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

Citation: *D. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 374

Tribunal File Number: AD-16-291

BETWEEN:

D. M.

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: Hazelyn Ross

Date of Decision: September 28, 2016

Canada

REASONS AND DECISION

INTRODUCTION

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

INTRODUCTION

[2] The Applicant applies for leave to appeal, (the Application), from the decision of the General Division of the Tribunal issued November 17, 2015. The decision determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* (CPP).

GROUNDS OF THE APPEAL

[3] On his behalf, Counsel for the Applicant submitted that the General Division breached the three grounds of appeal set out at subsection 58(1) of the *Department of Employment and Social Development, (DESD), Act.* She submitted that the General Division, variously, failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; 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. (AD1-4)

ISSUE

[4] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE GOVERNING STATUTORY PROVISIONS

[5] Subsections 56(1) and 58(3) of the DESD Act govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. 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."

[7] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[8] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

[9] *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.

ANALYSIS

The General Division based its decision on erroneous findings of fact.

[10] Counsel for the Applicant submitted that there were a number of contradictions in the General Division decision. She pointed out that at paragraphs 54 and 56, the General Division acknowledged that the attacks pre-dated the end of the Applicant's minimum qualifying period, (MQP). However, at paragraph 61, the General Division stated that the attacks "are of recent

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

onset". Counsel for the Applicant submitted that this was an error of fact that rendered the decision unsafe.

[11] The Tribunal record includes references to the Applicant suffering panic attacks in April 2010. (GD4-73) It is not clear to the Appeal Division what the GD meant by "recent onset". Thus, the Appeal Division finds that it is open to question whether the General Division erred in its appreciation of the evidence regarding the Applicant's panic attacks. Accordingly, an arguable case has been raised in this regard for which leave to appeal is warranted.

[12] In addition to this error, Counsel for the Applicant submitted that the General Division made erroneous findings of fact in regard to the Applicant's migraines and his rotator cuff injury. Counsel for the Applicant also submitted that the General Division failed to mention the "other diagnoses that had been made by Dr. Athwal, or erred by considering them abnormal."

[13] In respect of the Applicant's migraines, counsel for the Applicant submitted that the General Division erred when it stated at paragraph 54 that it was only in 2013 that the Applicant was bothered by migraines. She submitted that there was objective medical evidence that the Applicant suffered from mixed headaches as far back as April 2009.

[14] On considering the General Division's statement, the Appeal Division is not persuaded that it should be read as Counsel for the Applicant submitted. The statement was, "all of the Applicant's conditions pre-date the MQP although the migraine headache had seemingly not bothered the Appellant for some years until reference is made to them in 2013." In the Appeal Division's view, the statement is no more than an observation that it was only in 2013 that the migraine headaches appear to have become truly debilitating. The Appeal Division makes this inference based on the submissions made by the Respondent, which acknowledges that the Applicant "has had headaches since at least 1995;" but which also notes that despite this condition "he has been able to achieve substantially gainful employment in spite of this problem." (GD7-3)

[15] With respect to the Applicant's migraine condition, the Tribunal record shows the following:-

> Dr. Tabor investigated the applicant for possible migraines on Tuesday August 20, 2013; (GD4-157)
>
> The patient Medical history at GD6-11 shows that the Applicant was prescribed Mylan-Sumatripan for migraine but not the date on which the prescription was made;
>
> On Thursday April 24, 2014, Dr. Tabor noted "migraines have been bad of late";
>
> Dr. Tabor's consultation notes of May 8, 2014 stated "he does get frequent migraines approximately 4-5 times a week. (GD6-46)
>
> On June 13, 2014, Dr. Tabor noted that he would taper the Applicant off Verapamil as it does not seem to be very effective for migraine prophylaxis. (GD6-31)

[16] All of these consultations post-date the MQP. It is, therefore, difficult to find that the General Division erred when it concluded that the Appellant's migraines only became a significant issue in 2013. Indeed, at paragraph 56, the General Division admitted the existence of the applicant's migraine condition prior to the MQP. Accordingly, the Appeal Division is not satisfied that this submission discloses grounds of appeal that would have a reasonable chance of success.

[17] The Appeal Division is also not satisfied that the submission that the General Division disregarded Dr. Athwal's prognosis that he could offer the Applicant little surgically for his rotator cuff injury discloses a ground of appeal that would have a reasonable chance of success. The Applicant consulted with Dr. Athwal on October 17, 2012. Dr. Athwal issued a report after the consultation in which he stated:-

> "D. M. was seen today in follow up to review his MRI. To summarise, this gentleman is a 46-year-old gentleman with a hypoplastic glenoid. This is a congenital problem. He did sustain a workplace injury which was a slip and fall. Since this time he has had excruciating pain within the shoulder. He did have an ultrasound which demonstrated findings consistent with a rotator cuff tear. This may have been because of his baseline hypoplasia. We arranged for him to undergo an MRl. Fortunately, the MRI demonstrates a substantially intact cuff. He has no full-thickness rotator cuff tears. As such I do not believe surgical intervention is warranted at this time. His symptoms are more In keeping with rotator cuff tendinitis exacerbated due to a fall at work. D. M. is difficult to examine in that he does have hypersensitivity, allodynia and hyperpathia. As there is little I can

> offer him surgically at this juncture, I have not made a formal follow-up visit with him and have discharged him from care." (GD2-41)

[18] Given that Dr. Athwal found that the Applicant did not have a tear in his rotator cuff, his comment that he did not believe surgical intervention was warranted becomes clear. Therefore, if the General Division made no reference to Dr. Athwal's statement, no error or no material error arises from the omission. Accordingly, this submission, too, does not disclose a ground of appeal that would have a reasonable chance of success.

[19] Counsel for the Applicant also indicated that the General Division did not consider the new diagnoses that Dr. Athwal made, namely, "hypersensitivity, allodynia and hyperpathia." (GD2-41) She argued that the General Division also failed to mention that "Dr. Athwal during that visit diagnosed Mr. D. M. with a hypoplastic glenoid, which is a very rare congenital shoulder pathology. Dr. Athwal further indicated that Mr. D. M. was difficult to examine as he has hypersensitivity, allodynia and hyperpathia and Member Patterson defined these three conditions as "abnormally painful reactions to stimuli".

[20] Counsel for the Applicant provided definitions for these conditions. She stated that, "According to The Medical Dictionary:-

> a. "Hypersensitivity" is a state of altered reactivity in which the body reacts with an exaggerated immune response to a foreign agent. There are several subcategories of hypersensitivity.
> b. "Allodynia" is a condition in which ordinary non-painful stimuli evoke pain.
> c. "Hyperpathia" is excessive sensitivity and a raised threshold to painful stimuli."

[21] Counsel made the further submission that the General Division committed an error of fact "by concluding that the aforementioned conditions are abnormal; and therefore, carry negative connotations.

[22] In its decision, the General Division referenced the following conditions: fibromyalgia, left shoulder pain, chronic pain syndrome, depression, anxiety and migraines as ones to consider in its determination of whether the Applicant met the threshold for severe and prolonged disability. (para. 53) It also noted that in April 2010, the Applicant's family physician diagnosed him as having memory problems, among other medical issues. (para. 54 (c)

Thus, it is clear that the General Division did consider the Applicant's memory and concentration issues. However, the General Division found that despite suffering from these conditions, it could not find that, on or before the MQP, they met the CPP definition of "severe and prolonged" disability as the Applicant had been able to work despite the presence of these conditions. (para. 55).

[23] So far as the new diagnoses are concerned, the General Division noted at paragraph 34, that they had been made. It referred to the diagnoses as all describing an abnormal painful reaction to a stimulus. While it is not clear from which medical dictionary the definitions proffered originate, it is clear to the Appeal Division that the definitions all describe conditions that demonstrate an abnormal painful reaction to a stimulus, which is exactly what the General Division found. Therefore, this is a submission that does not disclose a ground of appeal that would have a reasonable chance of success.

The General Division erred in law

[24] Counsel for the Applicant also submitted that in discussing why the Applicant could not be retrained, the General Division ignored medical evidence. She contended that in their medical reports Dr. Warsi and Dr. Harth spoke to the issues with memory and concentration that the Applicant has had from the time he sustained a head injury in 1995. She argued that the General Division had ignored these reports.

[25] At paragraph 59, the General Division discussed the Applicant's failure to attempt retraining, stating:-

> [59] The Tribunal is unable to determine any reason why the Appellant could not have retrained for a less physically demanding position at any time between his termination from employment in 2009 and the MQP. The Tribunal recognizes that during this period the Appellant was hospitalized on several occasions for depression, gambling addiction and suicidal ideation but the Tribunal notes Dr. Mejia's report in 2007 that the Appellant's depression was recurrent (and at that time in complete remission). It appears to the Tribunal that the Appellant's hospitalizations for depression were related to

immediate and limiting situations: the Appellant's marital breakdown and a gambling disorder both of which have been apparently resolved.

[26] Dr. Warsi's report is dated February 18, 2010. The Applicant consulted him with respect to his problem gambling. (GD1B-74) He noted some lapses in memory "for remembering some dates in the past.

[27] Dr. Harth described the Applicant's memory problems as moderate. (GD1B-55)

[28] The General Division noted the Applicant's memory issues but did not elaborate on them in her analysis of why he did not seek retraining. However, in the context of its finding that the Applicant was able to work well past the date of his MQP, the Appeal Division finds that in not elaborating on the Applicant's memory issues in regard to its discussion of his failure to attempt retraining was immaterial to the outcome of the decision. No ground of appeal that would have a reasonable chance of success is disclosed.

[29] Counsel for the Applicant submitted that the General Division erred in law in that it failed to properly apply the case law, including that of *Villani v. Canada (Attorney General),* 2001 FCA 248; *Garrett v. Canada (Minister of Human Resources Development)* 2005 FCA 84; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; and *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[30] With respect to *Villani,* Counsel for the Applicant argued that the General Division cited but focused its analysis on its observations of only certain of his characteristics, namely that he was "relatively young, intelligent and well spoken."

[31] The Appeal Division is not persuaded that the General Division's "real world" analysis was deficient. The General Division identified not only the Applicant's physical and intellectual characteristics; it also acknowledged his considerable work experience. In addition, the General Division related the Applicant's life and work experience to his medical conditions, and his ability to obtain and maintain employment. Based on its analysis, the General Division was satisfied that the Applicant could work within his physical limitations. (para. 55) It held that

“his motivation, experience and knowledge would be desirable in any candidate for a less physically challenging position in the food service field”. The General Division may not have come to conclusions that were satisfactory to the Applicant; however, on the basis of the above analysis, the Appeal Division is not persuaded that it failed to make the relevant analysis. Therefore, this is not a ground of appeal that would have a reasonable chance of success.

[32] In addition, Counsel for the Applicant submitted that the General Division erred by failing to consider that the while the Applicant believed he could work in a supervisory or management capacity in food service, he never found such a position. The Appeal Division finds that this argument does little to advance the issue. The question is not whether the Applicant found a job in a supervisory or managerial position; it is whether he made any attempt to find alternate work. In any event, in making the statement, the General Division was merely repeating the Applicant’s evidence. No error arises from this submission.

[33] Counsel for the Applicant submitted that the General Division erred in law when it failed to discuss how the Applicant’s physical and psychological impairments made him employable in a real world situation. The Appeal Division does not agree. The General Division did engage in an extensive discussion of the Applicant’s physical and psychological issues, but found that, as of the MQP, they did not amount to a severe disability. The Appeal Division finds that this objection goes to the weight the General Division gave to the evidence. Per *Tracey,* it is not the role of the Appeal Division to reweigh the evidence.

[34] It was also submitted that the General Division did not consider all of the Applicant’s conditions when it determined that his impairments were not severe. Counsel submitted that the General Division did not “consider the impact of the Appellant's chronic pain in his left shoulder and resulting limitation; ongoing migraines headaches; fibromyalgia; anxiety and depression; non-restorative sleep and resulting cognitive impairments on his ability to sustain regular substantially gainful employment.”

[35] The Appeal Division is not persuaded by this submission. In its view, the General Division did consider the totality of the Applicant’s conditions noting at paragraph 56 that, “the more difficult question is whether the Appellant’s depression, anxiety and panic attacks in combination with his physical condition render his disability severe.” This clearly indicates that

the General Division did turn its mind to the totality of the Applicant's conditions. Indeed, the General Division went on to discuss the submissions of Counsel for the Applicant as to why his psychological conditions rendered him incapable regularly of pursuing any substantially gainful occupation. Leave to appeal is not granted in this regard.

[36] With regard to the argument that the General Division failed to assess the Applicant's disability as of the MQP, the Appeal Division is of the view that this is a nice argument that fails to consider that at the outset the General Division made it clear that the assessment was in relation to the Applicant's MQP of December 31, 2011. For the same reason, the Appeal Division is not persuaded by the submission that the General Division did not "closely examine the Applicant's health status as of the date of his MQP".

[37] Counsel for the Applicant submitted that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. The Appeal Division finds that no specific submissions have been made in this regard. Further, the grounds that were put forward address either an error of law, or an error of fact. Accordingly, no ground of appeal is disclosed in relation to this submission.

CONCLUSION

[38] Numerous submissions were put forward to support the position that the General Division either erred in law, whether or not the error appears on the face of the record; or based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. The Appeal Division finds that only one of these submissions points to a possible error on the part of the General Division. Leave to appeal is granted with respect to the issue of whether the General Division misapprehended the evidence concerning the onset of the Applicant's panic attacks.

[39] Accordingly, the Application is granted.

Hazelyn Ross
Member, Appeal Division