Citation: *J. R. C. v. Minister of Employment and Social Development,* 2015 SSTAD 769

Appeal No. AD-15-144

BETWEEN:

J. R. C.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 19, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 27, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that his disability was not "severe" at his minimum qualifying period of December 31, 2008. The Applicant filed an application requesting leave to appeal on March 24, 2015. To succeed on this application, he must show that the appeal has a reasonable chance of success.

SUBMISSIONS

[2] The Applicant seeks leave on the grounds that the General Division failed to consider some of the evidence, and that it made erroneous findings of fact, without regard for the material before it. In particular, he submits that:

(i) The General Division made misleading or incorrect statements. He listed the pages and paragraph numbers referencing these statements. He requested an opportunity to "go over" these statements, as he submitted that they will prove his eligibility for a disability pension under the *Canada Pension Plan;* and

(ii) No less than three physicians have diagnosed him with severe chronic medical conditions and co-morbidities since 2007. He referred in particular to a medical opinion dated April 11 2013 of Dr. J. Liu.

[3] The Applicant filed a medical report dated March 10, 2015 of Dr. C. Kamens, his current family physician, with his leave application.

[4] The Applicant filed additional submissions on May 20, 2015. He responded to the Respondent's submissions that the "evidence does not support a finding of disability". He pointed to the various medical records filed in support of his claim for a disability pension. The Applicant also reviewed his medical history and some of the medical records that had accompanied his Notice of Readiness filed on January 22, 2014 with the Social Security Tribunal. The Applicant also addressed the incorrect or misleading statements which he

had referred to in his leave application. From this, I understand that the Applicant submits that the General Division failed to consider these opinions and records in assessing whether he could be found severely disabled for the purposes of the *Canada Pension Plan.*

[5] The Respondent has not filed any written submissions.

THE LAW

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General),* 2010 FCA 63.

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) states that the only grounds of appeal are the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (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.

[8] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

ANALYSIS

(a) Did the General Division fail to consider the evidence before it?

[9] The Applicant submits that "incomplete documents were submitted leaving out [his] side of the case". From this, I understand the Applicant to mean the General Division failed to consider some of the evidence before it.

[10] Had this been a matter that the Applicant had submitted incomplete documents, I would have readily dismissed this ground of appeal for consideration, on the basis that it would not lead to a reasonable chance of success. It is incumbent upon an applicant or his or her representative(s) alone to produce the necessary documentary evidence and to arrange for any witnesses. There is no duty on the part of the Respondent to obtain any supporting evidence on behalf of an applicant.

[11] The General Division must be fully independent and impartial. There is no duty on the General Division to produce any records or documentary evidence, though if it is apparent that the materials are incomplete, it could of its own volition or upon request by one of the parties, adjourn the proceedings to enable an applicant to obtain the necessary documentation. I do not see how the General Division might have erred in any way if there were any incomplete documents, given that it is under no duty to produce documents in the first instance.

[12] Had this been a matter that the Applicant had submitted documentary evidence to the Social Security Tribunal, and somehow that evidence did not form part of the hearing file, that might have been another matter altogether. As it is, the Applicant has not identified any documents which he might have filed which did not form part of the hearing file before the General Division.

[13] These considerations aside, the Applicant suggests that the General Division failed to consider medical opinions of three separate physicians, each of whom have found him to have severe chronic medical conditions. He has identified only one specific medical opinion, the report dated April 11, 2013 of his former family physician. The General Division however referred to this report, in both the Evidence and Analysis

sections of the decision, and gave an extensive overview. In fact, in referencing the report, the General Division wrote, "It was opined that [the Applicant] has severe chronic medical conditions and co-morbidities dating back to at least 2007". Thus, I do not see how it can be said that the General Division failed to consider this medical report.

[14] In the submissions filed on May 19, 2015, the Applicant referred to additional reports, including a report dated July 15, 2008 of Dr. Aneel Kaushik; record dated January 22, 2009 of Dr. Geoff Duckworth; and report dated March 10, 2015 of Dr. Cathy Kamens. The General Division in fact referred to and considered some of these reports, including the reports of Drs. Kaushik and Duckworth. However, it could not have considered the report of Dr. Kamens, as she had yet to prepare it.

[15] If there were any other reports or portions of reports which the Applicant submits the General Division failed to consider, the Applicant ought to have not only identified them, but also advised as to what impact they might have had on the outcome.

[16] The Applicant also points to hospital emergency records which the General Division did not refer to in its decision. In this regard, I note that the Federal Court of Appeal has held that there is no obligation for a decision-maker to exhaustively list all of the evidence before it, as there is a general presumption that it considered all the evidence. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the Federal Court of Appeal held that, "… a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence".

[17] The Applicant is requesting, in large part, that the Appeal Division reassess the evidence that was before the General Division, and that it also consider the medical report of Dr. Kamens, which was obtained after the hearing before the General Division. For the purposes of a leave application, I am restricted to considering only those grounds of appeal which fall within subsection 58(1) of the DESDA. Generally, the subsection does not permit me to undertake a reassessment of the evidence or a consideration of any new records or opinions.

[18] I am not satisfied that the appeal has a reasonable chance of success under this ground.

(b) Did the General Division make erroneous findings of fact or make any misleading statements?

[19] The Applicant submits that the General Division made a number of incorrect and misleading statements, as follows:

i. page 3 - paragraph 10

ii. page 4 - paragraph 14

iii. page 5 – paragraphs 15 to 19

iv. page 7 – paragraphs 24 and 25

v. page 8 – paragraphs 27 and

vi. page 10 – pages 32 and 34

[20] In other words, the Applicant submits that the General Division based its decision on erroneous findings of fact, made in a perverse or capricious manner or without regard for the material before it.

[21] Paragraphs 10 to 25 of the decision of the General Division do not represent findings of fact made by the General Division. They represent the General Division's summary of the documentary evidence and the testimony before it.

[22] At paragraph 10 of its decision, the General Division wrote that the Applicant has three adult children. The Applicant advises that in fact, at the time of the hearing, he had two children and one child under the age of 18. If his youngest child was born in December 1994, as disclosed in both the Application for Disability Benefits and the form Child Rearing Provision, she would have attained the age of majority by the time of the hearing. Nonetheless, the issue as to the ages of the children had no impact and was not a deciding factor upon which the General Division based its decision.

[23] At paragraph 14, the General Division wrote that the Applicant was advised that he need not attend Mount Sinai for cognitive behavioural therapy, "because he was not suicidal or homicidal". The Applicant advises that he was not offered any options and was not permitted to attend therapy there. There may or may not be any distinction between the two, but either way, it was a fact which had no impact and was not a deciding factor upon which the General based its decision.

[24] At paragraph 17 of its decision, the General Division wrote that it had been two to three years since attacks of depression had been coming on for no reason. The Applicant submits that the General Division was incorrect, as he was experiencing attacks of depression two to three times per week, as opposed to only two to three times per year, and anxiety attacks twice a week. The General Division simply re-stated the evidence, though the correct quotation from the medical report dated December 6, 2007 of Dr. Duckworth would have read, "It is only in the last 2-3 years that these attacks of depression have been coming on for now (*sic)* reason". I do not see that the General Division made any findings as to the frequency at which the Applicant might have experienced any attacks of depression or anxiety. The Applicant does not otherwise allege that the General Division erred in stating that he had been experiencing these attacks for the past two to three years prior to 2007, so it was neither an incorrect nor misleading statement in that regard.

[25] At paragraph 18 of its decision, the General Division referred to a medical report dated July 8, 2008 prepared by Dr. Godfrey, a physiatrist. The General Division wrote that the Applicant's complaints of numbness and tingling in his extremities had reversed somewhat since going on Glyburide. The Applicant submits that the General Division erred, as he says that Dr. Godfrey did not prescribe Glyburide to him. Likely nothing turns on who might have prescribed Glyburide to the Applicant, and it does not appear that the General Division based its decision upon this finding. In any event, I do not see that the General Division made any findings as to who prescribed Glyburide. The Applicant does not otherwise allege that the General Division erred in stating that his complaints of numbness and tingling had reversed somewhat since going on Glyburide, so it was neither an incorrect nor misleading statement in that regard.

[26] At paragraph 19 of its decision, the General Division summarized the report dated July 15, 2008 of Dr. Kaushik. The General Division wrote that Dr. Kaushik indicated that the Applicant has several medical issues that are significant, including shoulder pain, diabetes mellitus, hypertension and depression. The Applicant submits that the General Division erred, as it did not quote Dr. Kaushik's opinion that the Applicant "lives with constant pain that is severely affected both physically and emotionally by this" … "This affliction affects his daily life and he is a person with a disability". As I have stated above, a decision-maker need not exhaustively refer to all of the evidence before it. In this regard, I note also the words of Stratas J.A. in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumbar Manufacturing Inc.*, 2012 FCA 165 in this regard. Stratas J.A. wrote:

> … trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[27] At paragraph 24 of its decision, the General Division referred to the medical report dated April 11, 2013 of Dr. Lui. The Applicant submits that the General Division erred, as it stated that Dr. Lui provided a medical opinion. The Applicant submits that "this was not an opinion it was a doctor's diagnosis". In fact, a diagnosis represents an expert's opinion.

[28] At paragraph 25 of its decision, the General Division referred to the psychiatric assessment dated March 21, 2013 of Dr. Shree Bhalerao, a psychiatrist. The Applicant wrote that he saw Dr. Bhalerao for major depression and anxiety attacks. He submits that the General Division erred as it failed to reference the fact that Dr. Bhalerao also noted that the Applicant was being seen for anxiety attacks and had elements of an anxiety disorder and learning disorder. Again, this was not a matter of the General Division mis- stating the evidence. The report of Dr. Bhalerao indicates that the Applicant had been referred for cognitive difficulties. Dr. Bhalerao diagnosed the Applicant with major depressive disorder in partial remission. The General Division stated this. The General Division however did not list all of the diagnoses made by Dr. Bhalerao, including the fact that he

diagnosed the Applicant with cluster b traits learning disorder. While that may be so, the General Division was alive to the Applicant's anxiety attacks.

[29] Apart from Dr. Bhalerao's report, there was no other mention by any other health caregivers that the Applicant might have a learning disorder, and how this might affect or impact him with regards to his capacity regularly of pursuing any substantially gainful occupation. It does not appear that the Applicant himself previously raised this issue, until the leave application. In that regard, I note that the Supreme Court of Canada has held that a decision-maker need not include all of the arguments, statutory provisions, jurisprudence or other details in his or her decision. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, the Supreme Court of Canada held that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.,* [1975] 1 S.C.R. 382, at p. 391).

[30] The Applicant made extensive submissions regarding paragraph 27 of the decision. The paragraph represents the submissions of the Respondent and nothing more. While paragraph 27 may contain some factual errors (such as whether the Applicant might have been under the regular care of a psychiatrist in 2008), they are those of the Respondent. The submissions do not represent findings of fact made by the General Division.

[31] Paragraphs 32 and 34 form part of the analysis undertaken by the General Division. Paragraph 32 refers to a number of medical reports. The Applicant submits that the General Division erred at paragraph 32 for the following reasons:

(a) In its summary of Dr. Godfrey's report, it wrote that Dr. Godfrey indicated improvement in numbness and tingling in the Applicant's extremities since he was started on Glyburide. The Applicant submits that he saw Dr. Godfrey

on one occasion only. Dr. Godfrey did not prescribe Glyburide. He cannot tolerate Glyburide, as he experiences various side effects. In fact, the General Division did not make any findings on these points. As noted above, the General Division correctly re-stated Dr. Godfrey's report;

(b) In noting that Dr. Lui prepared a report on September 30, 2009, when in fact the actual date was August 11, 2009. In fact, Dr. Lui had prepared a CPP Medical Report on September 30, 2009, at pages GT1-49 to GT1-52. The General Division correctly summarized this report. The General Division also noted that Dr. Lui prepared other medical reports dated September 24, 2012 and April 11, 2013, but found that they were not relevant in addressing the Applicant's capacity at the minimum qualifying period; and

(c) In its findings concerning Dr. Bhalerao's opinions, when it wrote that "Dr. Bhalerao noted on March 21, 2013 that the Applicant had no suicide obsessions, no delusions, no perceptual disturbances, insight and judgement were fair and cognition showed only slight impairment in short term memory. It was also noted that his [major depressive disorder] was in partial remission with no psychotic features", but of this, the Applicant does not identify what finding of fact may have been erroneous. A review of Dr. Bhalerao's report shows that the General Division correctly re- stated the report.

[32] At paragraph 34 of its decision, the General Division referred to *Inclima v. Canada (Attorney General)*, 2003 FCA 117 and held that where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition. The Applicant submits that the General Division erred in finding that he had the requisite capacity, as there are three physicians who are of the opinion that he was physically and mentally incapable of working.

[33] Overall, it seems that these submissions call into question the reasonableness of the decision of the General Division. For the purposes of a leave application, I am restricted to considering only those grounds of appeal which fall within subsection 58(1) of the DESDA. The subsection does not permit me to undertake a reassessment of the evidence, even if the Applicant raises questions as to the reasonableness of the decision.

[34] The Applicant has not satisfied me that the appeal has a reasonable chance of success on these grounds.

(c) Medical report dated March 10, 2015

[35] The Applicant filed a new medical report with his leave application. His family physician advised that she began seeing the Applicant in July 2012. She confirmed the various diagnoses and also wrote that she agreed that there is "no reasonable employment that would be appropriate for [the Applicant]".

[36] This new medical report should relate to the grounds of appeal. The Applicant has not indicated how the March 10, 2015 report of his family physician might fall into or address any of the enumerated grounds of appeal. If the Applicant is requesting that we consider this additional medical report, re-weigh the evidence and re-assess the claim in the Applicant's favour, I am unable to do so at this juncture, given the parameters of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

[37] If the Applicant has filed this additional medical report in an effort to rescind or amend the decision of the General Division, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant

to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.

[38] The family physician's medical report of March 10, 2015 does not relate to any grounds of appeal and I am therefore unable to consider it for the purposes of a leave application.

(d) Error of law on the face of the record

[39] If I were to restrict myself on this leave application to considering only those grounds alleged by the Applicant, I would readily dismiss the application, as he has not satisfied me that the appeal has a reasonable chance of success on the grounds which he has set out. However, that does not conclude the matter, as I may find that the General Division might have erred in law, whether or not the error appears on the face of the record.

[40] Notwithstanding the fact that the General Division stated that the standard of proof was one on a balance of probabilities, there is an arguable case that ultimately the General Division may have applied a stricter standard of proof when it stated at paragraph 32 of its decision that the "medical evidence on file leaves some doubt" as to the severity of the Applicant's symptoms as of the minimum qualifying period.

[41] I am satisfied that the General Division may have erred in law in effectively requiring the Applicant to prove the severity of his disability on a higher standard than required of him, when it indicated that the medical evidence left "some doubt" as to the severity of his symptoms.

APPEAL

[42] Issues which the parties may wish to address on appeal include the following:

i. What level of deference does the Appeal Division owe to the General Division?

ii. Based on the sole ground upon which leave has granted, did the General Division commit an error of law?

iii. Based on the ground upon which leave has been granted, what is the applicable standard of review and what are the appropriate remedies, if any?

[43] I must stress that the hearing of the appeal is not a *de novo* hearing. By that, I mean that I will not be taking evidence or hearing from witnesses.

[44] I invite the parties to make submissions also in respect of the form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers). If a party requests a hearing other than by written questions and answers, I invite that party to provide a preliminary time estimate for submissions.

CONCLUSION

[45] The Application is granted.

[46] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division