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

Citation: *G. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 489

Tribunal File Number: AD-15-1223

BETWEEN:

G. B.

Appellant

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

DECISION BY: Hazelyn Ross

HEARD ON: December 5, 2016

DATE OF DECISION: December 15, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant:	G. B.
Appellant's counsel:	Stephen Yormak
Appellant's spouse:	Mrs. B.
Respondent's representative:	Sylvie Doire
Student-at-Law:	Cindy Ko
Paralegals:	Mrs. Sarah Durkczak
	Natalya Strelkova
	Amanda DeBruyne

INTRODUCTION

[1] On September 10, 2015 the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable to the Applicant. On November 13, 2015 the Appeal Division of the Tribunal received an application for leave to appeal the General Division decision. It granted leave to on November 30, 2015.

[2] The Appeal Division granted leave to appeal because it found that the General Division did not analyse the Applicant's testimony regarding his pain and did not refer to any other subjective evidence regarding the Applicant's pain or its effect on his ability to function. This, in the view of the Appeal Division pointed to a possible breach of subsection 58(1)(c) of the *Department of Employment and Social Development (DESD) Act.*

[3] The Appeal Division also found that the General Division may have based its decision on an erroneous finding of fact. The Appeal Division came to this conclusion as it found that while the General Division summarised the evidence on the Appellant's attempt to find alternate employment, but did not per *Inclima v. Canada (Attorney General)*, 2003 FCA 117 refer to his attempts at self-employment when considering this aspect of the evidence.

ISSUE

[4] The Appeal Division must decide the following issues:

1. Did the General Division fail to analyse the Applicant's testimony regarding his pain and its effect on his ability to function?

2. Did the General Division base its decision on an erroneous finding of fact when analysing the Appellant's attempt at obtaining alternate employment?

THE LAW

[5] The grounds of appeal of a decision of the General Division are contained in subsection 58(1) of the DESD Act. They are that:

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.

SUBMISSIONS

[6] Counsel for the Appellant addressed the question of the Standard of Review. He noted that in the recent cases of *Tracey v. Canada (Attorney General)*, 2015 FC 1300 and *Huruglica v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No. 845 the Courts made pronouncements that make it clear that a standard of review analysis does not apply to the Appeal Division. However, he argued that he believed that the General Division committed both an error of law and an error of fact and that the hearing before the Appeal Division had to be concerned with the "correctness" of the General Division decision.

[7] In this regard, Counsel for the Appellant submitted that the General Division was not correct in its assessment of the Appellant's chronic pain. He explained how chronic pain is defined, noting that it is pain without a seeming organic basis, but which goes on for more than six months. He argued that while the medical evidence, namely MRI and bone scan revealed no significant source for the Appellant's pain, both Dr. Huffman at AD2-238 and Dr. Safakish in a medical report at AD4-3 had diagnosed him as suffering from chronic pain. He argued that the General Division ignored these diagnoses and did not ask, as it should have, what the level of the Appellant's pain was or whether his pain prevented the Appellant from working?

[8] Counsel for the Appellant made the further submission that the Minister based its position on the minimal findings, which position reinforces Counsel's argument that the Appellant suffers from chronic pain. He also argued that the Tribunal appears to have adopted the Minister's position.

[9] In essence, the arguments of Counsel for the Appellant were that the General Division had a duty to enquire into the Appellant's attempts to obtain alternate employment but failed to do so; that it had a duty to analyse his subjective evidence regarding his pain and its effect on his ability to function, which it also failed to do. Moreover, the General Division did not assess the Appellant's credibility as it should have. Therefore, its consideration of the second prong of *Inclima* was faulty, all of which points to an erroneous finding of fact on the part of the General Division.

[10] The Respondent's representative agreed that, following recent case law, at the appeal before the Appeal Division a standard of review analysis does arise. She disagreed with the position taken by Counsel for the Appellant that the General Division decision must be assessed with a view to its correctness. She submitted that a correctness standard did not apply as the notion of correctness is basically a reference to judicial review, which does not obtain in respect to an appeal before the Appeal Division.

[11] The Respondent's representative also agreed with the definition of chronic pain put forward by the Appellant's counsel. She agreed that the General Division was required to determine whether the Appellant's chronic pain prevented him from pursuing regularly any substantially gainful occupation. However, she expressed strong disagreement with the Appeal Division considering any new evidence, which she submitted was Counsel for the Appellant was attempting to do in his submissions. She noted that it was not the duty of the Appeal Division to reweigh the evidence but only to assess whether the General Division erred as per DESD 58.

[12] In the view of the Respondent's representative, the submissions of the Appellant's counsel, namely that the General Division was under a duty to enquire into the Appellant's subjective evidence, were in fact a disguised way of asking the Appeal Division to reweigh the evidence and that, the General Division had not erred or offended subsection 58(1) in any way.

She argued that in order to grant the appeal the Appeal Division would have to find that a fact has not been considered; that the principles in *Simpson v. Canada (Attorney General)*, 2012 FCA 82[1] applies but that the facts which Counsel for the Appellant argued were not considered were in fact considered. The Appellant had a duty to establish disability within the meaning of the CPP and there was no duty on the General Division to make the type of inquiry that his Counsel submitted they had to do. He failed to meet his onus.

[13] In the view of the Respondent's representative, the submissions of the Appellant's counsel were in fact asking the Appeal Division to reweigh the evidence and that, the General Division had not erred or offended subsection 58(1) in any way. She argued that in order to grant the appeal the Appeal Division would have to find that a fact has not been considered. The principles in *Simpson* applies but that the facts which Counsel for the Appellant argued were not considered were in fact considered. The Appellant had a duty to establish disability and there was no duty on the General Division to make the type of inquiry that his Counsel submitted they had to do.

ANALYSIS

Did the General Division fail to analyse the Applicant's testimony regarding his pain and its effect on his ability to function?

[14] The first basis on which leave to appeal was granted was that the General Division may have breached subsection 58(1)(b) in its analysis of the Applicant's testimony regarding his pain and other subjective evidence regarding his pain or its effect on his ability to function.

[15] The General Division set out Appellant's testimony at paragraphs 9 through 17 of its decision. The Member noted that the Appellant testified to long-standing back pain that he attributed to heavy labour (para. 10). The Member also noted the Appellant's testimony that it was not until August 2011 that he consulted a physician for his back pain, (para. 13), and the results of the consultations. At paragraphs14 through17 of the decision, the General Division set out the Appellant's testimony regarding the treatments that were either recommended or tried and the results of those treatments. The General Division set out the testimony of the

[1] *Simpson v. Canada (Attorney General)*, 2012 FCA 82 (CanLII) , "…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."

Appellant's spouse regarding his back pain and the treatment he received for it at paragraph 18 of its decision.

[16] The General Division Member analysed the Appellant's evidence regarding his medical condition at paragraphs 32 through 34 of its decision. He noted the Appellant's testimony that he had been able to be gainfully employed (work) even while suffering from back pain for many years. The Member also discussed the absence of any medical reports contemporaneous with his workplace injury of August 2011 as well as the fact that x-rays of the Appellant's lumbar and thoracic spine that were taken in October 2011, did not show any significant abnormalities. The Member also noted that neither the Appellant's treat physicians nor his family doctor said he was disabled from all work. (para. 34)

[17] The Appellant's counsel submitted that this was not a sufficient analysis. He argued that as the basis of the Appellant's case was chronic pain, the General Division had a duty to embark upon an enquiry of and an assessment of the Appellant's credibility in respect of his subjective assessment of his level of pain. He relied on the cases of *MNHW v. Densmore* CP 2389, 1983 and *Van Horne v. MHRD* (August 29, 2000) CP 08903, both decisions of the Pension Appeals Board, (PAB). He submitted that the General Division made no enquiry, but has made a supposition regarding the effect of chronic pain on the Appellant. He also submitted that the only place that chronic pain syndrome was addressed is at paragraph 4 of the Respondent's submission at AD5-7; nor did the General Division enquire how the Appellant's level of pain affected his ability to function.

[18] Counsel for the Appellant went on to argue that at AD2-237, Dr. Safakish indicated that the Appellant could not return to work and that he confirmed that the Appellant suffers from chronic pain syndrome at AD2-238. An examination of Dr. Safakish's report indicates that he did not so much make a finding that the Appellant was unable to work, as reported under the heading "Lifestyle Notes" that the Appellant is "a mechanic who has his own shop and who is unable to work because of the pain". Dr. Safakish noted other factors in regards to the Appellant's lifestyle that included excessive alcohol consumption, smoking, difficulty with functional abilities, recreational activities and sleeping. (AD2-237). As this report was made following the Appellant's first consultation with Dr. Safakish, the Appeal Division infers that

Dr. Sakafish was reporting information provided by the Appellant. Accordingly, the Appeal Division is not persuaded that Dr. Sakafish did make a finding that the Appellant was unable to work.

[19] With respect to Counsel's submission that Dr. Safakish had confirmed that the Appellant suffers from chronic pain syndrome, the Appeal Division notes that the exact diagnosis was that "there are also features consistent with chronic pain syndrome and mood disorder". AD2-238. In any event, it is not in dispute that the Appellant suffers from chronic pain.

[20] Counsel for the Appellant also took issue with the submission that the medical reports are mainly post-MQP. He argued that this criticism would be correct if chronic pain was not a progressive disease. He relied on *Curnew v. MHRD* (June 25, 2001), CP 12886, which case stands for the proposition that chronic pain is a progressive disability for which it may be difficult to pinpoint an exact date of onset. Thus, all of the evidence must be examined to determine onset, which could predate the end of the MQP.

[21] The Respondent's representative countered the Appellant's submissions by pointing out that the General Division decision shows that it was keenly aware that the case was one of chronic pain. She also submitted that by referring to the PAB decision in *Butler v. M.S.D.* (April 27, 2007) CP 21630 (PAB) at paragraph 38 of its decision, the General Division demonstrated that it was keenly aware of the legal framework it had to apply. She put forward the view that the General Division had not erred and that it had, in fact, considered and weighed the Appellant's evidence concerning his chronic pain. For the following reasons, the Appeal Division agrees with the position of the Respondent.

[22] The salient paragraph of *Densmore* states that it is not sufficient for chronic pain syndrome to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing any substantially gainful occupation. In *Densmore* the PAB emphasised that assessing chronic pain syndrome was a difficult task that had to be undertaken on a case by case basis and which involved credibility.

[23] While these statements are in keeping with the position of Counsel for the Appellant, the PAB also opined that an applicant "must show that treatment was sought and that efforts were

made to cope with the pain." The PAB noted that while it was not essential, it was desirable that applicants put forward evidence from all treating physicians.

[24] *Densmore* being a decision of the PAB is not binding upon the Appeal Division. However, in this appeal, the Appeal Division finds that it is of highly persuasive value because the principles to be derived from it are not incompatible with the later case of *Villani v. Canada (Attorney General)* 2001 FCA 248 which emphasised the need for objective medical evidence of an applicant's medical condition.

[25] The Appeal Division is of the view that the General Division did make the type of assessment required by *Densmore.* First, it acknowledged both the objective medical evidence as well as the oral testimony of both the Appellant and his witness. The General Division then looked at the whole of the evidence to see what treatment the Appellant sought and his efforts to cope with the pain. (paras. 32-34).

[26] Counsel for the Appellant is of the view that the General Division had an onus to make an enquiry into the Appellant's subjective level of pain. The Appeal Division finds that the General Division is under no such onus. The case law is clear that the onus rests with the persons seeking to obtain the benefit to establish that they come within the CPP definition of "severe and prolonged disability:" *Kent v. Canada (Attorney General)* 2004 FCA 420 at paragraph 4.[2] The Appeal Division finds an enquiry of the nature proposed by Counsel for the Appellant of a represented applicant to be incompatible with requirement.

[27] For all of the above reasons, the Appeal Division finds that the General Division did not err in law. The appeal fails on this ground.

Did the General Division base its decision on an erroneous finding of fact when analysing the Appellant's attempt at obtaining alternate employment?

[28] Leave to appeal was also granted on the basis that the General Division may have based its decision, in part, on an erroneous finding of fact in respect to the accommodation he received at work and his attempt to find alternate employment.

[2] The statutory definition of disability has been considered in numerous decisions of this Court. Often the controversy is whether the claimed disability is sufficiently severe to meet the test in subparagraph 42(2)(a)(i). The onus is on the applicant for a disability pension to present evidence that the severity test is met.

[29] The General Division found that the Appellant had retained work capacity and had failed to displace the onus placed upon him by *Inclima.* In doing so, the General Division factored into its analysis the undisputed fact that the Appellant had been gainfully employed for many years even though he was suffering from chronic pain. It also factored in his medication history. It noted that the Appellant was using over-the-counter medication to treat his back pain and not the medication that his family physician had prescribed because of the side effects he experienced. General Division also considered the fact that the first time the Appellant consulted a specialist was when he consulted Dr. Safakish in August 2013: (AD2-237). In *Hamzagic v. MHRD* (November 29, 1999) CP 08831, the PAB inferred that the Appellant's condition was not severe where the family physician had not referred the Appellant to a psychiatrist.

[30] From its review of the evidence, the General Division concluded that the Appellant had retained work capacity. Having examined the Tribunal record and having considered both the written and oral submissions made by the parties, the Appeal Division concluded that the General Division had some reasonable basis on which to make its decision. In the view of the Appeal Division, it was reasonable for the General Division to conclude, that notwithstanding the Appellant's present condition, the medical evidence as it existed at the time of the MQP did not support a finding of severe disability.

[31] In coming to this conclusion the Appeal Division acknowledges that in a letter dated November 17, 2015 (AD2-11) the Appellant's family physician does state that his degenerative disc disease predated the MQP and that it has resulted in the Appellant being unable to work. The full text of the letter is reproduced below: -

> Mr. G. B. does have an organic back injury at this time and ongoing. He is suffering from progressive degenerative disc disease. This has been progressive and is prior to 2011. This is a degenerative situation and has resulted in inability to work and social withdrawal. In addition he has suffered depression as a result of the loss of abilities and loss of identity as a productive member of his family. Mr G. B. has not been employable for the last several years and this would predate December 2012. His back pain is severe and this is a prolonged and degenerative condition. I would think that he plateaued in 2014. We are all in agreement that narcotic medications have an extremely limited role and I encourage him to do what he can. I will enclose a chart summary which will include his medications. Restrictions at this time would include any prolonged walking, lift or any strenuous activity. There are comorbid

> diagnosis of hypertension, COPD and Thoracic aneurysm that further limit his ability to participate in meaningful activities.

[32] However, this opinion was not before the General Division when it heard the Appellant's appeal on September 3, 2015. The Appeal Division is constrained by the DESD Act and subsequent case law against considering evidence that had not been presented at the General Division hearing.

[33] Counsel for the Appellant submitted that in coming to its conclusion that the Appellant retained work capacity the General Division took the position of a medical doctor. He argued that the opinions of the two doctors, Dr. Huffman and Dr. Safakish, both of whom say that the Appellant suffers from chronic pain syndrome and at various times that he cannot work. The Appeal Division finds that this submission invites it to step into the shoes of the General Division and to reweigh the evidence, which is not it role: *Tracey v. Canada (Attorney General)*.

CONCLUSION

[34] Counsel for the Appellant argued that the General Division erred in law with respect to its treatment of the Appellant's oral evidence regarding his chronic pain. He submitted that the General Division was under a duty to enquire into his level of pain; but failed to do so, thereby committing an error of law. Counsel for the Appellant also argued that the General Division did not properly apply the principles of *Inclima v. Canada (Attorney General)*. For all of the above reasons the Appeal Division finds that the allegations have not been made out.

[35] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division