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

Citation: *M. C. v. Minister of Employment and Social Development,* 2016 SSTADIS 387

Tribunal File Number: AD-16-170

BETWEEN:

**M. C.**

Applicant

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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Leave to Appeal Decision by: Janet Lew

Date of Decision: October 4, 2016

Canada

## REASONS AND DECISION

### OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 11, 2015, which 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" on or before the date of the hearing. The Applicant has a minimum qualifying period which ended on December 31, 2015. The Applicant filed an application requesting leave to appeal on January 14, 2016 indicating that submissions would be forthcoming. He filed additional submissions on February 22, 2016 and on March 11, 2016, in response to invitations from the Social Security Tribunal to clarify the grounds of appeal.

### ISSUES

[2] The two issues before me are as follows:

(1) is the application requesting leave to appeal late? If so, should I exercise my discretion and extend the time for filing the leave application, and

(2) does the appeal have a reasonable chance of success?

### FACTUAL BACKGROUND

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

- The Applicant filed an application requesting leave to appeal on January 14, 2016. He did not indicate when the decision of the General Division had been communicated to him. He alleged that the General Division based its decision on erroneous information, although he did not particularize the claim. He indicated that further information would follow (AD1).

- In response to a letter from the Social Security Tribunal, the Applicant filed submissions on February 22, 2016. He claimed that although he had been granted a fair hearing by the General Division, "pertinent information was

overlooked and not evaluated fully". He requested a review of an updated medical report dated February 17, 2016 from his family physician, who was of the opinion that the Applicant's work restrictions are permanent (AD1A).

- In response to a further letter from the Social Security Tribunal, the Applicant filed additional submissions on March 11, 2016. The Applicant identified several medical records which he alleges were overlooked by the General Division. Additionally, he argued that the General Division should have focused more on his past medical history than it did, as it explains his present-day condition. He also relied on updated medical reports of his family physician which indicate that he may be unable to tolerate work restrictions (AD1B).

## ANALYSIS

### (a) Late application

[4] Although the Applicant did not elaborate on the grounds of appeal in his January 2016 application requesting leave to appeal until after 90 days had elapsed when the decision of the General Division had been communicated to him, he identified at least one ground of appeal. He complied with the requirements under the *Department of Employment and Social Development Act* (DESDA) and the *Social Security Tribunal Regulations.* Therefore, I find that he met the requirements under paragraph 57(1)(b) of the DESDA that the application requesting leave to appeal be filed in the prescribed form and manner and within 90 days after the day on which the decision of the General Division had been communicated to him.

### (b) Application requesting leave to appeal

[5] Subsection 58(1) of the 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.

[6] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

**i. Erroneous findings of fact**

[7] The Applicant claims the General Division based its decision on erroneous finding of fact, however, did not identify the erroneous findings of fact, nor allege that any findings had been made in a perverse or capricious manner or without regard for the material before it. In the absence of any specific allegations, I am not satisfied that the appeal has a reasonable chance of success on this ground.

**ii. New medical records**

[8] The Applicant has filed additional medical records, including some which were prepared after the General Division hearing. However, the Federal Court pronounced that an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in subsection 58(1) of the DESDA: *Canada (Attorney General) v. O'Keefe,* 2016 FC 503. There is no indication that any of the medical records address any of the grounds of appeal. As such, there is no basis for me to consider them at this juncture.

### iii. Medical evidence before General Division

[9] The Applicant enclosed the following records with his submissions of February 22, 2016, to support his claim that the General Division overlooked and did not consider some of the medical evidence:

- (former) family physician's letter dated September 13, 2007 to insurer (AD1B-13 to AD1B-14 / GD4-51 to GD4-52)
- current family physician's brief medical letter dated October 17, 2013 (AD1B-10 and AD1B-18/ GD1-2)
- physiatrist's consultation report dated July 31, 2015 (AD1B-11 to AD1B-12 / GD9-3 to GD9-4)
- current family physician's letters dated July 17, 2015 (AD1B-17) and August 26, 2015 (AD1B-15 / GD15-2) and
- current family physician's sickness certificate dated August 10, 2015, advising that Applicant would be ill between August 10 and August 14, 2015 (AD1B-16)

[10] He did not indicate what probative value these medical records have.

[11] Neither the family physician's letter dated July 17, 2015 (AD1B-17) nor his sickness certificate dated August 10, 2015, had been filed and made available by the Applicant to the General Division. Therefore, there is no basis to the allegation that the General Division overlooked these two documents.

[12] In the case of the physiatrist's consultation report, the General Division summarized its contents at paragraph 12 and then proceeded to analyze portions of it at paragraphs 29 and 30 of its decision. The General Division discussed the family physician's medical report of August 26, 2015 at paragraphs 14 and 29. Therefore, there is no basis either to the allegation that the General Division overlooked these documents.

[13] As for the remaining medical records, there is no requirement in law that a decision-maker refer to all of the evidence before it, as there is a general presumption that it has considered all of the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Federal Court of Appeal held that, "… a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence". The presumption can be rebutted, if an applicant can establish that the evidence was of such probative value that the decision-maker ought to have analyzed it.

[14] Two of the medical reports, dated September 13, 2007 and October 17, 2013, respectively, pre-date the end of the minimum qualifying period by at least two years and therefore were of less relevance and probative value to the issue of the Applicant's medical status near the end of his minimum qualifying period. There were subsequent medical opinions and records prepared closer to the end of the minimum qualifying period, to which the General Division assigned more weight.

[15] Similarly, the sickness certificate dated August 10, 2015 (had it been before the General Division), is of little probative value as it offers little in the way of opinion. The family physician indicates that the Applicant will be ill and absent from August 10, 2015 to August 14, 2015, but this timeframe is relatively short and the certificate in no way addresses the issues of the severity or prolonged nature of the Applicant's disability.

[16] I am therefore not satisfied that the appeal has a reasonable chance of success on the ground that the General Division failed to consider some of the evidence.

#### iv. Weight of evidence

[17] Finally, the Applicant argues that the General Division should have focused more on his past medical history. This calls for a reassignment of weight to the evidence.

[18] In *Simpson,* 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". As such, I am not willing to interfere with the assignment of weight. 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.

The Applicant has not satisfied me that the appeal has a reasonable chance of success on this ground.

[19] Essentially, the Applicant is seeking a reassessment of the evidence. As the Federal Court held in *Tracey*, it is not appropriate for the Appeal Division, in determining whether leave should be granted or denied, to reassess the evidence or reweigh the factors considered by the General Division. Neither the leave, nor the appeal, provides opportunities to re-litigate or re-prosecute the claim.

## CONCLUSION

[20] Given these considerations, the application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division