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

Citation: *S. N. v. Minister of Employment and Social Development*, 2016 SSTADIS 380

Tribunal File Number: AD-15-1038

BETWEEN:

**S. N.**

Appellant

and

**Minister of Employment and Social Development**
**(formerly known as the Minister of Human Resources and Skills Development)**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Janet Lew

HEARD ON: April 1, 2016

DATE OF DECISION: September 28, 2016

Canada

## REASONS AND DECISION

## IN ATTENDANCE

| | |
|---|---|
| Appellant | S. N. and<br>J. K. (supporter) |
| Representative for the Respondent | Christine Singh (counsel) |

## OVERVIEW

[1] This appeal is about whether the General Division based its decision of June 18, 2015 on an erroneous finding of fact in regards to a physician's opinion on the Appellant's prognosis. The General Division determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that he did not have a severe and prolonged disability before the end of his minimum qualifying period (MQP) on December 31, 2011. The Appellant filed an Application Requesting Leave to Appeal to the Appeal Division on September 21, 2015. I granted leave to appeal on December 14, 2015. This hearing proceeded by videoconference on April 1, 2016, during which I sought written submissions from the parties.

## ISSUES

[2] There are two issues before me:

i. did the General Division base its decision on an erroneous finding of fact that it made without regard to the material before it?

ii. irrespective of whether the General Division made an erroneous finding of fact without regard to the material before it, should I defer to its findings?

## BRIEF HISTORY OF PROCEEDINGS

[3] The Appellant applied for a Canada Pension Plan disability pension on November 16, 2011. The Respondent denied his application initially and upon reconsideration. The Appellant appealed the reconsideration decision and the appeal was heard by the General Division.

[4] The General Division dismissed the appeal. The Appellant sought leave to appeal on a number of grounds. Leave to appeal was granted on the ground cited above, that the General Division may have based its decision in part on an erroneous finding of fact that it made without regard to the material before it.

## GENERAL DIVISION DECISION

[5] In its summary of the medical evidence, the General Division referred to the medical report dated October 26, 2011 of Dr. M.J. Smit, where she wrote that the Appellant had a "very good" prognosis. The General Division also referred to Dr. Smit's July 12, 2012 medical report for the Saskatchewan Ministry of Social Services. Dr. Smit indicated that the Appellant was not capable of "any other work", although expected that he would be ready for work in 12 months without restrictions (GT3-5 to GT3-7). (Although the report is dated "7.12.12", and could easily be read as July 12, 2012, it was more likely prepared in December 2012, shortly after the report form had been issued in November 2012.)

[6] The General Division found that, although the Appellant may not be able to perform his previous employment in the mining industry, he retained the capacity to do work suitable to his limitations at the minimum qualifying period. The General Division found the Appellant to be a highly educated individual with an impressive work history and a variety of transferable skills. The General Division found that the Appellant was capable regularly of pursuing sedentary work at the end of his minimum qualifying period. He impressed the General Division as an "avid and articulate researcher in a public place as well as from the privacy of his own home".

[7] The General Division took into consideration the Appellant's evidence, that in October 2011, he had no restrictions for sitting and standing, except from the occasional dizzy spell. The Appellant was noted to be able to walk 5 kilometres daily and lift a 25 kilogram object and carry it 100 metres. He was also noted to have no restrictions with bending. The Appellant's slurring had ceased although his short term memory, reasoning and concentration (prioritizing tasks) had worsened (GT1-57).

[8] The General Division referred to Dr. Smit's medical evidence of October 2011 that he had responded well to treatment, that he had no functional limitations then and that his prognosis was very good (GT1-50 to 53).

**LEAVE DECISION**

[9] In seeking leave to appeal, the Appellant submitted that the General Division erred in failing to recognize that Dr. Smit's opinion on his prognosis had changed from "very good" in October 2011 to "unsure @ present" in her December 2012 report (GT3- 5).

[10] In my leave decision, I noted that the General Division did not mention that Dr. Smit's opinion on the Appellant's prognosis had changed by December 2012 and that in its final analysis (paragraph 34), the General Division continued to rely on the earlier 2011 opinion that the Appellant's prognosis was "very good".

[11] I also noted that Dr. Smit prepared an October 2013 opinion in which she provided an updated opinion on the Appellant's prognosis. It appeared that Dr. Smit expected then that the Appellant would not be able to return to work as he had not seen any improvement in the last few years. She explained that she did not consider him capable of work as he had ongoing symptoms (GT3-7 to 8). The General Division did not refer to this subsequent 2013 opinion of Dr. Smit either.

[12] In assessing the leave application, the General Division discussed Dr. Smit's October 2011 opinion on the Appellant's prognosis under the heading "severe". Although the General Division considered several factors in assessing the severity of the Appellant's disability, it is clear that the General Division based its decision to some extent on the Appellant's prognosis of "very good" and on the fact that he had responded well to

treatment and had no functional limitations in October 2011. I granted leave on the question of whether the General Division should have also considered Dr. Smit's 2012 and 2013 opinion on the Appellant's prognosis, despite the fact that they were made after the minimum qualifying period had passed.

**GROUNDS OF APPEAL**

[13] 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;
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> (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.

[14] I granted leave to appeal on a succinct ground, namely, that the General Division might have 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.

[15] The Appellant made extensive submissions at the hearing, regarding his medical history, current medical condition and his employment history, including employment with J.W. for the years 2010 to 2012 and 2014. The Appellant suggested that the General Division failed to recognize that he had worked only a nominal number of hours in 2010 to 2012 and 2014, and that Mr. J. W. was a benevolent employer. However, the General Division did not refer to the Appellant's employment with Mr. J. W. at all, and made no findings in connection with this employment. The Appellant advises that, but for his disabilities, he would rather work. He noted his extensive work history throughout the world. He also noted that he has been prepared to work non-career related or menial jobs, as the "intrinsic reward is getting things done".

[16] The Appellant also identified typographical and factual errors in the Respondent's submissions. He denies the General Division's finding that he is engaged in e-commerce for third parties, as he simply purchases items on-line for friends. He also denies any suggestion that he regularly volunteers at the library, insisting that he volunteers only when he is already present and there is an urgent need for his services. There is no suggestion by the General Division that the Appellant regularly volunteers at the library or that he is engaged in e-commerce, other than on a limited basis.

[17] The Appellant reviewed his past and current medical history. He believes that he is deteriorating, rather than improving. He notes that he has been receiving different diagnoses for some of his conditions, in part attributable to the fact that he has had different family physicians and seen different locums. The Appellant denies that he is seeking a reassessment of the medical evidence but, at the same time, suggests that I should consider his medical issues. As the Federal Court held in *Tracey v. Canada (Attorney General),* 2015 FC 1300, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors on appeal.

[18] These additional submissions raised by the Appellant during the hearing of this appeal do not relate to any of the grounds of appeal under subsection 58(1) of the DESDA. I do not find these submissions germane to the appeal.

**Dr. Smit's Opinions**

[19] The Appellant did not provide any further submissions in regards to the issue on which I granted leave to appeal.

[20] In citing *Simpson v. Canada (Attorney General),* 2012 FCA 82 , the Respondent contends that the General Division was not required to refer to all of the evidence before it, as it is presumed to have considered all of the evidence, including the 2012 and 2013 reports of Dr. Smit.

[21] The Respondent argues that the decision of the General Division is supported by the totality of the evidence, as it takes into consideration all of the medical evidence,

including not only the evidence of Dr. Smit, but also the evidence of his family physician and nephrologist.

[22] The Respondent notes that the family physician had indicated that the Appellant would be left with some medical issues for the remainder of his life, but the "prognosis was good as the medication he was on enabled him to recover" (GT1-31 to GT1-34). In fact, the Respondent's submissions regarding the evidence do not fully accurately reflect the medical opinions of the family physician. Although the family physician had indicated that the Appellant had "recovered wonderfully on [the] medications", he did not indicate that the prognosis was good. Under the prognosis, the family physician simply wrote, "He will have this problem for the rest of his life" (GT1-33 to GT1-34).

[23] The Respondent also notes that the nephrologist indicated by 2012 that the Appellant's hyponatremia had normalized and there was no permanent damage from his low sodium condition (GT1-35 to GT1-36).

[24] The Respondent argues that, read as a whole, the decision does not contain an error of fact made in a perverse or capricious manner or without regard for the material before it. The Respondent argues that the decision is overall reasonable, based on the evidence before it, and that, as such, deference should be accorded to it.

[25] While it is clear that the General Division did not refer to Dr. Smit's medical reports of 2012 and 2013 and that it relied upon her report of October 2011 in regards to the prognosis, it was focused on the evidence surrounding the end of the minimum qualifying period. The General Division's analysis is preceded by the statement that, "the Respondent argued that the evidence surrounding the MQP is most important. The Tribunal agrees because it is at this particular time that the Appellant must meet the test disability under the CPP." The General Division then proceeded to examine the Appellant's testimony regarding his condition in October 2011 and the medical evidence for October 2011. The General Division summarized its finding by writing that the Appellant was capable regularly of pursuing sedentary work at his minimum qualifying period date. Given the context against which it made its findings, I am not willing to find that the General Division based its

decision on an erroneous finding of fact that it made but in a perverse and capricious manner or without regard for the material before it.

**DEFERENCE**

[26] The Appellant suggests that I should pay no deference to the decision of the General Division. In his submissions of June 14, 2016, the Appellant argues that it is common practice for parties to adduce expert evidence to interpret evidence and that, as the Respondent failed to do so throughout these proceedings – both before the General Division and the Appeal Division – there is no justification to defer to the findings of fact made by the General Division. He claims that as there was no "peer review" of the evidence, this casts doubt upon any findings of fact, and also indicates that the evidence could not have been "appropriately considered". The Appellant did not cite any authorities, other than *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, which I will discuss in detail below.

[27] The Respondent, on the other hand, urges me to find the decision overall reasonable. The Respondent's submissions essentially call for a standard of review analysis. The Federal Court of Appeal however rejects that approach for an appellate administrative tribunal such as the Appeal Division: *Canada (Attorney General) v. Jean*, 2015 FCA 242 and *Maunder v. Canada (Attorney General)*, 2015 FCA 274, and cautions that it refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context. The Federal Court of Appeal counsels the Appeal Division to look to its enabling statute. It notes that when the Appeal Division hears appeals pursuant to subsection 58(1) of the DESDA, its mandate is conferred to it by sections 55 to 69. In *Jean*, the Federal Court of Appeal held that the Appeal Division was required to determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record". The Federal Court of Appeal stated that there was "no need to add to this wording the case law that has developed on judicial review".

[28] In *Huruglica*, the Federal Court of Appeal indicated that it was not stating that the standard of reasonableness could never apply in appeals to administrative appeal bodies, but rather, one cannot simply decide that the standard will apply on the basis of one's

assessment of the factors listed in *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 (CanLII), 493 A.R. 89 at para. 43. These factors consist of the following:

> (i) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
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> (ii) nature of the question in issue;
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> (iii) the interpretation of the statute as a whole;
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> (iv) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
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> (v) the need to limit the number, length and cost of appeals;
>
> (vi) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
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> (vii) other factors that are relevant in the particular context.

[29] Rather, one "must seek instead to give effect to the legislator's intent". The Federal Court of Appeal indicated that the determination of the role of a specialized administrative body is "purely and essentially a question of statutory interpretation" (at paragraph 46). This requires us to analyze the words of the DESDA in their entire context, "in their grammatical and ordinary sense harmoniously" with the scheme of the DESDA and its purpose and object.

[30] The Federal Court of Appeal indicated that, for reasons of policy, it would also be inappropriate to important the considerations set out in *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, which provides for a high level of deference afforded by appellate courts to lower courts of law on questions of fact and mixed fact and law. There, the Supreme Court of Canada indicated that there were numerous bases for affording deference to the findings of fact of the trial judge, all of which could be grouped into three basic principles:

> (1) limiting the number, length and cost of appeals,
>
> (2) promoting the autonomy and integrity of trial proceedings, and

(3) recognizing the expertise of the trial judge and his or her advantageous position.

[31] In regards to this latter principle, Iacobucci and Major JJ., on behalf of the majority, wrote at paragraph 18 that:

> The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

[32] In *Huruglica*, the statutory analysis consisted of examining the relevant purpose and object of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), the legislative scheme and sections 110 and 111 of IRPA, and the legislative evolution and history of IRPA. Subsection 111(2) of IRPA reads as follows:

> **111 (2)** The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that
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> (a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and
>
> (b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division. (My emphasis)

[33] The Federal Court of Appeal determined that paragraph 111(2)(a) of IRPA indicates that the Refugee Appeal Division (RAD) does not need to defer for factual findings. It wrote that paragraph 111(2)(a) does not distinguish between errors of law, fact or mixed fact and law, as it simply requires that the decision of the Refugee Protection Division be "wrong in law, in fact or in mixed fact and law" (in French: "erronée en droit, en fait ou en droit et en fait"). At paragraph 66, the Federal Court of Appeal indicated that the word "wrong" has not been used in any other federal statute or regulation. By contrast, there are many examples of statutes and regulations that capture the standard of reasonableness through the use of words such as "reasonable" or "reasonably". At paragraph 77, the Federal Court of Appeal could find no indication in the wording of the IRPA, read in

the context of the legislative scheme and its objectives, that supports the application of a standard of reasonableness or of palpable and overriding error to the Refugee Protection Division (RPD) findings of fact or mixed fact and law. Gauthier, J.A. found that the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law.

[34] The Respondent argues that, applying the same analysis as that conducted by the Federal Court of Appeal, where there are errors of fact, the Appeal Division is limited to intervening only when the findings of fact are made in a perverse or capricious manner or without regard for the material before it.

[35] The Respondent says that this analysis includes examining Bill C-38, which proposed amendments to Part 5 of the *Human Resources Skills Development Act*, as it then was (now the DESDA), which established the Social Security Tribunal. The Respondent notes that, at second reading, when debating Bill C-38, the Parliamentary Secretary to the Minister of Human Resources and Skills Development and to the Minister of Labour, described the Social Security Tribunal as follows:

> Mr. Speaker, we are combining several appeal tribunals and boards at HRSDC into one organizational structure. This means a simple, more efficient, single window for Canadians to access appeals and the appeals process, something Canadians are looking for. The expertise of individual boards and tribunals will be maintained.
>
> *House of Commons Debates*, 1st Session, 41st Parliament, Vol. 126, No. 2, 2012, May 11, 2012, p. 7940.

[36] The DESDA, as it pertains to the Appeal Division, was preceded by section 83 of the *Canada Pension Plan*, as it read immediately before April 1, 2013. Parties dissatisfied with a decision of the former Canada Pension Plan Review Tribunal could seek leave to appeal that decision to the Pension Appeals Board, which had the power to confirm or vary a decision of a Review Tribunal under section 82 or subsection 84(2), as they read immediately before April 1, 2013 or could take any action that may have been taken by the Review Tribunal. The Pension Appeals Board heard appeals on a *de novo* basis.

[37] One of the significant features distinguishing the Appeals Division from the Pension Appeals Board is the fact that there are limited grounds of appeal under subsection 58(1) of the DESDA. The Respondent submits that, when examining the wording of paragraph 58(1)(c), it is important to note that the term error of fact is qualified by the words "perverse", "capricious," and the phrase "without regard to material before". The Respondent further submits that by qualifying the error of fact, Parliament intended the Appeal Division to accord deference to decisions of the General Division. This is unlike paragraph 111(2)(a) of IRPA, where the word "wrong" was used to qualify the error of law and the error of fact. The Respondent argues that under IRPA, there is no allowance for an error of fact to be made. Hence, not every error of fact will fatal to the decision of the General Division. The Respondent maintains that it is only those decisions that were made perversely, capriciously and without regard to the material before it that will invite the intervention of the Appeal Division.

[38] Considering the evolutionary path of the DESDA, the purported purpose and object of the DESDA, and the wording of subsection 58(1) of the DESDA, I agree that some measure of deference must be accorded by the Appeal Division to the General Division on findings of fact. However, I find that no deference is to be accorded where any erroneous findings of fact, upon which the General Division bases its decision, is made in a perverse or capricious manner or without regard for the material before it. Again, that was not the situation before me, as I find that the General Division qualified its findings of fact regarding the Appellant's prognosis.

[39] Finally, in undertaking this analysis, I also find that there is no room for a reasonableness review under the DESDA.

## CONCLUSION

[40] This appeal is dismissed.

*Janet Lew*

Member, Appeal Division