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

Citation: *S. H. v. Minister of Employment and Social Development,* 2016 SSTADIS 77

Tribunal File Number: AD-15-1326

BETWEEN:

S. H.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 15, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division rendered on November 16, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that her disability was not "severe" on or before her minimum qualifying period of December 31, 2012. The Applicant sought leave to appeal on December 1, 2015. Counsel for the Applicant filed additional submissions on January 22, 2016, to clarify the grounds of appeal, in response to a request from the Social Security Tribunal. 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 on any of the grounds cited by the Applicant?

SUBMISSIONS

[3] In the initial leave application filed on December 1, 2015, counsel for the Applicant submitted that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, erred in law and 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. Counsel submitted that this last ground was particularly relevant. Counsel further submitted that the decision did not properly and sufficiently reflect the totality of the evidence and that the testimony, coupled with all the relevant information, was not regarded properly and there was an improper finding of fact.

[4] The Social Security Tribunal wrote to the Applicant on December 23, 2015, seeking additional information and clarification. Counsel for the Applicant responded to this letter on January 22, 2016, listing the errors committed by the General Division.
Counsel submits that the General Division erred as follows:

(a) in its assignment of weight to the medical evidence. Counsel submits that the General Division erred in assigning any weight to the opinion of an occupational therapist and neurological services occupational therapy report dated December 18, 2009, given that the report was prepared on behalf of WSIB and therefore could not have been objective. Counsel submits that the General Division erred in preferring this report over the Toronto Rehabilitation Centre, as well as a number of reports of other medical health caregivers;

(b) in failing to discuss or sufficiently analyze the Applicant's disagreement over the contents of the occupational therapy report. Counsel submits that further medical information will be forthcoming to rebut several incorrect presumptions made by WSIB;

(c) in basing its decision on an erroneous finding of fact that the Applicant had not exhausted all of her treatment options and that therefore maximum medical recovery had not been achieved, given that there was medical evidence to show that maximum medical recovery had been achieved, and given the Applicant's testimony explaining her perceived non-compliance;

(d) in accepting the opinion of Dr. Ouchterlony that the Applicant slowly reduce the dosage of Gabapentin, without giving consideration to the Applicant's testimony that she is reliant on her current dosage of Gabapentin and without it, would "feel an incredibly high and terrible amount of pain in her head"; and

(e) in finding that the Applicant had not shown any efforts to obtain and maintain employment by reason of her health condition. Counsel explains that WSIB did not offer the Applicant any employment opportunities which were potentially suitable at the time. Her employer offered her one position, but WSIB agreed with the Applicant that that position was unsuitable and ultimately she was placed on "temporary told [*sic*] disability loss of income benefits".

[5] The Social Security Tribunal copied the Respondent with the leave materials, but the Respondent did not file any written submissions.

ANALYSIS

[6] 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.

[7] 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) Assignment of weight

[8] Counsel for the Applicant submits that the General Division erred in its assignment of weight. The Federal Court of Appeal has previously addressed this submission in other cases, that the Pension Appeals Board had not assigned the appropriate amount of weight to 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 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, as the General Division, as the trier of fact, is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign.

The Applicant has not satisfied me that the appeal has a reasonable chance of success on this ground.

(b) Occupational therapy report

[9] Counsel for the Applicant submits that the General Division failed to discuss or sufficiently analyze the Applicant's disagreement over the contents of the occupational therapy report. Counsel submits that further medical information will be forthcoming to rebut several incorrect presumptions made by WSIB.

[10] There is no obligation on a decision-maker to exhaustively address all of the evidence, arguments or submissions before it. The fact that the General Division may not have referred to some of the evidence does not mean that it did not sufficiently consider it. 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 (CanLII), 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.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391).

[11] In *Canada v. South Yukon Forest Corporation.*, 2012 FCA 165 (CanLII) Stratas J.A. had this to say:

> … 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.

[12] Counsel for the Applicant indicates that additional medical records will be forthcoming, to rebut the presumptions made in the occupational therapy report. If counsel

is requesting that I consider any additional facts, re-weigh the evidence and re- assess the claim in the Applicant's favour, the narrow grounds of appeal under subsection 58(1) of the DESDA restrict me from doing so. In *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at para. 108, and cited by *Tracey*, the Federal Court held that "the introduction of new evidence is no longer an independent ground of appeal".

[13] If counsel for the Applicant is going to provide additional records in an effort to rescind or amend the decision of the General Division, he must 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 that is empowered to do so, which in this case is the General Division.

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

(c) Treatment recommendations and Gabapentin

[15] Counsel for the Applicant submits that the General Division erred in basing its decision on an erroneous finding of fact that the Applicant had not exhausted all of her treatment options and that therefore maximum medical recovery had not been achieved. Counsel submits that there was in fact medical evidence to show that maximum medical recovery had been achieved; additionally, the Applicant had also explained why it was neither suitable nor logical for her to pursue a specific treatment that would have involved her going to a hospital for a "narrow and speculative" treatment option. Counsel further

submits that the General Division erred in requiring that the Applicant reduce her dosage of Gabapentin, without considering the impact this would have on her.

[16] Counsel for the Applicant submits that the General Division erred in not considering the reasonableness of the Applicant's non-compliance with various treatment recommendations.

[17] The only passage in the analysis of the General Division regarding the issue as to whether the Applicant had exhausted all treatment options is set out in paragraph 44, which reads in part:

> She was considered suitable for CBT. She must show that she availed herself of recommended treatments. She attended CBT sessions in 2013 but did not feel comfortable sharing her problems in that group setting. This indicates that she did not fully participate, such that she did not gain the benefits of this therapy.

[18] The only treatment recommendation which the General Division singled out in its analysis was cognitive behavioural therapy (CBT), which had apparently been recommended to the Applicant in February 2013 (GD3-62 to GD3-65) and in March 2013 (GD3-54 to GD3-61).

[19] While certainly the Respondent had made submissions that the Applicant had not utilized all treatment options and that the Applicant therefore had not attained maximum medical recovery, the General Division did not indicate one way or another whether it was prepared to accept the Respondent's submissions in this regard, and it did not make any findings either whether the Applicant had attained maximum medical recovery.

[20] The only reference to Gabapentin in the decision of the General Division is at paragraphs 14 and 19 in the Evidence section. At paragraph 14, the General Division listed the medications taken by the Applicant, and at paragraph 19, it summarized Dr. Ouchterlony's report. The General Division did not make any actual findings in its decision that the Applicant should reduce her dosage of Gabapentin, or that if she had not done so, that this represented non-compliance.

[21] Thus, it cannot be said that the General Division made erroneous findings of fact regarding the Applicant's use of Gabapentin, or whether she had attained maximum medical recovery. I am not satisfied that the appeal has a reasonable chance of success on this ground, given that the General Division did not make the findings of fact which counsel alleges that it made.

(d) Work efforts

[22] Counsel for the Applicant submits that the General Division erred in finding that the Applicant had not shown any efforts to obtain and maintain employment by reason of her health condition. Counsel explains that WSIB did not offer the Applicant any employment opportunities which were potentially suitable at the time. Her employer offered her one position, but WSIB agreed with the Applicant that that position was unsuitable and ultimately she was placed on "temporary told [*sic*] disability loss ofincome benefits".

[23] At paragraphs 37 and 46, the General Division wrote:

> [37] … Despite extensive testing by a number of specialists indicating that she was capable of returning to work as a truck driver on a gradual basis, she maintained that she could not perform any of the required tasks because of her injuries. She has not attempted any return to work since August 2008.
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> . . .
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> [46] 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 (*Inclima v. Canada (A.G.)*, 2003 FCA 117). As the various assessments up to 2011 have pointed out, the Appellant was capable of returning to work as a bus driver on a gradual basis. WSIB offered her employment opportunities at a warehouse training program, but she declined them. She has not attempted to return to any type of employment since 2008. She has therefore not met the requirement of showing that efforts to obtain and maintain employment were unsuccessful by reason of her health condition.

[24] Counsel for the Applicant seems to suggest that the Applicant's efforts at finding and maintaining work could be restricted to whatever WSIB might have found suitable for the Applicant, but the General Division clearly did not find this sufficient. The General Division indicated, for instance, that the Applicant could have explored or attempted other employment opportunities, to meet the requirements set out by the Federal Court of Appeal in *Inclima v. Canada (Attorney General)*, 2003 FCA 117. In other words, it was insufficient for the Applicant to have relied on WSIB to assist in finding and maintaining work, as it found that the Applicant's obligations under *Inclima* extended beyond that. Counsel has not pointed to any potential error of law in this regard. I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[25] The application for leave to appeal is dismissed.

Janet Lew

Member, Appeal Division