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

Citation: *J. H. v. Minister of Employment and Social Development*, 2016 SSTADIS 306

Tribunal File Number: AD-16-409

BETWEEN:

J. 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

LEAVE TO APPEAL DECISION BY: Janet Lew

DATE OF DECISION: August 9, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 29, 2015. The General Division 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" by the end of his minimum qualifying period of December 31, 2014. The Applicant requested leave to appeal on March 11, 2016 on the grounds that the General Division failed to observe a principle of natural justice, 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. The Respondent did not provide any submissions. For this application to succeed, 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 & ANALYSIS

[3] 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.

[4] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within the permitted grounds of appeal and that the appeal has a reasonable

chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Registered nurse's opinion

[5] The Applicant claims that the General Division breached a principle of natural justice, by assigning more weight to the opinion of Ms. G. U., a registered nurse, over the opinions of his own family physician and specialists.

[6] Ms. G. U. prepared submissions on behalf of the Respondent (GD6). She did not examine or treat the Applicant and did not give any evidence.

[7] The General Division set out the party's submissions. A review of the analysis section indicates that the General Division reviewed the medical opinions before it. There is no mention or reference to any opinion or argument of Ms. G. U. At paragraph 54, the General Division wrote that it "weighed the various medical reports" and although it noted that the family physician was supportive of the Applicant, the General Division stated that it "put more weight on the reports of the Specialist's [*sic*], especially Dr. MacInnes, Dr. Franan, Mark Westmacott, physical therapist and Hafeez Lalji, Kinesiologist". Thus, it cannot be said that the General Division assigned any weight to the opinion of Ms. G. U. One, she did not give any evidence and two, the General Division set out the evidence and the opinions to which it assigned weight. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Weight of evidence

[8] The Applicant submits that the General Division erred as it should have assigned considerable weight to the opinion of his own family physician, and to the rheumatologist's opinion that he has fibromyalgia. He argues that the fact he has fibromyalgia should, on its own, qualify him for a Canada Pension Plan disability pension. He notes that his family physician is of the view that the Applicant is unfit for any work. He adds that his condition continues to progressively deteriorate.

[9] The Federal Court of Appeal has addressed the issue of the assignment 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". Although *Simpson* was decided in the context of a judicial review, I agree that 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. Unlike its predecessor, the Pension Appeals Board, the Appeal Division does not hear appeals on a *de novo* basis, and the grounds of appeal are restricted to those set out under subsection 58(1) of the DESDA.

[10] For the most part, the Applicant is seeking a reassessment on the issue of whether he was severely disabled before the end of his minimum qualifying period, and has been continuously severely disabled since then. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence altogether or reweigh the factors considered by the General Division. Rather, its role on an application for leave to appeal is to determine whether the General Division erred in law, made an erroneous finding of fact or failed to observe a principle of natural justice, as set out under subsection 58(1) of the DESDA. Subsection 58(1) of the DEDSA does not contemplate a reassessment.

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

(c) Paragraph 52

[12] The Applicant contends 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 to the evidence before it. At paragraph 52, he disputes the General Division member's findings that there is no evidence for inflammatory joint disease and that the majority of his symptoms "do not fit with lumbar stenosis". He argues that his CPR readings, which measures inflammation, are up to twelves times above average. He also notes that x-ray reports show that he has spinal stenosis.

[13] Paragraph 52 reads as follows:

> [52] The Tribunal finds that on July 7, 2014, Dr. R. Offer, Rheumatologist, reported the Appellant has variable complaints in the heels or Achilles, left elbow and right wrist. When asked if there was any swelling he reported that his wife agreed there might be "a tiny bit of swelling" at the right wrist. This is in marked contrast to the level of disability he reports, where he cannot grip or shave and has difficulty dressing when the wrist is flaring. The Appellant mentioned he had some odd combination of ankylosing spondylitis, rheumatoid arthritis and fibromyalgia. However there is no evidence for any inflammatory arthropathy on my assessment today. His general examination is normal; other than mild diastasis recti. He has no evidence for inflammatory joint disease. The majority of symptoms do not fit with lumbar stenosis. He has tender points in most areas typical of fibromyalgia. Clinical impression is fibromyalgia associated with non-restorative sleep, IBS, migraines-headaches and TMJ symptoms. He appears to have no symptoms of neurogenic claudication while doing his daily walks. He understands regular exercise, fitness and increasing core strength, as well as stretches. Dr. Offer reported most fibromyalgia patients do not benefit medically from going on disability and are better off and have more functional years later if they remain in the mainstream of society. Occupations that are purely sedentary, purely physical or repetitive are poorly tolerated. (my emphasis)

[14] The statements, "there is no evidence for any inflammatory arthropathy on my assessment today", "he has no evidence for inflammatory joint disease", and "the majority of symptoms do not fit with lumbar stenosis" are directly taken from the rheumatologist's report at GD4-7 to GD4-9 of the hearing file. Perhaps this should have been obvious, given the reference to an assessment having been undertaken that day, as the General Division would not have performed an assessment. There was an evidentiary basis upon which the General Division made its findings, given that it adopted the rheumatologist's opinions. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) Paragraph 55

[15] The Applicant claims that the General Division erred when it wrote that there were no clinical records of the family physician, when he had filed numerous reports. The General Division member wrote, "There are no clinical notes from regular visits with the family physician". He suggests that both the Respondent and the General Division could not have properly evaluated his appeal in the absence of a complete medical file.

[16] There is a distinction between clinical notes and reports. The clinical notes represent the notes of the family physician, usually prepared contemporaneously or shortly after a patient's visit with his physician. The notes generally document a patient's complaints and the physician's observations and findings, whereas a medical report, typically in narrative form, recites symptoms, history and records and gives a diagnosis, treatment, results and present condition. This is a factual summary of the information in the records. Clearly, the hearing file contained the reports of the family physician. After all, the General Division referred to them in its analysis.

[17] A review of the hearing file indicates that, indeed, the General Division erred when it stated that there were no clinical notes from the family physician. The family physician's notes can be found at GD3-18 to GD3-20 and at GD13-2 and GD13-3. These notes cover six visits from February 18, 2013 to August 26, 2013 and three visits from November 18, 2014 to April 16, 2015.

[18] Some of clinical notes are in point form and contain abbreviations. The notes document the Applicant's complaints of back and neck pain and migraines. The family physician diagnosed the Applicant with polyarthralgia and chronic pain. He also outlined a treatment plan, which included a referral to a rheumatologist. The family physician prepared no less than three medical reports in which he set out the Applicant's complaints, provided a diagnosis and described the treatment recommendations. Thus, it may be that the clinical notes do not add much but, to some extent, it appears that the General Division may have based its decision on an erroneous finding that there were no clinical notes from the family physician. On this basis, I am satisfied that the appeal has a reasonable chance of success.

(e) Updated medical report

[19] The Applicant filed an updated medical report of his family physician. However, in *Canada (Attorney General) v. O'Keefe,* 2016 FC 503, the Federal Court pronounced that an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in subsection 58(1) of the DESDA. There is no indication that the updated medical report addresses any of the grounds of appeal and as such, there is no basis upon which I may consider it at this juncture.

CONCLUSION

[20] The application for leave to appeal is granted.

[21] This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division