role of this Court is not to re-weigh or reassess the evidence that was before the administrative fact-finder, in this case, the General Division (*Vavilov* at para. 125). Thus, the question before us is not whether this Court would have

granted Mr. Wall's application, but rather whether the Appeal Division's decision not to interfere with the General Division's decision was reasonable (*Cameron v. Canada (Attorney General)*, 2018 FCA 100, [2018] F.C.J. No. 582 (QL) at para. 3).

[9] In this application for judicial review, I would suggest that the questions before us can be framed as follows:

> A. Was it reasonable for the Appeal Division to find that the General Division properly applied the legal test for incapacity established by this Court in *Canada (Attorney General) v. Danielson*, 2008 FCA 78, 165 A.C.W.S. (3d) 560 [*Danielson*]?; and,
>
> B. 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?

[10] For the following reasons, despite Mr. Wall's compelling written memorandum of fact and law and eloquent oral submissions, and having regard to the standard of review that I must apply, I am of the view that the AD Decision is reasonable and I would dismiss the application.

III. Brief Factual Background

[11] Mr. Walls' health problems began in July 2010, after a tick bit him. He became very ill, and his overall health and cognitive capacity deteriorated. Mr. Walls' symptoms included:

- unrelenting excruciating pain in upper back/lower neck areas and in his jaw/facial bones;
- digestive issues;
- exhaustion;
- continuous nausea;
- continuous brain fog;
- lethargic brain;
- inflammation of the brain;
- inability to concentrate;
- loss of strength;
- shortness of breath;
- fatigue;
- a total lack of energy;
- extreme headache;
- inability to concentrate;
- inability to plan or problem solve; and
- behaviour changes such as anxiety and agitation.

[12] Mr. Walls testified before the General Division that he was dismissed from his employment on October 31, 2011, not having ever applied for long-term disability benefits for fear of losing his job. Following his dismissal, Mr. Walls never worked again or earned employment income. He indicates that he "was in a vegetative Zombie-like mental state from November 2011 to November 2018 that was severe, prolonged and continuous". He sought medical treatment, but gave up and remained bedridden and isolated in his home (Affidavit of the applicant at para. 27, Applicant's Record, p. 24).

[13] When he reached the age of 65, Mr. Walls received a letter from Service Canada indicating that he should apply for the CPP. He visited the Service Canada office and struggled with his application. As a result, a staff person from Service Canada helped him "for a lengthy period" to complete the application. His application was allowed and Mr. Walls has been in receipt of a CPP retirement pension since October 1, 2017 (Affidavit of the applicant at paras. 13-14, Applicant's Record, p. 21).

[14] Around that time, Mr. Walls also received the necessary forms to apply for CPP disability benefits when it came to light that he had been ill for a long time. This application took him one "full year to complete…through the helpfulness of the individuals who assisted [him] at Service Canada." (Affidavit of the applicant at para. 13, Applicant's Record, p. 21).

[15] Mr. Wall's CPP disability pension benefits would have become payable in December 2017 and ended in February 2018 when he turned 65. The Minister determined that cancelling Mr. Walls's retirement pension would result in an overpayment amount that was higher than his estimated disability pension underpayment. The Minister offered him the option to cancel his retirement pension or withdraw his disability application, because it is not possible to receive both concurrently. On August 1, 2019, Mr. Walls wrote to the Minister to notify her that he did not want to cancel his CPP retirement pension or withdraw his disability application. The Minister decided to continue paying Mr. Wall's retirement pension while his disability application was under consideration (Affidavit of the applicant at para. 16, Applicant's Record, p. 22).

IV. Appeal Division Decision under Review.

[16] Mr. Walls, who was self-represented before the Appeal Division, raised four main issues:

1) Whether the General Division erred by failing to provide Mr. Walls with a fair process;

2) Whether the General Division erred in law by failing to apply the decision of this Court in *Danielson;*

3) Whether the General Division erred in relying on medical evidence that failed to support a finding incapacity; and,

4) Whether the General Division based its decision on other factual errors.

[17] On the first issue, the Appeal Division concluded that the proceedings before the General Division were fair. The Appeal Division found that Mr. Walls had legal counsel before the General Division and that he had a full and fair opportunity to make arguments on every fact or factor relevant to his case. The Appeal Division explained that what fairness requires in each case depends on various factors, including the right to be heard, the need for Tribunal members to be masters of their proceedings and to balance informality, speed, and fairness. The Appeal Division found that the process was fair because Mr. Walls agreed to a process by which he would not read his entire personal statement. Further, Mr. Wall's legal counsel led him through his testimony and made a closing argument. The General Division member had given Mr. Walls the opportunity to

edit and summarize his personal statement as initially agreed, checked in with Mr. Walls multiple times before and during the hearing, and allowed Mr. Walls the opportunity to raise every issue (AD Decision at paras. 16-26). Having considered all of these factors, the Appeal Division found that the General Division observed the principles of natural justice.

[18] On the second issue, the Appeal Division held that the General Division followed the legal test established to determine incapacity set out in *Danielson*. The Appeal Division explained that *Danielson* requires the General Division to consider both Mr. Wall's activities and the medical reports about the period during which he argues he was incapable of forming or expressing an intention to apply for the CPP. The Appeal Division found that the General Division considered both Mr. Walls' activities and his medical reports, and that it correctly assessed whether he showed that he had the capacity to form the intention to apply (AD Decision at paras. 27-33).

[19] Finally, with respect to the two remaining factual issues raised by Mr. Walls, reliance on certain medical evidence and other factual errors, the Appeal Division found that the General Division made no factual errors in relation to the key evidence before it. The Appeal Division explained that, while it is an error for the General Division to base 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, this did not happen in the present case. Overall, it found that the General Division did not make erroneous findings of fact in relation to the key evidence or any other evidence (AD Decision at paras. 34-66). It dismissed the appeal.

V. Applicant's Position

[20] Mr. Walls' arguments focus on two categories of errors that he submits renders the AD Decision unreasonable.

[21] First, Mr. Walls submits that the General Division did not properly apply the legal test to determine incapacity in *Danielson*, as re-articulated in this Court's recent decision in *Blue v. Canada (Attorney General)*, 2021 FCA 211, 337 A.C.W.S. (3d) 534 [*Blue*]. This renders the AD Decision unreasonable, he says, because the Appeal Division should have found that the General Division erred in applying the legal test.

[22] On this point, Mr. Wall submits that the General Division failed to address the fourth element of the test, as articulated in paragraph 42 of *Blue*, that being the extent to which his "inactivities" cast light on his capacity to form or express an intention to apply for disability benefits during the relevant period.

[23] Mr. Walls argues that the General Division did not properly assess the evidence that listed all of the activities that he was no longer able to perform that required any degree of mental capacity. He underscores the long list of "inactivities" during the period of November 2011 to November 2018, including (Affidavit of the Applicant at para. 11, Exhibit C, Applicant's Record, pp. 20, 30 and 31):

- Looking after his finances and investments, resulting in him losing significant amounts of money;
- Finding a new family doctor who would take an actual interest in his health;
- Thinking about the preparation of a Last Will and Testament;
- Dealing with a house insurance claim, resulting in him losing $6000;
- Fulfilling his duties as an executor on his mother's estate, which he says remains in limbo;
- The inability to commence a small claim action;
- The delay in him seeking treatment for physical ailments which resulted in him having no choice but to undergo surgery;
- The inability to move to a new apartment despite the level of noise and disruption he experienced outside his dwelling which exacerbated his mental state and agitation levels;
- The isolation from family and others who might have otherwise provided support;
- The inability of finalizing a settlement agreement reached between himself and his spouse prior to his the onset of his illness. As a result, all shared assets remained frozen for the ten years of his illness; and
- The years of lost income he could have expected having been dismissed from his employment because of his health issues at the age of 58.

[24] Mr. Walls argues that these examples of the numerous pursuits and actions he was no longer able to undertake overwhelmingly demonstrate that he lacked mental capacity during the period in question.

[25] The second error that Mr. Walls advances is that it was unreasonable for the Appeal Division to conclude that the General Division did not err when it put too much weight on certain medical evidence, and that it did not take into account other medical evidence and factors which, taken together, demonstrated incapacity.

[26] On the question of the medical evidence upon which the General Division relied to establish capacity, Mr. Walls submits that the General Division put too much emphasis on a limited number of medical related activities which, in and of themselves, required no real thought and were simple in nature. For example, his signing of a consent form to have surgery in March 2015 and the verbal and written consent he provided in June 2015 for a different surgical intervention required no thought because in his submission, he had no choice but to undergo both of these medical interventions. With respect to the pre-operative questionnaire he completed in January 2016 in connection with his second surgery, the questionnaire consisted of check-off boxes and was simple in nature. Finally, his consent to undergo an unrelated medical test in December 2016 was also related to the symptoms he believed stemmed from Lyme Disease. In his view, this was an automatic response and no thought was necessary on his part.

[27] Rather, Mr. Walls submits that the General Division should have given much more weight to the medical evidence from his family doctor who completed the Declaration of Incapacity form

submitted along with his application for disability benefits. The doctor answered "yes" to the question "[d]oes the applicant's condition make him incapable of forming or expressing the intention to make an application?" Further, the doctor answered "ongoing" in response to the question "[p]lease provide the date the incapacity ceased" (Affidavit of the applicant at para. 18, Applicants Record, p. 22).

[28] The other factors that were relied upon too heavily by the General Division, in Mr. Walls' submission, were his attempt to return to the gym in 2016 and later in 2018. This should not be indicative of his mental improvement.

[29] Finally, Mr. Walls disputes the accuracy of some of the factual findings made by the General Division. For example, he contends that referencing his "ugly divorce" was inaccurate, as he was never divorced. He also argues that referencing his multi-tasking was inaccurate.

[30] In summary, Mr. Walls argues that the evidence relied upon by the General Division as establishing capacity does not, in his view, demonstrate mental capacity or any degree of mental acuity, and it should not be used as representing the true meaning of "capacity".

VI. Analysis

[31] At the outset, as the Court indicated to Mr. Walls during the hearing, there is no question that he is disabled within the meaning of the CPP. There is no dispute that his numerous symptoms were debilitating and life changing. He was unable to return to work and earn an income because of his disability. The question is not whether he is disabled, however. The question is whether he

had the capacity to form or express an intention to make an application for CPP disability benefits before he made the application on November 9, 2018. A finding of incapacity under subsection 60(8) of the CPP applies only in a very narrow set of circumstances.

[32] Indeed, it is most unfortunate that Mr. Walls only became aware of his opportunity to apply for CPP disability benefits when he met with a Service Canada staff person in 2017.

A. *Was it reasonable for the Appeal Division to find that the General Division properly applied the legal test for incapacity established by this Court in Danielson?*

[33] Turning to Mr. Wall's arguments on the application of the legal test in *Danielson*, as re-articulated in *Blue*, in my opinion, the Appeal Division reached a reasonable conclusion in deciding that the General Division had appropriately applied the legal test.

[34] In *Danielson*, the majority of this Court held that the activities of a claimant during the period of incapacity in question may be relevant to cast light on their continuous incapacity to form or express the requisite intention and ought to be considered (*Danielson* at para. 7). In allowing the application for judicial review, Justice Létourneau, writing for the majority, found that "[w]hat the Board should have looked at is whether these events at the time they occurred evidenced a capacity to form or express an intention to make an application for benefits." Rather, the Board omitted to do that and erroneously considered other relevant activities of the respondent. This misapplied the legal test (*Danielson* at para. 11).

[35] Additionally, in *Sedrak v. Canada (Social Development*), 2008 FCA 86, 377 N.R. 216, [*Sedrak*] this Court held that the "capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant." (*Sedrak* at para. 3). Rather, "[t]he fact that a particular choice may not suggest itself to an applicant because of his world view does not indicate a lack of capacity to do so … Nothing in this scheme requires us to give to the word "capacity"' a meaning other than its ordinary meaning." (*Sedrak* at paras. 3-4).

[36] Thus, the case law informs us that the applicable legal test is not whether the applicant has the capacity to make, prepare, process, or complete an application for disability benefits. That is, it does not depend on whether the applicant has the physical capacity to complete the application. Rather, it is whether the applicant has the mental capacity, quite simply, of forming or expressing an intention to make an application. This capacity is the same as forming or expressing an intention to do other things.

[37] The recent decision of this Court in *Blue* provides a helpful reiteration of the test in *Danielson*. In *Blue*, unlike in the present case, the applicant had psychological evidence that supported a finding of incapacity. The legal test for incapacity was restated in *Blue* at paragraph 42 and bears repeating:

> [42] From this, it appears that the test for incapacity for the purposes of subsection 60(9) of the *Canada Pension Plan* involves consideration of the following matters, at a minimum:
>
> (1) The applicant's evidence with respect to the nature and extent of his or her physical and/or mental limitations;

> (2) Any medical, psychological or other evidence adduced by an applicant in support of their claim of incapacity;
>
> (3) Evidence of other activities in which an applicant may have been engaged during the relevant period; and
>
> (4) The extent to which these other activities cast light on the capacity of the applicant to form or express an intention to apply for disability benefits during that period.

[38] I cannot agree with Mr. Walls' submissions that the General Division failed to consider the elements set out in the fourth factor in *Blue*, the extent to which these other activities (in his case, "inactivities") cast light on his capacity to form or express an intention to apply for disability benefits. It was reasonable for the Appeal Division to find that the General Division had considered these "inactivities" as set out in paragraph 32 of the AD Decision. Mr. Walls does not agree with the weight given by the General Division to his list of pursuits and actions that he was no longer able to perform during the relevant period of November 2011 to November 2018. However, it is not our role, nor was it the role of the Appeal Division, to reconsider and re-weigh the evidence. The General Division did consider this list of "inactivities" at paragraphs 17 and 18 of its reasons. As stated in paragraph 33 above, it was reasonable for the Appeal Division to find that the General Division appropriately applied the legal test in *Danielson* to all of the evidence that was before it. These examples of "inactivities" simply did not convince or persuade the General Division of Mr. Wall's mental incapacity.

[39] In my view, it was reasonable for the Appeal Division to find no error with the General Division's decision on the application of the legal test in *Danielson.*

B. *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?*

[40] On the second error, 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 DESD Act.

[41] 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."

[42] Here, it cannot be said that the General Division wilfully made factual findings that went contrary to the evidence. The General Division set out Mr. Wall's medical evidence, the physical and the mental symptoms that he faced during the period of July 2010 to November 2018. The

General Division also considered, at paragraphs 4 and 13 to 20 of its reasons, the list of activities Mr. Walls was no longer able to accomplish. The complaint made by Mr. Walls is the manner in which the General Division weighed all of the evidence before it. On this record, it was reasonable for the Appeal Division to find that the General Division had not based its decision on an erroneous finding of fact.

[43] In addition, nowhere in the General Division's reasons do I see circumstances where there was no evidence to rationally support its findings of fact or where it failed to reasonably account for critical evidence that ran counter to its findings. The General Division found that Mr. Walls met with his attending physician and other medical specialists and had the mental capacity to consent to surgeries, complete a medical questionnaire, and undergo medical tests. His ability to consent to such medical procedures and tests was evidence of his capacity, quite simply, of forming or expressing an intention to make an application for CPP disability benefits.

[44] It was reasonable for the Appeal Division not to intervene in the General Division's factual findings.

VII. Conclusion

[45] For these reasons, I would dismiss the application for judicial review, without costs.

"Marianne Rivoalen"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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