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

Citation: *M. H. v. Minister of Employment and Social Development,* 2016 SSTADIS 158

Tribunal File Number: AD-15-1583

BETWEEN:

M. H.

Applicant

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: Neil Nawaz

DATE OF DECISION: April 29, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 6, 2015. The General Division conducted an in-person hearing on October 2, 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" prior to the minimum qualifying period (MQP) of December 31, 2012. On December 17, 2015, the Applicant's representative filed a lengthy application requesting leave to appeal, advancing numerous grounds of appeal and relying on various legal authorities. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[2] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[3] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

ISSUE

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

SUBMISSIONS

Failure to Observe a Principle of Natural Justice

[5] The Applicant's representative submits that, in making its decision, the General Division did not observe principles of natural justice and acted beyond its jurisdiction:

(a) It failed to take into account highly relevant evidence, specifically Dr. Greenstone's letter of October 2012;

(b) It failed to provide adequate reasons why some evidence, including Dr. Greenstone's letter, was excluded.

(c) It took into account irrelevant information by:

(i) Discussing non-credible statements while insisting no finding was made on the Applicant's credibility;

(ii) Alternatively, making an explicit finding of credibility without regard for the Applicant's limited English skills;

(iii) Alternatively, basing an implicit credibility finding on a "formulaic and unrealistic" interpretation of the Applicant's statements.

Errors of Law

[6] The Applicant's representative submits that in making its decision the General Division erred in law, whether or not the error appeared on the face of the record:

(a) It incorrectly compartmentalized the discussion of the "real world" factors so that it wound up being only a transient consideration, rather than a factor undergirding the entire severity analysis.

(b) It made unreasonable inferences regarding transferrable skills.

Erroneous Findings of Fact

[7] The Applicant's representative submits that the General Division based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

(a) Medication

(i) It incorrectly found that that the Applicant had not been prescribed narcotics;

(ii) It incorrectly found that narcotics were not typically prescribed in chronic pain cases.

(b) Other Conditions

(i) It incorrectly found that the Applicant had not submitted evidence on the effect of his secondary conditions on his ability to function;

(ii) Alternatively, if the statement above was merely misstated and the Applicant's evidence was considered but discounted then the General Division breached its jurisdiction by not providing adequate reasons to allow the appellate body to review the consideration.

(c) Inability to Work

(i) It incorrectly found the Applicant was unable to work at any job;

(ii) It incorrectly found the medical evidence did not rule out all work;

(iii) Alternatively, the preceding finding revealed an error in law.

(d) Pain magnification

(i) It paraphrased Dr. Telfer's comments on the Applicant's pain in a way that perversely misrepresented his meaning;

(ii) It raised the issue of pain magnification without providing notice to the Applicant, in violation of the principles of natural justice.

ANALYSIS

[8] 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.

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* 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.

[10] Before leave can be granted, 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.

Failure to Observe Principles of Natural Justice

Ignoring Dr. Greenstone's Letter

[11] The Applicant alleges that the General Division unfairly neglected to consider Dr. Greenstone's October 2012 letter declaring him unable to work. It invoked the Supreme Court of Canada in *Oakwood Developments Ltd. v. St. Francois Xavier (Rural Municipality)*, [1985] 2 SCR 164 in submitting that the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration.

[12] An important question here is whether Dr. Greenstone's letter was "highly relevant." It is true that the General Division made no reference to it in its decision, but it is established law that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). Therefore, omitting reference to some document will not, by itself, amount to a breach of natural justice, as it remains the right of the finder of fact to assess the quality of the evidence and assign it appropriate weight.

[13] It should be noted that Dr. Greenstone's letter is actually a brief note written by hand on a prescription pad. It does little more than refer to "persistent right shoulder pathology which prevents [the Applicant] from working." While it may have been brief and easy to overlook, it is nonetheless an unequivocal statement from the family doctor that the Applicant was no longer able to work, made within three months of the end of his MQP. It is also true that the General Division seemed to base its decision, at least in part, on a finding that other medical reports did not rule out work. Here, an arguable case can be made that in neglecting to take into account the one report that did rule out work, the General Division committed a breach of natural justice.

Considering Irrelevant Information

(i) Discussing non-credible statements while insisting no finding was made on credibility

[14] The Applicant's representative argues that the General Division's declaration that it made no finding on credibility precluded it from noting inconsistencies in the Applicant's testimony. In particular, the Applicant's representative argues that this declaration and the "Member's choice
of hearing type" took the General Division beyond its jurisdiction when it drew attention to the apparent discrepancy between the Applicant's testimony that he could not do "anything" around the house and his earlier statement on the Application for benefits that he was capable of shopping and light work.

[15] I found this argument strained. The Applicant's representative cited a case cautioning decision-makers to exclude irrelevant evidence regarding an applicant's character, but I found no indication that the General Division was taking extraneous factors into account. In fact, it seems more likely that the General Division, in explicitly de-emphasizing "credibility," was attempting to assure readers that the Applicant's character was *not* at issue. Merely pointing out inconsistencies in testimony does not necessarily mean that a finder of fact is impugning an applicant's character or questioning his honesty. In determining that some of the Applicant's statements were not reliable, the General Division was simply exercising its right—and duty—to assess testimonial evidence.

[16] I am not satisfied that there is an arguable case here or that the appeal would have a reasonable chance of success on this particular ground.

(ii) ***Making a finding of credibility without regard for the Applicant's limited English***

[17] In his Hearing Information Form, completed April 11, 2014, the Applicant specified his desire to use a "Hindi medical interpreter." Accordingly, a professional interpreter of Hindi was made available for the hearing. A review of the hearing recording indicates that the interpreter advised the General Division Member (at 00:35) that the Applicant had earlier expressed his wish to forego verbatim translation. The Member confirmed with the Applicant whether this proposed arrangement would be acceptable to him and he replied "yes." The remainder of the hearing proceeded with the Applicant presenting his case fluently in English with little apparent difficulty in expression or comprehension. I heard no hint of duress or pressure in any of the passages I listened to and am satisfied that if the Applicant could not follow the proceedings, it was open for him to say so.

[18] The Applicant's representative also suggests that the General Division was incorrect to conclude that the Applicant had no difficulty understanding any part of the hearing. "There is no understanding of how the member reached this conclusion. It can be inferred that the demeanour of the Applicant at the hearing must have been a factor in this determination." I disagree that the General Division had no basis to conclude that the Applicant understood the proceedings. The Member was in the same room with the Applicant and engaged in several exchanges with him. She was well positioned to make an assessment about his capacity to speak and understand English, and, having listened to significant portions of the recording, I do not see an arguable case on this ground.

(iii) Basing credibility on a "formulaic and unrealistic" interpretation

[19] The Applicant's representative submits that when the Applicant testified that he could not do "anything," it should not have been taken at face value. "There is a colloquial meaning to absolutes like 'anything' that impart a sense they carry an implicit clause '…that is significant.'" To do otherwise would create a nearly impossible standard to meet.

[20] I would not allow the appeal to proceed on this ground as it has no reasonable chance of success. The General Division member made it clear on two occasions that she gave little weight to the Applicant's statement that he could not do "anything" for himself or around the house— suggesting she was well aware that such an unqualified statement was not to be taken literally.

The General Division preferred the Applicant's evidence that he was capable of light housework, and it was within its jurisdiction as a finder of fact to make that determination. It noted the inconsistency between the Applicant's testimony and his prior statements, but, as mentioned above, drew no broad conclusions about his honesty and character. In any case, a reading of the decision as a whole shows that it turned on many factors, primarily the medical reports, other than the reliability of the Applicant's testimony.

Errors of Law

Compartmentalizing the Villani "real world" factors

[21] The Applicant's representative seemed to suggest that the General Division made an error in law by addressing the *Villani* factors in a separate discussion, when they should have been considered at all junctures of the severity analysis. Furthermore:

> …the member compartmentalized the analysis such that the look at contextual factors effected [sic] employability was undergone without effecting or affecting other considerations. The Member had concluded that the Applicant had skills which would apply in fields other than hard labour and this holding coloured later considerations.

[22] I cannot agree that *Villani* was applied incorrectly in this instance. First, nowhere in *Villani* is it required that discussion (or consideration) of the contextual factors be interspersed throughout the analysis. The opening paragraph of the General Division decision contains a discussion on the Applicant's age, education, language skills and work experience. If the *Villani* factors were discussed in a discrete paragraph, it does not mean they were not considered in assessing the Applicant's claimed medical impairments and their impact on his vocational functionality.

[23] Second, there is no suggestion in the decision that the General Division neglected to consider the potential impact of the *Villani* factors on the Applicant's capacity to perform non-

physical work. The Member referred to the Applicant's post-secondary training, supervisory experience and facility in English in determining that he would be able to adapt to another work environment. The Member spent much of the remainder of the analysis considering whether the Applicant's physical impairments would prevent him from functioning in sedentary employment. It was open to the Member to apply the *Villani* factors to the Applicant's condition and conclude that he was capable of alternative work. In the decision, it is clear that the Member was well aware the Applicant had not finished his real estate course or had success in his subsequent job search, but there was no indication that she put aside *Villani* in concluding there were no medical reasons for either outcome.

[24] I see no reasonable chance of success on this ground.

Making unreasonable inferences about transferrable skills

[25] The Applicant's representative alleges that the General Division listed the real estate program as an educational achievement yet acknowledged elsewhere the Applicant was unable to complete the training due to pain. However, this is not what the decision says. It does not describe the real estate course as an achievement, or in anything approaching those terms, nor does it do anything other than relay the Applicant's evidence that he failed to complete the course because of pain. While the Member notes the Applicant's testimony on this matter, it is clear that she does not fully accept it.

[26] The Applicant's representative also alleges that the General Division mischaracterized the Applicant's school and work experiences while failing to place them in their appropriate context. I find that these claimed grounds are more appropriately classified as erroneous findings of fact, and that they amount to a request for a reassessment of the evidence on the Applicant's education and vocational skills, which is beyond the scope of a leave application.

[27] I see no reasonable chance of success on this ground.

Erroneous Findings of Fact

Medication

[28] The Applicant's representative submitted that the General Division found, against the available evidence, that the Applicant had not been prescribed narcotics. The General Division is also alleged to have incorrectly stated that narcotics are not typically prescribed in chronic pain cases.

[29] The Member stated at paragraph 24 that there was "no evidence any doctor had recommended that he take narcotic medication." A review of the references cited by the Applicant's representative indicates that in two instances (Dr. Telfer and Dr. Gittens), the examining physician was merely documenting the Applicant's history and did not prescribe or recommend Tylenol #3 themselves. Two other documents cited by the Applicant's representative (the CPP disability questionnaire and the submission at GT8) were prepared by the Applicant, who reported without any independent confirmation that he was taking Tylenol #3. Finally, the copy of the Ambulatory Care Report, which purportedly prescribed the Applicant with Percocet, is completely illegible in the document record, and offers no evidence one way or another.

[30] Furthermore, other documents, including the CPP medical report completed by the family physician, listed the Applicant's medications but did not mention any narcotic. I therefore conclude that the General Division was correct to state that there was no objective medical evidence of a recommendation that the Applicant had been prescribed narcotics.

[31] Nevertheless, having noted an absence of evidence that the Applicant was recommended narcotics, the General Division then appeared ("of note") to draw a negative inference from that fact, based on their common use in chronic pain cases. Implicit in paragraph 58(1)(c) of the DESD Act is a requirement that an error of fact, once identified, be material—that is, it must be shown to have significantly influenced the final decision. Whether or not narcotics are commonly used or indicated in chronic pain cases is an open question, and there is at least an arguable case that the General Division made an erroneous finding of fact without reference to the material before it.

Other Conditions

[32] The Applicant's representative submits that the General Division incorrectly found that the Applicant had not submitted evidence on the effect of his secondary conditions on his ability to function. It was "patently false" to suggest that no evidence was presented on the debilitating effect of diabetes, arthritis, thyroid disorder, among many other disorders.

[33] While it is true that the General Division treated the Applicant's other conditions only cursorily, in doing so it did no more than reflect the medical evidence, which is largely focused on musculoskeletal pathology. Where there are references to the Applicant's other conditions, they usually come in the form of lists of diagnoses, with little insight into how those diagnoses affected his ability to work. Dr. Greenstone's CPP Medical Report and Dr. Ham's terse letter both fall into this category.

[34] The Applicant's representative also cites the CPP Questionnaire for Disability Benefits, the Functional Limitations Form and other letters and submissions made by the Applicant himself. While there is no doubt that these documents constitute "evidence," it cannot be fairly said that they qualify as "medical evidence," as they were not prepared by neutral and independent medical practitioners. In that sense, it was reasonable for the General Division to note that the Applicant presented no evidence that the other conditions affected his ability to function. The appeal would stand no reasonable chance of succeeding on this ground.

[35] It is also submitted in the alternative that if it were found that the Applicant's evidence on his other conditions was considered but discounted, then the General Division should have explicitly said so and explained why. In failing to do so, it breached a principle of natural justice by not providing adequate reasons to allow the appellate body to review the consideration.

[36] Again, I find this argument unconvincing. While the General Division may not have provided a comprehensive review and analysis of the evidence, leaving unmentioned various opinions or complaints, this does not mean that the General Division failed to consider that evidence. According to *Simpson* v. *Canada (Attorney General)*, 2012 FCA 82, a decision-maker is presumed to have considered all of the evidence before it. This presumption can of course be rebutted, but I am not satisfied that the presumption ought to be displaced, based on the

submissions before me. It is unnecessary for a decision-maker to mention each of the available medical reports or records, as the Applicant's representative submits the General Division ought to have done.

[37] I also note that there is no legal obligation for a decision-maker to write exhaustive reasons addressing all of 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.

Inability to Work

[38] The Applicant's representative alleges that the General Division erred in finding: (i) the Applicant was unable to work at any job; (ii) the medical evidence did not rule out all work; or (iii) alternatively, the preceding findings revealed an error in law.

[39] I find these claimed grounds of appeal as to be so broad that they amount to a request to retry the entire claim. In my view, the Applicant has improperly characterized these issues as findings of fact when they are more accurately part of the processes which an administrative tribunal goes through in coming to its decision. The Applicant has blurred the distinction between findings of fact and the ultimate decision to be made. The General Division may have based its decision on a finding of fact that was not supported by the evidence, but the Applicant needs to specifically identify the finding of fact that is allegedly unsupported. It is insufficient to say that the General Division ought to have concluded differently based on the evidence before it.

[40] It is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might choose to accept or disregard, and to decide on its weight. An applicant is still required to identify what the erroneous findings

of fact might be. Without having done so, I am unable to consider granting leave under this ground.

Pain Magnification

[41] The Applicant's representative submits that the General Division erred in paraphrasing Dr. Telfer's comments on the Applicant's pain in a way that perversely misrepresented his meaning. In suggesting that Dr. Telfer detected "symptom magnification" on the part of the Applicant, the General Division distorted the orthopedic surgeon's actual words, which referred only to "significant abnormal pain behaviour with tenderness in non-organic areas" and "some abnormal flinching and verbalizations" consistent with the expected behaviour of a chronic pain patient. The Applicant's representative also alleges that the General Division breached the principles of natural justice by raising the issue of pain magnification without providing notice to the Applicant.

[42] If one is to determine whether the General Division misrepresented Dr. Telfer, one must first attempt to understand what he meant to say. In noting "significant abnormal pain behaviour" and "abnormal flinching and verbalization," Dr. Telfer, I think it is fair to say, was documenting his observation that the Applicant reacted to his examination in ways that an experienced clinician would not ordinarily expect. His reference to "non-organic" tenderness suggests that he saw a psychosomatic element to the Applicant's pain level. In the medical lexicon, non-organic symptoms are physical findings that do not have a direct anatomical cause and are presumed to have a psychological component. Dr. Telfer did not use the word magnification, but he did suggest that the Applicant's expression, and perhaps experience, of pain did not correspond with his observable pathologies. I find no indication that the General Division misunderstood or misrepresented Dr. Telfer's remarks—perversely, capriciously or otherwise.

[43] I also find, given the General Division member's ordinary and natural interpretation of Dr. Telfer's remarks, that a reasonable question was raised on whether the Applicant's heightened pain response contained an element of intentional deception. The General Division member quite properly put this question to the Applicant at the hearing and he offered a response. The purpose of a General Division hearing is to explore and investigate a claimant's

disability in order to determine whether it meets the legal standard. It is a forum in which it is understood that any number of uncomfortable, though relevant, questions may be raised, including whether or not a claimant is prone to exaggerating his or her symptoms. This goes to a claimant's credibility, which is an important consideration in determining disability. Whether or not Dr. Telfer's report was misinterpreted (and I find that it was not), the General Division was within its jurisdiction to give the issue of pain magnification due weight and raise it at the hearing. To insist that an administrative tribunal must provide advance notice of its intention to ask questions about potentially contentious issues would be to defeat one of the primary purposes of an oral hearing and to encumber appeals with an additional and unnecessary level of procedure.

[44] I find this ground of appeal stands no reasonable chance of success.

APPEAL

[45] I am allowing leave to appeal on two grounds: (i) The General Division may have breached a principle of natural justice by neglecting to consider Dr. Goldstone's October 2012 note; and (ii) the General Division may have made an erroneous finding of fact without reference to the material before it when it found that narcotics are commonly indicated in chronic pain cases.

[46] I invite the parties to make submissions also in respect of the 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). The parties may also wish to address the level of deference they believe the Appeal Division owes to the General Division.

CONCLUSION

[47] The Application is granted on the aforementioned grounds.

[48] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division