Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 67

Tribunal File Number: AD-15-1109

BETWEEN:

**M. K.**

Appellant

and

**Minister of Employment and Social Development**
**(formerly known as the Minister of Human Resources and Skills Development)**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Janet Lew

DATE OF DECISION: February 4, 2016

## REASONS AND DECISION

## OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division rendered on April 15, 2015 that he was not eligible for a disability pension under the *Canada Pension Plan.* The General Division found that the Applicant's disability was not "severe" on or before his minimum qualifying period of December 31, 2011.

[2] The Applicant sought leave to appeal the decision of the General Division on October 9, 2015, alleging a number of grounds. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

## SUBMISSIONS

[3] The Applicant submits the following:

(a) various health caregivers were of the opinion that he has a severe medical condition, while there were no contrary opinions from the Respondent or the Social Security Tribunal. He further submits that the General Division lacked knowledge about his medical condition;

(b) there is no cure for his chronic obstructive pulmonary disease, and it is irreversible. His health is rapidly deteriorating. He experiences exacerbations when he breathes, resulting in constant coughing fits. He is unable to care for himself or secure gainful employment due to his severe condition. He has not left his apartment in over 2.5 years due to his severe condition and lung infection which he catches when in public. His next step is to move to assisted living quarters and hopefully remove the burden off his family;

(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; and

(d) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, as it did not provide him with a copy of the oral hearing, and the General Division Member "totally embellish[ed], fabricate[d], and blatantly lied in her interpretation of the oral information provided and due to lack of medical knowledge[,] mis[-]assessed the medical information".

[4] The Social Security Tribunal wrote to the Applicant on December 15, 2015, as follows:

> You also indicated that you have been unable to obtain a copy of the oral hearing to support your appeal.
>
> Please find enclosed a copy of the recording of the hearing before the General Division.
>
> Please provide the following:
>
> **1.** Identify the erroneous findings of fact upon which the General Division is alleged to have based its decision in a perverse or capricious manner or without regard for the material before it;
>
> **2.** What evidence is the General Division alleged not to have had regard for; and
>
> **3.** What information did the General Division "total [sic] embellish, fabricate, and blatantly [lie about] …"?

[5] The Social Security Tribunal requested that the Applicant provide any additional information in writing within 30 days, or by no later than January 18, 2016, or he could otherwise request an extension of time, to address these questions. The Applicant did not provide any further submissions or information, nor did he request an extension of time.

[6] The Respondent did not file any written submissions in respect of this leave application.

## ANALYSIS

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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] 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 approved this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

### (a) Medical opinions

[9] The Applicant submits that neither the Respondent nor the Social Security Tribunal provided any medical opinions to suggest that he does not have a severe medical condition, and that as such, the opinions of his own experts ought to necessarily be accepted.

[10] The General Division Member is an independent and impartial decision-maker. It would be highly inappropriate for the General Division (or the Appeal Division for that matter) to obtain any medical opinions in support of any of the parties to an appeal. The role of the General Division is to determine whether, based on the evidence before it, appellants meet the requirements under the *Canada Pension Plan* for a disability pension.

[11] The Respondent is one of the parties to an appeal. It is open to the Respondent to obtain a rebuttal opinion, conduct investigations or even secure video surveillance, but the fact that it may not (and seldom does) does not require the General Division to draw any

adverse inferences. After all, the onus remains on an appellant to prove his or her case on a balance of probabilities. An appellant must establish whether he or she meets the criteria under the *Canada Pension Plan* and qualifies for a disability pension. It is insufficient for a health caregiver to state that his or her patient is severely disabled. The question as to whether an appellant can be found severely disabled is reserved for the General Division to determine, as severity under the *Canada Pension Plan* is strictly defined, and differs from definitions under other insurance or provincial disability schemes.

[12] The General Division must consider and assess the medical evidence before it. Here, the General Division did just that, and drew conclusions based on the most current evidence before it. The General Division referred in particular to the medical opinions of Dr. Wilson in February 2012, and of Dr. West in March 2012. The latter opinion was set out in what appears to be the clinical records of Dr. West, at page GT1-34 of the hearing file. In hand-written notes on a copy of the decision filed with the leave application, the Applicant indicates that Dr. West was no longer his physician at this time, however does not dispute the veracity or the authenticity of the notes of Dr. West. While the Applicant may have begun seeing another family physician at this time, there is no suggestion either that Dr. West was not well-placed to render an opinion regarding the Applicant then. The Applicant suggests that his own expert medical opinions ought to be accepted, but he has not pointed to any contradictory medical evidence from that of Dr. West or Dr. Wilson. There was an evidentiary basis upon which the General Division relied and drew conclusions in determining whether the Applicant could be found disabled for the purposes of the *Canada Pension Plan.*

[13] In passing, I note that the General Division seemingly did not address the medical evidence in or about December 31, 2011, the Applicant's minimum qualifying period. This might have presented an error of law, if the General Division had failed to determine whether the Applicant could be found disabled at his minimum qualifying period, but I infer that the General Division's review of the medical evidence shortly after December 31, 2011 – in February and March 2012 – falls so close to the minimum qualifying period, that it could be considered *de facto* an assessment at the material time. As well, the evidence immediately following the minimum qualifying period suggested a residual capacity. As the

*Canada Pension Plan* requires that the disability not only be severe, but be prolonged, given this finding that he exhibited residual capacity after his minimum qualifying period, I do not see how the Applicant would have been able to meet the requirements under the *Canada Pension Plan.*

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

**(b) Applicant's medical condition**

[15] The Applicant submits that there is no cure for his chronic obstructive pulmonary disease, it is irreversible and his health is rapidly deteriorating. He is unable to care for himself or secure gainful employment due to his severe condition. He states that he has not left his apartment in over 2.5 years due to his severe condition and lung infection which he catches when in public. His next step is to move to assisted living quarters and hopefully remove the burden off his family.

[16] Much of this evidence was before the General Division. Essentially the Applicant seeks a reassessment or a re-determination of the evidence. The jurisdiction of the Appeal Division is however restricted by subsection 58(1) of the DESDA. That subsection does not permit reassessments or a re-determination of the evidence. An applicant is required to set out grounds of appeal which address any of the grounds under subsection 58(1) of the DESDA. This particular ground does not speak to any of the enumerated grounds under subsection 58(1) of the DESDA. 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. I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(c) Erroneous finding of fact**

[17] The Applicant 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. However, the Applicant has not provided any particulars of any erroneous findings of fact which the General Division may have made.

[18] An Applicant should set out some particulars of the error or failing committed by the General Division. It is insufficient to make a general statement that the General Division based its decision on erroneous findings of fact that it made in a capricious or perverse manner or without regard for the material before it, without pointing to what the erroneous findings might have been, and how they might have impacted upon the outcome. Otherwise, I have no basis upon which I can properly assess the leave application.

[19] Despite requesting particulars, the Applicant has not cited with any specificity any erroneous findings of fact which the General Division might have based its decision, and which was made without regard for the material, or made in a perverse or capricious manner. I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(d) Natural justice**

[20] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, as it did not provide him with a copy of the oral hearing, and the General Division Member "totally embellish[ed], fabricate[d], and blatantly lied in her interpretation of the oral information provided and due to lack of medical knowledge[,] mis[-]assessed the medical information".

[21] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his or her case, that he or she has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias.

[22] There is no correlation between providing a recording of the hearing and natural justice where the General Division is concerned, as the General Division is required to ensure a fair hearing and providing the parties with a fair and reasonable opportunity to present their respective positions, before a recording is even produced.

[23] Neither the Social Security Tribunal nor the General Division is under any obligation to provide the parties with a copy of the recording of the hearing before the General Division, though a party may request a copy of it (provided that one exists). I do not

see any evidence that the Applicant had ever requested a copy of the recording, or that any such request was ever refused by the Social Security Tribunal.

[24] In his leave application, the Applicant made a number of serious allegations against the General Division. He also advised that he had not been provided with a copy of the oral hearing. Given the nature of the allegations, the Social Security Tribunal provided the Applicant with a copy of the recording of the hearing before the General Division, and also requested that he cite whatever information the General Division was alleged to have "embellish[ed], fabricate[d] and blatantly lied [about]…". Despite the request, the Applicant did not provide any particulars to support his allegations, nor did he cite or pinpoint any portion of the recording of the hearing to show where the General Division is alleged to have "embellish[ed], fabricate[d] and blatantly lied [about]…".

[25] An Applicant should set out where the General Division is alleged to have failed to observe a principle of natural justice. It is insufficient to make a general statement that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, without providing some specifics.

[26] The only specific breach alleged was that the General Division had failed to provide a copy of the oral hearing, but the General Division was not duty-bound to provide a copy, nor does it indicate, in any event, how such a "failure" resulted in the Applicant having been denied either a fair hearing or the opportunity to fairly present his case.

[27] I recognize that the Applicant has made a number of handwritten points on a copy of the decision of the General Division, which he filed with his leave application. Much of the notes falls within the evidence section, and do not necessarily represent any findings of fact made by the General Division. Many of the notes appear to explain the evidence or any factual findings made by the General Division, but they do not speak to any bias, given that the findings appear to have some evidentiary foundation.

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

## CONCLUSION

[29] The application for leave to appeal is denied.

*Janet Lew*
Member, Appeal Division