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

Citation: *H. W. v. Minister of Employment and Social Development*, 2016 SSTADIS 416

Tribunal File Number: AD-16-500

BETWEEN:

H. W.

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: October 25, 2016

Canada

REASONS AND 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 Application), from the decision of the General Division of the Tribunal issued September 23, 2014, which decision determined that she was not eligible to receive a *Canada Pension Plan*, (CPP), disability pension.

REASONS FOR THE APPLICATION

[3] The Applicant's representative submitted that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction by disregarding pertinent evidence. (AD1-3)

HISTORY OF THE APPLICATION

[4] This is the second time that this Application has come before the Appeal Division. The Applicant filed her request for leave to appeal with the Tribunal on January 12, 2015. On June 22, 2015 a different member of the Appeal Division granted the Application on the basis that the General Division may have disregarded evidence and that there was an appearance of bias. The Member made an Order returning the decision to the General Division for redetermination by a different Member. The Respondent applied for a judicial review of the Appeal Division decision.

[5] By consent, the parties agreed that the matter should be returned to the Appeal Division for determination by a different Member. On April 4, 2016 the Federal Court of Appeal, being satisfied that the Applicant's consent to the judgment was fully informed, voluntary and genuine, and also being satisfied that the judgment was warranted and appropriate, made the Order sought. The Federal Court of Appeal ordered that the Appeal Division decision dated June 22, 2015 be set aside and the matter remitted back for determination by a different Appeal Division Member.

ISSUE

[6] Does the appeal have a reasonable chance of success?

THE LAW

[7] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act), govern the grant of leave to appeal. Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division with subsection 56(1) providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted."

[8] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[9] To obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise leave is refused.[1] 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: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[10] 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.

[11] *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.

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[1] 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."

ANALYSIS

The General Division failed to observe a principle of natural justice

[12] Subsequent to the issuance of the decision of the Federal Court of Appeal, the Appeal Division received additional submissions from the Applicant's representative. He argued that by not giving weight to the reports of the various alternate health care providers, the General Division demonstrated bias. He stated, "… had consideration of the Laws of Natural Justice been considered the outcome may have been favourable to Ms. H. W. I also believe the General Division may have been biased in making its decision. I do not think that it was accomplished in a perverse or capricious fashion…" while not stating specifically that the bias was against practitioners of alternate medicine: the inference is clear that this is the bias being referred to.

[13] In the original submissions, the Applicant had set out her position much more clearly. She stated that the General Division gave "no allowance to alternate health providers and I was specifically told by CPP employees on the phone and the tribunal hearing of January 2012 that these were credible health care providers." It should be noted that the Appeal Division could find no record of a hearing in January 2012, although a hearing that was scheduled before a Review Tribunal for January 9, 2013 was adjourned at the request of the Respondent. (GT1-68)

[14] Addressing the issue of bias, the Federal Court of Appeal stated in *Joshi v. Canadian Imperial Bank of Commerce*, 2015 FCA 92, at para. 112 that:-

> "bias is a term with a precise legal definition. Allegations of bias are of a very serious nature and should not be made without proof. According to the dicta in *Abi-Mansour v. Canada (Aboriginal Affairs)*, 2014 FCA 272 at para. 12, [2014] F.C.J. No. 1145 (QL) such allegations are particularly egregious when made against judges, as they attack one of the pillars of the judicial system, namely the principle that judges are impartial as between the parties who appear before them."

[15] *Abi-Mansour* applies equally to Tribunals, a fact that, with respect to this Tribunal, is recognised by the enactment of paragraph 58(1)(a) of the DESD Act.

[16] Applying *Abi-Mansour,* the test by which bias is established is: would a reasonable person, viewing the matter objectively, and with knowledge of all the relevant facts, be

persuaded that the trier of fact intended to favour one party over the other? In the Applicant's case, the Appeal Division is not satisfied that this threshold has been met. Other than a bald allegation, neither the Applicant nor her representative has shown how the General Division intended to favour the Respondent or to act to the disadvantage of the Applicant. The Appeal Division deduces that the true complaint is against the conclusion that the General Division reached after it had assessed and weighed evidence.

[17] The Appeal Division notes that it is the task of the General Division to weigh evidence. Absent error, it is not for the Appeal Division to reassess and reweigh evidence in order to reach a conclusion that is more satisfactory to an appellant: *Tracey*, *supra.*

[18] The cases of *Canada (Attorney General) v. Jean; Canada (Attorney General) v. Paradis*, 2015 FCA 242, *Maunder v. Canada (Attorney General)*, 2015 FCA 274 and now *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 93 clarify that the ambit of the Appeal Division's enquiry is restricted to the mandate provided in the grounds of appeal set out in section 58 of the DESD Act. Accordingly, the Appeal Division is not satisfied that with respect to the allegations of bias, grounds of appeal that would have a reasonable chance of success have been raised.

[19] The Appeal Division considered the Applicant's submissions as well as those of her representative. The Applicant took issue with a number of statements in the General Division decision. Specifically, she complained that the General Division Member misconstrued her testimony as well as the testimony of her sister and her representative. She submitted that, contrary to what the General Division said at paragraph 12 of the decision, she did not testify that she had no faith in traditional, medical doctors. She submitted that this was an example of the General Division twisting her words. She explained that she used alternate medical practitioners because she had difficulty getting well and was desperate. (AD1-5) As stated earlier, the Applicant submits that CPP (Service Canada) employees had assured her that she could rely on reports provided by alternate health care providers.

[20] The statements being complained of read as follows:-

> [12] "… F encouraged her sister to seek help through alternative medical providers including acupuncture, naturopaths, and homeopathic treatments. The Appellant testified

> that she did not have faith in traditional medical doctors who did not diagnosis or help her. F confirmed this evidence, and drove her to alternative medical appointments."

[21] A similar statement is repeated at paragraph 18 in respect of the Applicant's medicinal usage, namely:-.

> [18] The Appellant uses drops made by Ms. K of Complementary Health Care. She indicated she does not have faith in traditional medical doctors andrelies on service providers such as Reiki and homeopathy.

[22] The Appeal Division would have been helped by a recording of the hearing but none was available. In *CUPE Local 301 v. City of Montreal* [1997] 1 S.C.R. 793, the Supreme Court of Canada held that the absence of a recorded transcript is not fatal when there is no obligation to record. In such cases the absence is fatal only when there is no alternative evidence that is available:-

> [83] As I have stated, in the absence of a statutory right to a recorded hearing, a party's rights to natural justice will only be infringed where the court has an inadequate record upon which to base its decision.

[23] In the instant case, the recording of the hearing is not the only means by which the AD can assess the allegation of bias. Having regard to the Tribunal record and the General Division decision, the Appeal Division is not persuaded, on a balance of probabilities, that the General Division misinterpreted and mischaracterised the evidence. Furthermore, even if the General Division had mischaracterised the evidence, which the Appeal Division does not accept, it is also not persuaded that the mischaracterisation demonstrated that the General Division member was biased against alternate medical practitioners. In each case, the General Division considered the content of their reports and put forward a rational explanation for why it was rejecting the report or reports. In the circumstances, the Appeal Division is not satisfied that the Applicant has raised grounds of appeal that would have a reasonable chance of success.

The General Division based its decision on erroneous findings of fact

[24] The Applicant also submitted that the General Division erred when it stated that she had traded her full time shifts for part-time. She argued that while her shifts were reduced to 3 hours daily, this was an accommodation extended by the employer. While it is true that the Applicant may not have traded her full-time shifts for half-time ones as the Appeal Division understands the word "trade", the Appeal Division is not persuaded that a ground of appeal arises from the General Division's use of the term. The Appeal Division sees it as the General Division's "short-hand" for describing what took place in regard to the reduction of the Applicant's working hours. While the General Division could have used a different term, the Appeal Division is not persuaded that a ground of appeal that could have a reasonable chance of success is disclosed by the use of the term "traded".

[25] Another point of objection was the General Division's reference to statements that had been made by the Applicant's former employer regarding her work performance. The General Division referred to these statements at paragraph 16 of the decision. The Applicant sought to explain them by stating that the statements arose as a result of her physical condition. However, the General Division decision accurately reflects the responses given by the Applicant's former employer to the questions posed in the Employer Questionnaire, which is found at GT1-49 to (GT1-51).

[26] In response to the General Division's observation that she was "vague on the question of whether she exercised as recommended by her medical doctor, the Applicant proffered the explanation that she limps and that it is painful for her to walk far." However, the General Division's observation extended beyond the Applicant participating in walking to noting that she participated in no form of exercise when Dr. Harth had recommended that she do so.

[27] In the absence of evidence that walking was the only form of exercise that had been prescribed, the Appeal Division is not persuaded that the General Division's statement discloses a ground of appeal that would have a reasonable chance of success. The Tribunal record shows that the advice was: "She (the Applicant) should continue to do some low-impact aerobic exercise such as walking." (GT1-81).

[28] Another submission was that the General Division stated that there were no records showing visits to medical doctors between 1993 and 2009. However, this statement which appears at paragraph 31(b) of the decision was a submission that was made by the Respondent. It was not a conclusion of the General Division. Therefore, the submission does not disclose a ground of appeal that could have a reasonable chance of success. In any event, the Applicant's representative acknowledged that there were no medical records between 1993 and December 2007. (GT1-84) The medical reports cover two periods. The first goes up to June 1995. The next medical report is the CPP medical report of December 2009 (date stamped March 22, 2011).

The General Division disregarded medical evidence

[29] The Applicant and her representative raised additional concerns with the General Division's treatment of the conclusions of Dr. Harth, Dr. Pop and the alternate medicine practitioners. They submit that their reports support a finding that the Applicant had a severe and prolonged disability, however, the General Division disregarded them. These objections are the heart of the Application. The Appeal Division finds that their arguments are essentially about weighing evidence, which is the domain of the General Division.

[30] Moreover, in its analysis, the General Division discussed the history of the Applicant's consultations with Dr. Harth and Dr. Pop. Dr. Harth's report to Dr. Pop is dated October 31, 2011. This is more than three years after the MQP. Thus, while he may have concluded that she was "work disabled" as of October 2011, for this and other reasons having to do with the reliability of the Applicant's evidence, the General Division found that Dr. Harth's report could not reliably shed light on the applicant's health situation as it existed on or before the MQP. The Appeal Division is not satisfied that, in this regard, the Applicant has raised grounds of appeal that would have a reasonable chance of success.

[31] Similarly, the General Division provided cogent reasons why it could place little reliance on Dr. Pop's report. The Member noted that Dr. Pop only began to treat the Applicant in October 2009, which was well after her MQP had ended; and that while Dr. Pop had had access to Dr. Boyd's report, that report was inconclusive as to her diagnosis. (GT1-85) The General Division also explained why it concluded that Dr. Pop had become an advocate for the

Applicant and also why it found that her conclusions did not shed light on the Applicant's medical condition as it existed on or before the MQP. The Appeal Division finds that there was some basis on which the General Division could make its determination. Accordingly, its decision was neither perverse nor capricious.

[32] With respect to the alternate medical practitioners, as stated earlier, the General Division explained why it found their conclusions not to be reliable indicators of the Applicant's physical condition on or prior to the MQP. At paragraphs 33 to 36 the General Division examined the qualifications of the various alternate health care providers; the treatments they provided; the number of times the Applicant consulted these practitioners; and their statements regarding her health condition. The General Division explained why, taking all of that information into consideration, it could place little reliance on the assessments of the alternate health care providers. According to *Tracey*, at the leave stage it is not for the Appeal Division to reweigh the evidence. Consequently, the Appeal Division is not persuaded that, in regard to its conclusions regarding the alternate health care practitioners, the Applicant has raised grounds of appeal that would have a reasonable chance of success.

[33] The Applicant submitted that she was given assurances that the reports of the alternate health care practitioners would be found credible and would be accepted. This raises the spectre of an induced error or "erroneous advice". With regard to this submission, not only does the Applicant have the onus of proving that she acted on erroneous advice; but the appropriate remedy lies not with the Appeal Division but with the Federal Court: *Pincombe v. Canada (A.G.)*, [1995] F.C.J. No. 1320 (QL),[2] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278; *Grosvenor v. Canada* 2011 FC 799.

[34] Finally, the Applicant asserts that she follows recommended medical treatment e.g. she walks two blocks every day which she discussed with Dr. Pop in 2014. The Appeal Division notes that the Applicant makes reference to her current situation as opposed to her status prior

[2] where Isaac C.J. determined that the *Canada Pension Plan* provided no jurisdiction to the Review Committee (since renamed the Review Tribunal) to hear an appeal of decisions made pursuant to subsection 66(4) of the Plan.

to the MQP. The Appeal Division finds that no ground of appeal that would have a reasonable chance of success is disclosed by this submission.

CONCLUSION

[35] For the above reasons, the Appeal Division is not satisfied that the Applicant's submissions have disclosed grounds of appeal that would have a reasonable chance of success.

[36] The Application is refused.

Hazelyn Ross
Member, Appeal Division