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

Citation: *H. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 313

Tribunal File Number: AD-16-602

BETWEEN:

H. T.

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: Hazelyn Ross

DATE OF DECISION: August 12, 2016

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] The Applicant applies for leave to appeal the decision of the General Division of the Tribunal issued on February 11, 2015 that dismissed the Applicant's appeal from a reconsideration decision that found him ineligible for a disability pension under the *Canada Pension Plan* (CPP).

HISTORY OF THE APPLICATION

[3] This is the second time this matter has come before the Appeal Division. The Applicant first applied for leave to appeal this decision in February 2015. In the covering letter to the application for leave, the Applicant's representative asked the Tribunal to hold the Applicant's file in abeyance until such time as he made a "more formal submission". (AD1-1)

[4] The Tribunal received additional documents from the Applicant's representative on June 19, 2015. (AD1A). This additional documentation included a signed declaration giving the Tribunal authorisation to disclose information to his representative. The Appeal Division issued a decision refusing leave to appeal. The Applicant's representative wrote to the Tribunal to register his objection to the Appeal Division issuing a decision on the application for leave while the file was being held "in abeyance". He applied to the Federal Court for judicial review of the Appeal Division decision of September 22, 2015.

[5] On the consent of the parties, the Federal Court issued an Order granting the application for judicial review and setting aside the decision of the Appeal Division. Mme. Justice Roussel also sent the matter back to the Appeal Division for redetermination under s. 58 of the *Department of Employment and Social Development Act* (DESD Act). In addition, Mme. Justice Roussel allowed the Applicant ten (10) days from the date of the Order to make submissions to the Appeal Division.

[6] On April 25, 2016, the Tribunal received an amended and expanded request for leave to appeal from the Applicant's representative. (AD2) On April 26, 2016 the Tribunal received additional documentation in the form of "Certified Statements" from the Applicant's children C. T., C. T. and T. T. (AD3)

GROUNDS OF THE APPLICATION

[7] In both his original request for leave to appeal and the subsequent request, (AD2) the Applicant's representative alleged that the General Division breached the three grounds of appeal set out in the DESD Act, namely that the General Division:-

1) failed to observe a principle of natural justice or otherwise acted beyond its jurisdiction;
2) erred in law; and
3) based its decision on erroneous findings of fact that it made without regard for the material before it.

ISSUE

[8] The only issue before the Appeal Division is whether the appeal has a reasonable chance of success.

THE LAW

[9] 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:-

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

[10] Subsections 56(1) and 58(3) of the DESD Act govern the granting of leave to appeal. Subsection 56(1) makes it clear that leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division, providing that, "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection

58(3) makes the grant or refusal of leave mandatory. To obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1]

[11] An applicant satisfies the Appeal Division that his appeal has a reasonable chance of success by raising an arguable case in his application for leave.[2] The Federal Court of Appeal has equated an arguable case to a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[12] *Tracey v. Canada (Attorney General),* 2015 FC 1300 supports the view that in assessing an application for leave to appeal, the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal

PRELIMINARY ISSUES

[13] A preliminary issue arises with respect to the submissions of the Applicant's representative. As stated earlier the Order of Mme. J. Roussel gave the Applicant ten days from the date of the Order (April 15, 2016) to make submissions to the Appeal Division. The Appeal Division takes the amended request for leave and accompanying certified statements as having been submitted in compliance with the Court's order. The problem arises with the "certified statements" of the Applicant's children C. T., C. T. and T. T., (AD3) which attest to the Applicant's present functional limitations.

[14] The Appeal Division finds that the Certified Statements are not submissions; but are, in fact, in the nature of additional evidence. In fact, the statements acknowledge as much. In paragraph 1 of each certified statement, the person affirming the statement states that his or her statement is added as "a more complete version of my evidence before the Tribunal." That the

[1] (58(2) "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

Appeal Division cannot consider additional evidence in any form when deciding whether or not to grant leave to appeal was made clear by Mme. J. Roussel in *Tracey v. Canada (Attorney General)* 2015 FC 1300. At paragraph 29, Mme. J. Roussel noted that,

> [29] …Under the current legislative framework, however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves*, at para. 108). The SST-AD was therefore under no obligation to consider the clinic report signed on January 29, 2014 and the CHR website articles as an independent ground of appeal in determining whether the Applicant's application for leave to appeal had a reasonable chance of success.

Accordingly, the Appeal Division acknowledges but cannot consider, for the purposes of this Application, the certified statements of the Applicant's children.

ANALYSIS

[15] In his amended request for leave to appeal, the Applicant's representative sets out two main areas in which he submits the General Division erred. He alleges that the General Division committed errors of fact and law. He did not allege a breach of natural justice as he did in his initial application for leave to appeal. Nonetheless, the Appeal Division has opted to treat both requests as constituting the entire application and will also address the alleged breach of natural justice and the issues raised in the original Application.

Did the General Division fail to observe a principle of natural justice or otherwise act beyond its jurisdiction?

[16] In his original request for leave to appeal, (AD1) the Applicant's representative submitted that the General Division failed to provide the Applicant with a fair hearing and otherwise acted beyond its jurisdiction when it held that submissions on the severity of the Applicant's medical conditions were not necessary and did not hear such submissions. The Appeal Division finds that this submission is supported neither by the decision nor the Tribunal Record.

[17] The hearing before the General Division was quite lengthy with the Applicant, his spouse and his three children giving evidence. The General Division summarised the medical evidence in paragraphs 12 to 26 of the decision. The Applicant's disabling conditions are shown as being lumbar radiculopathy and blocked arteries in his right leg. The General Division also

lists his other medical conditions as including high blood pressure and indicated that he has certain functional limitations. The medical evidence also refers to the surgical procedures and post-operative treatment that the Applicant has undergone.

[18] Paragraphs 27 and 28 of the decision set out the interaction between the Applicant's representative and the Tribunal with regard to the Applicant's readiness to proceed with the appeal. The General Division does not mention excluding any submission. The only reference to submissions is at paragraph 27, where the General Division notes that on March 29, 2014, the Applicant's representative stated in the Notice of Readiness that he had no additional documents or written submissions to file. The General Division also mentions that in the covering letter to the Notice of Readiness the Applicant's representative stated that he was in the process of gathering further information and evidence that he would file as they became available. This was in contradiction to his statement in the Notice of Readiness.

[19] Paragraphs 61 and 62 contain summaries of the submissions of the parties.

[20] In the original Application, the Applicant's representative alleged that the General Division had prevented the Applicant from making submissions regarding his medical condition and had prevented him from calling the Applicant's family physician as a witness. However, at paragraph 28 the General Division noted that the Applicant's representative had indicated he was reserving the right to call the Applicant's family physician as a witness. (Para 28/GT3-4). He was not called; nor is there any record indicating that the Applicant's family physician attended the hearing. Similarly, there is no record that the Applicant's representative filed an updated medical report with the Tribunal. The only reference to such request is contained in the letter of the Applicant's representative dated April 30, 2014 and received May 1, 2014. In this letter, the Applicant's representative requested "a short extension in order to secure our witness or medical report." (GT3-4). The hearing which was originally set for September 4, 2014 was not held until February 11, 2015. Thus, the Applicant's representative had ample time to make additional submissions to the General Division.

[21] In the Addendum to its submissions, the Respondent's representative refers to additional evidence that had been submitted by the Applicant's representative since the Respondent filed its written submissions with the General Division. (GT4-3) The Tribunal

received a copy of both the submissions and the Addendum to the submissions on September 26, 2014. (GT4-1-5) The Appeal Division infers that the Respondent representative was referring to the documents filed by the Applicant's representative on April 01, 2014 (GT-2) and to its initial explanation of the decision under appeal. In GT2 the Applicant's representative submitted further medical documentation from Dr. Terry McVey, who noted that the Applicant was suffering from the effects of lumbar radiculopathy and from Dr. Sudhir Nagpal regarding the Applicant's claudication and vascular issues.

[22] The General Division took care to address the actions of the Applicant's representative when he indicated his readiness to proceed with the hearing. Given this attention to detail, the Appeal Division finds it more likely than not that, had he done so, the General Division would also have addressed any decision to exclude the Applicant's submissions.

[23] Given all of the above circumstances, the Appeal Division is not persuaded that the Applicant's representative has made anything more than a bald allegation without any supporting material. (AD2-2) Accordingly, the Appeal Division is not satisfied that this is a ground of appeal that would have a reasonable chance of success.

Did the General Division err in fact?

[24] The Applicant's representative submitted that the General Division based its decision, in part, on an erroneous finding of fact that was made without regard for the material before it. He argued that pursuant to *Villani v. Canada (Attorney General)* 2001 FCA 248, the General Division was required to include the circumstances of the Applicant's wife in its real world analysis because her circumstances impacted upon the Applicant's ability to pursue any substantially gainful occupation. He argued that it was an error of law for the General Division to do no more than mention that the Applicant's wife was receiving a CPP disability pension as a cancer survivor who was currently undergoing treatment for bone cancer.

[25] He placed further reliance on the Appeal Division decision in *N.A. v. Canada (Minister of Social Development)* 2015 SSTAD 858 which he stated stood for the proposition that the General Division was obliged to consider the evidence and not merely note it, otherwise, it constituted an "error of fact and the basis for the grant of leave". The Appeal Division does not

agree with his interpretation of either case. In any event, decisions of the Appeal Division are of persuasive, as opposed to binding, value on the General Division. Accordingly, it would not be an error of law for the General Division to refuse to follow a decision of the Appeal Division.

[26] While there is clear support in the case law for the position that it is an error of law to do no more than set out the evidence and then to state a conclusion regarding that evidence, *(Marrone v. Canada (Attorney General)*, 2008 FCA 216, the Appeal Division is not persuaded that the General Division made any such error in relation to the evidence of the personal circumstances of the Applicant's spouse.

[27] The Appeal Division knows of no case where the personal circumstances of an applicant's family member has been found to be determinative or even a relevant consideration in the assessment of whether that applicant meets the definition of severe and prolonged. Neither the Applicant nor his representative has pointed the Appeal Division to such a case. Nor is the Appeal Division persuaded that *Villani* envisioned such a circumstance as being part of a "real world" analysis to be applied to an applicant for CPP disability benefits. Accordingly, the Appeal Division finds that the General Division did not base its decision on an erroneous finding of fact which it made in a perverse or capricious manner or without regard for the material before it as submitted by the Applicant's representative. Leave to appeal cannot be granted in respect of this submission.

Did the General Division err in law, whether or not the error appears on the face of the record?

[28] The Applicant's representative submitted that there were three areas in which the General Division committed an error of law, namely, with respect to:-

1) Its interpretation and application of the definition of "prolonged disability."
2) Its application of the decision of the Pension Appeals Board, (PAB), in *Canada (Minister of Employment and Immigration) v. Gaspich (1994) CP02592* (PAB).
3) Its application of *Villani*.in that the General Division failed to consider the totality of the Applicant's medical conditions.

The General Division misapplied the definition of "prolonged disability".

[29] The Applicant's representative submitted that the General Division erred in law by misapplying the definition of prolonged. He took the position that there was ample evidence from the Applicant and his witnesses that the Applicant's surgery had not resulted in an improvement in his medical conditions belying the speculative prognoses for his recovery; thus, there remained uncertainty about the duration of his disability. He made the further submission that in light of these factors, had the General Division properly understood the Applicant's prognosis it would have found that he met the test of "reasonable uncertainty" with respect to the prolonged aspect of the definition, as both the Applicant and his witnesses had testified that surgery was not successful in relieving the Applicant's symptoms to a functional level. (AD2-4) At paragraph 67 of its decision, the General Division found that this latter submission appears to have been contradicted by Dr. Nagpal as well as by the Applicant:-

> [67] … the evidence does not indicate that the Appellant's surgery was not successful. The objective of the surgery was to alleviate the claudication and the surgery did that. On June 22, 2011, Dr. Nagpal reported that, as a result of surgery, the Appellant now had pulses in his feet and his feet were warm and well perfused.

[30] The Appeal Division finds no error on the General Division's part arising from its finding.

[31] The Applicant's representative alludes to a test of "reasonable uncertainty." In this he relies on the *dicta* in *MNHW v. Lauzon*, (October 2, 1991), CP2126 as well as the CPP Adjudicative Framework, which neither guides nor binds the Tribunal. In *Lauzon,* the PAB framed the question in terms of whether an applicant's "return to the work force in whatever capacity within a reasonable time is medically uncertain" and, therefore, prolonged.

[32] Even if the *Lauzon* test could be applied to the Applicant's circumstances, the definition of disability in the CPP hinges on a finding that an applicant meets both of its criteria. Thus, the medical or mental health condition must be found to be both severe and prolonged. A finding that a disability is severe without a concurrent finding that it is prolonged, and vice versa, will not be sufficient to bring an applicant within the CPP definition. The General Division did not make such a finding. It examined the Applicant's situation in three distinct time periods; pre-

vascular surgery; post-surgery to fall 2011; and late fall 2011 to the MQP. The General Division found that in none of these time periods could the Applicant be found to be suffering from a condition that was both severe and prolonged. (para 78)

[33] That the Applicant disagrees with this finding is clear, however, the arguments put forward in objection to the finding had been raised before the General Division which had the opportunity to assess them in light of the evidence presented at the hearing. The Appeal Division finds that, essentially, the Applicant is asking that it reweigh that evidence, which per *Tracey*, is not the job of the Appeal Division. Therefore, the Appeal Division is not satisfied that, in this respect, the Applicant has raised a ground of appeal that would have a reasonable chance of success.

The General Division erred in its treatment of *Gaspich*

[34] The Applicant's representative submitted that the General Division erred when it concluded that the decision in *MEI v. Gaspich*, CEB PGR 8539 (PAB) was of no assistance. He submitted that the relevance of the decision in *Gaspich* lay in the fact that her medical condition failed to improve substantially after the surgery. The General Division distinguished *Gaspich* on two grounds. One, the symptoms "remained more or less the same before and after her surgery" and, two, that the favourable prognosis followed the surgery. By contrast, the General Division found that the favourable prognosis preceded surgery to the Applicant's right leg which improved following the surgery. The General Division based its conclusions that it could not find that Dr. McVey's prognosis was incorrect on the Applicant's testimony that his right leg had improved some 60% as a result of the surgery. As the "trier of fact" the General Division weighed the evidence and concluded that the surgery was successful in that it largely achieved its objective. (para 67) The Appeal Division finds no error in the way the General Division treated the *Gaspich* decision, which in any event it did not have to follow.

[35] The Applicant's representative submitted that the General Division should have considered subsequent events, namely, the complications that followed the surgery in order to determine if the pre-surgery prognosis was correct. He submitted that the General Division did not understand the prognosis otherwise it would have come to a different conclusion.

[36] The Appeal Division is not so persuaded as it finds that the General Division demonstrated its appreciation of the pre-surgery prognosis, namely, that the outcome was dependent upon the surgery being successful. (para 65) The General Division also specifically examined the post-surgery events and prognosis of Dr. Nagpal. It conceded that post-surgery the disability was likely severe, however, the General Division was unable to conclude that it was prolonged due to the absence of objective medical evidence, namely follow-up reports from Dr. Nagpal.

[37] The Applicant's representative posits that there was sufficient evidence before the General Division namely, the medical documentation that established his difficulty with his left leg and post-surgery complications as well as the oral testimony of the witnesses, to allow it to find that after the surgery, the Applicant's medical conditions were both severe and prolonged. This, in the view of the Appeal Division calls for a re-weighing of the evidence as opposed to a determination of whether an error has occurred. As stated earlier, it is not the role of the Appeal Division to reweigh the evidence. Leave to appeal cannot be granted in this regard.

The General Division failed to consider the totality of the Applicant's medical conditions

[38] The Applicant's representative conceded that per *Villani*, medical documentation is required in order to establish a severe and prolonged disability. However, he took the position that the General Division "focused too heavily on the medical documentation without considering the totality of the evidence of four witnesses on the impact of the disability on the Applicant." Again, this submission is concerned with the way in which the General Division weighed evidence. Bearing in mind that the operative date is December 31, 2013, the Appeal Division does not find that the General Division disregarded the oral testimony that was given at the hearing, much of it being concerned with the applicant's current or post-MQP situation. Inherent in the General Division decision is an expectation that, were the Applicant' symptoms are described, there would be objective medical evidence to support them. The Appeal Division finds that this is not a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[39] The Applicant's representative submitted that the General Division failed to observe a principle of natural justice or otherwise acted beyond its jurisdiction; erred in law; and based its decision on erroneous findings of fact that it made without regard for the material before it in various ways. Having considered the totality of his submissions as well as the Tribunal record including the decision of the General Division, the Appeal Division is not satisfied that grounds of appeal that would have a reasonable chance of success have been raised. Therefore, the Appeal Division refuses leave to appeal.

[40] The Application is dismissed.

Hazelyn Ross
Member, Appeal Division