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

Citation: *J. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 348

Tribunal File Number: AD-16-126

BETWEEN:

J. R.

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: September 7, 2016

Canada

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 3, 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, 2009. However, the Applicant did not perfect his application requesting leave to appeal until March 2, 2016, close to one year after the day on which the decision of the General Division had been communicated to him.

[2] For this application to succeed, one, I must be satisfied that

i. the application was filed on time, or that circumstances warrant an extension of time to file the application, and

ii. that the appeal has a reasonable chance of success.

FACTUAL BACKGROUND

[3] The relevant facts for the purposes of this application are as follows:

- The Applicant requested leave to appeal on April 23, 2015, on two grounds: (1) the General Division had rendered its decision without all of the available medical evidence; and (2) it did not assign the appropriate weight to the evidence. His covering letter was virtually the same as his letter dated October 29, 2011 (GT1-08), although he re-dated it to April 17, 2015 (AD1-1). The recent letter indicates that his family physician reports that he continues to deal with several medical conditions.

- On January 12, 2016, the Social Security Tribunal wrote to the Applicant, advising him that his application was incomplete and that he had to identify the reasons for his appeal. The SST also required that he explain why his

leave application had a reasonable chance of success by no later than February 12, 2016, otherwise it would consider the application to have been received on the date when it received all of the requested information. The Applicant contacted the SST on January 20, 2016, to seek clarification of its requirements.

- The Applicant subsequently retained the services of a representative. On February 8, 2016, she requested an extension of time to file a leave to appeal application (having understood that the appeal was incomplete). The extension would enable her to obtain and review the audio-recording of the hearing before the General Division.

- On February 19, 2016, the SST informed the Applicant's representative that the Acting Vice-Chairperson of the Appeal Division refused her request for an extension. On the same day, the representative acknowledged the refusal. She indicated that she would "submit grounds on the weekend". However, she did not file these until March 2, 2016, although she wrote on the application that the submissions had been "received pursuant to the deadline date of March 3rd, 2016".

LATE APPLICATION

[4] Paragraph 57(1)(b) of the *Department of the Employment and Social Development Act* requires an application for leave to appeal to be made to the Appeal Division in the prescribed form and manner within 90 days after the day on which the decision was communicated to an appellant (in the case of a decision made by the Income Security section). Under subsection 57(2) of the DESDA, the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to an appellant.

[5] The Applicant filed an initial leave to appeal application on April 23, 2015, well within the 90-day filing period. However, the SST determined that his application was

"incomplete". The SST received what it considered a "completed" application on March 2, 2016, more than 90 days after the day on which the decision of the General Division had been communicated to the Applicant.

[6] If I determine that the initial application was incomplete, this would open up two issues:

(a) must an application be "perfected" (i.e. be in the prescribed form and manner) before it can be considered to have been made, for the purposes of paragraph 57(1)(b) of the DESDA and section 40 of the *Social Security Tribunal Regulations*?

(b) if so, does the Applicant meet the four criteria set out in Canada (Minister *of Human Resources Development) v. Gattellaro,* 2005 FC 833, and would it serve the interests of justice to exercise my discretion to extend the time for filing the application?

[7] Other than for the fact that the Applicant had not provided a copy of the decision in respect of which leave to appeal was sought, there is an argument to be made that he had otherwise made what could be regarded as a "completed" application on April 23, 2015, well within the 90-day filing period. Subsection 40(1) of the *Regulations* requires that an application contain grounds. The Applicant had provided some grounds of appeal in the initial application. The Applicant may not have succeeded in proving that they were grounds of appeal under subsection 58(1) of the DESDA, or that the appeal had a reasonable chance of success, but nevertheless, he had provided some grounds.

[8] In any event, the circumstances of this case warrant an extension of time for filing. The Applicant filed additional submissions and grounds before a full year elapsed after the decision of the General Division had been communicated to him. He readily fulfills at least three of the criteria set out by the Federal Court in *Gattellaro:*

(1) he held a continuing intention to pursue the application or appeal, as evidenced by filing the initial application for leave to appeal and, upon learning that the SST considered his application "incomplete", he

immediately contacted the SST and subsequently retained the services of a representative to assist him;

(2) he has a reasonable explanation for the purported delay, as he did not learn that the SST considered his application incomplete until January 2016. Once he learned of the delay, he immediately contacted the SST and then retained the services of a representative; and,

(3) there is no prejudice to the other party in allowing the appeal.

[9] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (CanLII), the Federal Court of Appeal held that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions – the last of these being whether the matter discloses an arguable case - relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour. Therefore, had the timeliness of the filing of a complete application within 90 days after the decision of the General Division had been communicated to him been an issue, I would have found it to be in the interests of justice to exercise my discretion and grant an extension of time for filing leave to appeal.

APPLICATION REQUESTING LEAVE TO APPEAL – GROUNDS OF APPEAL

[10] 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.

[11] 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) New evidence

[12] The Applicant filed several medical records with his initial application, some of which were obtained after the hearing before the General Division. He suggests that it was a breach of natural justice that the General Division assessed his disability before it received these records, given that it was the Respondent which requested them.

[13] There is no indication from the Applicant whether he sought an adjournment of the proceedings to await receipt of these additional medical records, or that the General Division was ever notified that additional medical records might be forthcoming. On that basis, I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division breached a principle of natural justice in ensuring that it had a full medical history before it. In any event, the burden of proof rests with a claimant to prove his case. This requires him to adduce whatever evidence is necessary to establish that his disability was severe and prolonged, and if that evidence is unavailable by the time of the hearing, to seek an adjournment of the proceedings. I do not see that that occurred in this case.

[14] The Applicant relies on these additional records to prove that his disability was severe, but the Federal Court pronounced in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503 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. From this, it is also apparent that an appeal does not provide any opportunities for a reassessment. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Weight of evidence

[15] The Applicant argues that some weight should be assigned to the fact that he has met one of the rules to qualify for a disability pension. This argument appears to relate to the additional medical records.

[16] 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 several medical reports which she argued 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.

[17] For the most part, the Applicant is seeking a reassessment on the issue of whether he was severely disabled. 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.

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

(c) "Real world" analysis

[19] In his recent submissions, the Applicant claims that the General Division failed to apply the principles set out in *Villani v. Canada (Attorney General),* 2001 FCA 248, in that it failed to apply a "real world" approach when assessing the severity of the Applicant's disability. The Applicant argues that this consists of two parts: (1) an applicant's personal

characteristics such as his age, education, language proficiency and past work and life experience; and (2) the totality of his medical condition, not just his primary impairments. In particular, the Applicant alleges that the General Division not only failed to consider his age, education, work history and training, but that it also failed to consider that he has a poor memory, is unable to drive or sit for prolonged periods, does not have restorative sleep and most importantly, experiences symptom aggravation with even brief activity. The Applicant submits that the decision of the General Division is contrary to *S.T. v. Minister of Employment and Social Development*, 2015 SSTAD 65 and *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

[20] The General Division indicated in its analysis that it was guided by the principles set out in *Villani*. It wrote:

> [29] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.
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> [33]The Appellant is still relatively young. He was in his thirties when he was injured. There is no objective evidence of any physical or cognitive impairment that would have prevented him from at least trying to learn English, upgrade his education, or train for a sedentary job. While depression was noted in October 2011, there is no evidence that it was a concern at or near the Appellant's MQP of December 31, 2009, nor is there evidence that the Appellant has made use of all treatment methods such as counselling or medication adjustments. The Appellant was urged to become more active by Dr. Fenton.

[21] The Federal Court of Appeal cautions against interfering with a trier of fact's assessment of an applicant's circumstances. At paragraph 49, Isaac J.A. wrote:

> [49] Bearing in mind that the hearing before the Board is in the nature of a hearing *de novo*, as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is

> incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances i s a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[22] If the General Division considers an appellant's personal circumstances, that assessment generally ought not be interfered with. It is inappropriate for me to consider the Applicant's personal characteristics, as this would, in essence, amount to undertaking a reassessment of the evidence.

[23] It is implicit from paragraph 33 of its decision that the General Division considered the Applicant's age, education, language proficiency and past work and life experience.

[24] I have reviewed the clinical records of the family physician primarily for 2009 and 2010, mindful that the Applicant's minimum qualifying period ended on December 31, 2009. While the Applicant mentioned in a December 2010 questionnaire that he had problems with his memory, was unable to sit for more than 10 minutes, and encountered sleep disturbance because of his pain, I do not see that there were any corroborating entries in the family physician's records that the Applicant suffered from poor memory, non-restorative sleep or limitations with driving or sitting for prolonged periods of time (other than for sitting cross-legged) within this timeframe. While the records document that the Applicant's symptoms were aggravated with activity, the symptoms were confined to his left knee. He also experienced increased neck and back pain and stiffness while in a prolonged single position (i.e. for more than 20 to 30 minutes) and repetitive bending. While the Applicant indicated in the questionnaire accompanying his application for a disability pension that he endured poor sleep, the only mention of this in the clinical records was immediately following his motor vehicle accident in December 2008. Otherwise, the family physician's clinical records do not mention any sleep issues until September 2011 and again in October 2011, and sleeping aids made him very drowsy. Indeed, the family physician's initial medical report dated December 8, 2010 makes no mention of these (GT1-104 to GT1-107).

[25] While I agree with the general premise that the General Division is required to consider the totality of the evidence before it, in this particular case, I am unable to locate any evidence in the documentary record that the Applicant was plagued by poor memory, physical impairments with prolonged sitting and driving, and non-restorative sleep, or that they contributed to the severity of his disability, by the end of his minimum qualifying period at December 31, 2009.

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

(d) Applicant's *viva voce* evidence

[27] The Applicant claims that the General Division neglected to consider his testimony. However, he did not identify any particular aspects of his testimony which he suggests the General Division should have considered, i.e. were probative of the issues. His representative maintains that the decision General Division was "rendered as if there was no *viva voce* evidence presented and effectively ignored the Applicant's oral testimony".

[28] The General Division referred to the Applicant's testimony in its evidence section, at paragraphs 12, 14 and 22 to 25. The Applicant testified about his depression, sleep issues and general pain. He also testified that he takes some medication, but that otherwise, he no longer does any physiotherapy or massage therapy because of financial limitations. The Applicant also testified about some of his limitations and restrictions. The General Division did not reproduce nor refer to any of the Applicant's specific testimony or, for that matter, any of the specific medical evidence in its analysis section, other than referring to the opinion of Dr. Fenton. However, the General Division addressed what it considered were the primary issues, and it could not have made findings on these issues without a consideration of the evidence. Unless an Applicant identifies specific pieces of evidence, and indicates what probative value they might have had, I would generally defer to the General Division's assessment of the evidence. After all, the Supreme Court of Canada has indicated that a decision-maker need not refer to every argument or detail, or to make findings on each element the reviewing judge would have preferred: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62.

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

(e) Consideration of medical evidence

[30] The Applicant argues that the General Division ignored various aspects of the medical evidence, as follows:

- the Applicant's persistent left knee pain which affected his daily functioning (AD1C-5, para 21);
- the results of a functional capacity assessment, including "decreased left hand grip strength, increased pain with resisted left arm activity, slow left hand, sitting tolerance of 20 to 45 minutes, work intensive sitting tolerance of 15 minutes, standing tolerance of 15 to 35 minutes and walking tolerance of 5 minutes at a slow pace on a flat surface". The family physician referred to the functional capacity assessment in his report of December 9, 2011 (AD1C-5, para. 22);
- the family physician's medical opinion dated October 26, 2011, which addresses the Applicant's functionality and work capacity, taking into account his personal characteristics (AD1C-6, para. 23); and
- the objective results of testing conducted by the family physician throughout 2009 and 2010 (AD1C-6, para. 24).

[31] The Applicant argues that the General Division ignored the Applicant's persistent left knee pain. The General Division did not specifically refer to this condition in its analysis, but set out the history of complaints and treatment in paragraphs 15 to 19, 21 and 22 in its summary of the evidence. At paragraph 15, the General Division noted that the Applicant's left knee worsened with certain activities, such as sitting cross-legged. At paragraph 20, the General Division also noted the family physician's reference to the functional capacity assessment of October 14, 2011, following which the occupational therapist determined that the Applicant had the physical capacity to perform part-time sedentary work with flexible sitting commands.

[32] The Applicant argues that the General Division failed to consider the objective testing undertaken by the family physician in 2009 and 2010, or the family physician's medical report of October 26, 2011. The General Division did not directly mention the October 26, 2011 report (GT1-36), but clearly referenced it at paragraph 31 of its analysis. However, the family physician prepared a report dated December 9, 2011, in which he provided a medical history dating back to the Applicant's first motor vehicle accident in October 2007. The family physician set out the complaints and limitations expressed by the Applicant since then. It was therefore reasonable for the General Division to largely rely on the family physician's report of December 9, 2011 as a summary of his most salient opinions and findings, including the results of any testing and his opinion on the Applicant's functional limitations and work capacity.

[33] The General Division did not have a copy of the functional capacity assessment dated October 14, 2011, but it was referred to in the family physician's medical report of December 9, 2011. The General Division referred to the family physician's December 2011 report at paragraphs 15, 16 16 and 19 in its evidence section. The Applicant suggests that the General Division could not have considered aspects of the functional capacity assessment if it did not fully address the report or aspects of it in its reasons. However, this seems to suggest that there is a duty on the General Division to provide comprehensive reasons. As the Supreme Court of Canada held in *Newfoundland and Labrador Nurses' Union*:

> 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.*, [1975] 1 S.C.R. 382, at p. 391).

[34] The Applicant further argues that the General Division erred by finding that there was "no objective evidence of any physical or cognitive impairment that would have prevented him from at least trying to learn English, upgrade his education, or train for a sedentary job". The Applicant claims that there are "pages of objective medical information" and noted physical limitations. The Applicant notes, for instance, that the hearing file also

includes diagnostic examinations, such as x-rays, CT scans and MRIs. The Applicant maintains that there was both objective and subjective evidence to show that he does not have the capacity to retrain or learn English.

[35] The General Division referred to some of the diagnostic examinations, the various medical opinions and some of the Applicant's physical limitations in the evidence section. The General Division clearly was aware of this evidence and from it, concluded that it did not establish that the Applicant had any physical or cognitive impairment that would have prevented him from at least trying to learn English, upgrade his education or train for a sedentary job.

CONCLUSION

[36] For the reasons set out above, the application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division