Citation: *S. N. v. Minister of Employment and Social Development*, 2015 SSTAD 1427

Appeal No. AD-15-1038

BETWEEN:

S. N.

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:	December 14, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 18, 2015. The General Division conducted a teleconference hearing on June 18, 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, 2011. The Applicant filed an application requesting leave to appeal on September 21, 2015. In response to my request of October 26, 2015 for some clarification, the Applicant filed further submissions on November 26, 2015. 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] The Applicant submits that the General Division erred in law in making its decision, whether or not the error appears on the face of the record. The Applicant further submits that 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.

[4] The Applicant provided some additional background information. He submits that this information, which together with what he describes as "a wealth of supporting medical documentation", provides sufficient evidence for an appeal to be successful. He points to three medical reports prepared between 2012 and 2014 for the Saskatchewan Minister of Social Services which indicate that he is not capable of any other work. The Applicant also submits that his dizziness and lightheadedness has prevented him from engaging in substantially gainful work from 2008 to the present. In addition, he notes he had two falls in 2009 that resulted in a total of eight broken ribs and a subdural haematoma.

He was also admitted to mental health facilities in 2009 and 2015 as he was deemed a suicide risk. The Applicant advises that the Ministry of Social Services approved his application for Saskatchewan Assured Income for Disability in January 2015.

[5] In his more recent submissions, the Applicant submits that the General Division failed to apply *Villani v. Canada (Attorney General),* 2001 FCA 248 "in a complete and thorough" manner. The Applicant referred to paragraphs 29, 38 and 49 of the decision. He submits that the General Division failed to interpret the words in subparagraph 42(2)(a)(i) of the *Canada Pension Plan* in a large and liberal manner. He submits that the General Division erred in finding that eight hours of research at a library represents capacity to work much longer hours in a real world setting where he would be expected to meet performance standards.

[6] The Applicant further submits that the General Division erred in finding that he is capable of pursuing with consistency frequency any truly remunerative occupation, as his paid employment since 2008 has been with a "benevolent and brave employer". The Applicant notes that his hours for 2010, 2011, 2012 and 2013 were 26, 100, 132 and 17 hours, respectively.

[7] The Applicant further submits that the General Division based its decision on numerous erroneous findings of fact, in that it "ignored certain key evidence" either before it, or available to it by "consent to review hospital records". The Applicant submits that the General Division failed to specifically note the following:

a. Pneumothorax caused by broken ribs in 2009. The Applicant advises that he incurred eight broken ribs in two falls that year including a subdural haematoma. This was coupled with two separate occurrences of pneumonia;

b. in 2009, the admission to the Hantelman Unit at Royal University Hospital in Saskatoon, as the Applicant was deemed a suicide risk;

c. idiopathic spinal osteoporosis and vertebrae fracture that was diagnosed in 2010;

d. three medical reports for the Saskatchewan Ministry of Social Services submitted to the General Division (2012-2014 inclusive), which state that the Applicant is “not capable of any other work";

e. in the 2012 report. Dr. Smit had changed her prognosis in less than nine months, from “very good" to “unsure @ present";

f. he experiences constant light-headedness; and

g. there were numerous emergency room visits or admissions between 2006 and 2015, possibly exceeding 25 visits.

[8] The Applicant further submits that although the General Division cited *Inclima v. Canada (Attorney General),* 2003 FCA 117*,* the General Division had failed to acknowledge that he had lost his last full-time position to “illness-caused absenteeism”.

[9] The Applicant further submits that the General Division erred in accepting the Respondent’s submissions regarding the Saskatchewan Assured Income Disability program, and thereby erred in failing to review the criteria for Saskatchewan Assured Income Disability (SAID) disability benefits; the Applicant submits that the “criteria [for SAID and the Canada Pension Plan] are broadly similar with the aim of identical goals”. The Applicant submits that the criteria for SAID are much more rigid, and even require an in-home interview, which the Canada Pension Plan does not require.

[10] Finally, the Applicant submits that his appeal be placed in context. He had been advised that in 2006 that the survival rate for patients with kidney cancer was 60% for five years or more, and that this rate fell to 49.8% for 10 years.

[11] The Respondent did not file any written submissions.

THE LAW

[12] 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.

[13] 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. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

ANALYSIS

[14] In the initial leave application, the Applicant made general reference to two of the grounds of appeal under subsection 58(1) of the DESDA, but it is insufficient to make a general statement that the General Division erred in law or based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, 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.

[15] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some particulars of the

error or failing committed by the General Division which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA, otherwise the submissions are deficient.

[16] The Applicant submits that there is “a wealth of supporting medical documentation”, to support a successful appeal. The General Division considered the background and medical evidence upon which the Applicant relies.

[17] The Applicant’s submissions set out in the leave application filed on September 21, 2015 largely call for a reassessment and re-weighing of the evidence, which is beyond the scope of a leave application. The role of the Appeal Division is to determine if the General Division committed a reviewable error under subsection 58(1) of the DESDA, and if so, to provide a remedy for that error. The Appeal Division has no jurisdiction to intervene otherwise or to hear the appeal on a *de novo* basis. The additional medical background and information cited by the Applicant do not raise appropriate grounds of appeal under subsection 58(1) of the DESDA.

[18] The Applicant provided some clarification regarding the remainder of his submissions in his recent letter of November 26, 2015.

(a) *Villani*

[19] The Applicant submits that the General Division failed to follow *Villani* in a complete and thorough manner, and failed to give a large and liberal interpretation to the severe definition in the *Canada Pension Plan.* The Applicant submits that the Federal Court of Appeal determined that “the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as his age, education level, language proficiency and past work and life experience”.

[20] The General Division referred to *Villani* at paragraph 31 of its decision, where it wrote:

> [31] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person’s disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[21] The General Division then proceeded to consider the Applicant's personal characteristics, in the context of whether his disability could be considered severe for the purposes of the *Canada Pension Plan.* It wrote, in part, in paragraph 34 that, "The Appellant is a highly educated individual with an impressive work history, having attained senior positions in the mining sector. He also had a variety of transferable skills (GT3-18)."

[22] The Federal Court of Appeal also stated at paragraph 49 in *Villani* 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. <u>The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere</u>. (My emphasis)

[23] Given that the General Division considered the Applicant's personal circumstances – his education and past work history were of particular relevance -- I would not interfere with its assessment, in following *Villani.* As the General Division undertook the *Villani* analysis required of it, I am not satisfied that the appeal has a reasonable chance of success on the grounds that the General Division erred in failing to apply the "real world" context of the Applicant.

(b) <u>Erroneous findings of fact</u>

[24] The Applicant submits that the General Division based its decision on numerous erroneous findings of fact. He points to no less than seven considerations in paragraph 7, above.

[25] The fact that the General Division may have not have analyzed or referred to some of the evidence in its decision does not qualify as an erroneous finding of fact. To properly qualify as a ground of appeal under paragraph 58(1)(c) of the DESDA, (1) the erroneous finding of fact had to have been one upon which the General Division based its decision and

(2) the erroneous finding of fact had to have been made in a perverse or capricious manner or without regard for the material before it. The General Division does not appear to have made any findings of fact regarding most of the considerations identified by the Applicant in paragraph 7, above, other than perhaps his lightheadedness and to Dr. Smit's opinion regarding the Applicant's prognosis. As such, it cannot be said that the General Division thereby based its decision on the erroneous findings of fact identified by the Applicant, other than perhaps regarding the Applicant's lightheadedness and Dr. Smit's opinion.

i. Lightheadedness

[26] In the evidence portion, the General Division noted the Applicant's testimony that his lightheadedness and dizziness have impacted much of his life since 2006, and that they prevent him from regularly working. The General Division also noted the Applicant's submissions regarding his symptoms, including his lightheadedness, which reportedly prevented real gainful employment and made day-to-day coping arduous. While the General Division did not focus on the Applicant's lightheadedness in its analysis, it looked to the Applicant's functional capacities and limitations. It wrote that according to the Applicant's evidence in October 2011, he had no restrictions for sitting and standing except from the "occasional dizzy spell". The Applicant does not dispute this particular finding of fact. If there was any conflicting evidence involving the frequency of the dizzy spells and/or lightheadedness, it was open to the General Division to prefer some of the evidence over other portions of the evidence, although that does not appear to have been the case here. The Applicant has not pointed to any evidence which suggests that the General Division might have made this particular finding to have been made in a perverse or capricious manner or without regard for the material before it. I am not satisfied that the appeal has a reasonable chance of success on this ground.

ii. Dr. Smit's opinions

[27] The Applicant also submits that the General Division erred in failing to recognize that Dr. Smit's opinion on his prognosis had changed from "very good" in October 2011 to "unsure @ present" in her December 2012 report (GT3-5). (The

General Division mistook the date of “12/12/7” for “July 12, 2012” when the report was more likely prepared in December 2012, shortly after the report form had been issued in November 2012.) The General Division referred to both reports in its Evidence section, at paragraphs 22 and 25. The General Division did not mention that Dr. Smit’s opinion on the Applicant’s prognosis had changed by December 2012, and in its final analysis at paragraph 34, continued to rely on the earlier opinion. The General Division wrote that the Applicant had responded well to treatment, that he had no functional limitations at that time and that his “prognosis was very good”. While that may have reflected Dr. Smit’s opinion in October 2011, Dr. Smit did indicate in a subsequent opinion in December 2012 that the prognosis was by then uncertain.

[28] At paragraph 25 of its decision, the General Division noted that in the 2012 report of Dr. Smit (mistakenly referred to as a July 12, 2012 report), she checked off the “No” box in answer to whether the Applicant was capable of “any other work”. The General Division noted that Dr. Smit however expected that the Applicant would be ready for work in 12 months without restrictions (GT3-5 to 6). It is unclear whether the General Division was aware that Dr. Smit had also indicated that the prognosis by now was “unsure @ present” and if so, whether her opinion that he would be ready for work in 12 months without restrictions was how the General Division interpreted or explained “unsure @ present” or was an attempt by it to perhaps diminish her opinion. It is speculative that the General Division might have relied upon Dr. Smit’s 2012 opinion that the Applicant would be ready for work in 12 months without restrictions, to support her earlier prognosis.

[29] I note also that Dr. Smit prepared an October 2013 opinion in which she provided an updated opinion on the Applicant’s prognosis. It seems also that she now expected that the Applicant would not be able to return to work as he had not seen any improvement in the last few years. She explained that she did not consider him capable of work as he had ongoing symptoms (GT3-7 to 8). The General Division did not refer to this subsequent opinion of Dr. Smit either.

[30] While the prognosis could have been used to address the prolonged criterion, here, the General Division seems to have relied upon the opinion in the context of the severity criterion. Given the relative brevity of the analysis as to whether the Applicant could be found severely disabled for the purposes of the *Canada Pension Plan*, it appears that the General Division based its decision in large part on the Applicant's prognosis as being "very good" and on the fact that he had responded well to treatment and had no functional limitations in October 2011.

[31] While certainly the General Division could have justified finding that the Applicant's long-term prognosis was very good, for it to have done so based on an earlier opinion in the face of a more subsequent, and perhaps uncertain, opinion may well qualify as an erroneous finding of fact made without regard for the material before it. If the General Division is going to rely on the opinion of Dr. Smit regarding the Applicant's prognosis and capacity, it should be mindful about her subsequent opinions in 2012 and 2013. It may well be that the General Division relied on other evidence to refute Dr. Smit's subsequent opinions, but that is unclear from the decision, as the only medical evidence referred to by the General Division in its analysis was the October 2011 medical report of Dr. Smit. The General Division may have relied on the 2011 prognosis in assessing severity, without apparent regard for or consideration of the 2012 opinion, and for that matter, the 2013 opinion.

[32] I am satisfied that the appeal has a reasonable chance of success on the ground that the General Division may have based its decision on an erroneous finding of fact that it made without regard for the material before it.

iii. Other considerations

[33] The Applicant submits that the General Division made other erroneous findings of fact. As I have indicated above, the General Division does not appear to have made any findings of fact on these other consideration.

[34] While the General Division may not have summarized all of the evidence or referred to it when conducting its analysis, 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).

[35] And, in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc.,* 2012 FCA 165, 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.

[36] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division did not refer to or analyze some of the medical history, particularly when some of that history occurred years prior to the minimum qualifying period.

(c) *Inclima*

[37] The Applicant further submits that although the General Division cited *Inclima,* the General Division had failed to acknowledge that he had lost his last full-time position to "illness-caused absenteeism".

[38] This submission does not speak to an applicant's obligations set out by the Federal Court of Appeal in *Inclima.* The fact that the Applicant might have lost his last full-time position to "illness-caused absenteeism" is not particularly germane where the

General Division found that the Applicant exhibited the capacity regularly of pursuing any substantially gainful occupation. I am not satisfied that the appeal has a reasonable chance of success under this ground.

(d) <u>Saskatchewan Assured Income for Disability</u>

[39] The Applicant suggests that he qualifies for a Canada Pension Plan disability pension because he has been approved for SAID. He submits that the General Division erred in failing to consider this and in failing to review the criteria for SAID.

[40] The fact that the Applicant is in receipt of disability benefits or a disability pension under a different scheme is of no probative value to the issues at hand. The Social Security Tribunal is not bound by any determinations made by the Saskatchewan Assured Income for Disability, or for that matter, any other body. The *Canada Pension Plan* strictly defines disability and the Applicant is still required to prove that he is disabled as defined by the *Canada Pension Plan*. I am not satisfied that the appeal has a reasonable chance of success under this particular ground of appeal.

[41] The fact that the Applicant has been approved for a disability pension or benefits under a different scheme does not raise appropriate grounds of appeal under subsection 58(1) of the DESDA.

CONCLUSION

[42] For the reasons set out above, the application for leave to appeal is granted.

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

[44] In the event that I should determine that a further hearing is required, the parties should request their desired form of hearing and make submissions also as to the appropriateness of that 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). In the event that a party requests a hearing other than by written questions and

answers, I invite the parties to also provide preliminary time estimates for oral submissions and their respective dates of availability.

Janet Lew
Member, Appeal Division