Citation: *R. R. v. Minister of Employment and Social Development*, 2015 SSTAD 1344

Appeal No. AD-15-355

BETWEEN:

**R. R.**

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: November 19, 2015

## REASONS AND DECISION

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 8, 2015. The General Division conducted a teleconference on April 8, 2015 and 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, 2013. Counsel filed an application requesting leave to appeal on June 12, 2015 on behalf of the Applicant. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

## ISSUE

[2] Does the appeal have a reasonable chance of success?

## SUBMISSIONS

[3] Counsel for the Applicant submits that the General Division failed to observe a principle of natural justice and refused to properly exercise its jurisdiction; that it erred in law in making its decision; and based its decision on an erroneous finding of fact made in a perverse and capricious manner, without regard for the material before it. In particular, counsel submits that the General Division failed to give adequate consideration to the medical documentation with respect to the nature and extent of the Applicant's multiple injuries and disabilities. Counsel further submits that the General Division failed to weigh the impact these injuries had.

[4] On June 18, 2015, counsel filed close to 80 pages of medical notes and records of Dr. William Southcott, consisting of the following:

(a) Attending Physician's Statement of Continuing Disability dated April 2, 2015, prepared by Dr. J.O. Ajayi-Obe (AD1A-3 to AD1A-5);

(b) Attending Physician's Statement of Continuing Disability dated June 17, 2013, prepared by Dr. W.P. Southcott, orthopaedic surgeon (AD1A-6 to AD1A-8 and AD1A-78);

(c) Occupational Health Inc. Supplemental Attending Physician's Statement dated September 11, 2012 (AD1A-45 to AD1A-46);

(d) Referral requests (AD1A-11, AD1A-17, AD1A-36; AD1A-56; AD1A-73);

(e) Follow-up notes of Dr. W.P. Southcott, dated July 7, 2003 (AD1A-60); May 16, 2011 (AD1A-25); July 25, 2011 (AD1A-23); February 27, 2012 (AD1A-22), September 22, 2014 of (AD1A-12);

(f) Various consultation reports of Dr. W.P. Southcott, dated January 26, 2011 (AD1A-26); November 20, 2013 (AD1A-13);

(g) Medical letter dated January 25, 2012 from Dr. W.P. Southcott to Organizational Health Inc. (AD1A-47 to AD1A-48);

(h) Out-Patient Report/Note dated April 25, 2003 (AD1A-61); June 11, 2003 (AD1A-63) and June 28, 2011 (AD1A-24);

(i) Diagnostic reports (AD1A-19; AD1A-39; AD1A-58; AD1A-74);

(j) Bluewater Health Ambulatory Services records (AD1A-27 to AD1A-29, AD1A-34); Pre-Operative Reports (AD1A-35 and AD1A-37 to AD1A-38) and Operative Report dated November 2, 2010 (AD1A-30 to AD1A-31); Patient Progress/Discharge Summaries dated December 21, 2010 (AD1A-57) and January 24, 2011 (AD1A-55);

(k) Functional Abilities Form for Timely Return to Work, dated September 14, 2011 (AD1A-50);

(l) Form prepared by Dr. W.P. Southcott, with most recent visit of January 26, 2011 (AD1A-51) (incomplete copy);

(m) Sarnia General Hospital Ambulatory Services records (AD1A-64 and AD1A-67);

(n) Note dated June 9, 2003 of physiotherapist (AD1A-65);

(o) Lambton Hospitals Group Operative Report for April 22, 2003 (AD1A-68);

(p) CBI Physiotherapy and Rehabilitation Centre Progress Note dated March 18, 2003 (AD1A-72); and

(q) Letter dated August 20, 2013 from Dr. Southcott to Winchester Consulting Services advising that the Applicant was last examined February 27, 2012 for severe osteoarthritis of both knees.

[5] Counsel did not provide any accompanying submissions as to the purpose for which these various medical notes and records were provided.

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

**ANALYSIS**

[7] 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.

[8] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out 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.

[9] I need to be satisfied 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.

[10] Counsel made general reference to the grounds of appeal under subsection 58(1) of the DESDA, but it is insufficient to make a general statement that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision, or that it made errors of law or erroneous findings of fact, without specifying what those errors might be and how they might have impacted upon the outcome, as otherwise the application for leave to appeal provides no guidance or direction as to how I am to assess whether the appeal has a reasonable chance of success. The allegation that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction must therefore fail. I can consider the remaining grounds, as counsel has provided greater particulars for these allegations.

**(a) Errors of fact**

[11] Counsel submits that the General Division based its decision on the following erroneous findings of fact:

- **Seeking alternative employment**

[12] Counsel notes that the General Division described the Applicant's previous attempt to return to work as "valiant". Counsel submits that the General Division ignored the fact that the Applicant persevered through the initial stages of his chronic illness, when determining whether the Applicant was correct or reasonable in his decision not to apply for alternative employment. Counsel submits that this qualifies as an appealable error of fact.

[13] The Federal Court of Appeal has previously addressed this submission in other cases that the Pension Appeals Board failed to consider all of the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Applicant's counsel identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. The Federal Court of Appeal dismissed the application for judicial review before it, stating 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".

[14] In any event, this does not qualify as an erroneous finding of fact, when the "fact" relied upon is the General Division's description of any efforts undertaken by the Applicant at an earlier time. Here, the General Division found that the Applicant had not undertaken any efforts to seek other employment after July 2010. There would have been no basis for it to use previous efforts as the factual foundation to determine the reasonableness of the Applicant's decision not to apply for alternative employment. I am not satisfied that the appeal has a reasonable chance of success on this ground.

- **Weight loss**

[15] Counsel submits that the General Division regarded the Applicant's weight gain subsequent to his second scope surgery unfavourably throughout its decision, and in particular, at paragraphs 14, 15, 16, 31, 34 and 39. Counsel submits that the General Division made disparaging remarks about the Applicant, writing, for instance, that it did not know why it was not possible for the Applicant to lose weight. Counsel submits that it is clear that the General Division failed to consider how the Applicant's substantial mobility limitations could explain the Applicant's weight gain and his inability to lose weight. Counsel submits that a reasonable apprehension of the facts would have resulted in an understanding that the Applicant's rapid weight gain so closely followed the onset of his health problems that they were causally connected. He cited, for instance, that the ability to go for a run is no longer an option for the Applicant, making his weight loss goals extremely difficult. Counsel submits that this amounts to an unreasonable and capricious determination and an error of fact.

[16] The fact that the General Division commented on the Applicant's weight and weight gain does not constitute an erroneous finding of fact, as there was an evidentiary foundation for the General Division to have done so. At most, the General Division indicated that the Applicant's weight and his weight gain inhibited him from being considered for full knee replacements. I am not satisfied that the appeal has a reasonable chance of success on this ground.

### (b) Errors of mixed fact and law

#### - Functional limitations

[17] Counsel submits that the General Division made errors of mixed fact and law when it did not properly consider or address how the Applicant's functional limitations would "prohibit even a sedentary job". Counsel submits that, at a minimum, the General Division was required to address the sitting and standing limitations that the Applicant identified, as they would preclude the Applicant from any form of employment.

[18] Unless the General Division altogether failed to consider the Applicant's functionality and its impact upon his capacity regularly of pursuing any substantially gainful occupation, these submissions essentially amount to a request that the Appeal Division should undertake a reassessment on these issues.

[19] In assessing capacity, it is vital for the General Division to assess an applicant's medical history, but this also involves reviewing the clinical history and an applicant's history of limitations and restrictions. Here, it seems that when considering the Applicant's personal characteristics, the General Division contemplated that the Applicant would qualify for more sedentary, advisory work. The evidence before the General Division in regards to the Applicant's capacity for sitting is set out at paragraph 16, where the General Division noted that the Applicant testified that "as of 2015, [the Applicant] now has trouble getting around. He has pain every day and can't sit for long". It seems that the General Division did not consider sitting to have been a limitation at the minimum qualifying period, as the Applicant testified that it was 2015, that he "now has trouble getting around. He has pain every day and can't sit for long".

[20] In its analysis, the General Division noted that the Applicant's limitations in January 2011 related to squatting, kneeling and climbing stairs or ladders. The General Division concluded that while this would limit the Applicant's ability to do some jobs, it should not prevent him from doing all types of work. Then, at paragraph 38, the General Division wrote that it regarded the knee pain, discomfort and mobility problems as being an inconvenient nuisance to the Applicant. The General Division also wrote:

> There is no medical or even subjective evidence from the [Applicant] as to how his medical issues as of the [minimum, qualifying period] would have prevented him for [*sic*] other employment, within his physical limitations, that could accommodate his mobility issues. There is no professional report that suggests that he was without work capacity as of December 2013. (My emphasis)

[21] While the General Division did not specifically address the Applicant's limitations for sitting, standing and walking, clearly, the General Division recognized that the Applicant experienced various restrictions and limitations at his minimum qualifying period. Hence, it cannot be said that the General Division failed to consider the Applicant's various physical limitations and restrictions in the context of his capacity regularly of pursuing any substantially gainful occupation.

[22] While the General Division may not have provided a comprehensive analysis of the evidence relating to the Applicant's limitations, nor referred to some of the evidence in the Analysis section, that does not necessarily mean that it ignored that evidence or that it failed to consider it. Indeed, the Supreme Court of Canada has determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all the issues before it. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, the Supreme Court of Canada remarked 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).

[23] I note too the words of Stratas J.A. in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber 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.

[24] Given these considerations, I am not satisfied that the appeal has a reasonable chance of success on this ground.

- **Assessment of personal characteristics**

[25] Counsel submits that the General Division erred in assessing the Applicant's personal characteristics. At paragraph 37, the General Division wrote:

> It is the Tribunal's view that the [Applicant's] personal characteristics actually work to his advantage in terms of him being employable in the real world. The [Applicant] is still in an employable age bracket. His education upgrades qualify him for more sedentary, advisory work.

[26] Counsel submits that, at 57 years old, the Applicant is at the "older end of the spectrum" and being "below the eligibility age limit of 65 does not serve as evidence of employability". Counsel further submits that the Applicant's education and training do not qualify him for sedentary or advisory work. He notes that the Applicant received his secondary school diploma as an adult in the early 1990s, and that the Applicant's post-secondary qualifications are purely of a mechanical and technical nature. Counsel submits that every job that the Applicant has held has been in a farming or heavy industrial environment. He submits that while applicants could technically be less qualified to work a sedentary job, the Applicant is substantially less qualified than most applicants for sedentary or advisory work.

[27] Essentially, counsel is requesting that I reassess the evidence as it pertains to the Applicant's personal characteristics, in assessing whether, in a real world context, he can be found disabled. In this regard, I note the words of the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248, that:

> . . . as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation. The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[28] I would not interfere with the assessment undertaken by the General Division, where it has noted the correct legal test and taken the Applicant's personal circumstances into account, as it has done here. I am not satisfied that the appeal has a reasonable chance of success on this ground.

- **Mitigation and efforts to lose weight**

[29] Counsel points to paragraphs 32, 33 and 34 of the decision of the General Division. Counsel submits that the General Division erred when it found that the Applicant had failed to mitigate. Counsel submits that the General Division found that the Applicant had failed to lose weight, and that it was this failure to lose weight which discounted him from qualifying for a total knee replacement, which might have improved some of his medical condition.

[30] Counsel submits that the Applicant's failure to qualify for knee surgery because of his weight, on its own, does not constitute a failure to make good faith efforts to mitigate his situation. Counsel submits that the "logical reasoning used by the General Division … constitutes an appealable error of mixed fact and law as it relies on successive levels of assumptions that, in sum, predict an outcome with a remote chance of occurring".

[31] Paragraphs 32 to 34 read as follows:

> [32] The Tribunal has considered the issue of the Appellants [SIC] obligation to mitigate his situation. In *Lombardo v. MHRD* (2001) CP 12731 the Pension Appeals Board concisely set out this persuasive principle as follows:
>
> > "The Board has, over the years emphasized the need for applicants for disability entitlement to demonstrate good faith preparedness to follow obviously appropriate medical advice and, as well, to take such retaining [*sic*] or educational programs as will enable one to find an alternative employment when it is obvious that one's prior employment is no longer appropriate."
>
> [33] The Tribunal notes the Respondent's argument that there is not sufficient evidence that the Appellant has exhausted treatment options for his condition. The Respondent notes that the Appellant did not comply within the MQP to stop smoking or lose weight as strongly suggested in a number of medical reports. His retraining as a qualified "foreman" could lead to more sedentary work. He did not look for any after his Dow employment.
>
> [34] It is necessary for those seeking a CPP disability pension to show good faith in following appropriate recommended medical advice and treatment options. The case law establishes that the Tribunal must determine whether or not the Appellant's refusal of treatment is reasonable (*MSD v. Gregory* (October 28, 2005), CP 22759). The Tribunal does not accept the explanation of the Appellant as to why he did not return to some form of work or why the total knee surgery pre-requisites was not acted upon.

[32] Paragraph 33 of the decision summarizes the Respondent's position. Counsel suggests that the General Division required the Applicant to mitigate by undergoing total knee replacement surgery, but I do not see that the General Division required the Applicant to undergo the surgery. If anything, the extent of mitigation was limited to the Applicant's smoking habit and his weight loss.

[33] It was not simply a matter of the Applicant failing to undergo total knee replacement surgery; one of the prerequisites required that the Applicant lose weight. While it is not for me to assess the reasonableness of the Applicant's non-compliance

where his weight loss was concerned, it was something which the General Division was required to consider, and here, the General Division rejected the Applicant's explanation for his non-compliance.

[34] In regards to the Applicant's weight, the General Division wrote at paragraph 31 that, "despite recommendations for the [Applicant] to lose weight, he has been unsuccessful". Had the General Division concluded the issue of weight loss on this point, there might have been a sound argument that the General Division did not consider whether the Applicant had been non-compliant with weight loss recommendations. However, at paragraph 34, the General Division squarely addressed the Applicant's non-compliance with recommendations to lose weight when it wrote that it did not accept the Applicant's explanation why he did not act upon the total knee surgery pre-requisites, which included losing weight, and at paragraph 39, added that there was no documentation provided, including medical reports suggesting a reason why following through with the recommendations was not possible.

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

**(c) Errors of law**

[36] Counsel submits that the General Division erred in law in requiring that the Applicant make efforts to obtain and maintain employment, as it failed to consider the Applicant's "reasonable explanations" for his inability to seek other employment. Counsel further submits that the General Division erred in failing to indicate that there were exceptions for the requirement to seek out new work.

[37] I might have been prepared to consider this submission, but apart from a general statement of the law as refined by the Pension Appeals Board, counsel has not pointed to any specific evidence that the Applicant had a reasonable explanation why he did not make efforts to obtain and maintain employment. Counsel submits that the General Division failed to consider the Applicant's reasonable explanations for his inability to seek other employment, but counsel has not pointed to what these "reasonable

explanations" might be, whether within the documentary evidence or in the Applicant's testimony before the General Division. While it is unnecessary to provide a comprehensive list of those "reasonable explanations", it is insufficient to point to the example of applicants in other cases and expect that they should necessarily apply to the Applicant.

- **Substantially gainful employment**

[38] Counsel submits that the General Division committed a further error in law when it failed to apply the new test for "substantially gainful" under the *Canada Pension Plan Regulations.* Counsel submits that the failure to identify or discuss this formula in the consideration of whether an applicant is unable to pursue substantially gainful employment constitutes an error of law and is a viable ground of appeal. Counsel submits that alternatively, if another test applied, the General Division was required to identify this other legal test and apply it to the Applicant's circumstances. Counsel submits that even if he was able to obtain and maintain minimal hours per week at a sedentary position, his capabilities would place him "well below substantially gainful employment".

[39] There is no suggestion by the Applicant or his counsel that the General Division erred in its statement or application of the test for "substantially gainful" in assessing the severity of the Applicant's disability, but counsel goes further than that. He suggests that the General Division was required to set out the test for "substantially gainful" in its decision. I know of no authority to support the Applicant's proposition that the General Division is required to set out the test for "substantially gainful" in its decision, particularly when it is set out in the legislation (the *Regulation* came into effect on the date of registration, on May 29, 2014, months after the minimum qualifying period of December 31, 2013.) I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to set out the test for "substantially gainful" in its decision.

### (d) Weight of evidence

[40] Counsel submits that the General Division did not assign the appropriate weight to some of the evidence. As noted above, the Federal Court of Appeal has addressed this issue and in *Simpson*, refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". I agree with that approach.

### (e) Records of Dr. W.P. Southcott

[41] For the most part, the medical records of Dr. W.P. Southcott which counsel submitted to the Social Security Tribunal on June 18, 2015 appear to be "new", in the sense that the General Division did not have copies of these records prior to rendering its decision.

[42] The additional records should relate to the grounds of appeal. Counsel has not indicated how the proposed additional records might fall into or relate to one of the enumerated grounds of appeal. If counsel is requesting that we consider these additional medical records, re-weigh the evidence and re-assess the claim to a disability pension in the Applicant's favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-hear the merits of the matter.

[43] If counsel intends to file the additional medical records 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 that must be met to succeed in an application for rescinding or amending a decision. 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.

[44] Paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that any new facts are material and that they could not have been discovered at the time of the

hearing with the exercise of reasonable diligence. 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, which in this case would be the General Division. It strikes me in any event that these records likely would not constitute new facts under section 66 of the DESDA. The records -- listed in paragraph 4 above – all pre-date the hearing before the General Division and likely were available and could have been discovered prior to the teleconference before the General Division on April 8, 2015, with the exercise of reasonable diligence.

**CONCLUSION**

[45] The Application is refused.

*Janet Lew*
Member, Appeal Division