Social Security Tribunal

CANADA

Tribunal de la sécurité sociale

Citation: *B. T. v. Minister of Employment and Social Development,* 2016 SSTADIS 138

Date: April 11, 2016

File number: AD-15-846

Appeal Division

BETWEEN:

B. T.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross. Member, Appeal Division

Canada

PERSONS IN ATTENDANCE

Appellant	-	B. T.
Appellant's Representative	-	Julie Ellery
Respondent's Representative	-	Sylvie Doire

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] The applied for a *Canada Pension Plan*, (CPP), disability pension. The Respondent denied the application and maintained the denial upon reconsideration. The Appellant appealed the reconsideration decision to the *Social Security Tribunal*, (the Tribunal), and on May 25, 2015 the Tribunal's General Division denied the appeal. He then applied to the Appeal Division for leave to appeal the General Division decision. A different member of the Appeal Division granted the application, holding that the Appellant had put forward grounds of appeal that potentially had a reasonable chance of success.

ISSUE(S)

[3] The issues that arise for determination are:-

a. Did the General Division commit an error of law by failing to analyse evidence that was before it?

b. Did the General Division commit errors of law by failing to apply the principles set out in the case law to the facts of the Appellant's case?

PRELIMINARY ISSUES

Degree of Deference

[4] Counsel for the Appellant made no submissions on the question of standard of review or degree of deference that the Appeal Division should accord to the General Division decision, however, the Respondent's representative made extensive submissions on the question. After outlining the legislative history of the relevant sections of the *Department of Employment and Social Development Act*, (the DESD Act), the Respondent's representative compared the

legislative provisions governing the powers on appeal of the former Board of Umpires and that of the present Appeal Division. She submitted that the Appeal Division was modeled after the former and thus its powers ought to be exercised in a manner that was similar to that of the former Board of Umpires when it reviewed decisions of the former Boards of Referees. Thus, the Appeal Division should accord deference to the General Division on questions of fact and mixed fact and law but should show no deference to it on questions of law. The Appeal Division should show deference to the General Divisions on the issues in this appeal because they involved questions of fact.

[5] The Appeal Division is mindful of recent decisions of the Federal Court and the Federal Court of Appeal which run counter to the position taken by the Respondent's representative. These decisions dictate that the Appeal Division should confine its enquiry to a determination of whether the General Division has breached any of the provisions of ss. 58(1) of the DESD Act without engaging the principles or language of "judicial review"[1] These decisions take the view that this was the legislator's intent when it created the Appeal Division and that it is the legislator's intent that is paramount.

[6] In *Jean, Maunder,* and in *Tracey* the Courts were at pains to specifically delimit the ambit of the Appeal Division as excluding "judicial review." The Federal Court of Appeal underscored this position in the recent decision of *Minister of Citizenship and Immigration v. Huruglica et al* 2016 FCA 93. The Appeal Division is bound by the decisions of the Federal Court and Federal Court of Appeal, despite the ambiguity attaching to the status of and the applicability of the substantial body of case law built up under the former regime.

THE APPLICABLE STATUTORY PROVISIONS

[7] Appeals to the Appeal Division are governed by Sections 56 to 59 of the DESD Act. The grounds of appeal are set out at ss. 58 (1) and are:-

[1] *Canada (Attorney General) v. Jean; Canada (Attorney General) v. Paradis*, 2015 CAF 242 (CanLII), 2015 FCA 242; *Maunder v. Canada (Attorney General),* 2015 FCA 274; In *Tracey v. Canada (Attorney General)* 2015 FC 1300. The Federal Court of Appeal and the Federal Court observed that the scope of the Appeal Division's jurisdiction is set out in section 58 of the DESD Act.

58(1) Grounds of Appeal –

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] An appeal succeeds if the Appellant is able to establish that the General Division breached any of the above statutory provisions.

ANALYSIS

The basis on which Leave to Appeal was granted

[9] The Appeal Division granted leave to appeal on the basis that:-

1. While the General division decision contained a summary of the evidence, the General Division did not analyse the evidence nor did it explain how it weighed the evidence to reach a decision.
2. The General Division correctly set out the principles of *Inclima v. Canada (Attorney General)* 2003 FCA 117 and *Canada* (*Minister of Human Resources Development) v. Scott* 2003 FCA 34 but did not apply the principles to the facts of the Appellant's case. (paras. 38 and 39); and
3. It was not clear why the General Division decision made the decision it did.

Did the General Division fail to analyse the evidence that was before it?

[10] At the outset of the hearing Counsel for the Appellant sought to better define the scope of the appeal. She identified paragraph 40 of the decision as the source of the problem, particularly, the seeming omission from consideration that the in addition to regular *Employment Insurance*, (EI), benefits, the Appellant had also collected EI sick benefits after the regular benefits ended. Much of the arguments of Counsel for the Appellant were centred on this point. She agreed that while the Appellant was collecting EI benefits he had to be taken as being capable regularly of pursuing any substantially gainful employment. However, she argued that this was not the case after he began to receive EI sick benefits. In her argument, the receipt of EI sick benefits ought to trigger a different analysis on the part of the General Division. Thus, the failure of the General

Division to do so was an error of law because the General Division had made a leap from the Appellant being able to work in April 2010 to his being able to work in December 2012.

[11] Counsel for the Appellant cited other examples where, in her view, the General Division ignored evidence. These included the Appellant's attempts to work prior to end of his minimum qualifying period, (MQP), of December 2012; medical evidence; the results of a function limitations assessment; and the fact that the Appellant had been hospitalised in July 2009 for severe back pain.

[12] Responding to the arguments of Counsel for the Appellant, the Respondent's representative submitted that the General Division had not ignored the appellant's EI sick benefits but had made the deliberate choice not to factor it into her analysis. Thus, no error arose from this decision.

[13] The Appeal Division considered the submissions of the parties on the question of whether it was an error to omit or not factor into the decision the effect of the Appellant's receipt of EI sick benefits. With respect, the Appeal Division is not persuaded that a direct line can be drawn or ought to have been drawn between the receipt of EI sick benefits between April and July 2010 and a finding that as of December 31, 2012 the Appellant was incapable regularly of pursuing any substantially gainful occupation. The Appeal Division comes to this conclusion taking into consideration the objectives and principles of the Employment Insurance Act as identified by the Supreme Court of Canada, (the SCC), in *Reference re Employment Insurance Act (Can*), *ss. 22 and 23*, 2005 CarswellQue 9127. The SCC described the Employment Insurance regime as:-

> "a public insurance programme based on the concept of social risk the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market by paying temporary income replacement benefits, in the event of an interruption of employment."

[14] That the notion of temporariness is central to the EI scheme is underlined by the SCC in its mention of "re-entry into the labour market" and paying "temporary income replacement benefits". By contrast, the CPP envisages payment of a disability pension where there is a total incapacity to regularly pursue any substantially gainful employment. These two concepts are

ideologically opposed, a point that was underscored in *Canada (Minister of Human Resources Development v. Henderson)* 2005 FCA 309 where the Federal Court of Appeal stated that:-

> "a disability cannot be prolonged unless it is determined to be of indefinite duration. The restrictive language of s. 42 indicates that the purpose of the CPP is to provide a pension to those who are disabled from working on a long-term basis not tide claimants over a temporary period where a medical condition prevents them from working."

[15] Thus, the fact that the Appellant received sick benefits immediately following a period of his receiving regular EI benefits is in the view of the Appeal Division not determinative of his capacity to regularly pursue any substantially gainful employment. Accordingly, the Appeal Division finds that the General Division did not err when it omitted from its discussion, the fact that the Appellant had received EI sick benefits for two months prior to the end of the MQP.

[16] With regard to the other evidence that Counsel for the Appellant submitted the General Division disregarded, the Appeal Division finds that the General Division specifically noted the Appellant's efforts at retraining and job search. What emerges from the decision is that the Appellant did not look for alternative employment and that he "self-restricted" his efforts based on his subjective assessment of what a prospective employer would require and the difficulties he would have to find employment due to his age. (paras. 25-27) In the face of the Appellant's testimony, the Appeal Division is not persuaded that the General Division disregarded evidence of his employment efforts. To the contrary, General Division specifically addressed this aspect of the Appellant's testimony at para. 40 of the decision, when it noted:-

> "the Appellant stated that he has not made efforts at finding employment because he could not work full-time and felt that even a part-time employer would require at least a four-hour commitment. The Tribunal finds that the Appellant had the capacity to work at his MQP but has not made an effort to find appropriate employment."

[17] Counsel for the Appellant submitted that the General Division made a leap from finding that the Appellant had retained work capacity during the period he received regular EI benefits to finding that he retained work capacity at the end of his MQP. The Appeal Division disagrees. In the view of the Appeal Division there is no leap. The sequence of events could be described as follows:- the Appellant stopped working in June 2009; he applied for and received regular EI benefits; he received these benefit until April 2010. While the Appellant collected regular EI benefits, he expressed himself ready, able and willing to work. From April 2010 to August 2010

the Appellant received Special EI benefits, namely sick benefits. The Appeal Division infers that he received them because an illness prevented him from working. The Appellant's MQP ended on December 31, 2012, however, between the time EI sick benefits ended and the end of his MQP the Appellant neither sought alternative employment nor retrained.

[18] Seeking alternative employment is, per *Inclima*, a requirement for persons who apply for a CPP disability pension, who must show that their efforts at obtaining and maintaining employment were rendered futile by reason of the applicant's health condition. The Appellant had the onus of establishing that he made attempts to obtain and maintain alternative employment but was stymied from doing so because of his medical conditions. In the face of the Appellant's testimony that he "self-restricted" and never looked for alternative employment the Appeal Division finds that the General Division properly applied the principles of *Inclima* and *Scott*. Consequently, the Appeal Division also finds that the General Division did not err in its conclusion that the Appellant retained work capacity.

[19] Similarly, the Appeal Division finds that the General Division did not disregard the fact that Dr. Gordon had advised the Appellant to find less physically demanding work. In the view of the Appeal Division, this advice is qualitatively different from a recommendation that the Appellant cease all work. The Appeal Division finds that the same conclusion can be drawn in regard to the Appellant's hospitalization and the result of an FAA.

[20] With respect to the *Inclima* argument, Counsel for the Appellant submitted that the General Division failed to address the fact that the Appellant started to receive EI sick benefits immediately after receiving regular benefits. She submitted that this fact suggests that the Appellant was incapable of working. In the arguments of Counsel for the Appellant, the General Division made two errors in this regard. First, it ignored a material fact, namely the receipt t of EI sick benefits. Second, the General Division did not adequately explain how it came to the conclusion that the Appellant had capacity to work prior to the end of his minimum qualifying period, (MQP).

[21] The Appeal Division finds that much of these arguments is and has been answered by its discussion regarding the General Division's treatment of the Appellant's EI sick benefits. In the view of the Appeal Division, its discussion leads to the conclusion that the General Division did not ignore a material fact when it did not comment on or consider the Appellant's receipt of EI sick benefits. Nor does the Appeal Division find that the General Division failed to apply the principles in *Inclima* and *Scott.* In the view of the Appeal Division, the General Division expanded on those principles in paragraph 40 of the decision. It might have been preferable for the General Division to express its decision-making process in a more fulsome manner however, the Appeal Division is not persuaded that its brief analysis indicates that the General Division decision breached any of the grounds set out in sub-section 58 (1) of the DESD Act. Support for this position is found in *Giannaros v. Canada (Minister of Social Development),* 2005 FCA 187, where the Federal Court of Appeal stated:

> "the Court should not intervene because it is of the opinion that the PAB failed to express themselves in a way acceptable to the Court. The reasons under review should be fairly considered … Judicial review should not be granted on this basis where the Court can discern the PAB's reasoning from the language it has used, although it is obvious that the PAB could have explained it reasons more fully."

CONCLUSION

[22] For all of the above reasons, the appeal is dismissed.

Hazelyn Ross
Member, Appeal Division