Federal Court  Cour fédérale

Date: 20180319

Docket: T-845-17

Citation: 2018 FC 308

2018 FC 308 (CanLII)

Ottawa, Ontario, March 16, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DARLA BOWLES-FRASER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Bowles-Fraser asks the Court to review a decision of the Appeal Division of the Social Security Tribunal [AD-SST] refusing her leave to appeal the decision of the General Division [GD-SST]. The GD-SST found that Ms. Bowles-Fraser was not eligible for disability benefits under the Canadian Pension Plan as her disability was not "severe" prior to the minimum qualifying period [MQP] that ended on December 31, 2014.

[2] I have concluded that the AD-SST unreasonably found that Ms. Bowles Fraser's argument that GD-SST made its decision without regard for the material before it did not have a reasonable chance of success. Specifically, the AD-SST failed to consider that the GD-SST failed to consider medical evidence that post-dated the MQP but that spoke directly to Ms. Bowles-Fraser's condition prior to that date and which conflicted with the evidence the GD-SST relied upon.

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[3] Ms. Bowles-Fraser's employment history includes an accounting position for a large national grocer, a senior payroll administration position for a well-known fast-food restaurant chain, two decades as a medical secretary, and immediately prior to the onset of her claimed disability, work as a foster parent.

[4] On October 26, 2011, she tripped over a large industrial vacuum hose. She sustained a fracture of her humerus. She identifies this as the date from which she could no longer work because of her medical condition, which she describes as fibromyalgia, constant headaches that are "totally disabling", and all over "extreme" body pain and cramping. Further, the use of her left (dominant) arm is limited, including difficulty writing or typing for any length of time. She also states she has very bad pain in her shoulder and both knees.

[5] In order to qualify for a Canada Pension Plan disability pension, Ms. Bowles-Fraser must have become severely and continually disabled by December 31, 2014. She applied for a disability pension on April 24, 2013, but it was denied. Her request for reconsideration was also denied. She completed her appeal of the reconsideration decision on February 4, 2015. The GD-

SST heard testimony on August 25, 2016. It determined that she was not eligible for a disability pension because she "failed to demonstrate that she was incapable regularly of pursuing any substantially gainful occupation at the time of the MQP."

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[6] The AD-SST dismissed her appeal, finding that she "has not identified grounds of appeal under subsection 58(1) [of the *Department of Employment and Social Development Act* [*DESDA*], SC 2005, c 34] that would have a reasonable chance of success on appeal."

[7] On this application, Ms. Bowles-Fraser filed an affidavit that contained very recent medical information that was not before the AD-SST. The Respondent objected to the evidence being before the Court, and Ms. Bowles-Fraser did not rely on it during oral submissions. I support the position of the Respondent respecting this evidence. It cannot be considered when assessing the reasonableness of the decision under review as it was not before that decision-maker.

[8] Ms. Bowles-Fraser accepts the statements in paragraphs 18 and 19 of the Respondent's memorandum as to the test the AD-SST is to apply:

> Subsection 58(2) [of the *DESDA*] provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." This Court has stated that "having a reasonable chance of success in this context means having some arguable ground upon which the proposed appeal might succeed:" *Osaj v Canada (Attorney General)*, 2016 FC 115, at para 12.
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> When applying this test, the Appeal Division should review the underlying decision of the General Division to determine whether it failed to properly account for any of the evidence. If important evidence has been arguable overlooked or misconstrued, then leave to appeal should ordinarily be granted: *Griffin v Canada (Attorney*

> *General)*, 2016 FC 874 at para 20, and *Joseph v Canada (Attorney General)*, 2017 FC 391, at paras 43-44.

[9] Ms. Bowles-Fraser pointed to numerous passages in the evidence before the GD-SST which she submitted had been overlooked or misconstrued. The Respondent submitted that the real complaint was with the weight the GD-SST gave to the medical evidence. I need not examine each of these allegations because I am satisfied that the GD-SST failed to properly account for at least some of the evidence before it that may have had a significant impact on the decision, namely evidence that post-dated the MQP, but which related to the medical condition prior to that date.

[10] At paragraph 41 of the decision of the GD-SST, it states:

> The Tribunal prefers – and relies on – medical evidence of these conditions that was obtained up to the Appellant's MQP. [emphasis added]

[11] There can be little question that evidence of her medical condition after the MQP, save in exceptional circumstances, establishes little about her condition prior to the MQP. Here, however, the GD-SST discounted medical evidence because it was obtained after the MQP but failed to consider that it specifically reversed the expert's previous medical opinion expressed in reports during the MQP. Such evidence cannot be rejected out of hand. It needs to be considered and weighed for its probative value. This is especially so when the GD-SST relies on earlier reports which are subsequently changed by their authors.

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[12] The most obvious example of this is Dr. Axelrod's report dated after the MQP in which he explicitly repudiates portions of his pre-MQP report relied on by the GD-SST in its analysis.

[13] The GD-SST noted that "Dr. Axelrod's June 2013 report indicates her 'frozen' shoulder could possibly improve through an exercise program and extensive physiotherapy twice per week". This was presumably a reference to the statement in his June, 2013 report that:

> With the passage of time and more therapy, plus or minus the possibility of surgical intervention for her shoulder, Ms. Bowles-Fraser may have sufficient improvement in her level of function to return to her work as foster parent for older children. This remains possible although far from certain.

Dr. Axelrod directly addresses his earlier conclusion in his March 2, 2016 report:

> Despite my previous recommendations for extensive amounts of additional physiotherapy, Ms. Bowles-Fraser has not been able to regain additional movement in her arm. I noted on my previous assessment that there was potential for further improvement. Unfortunately, I have not noted much in the way of further improvement for Ms. Bowles-Fraser's left upper extremity function other than slight increase in elbow flexion.
>
> I would consider that Ms. Bowles-Fraser continues to have evidence of a severe impairment of her left arm function. This is chronic in nature and likely permanent given that there has been no material improvement over the last three years since my previous assessment.

[14] Dr. Axelrod's March 2016 report does not indicate that Ms. Bowles-Fraser's situation has worsened, but rather that the hoped for improvements on which he based his opinions as to her ability to work had unfortunately not occurred. This later report is therefore highly relevant to the severity of Ms. Bowles-Fraser's disability at the time of her MQP, and it was an error for the

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AD-STT to find that Ms. Bowles-Fraser did not have reasonable ground of appeal regarding the GD-SST's failure to consider this report.

[15] This sort of error has been previously noted by the Court as warranting the granting of judicial review of AD-SST decisions: See *Plaquet v Canada (Attorney General)*, 2016 FC 1209 at paras 59-63, and *Lavin v Canada (Attorney General)*, 2011 FC 1387 at paras 38-40.

[16] No party asked for costs and none will be ordered.

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JUDGMENT in T-845-17

THIS COURT'S JUDGMENT IS that:

1. This application is allowed;

2. The decision of the Appeal Division of the Social Security Tribunal is set aside;

3. The appeal is referred back to a differently constituted panel of the Appeal Division for redetermination; and

4. There is no order as to costs.

"Russel W. Zinn"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-845-17
STYLE OF CAUSE:	DARLA BOWLES-FRASER v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 8, 2018
JUDGMENT AND REASONS:	ZINN J.
DATED:	MARCH 19, 2018

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