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

Citation: *J. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 9

Tribunal File Number: AD-16-981

BETWEEN:

**J. D.**

Applicant

and

**Minister of Employment and Social Development**
**(formerly 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: Neil Nawaz

Date of decision: January 13, 2017

Canada

## REASONS AND DECISION

## DECISION

[1] Leave to appeal is refused.

## INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated April 28, 2016. The General Division, having earlier conducted a hearing by teleconference, determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that his disability was not "severe" prior to the minimum qualifying period (MQP), which ended December 31, 2010.

[3] On July 27, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division an application requesting leave to appeal and detailing alleged grounds for appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

## THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[5] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[6] According to subsection 58(1) of the DESDA, the only grounds of appeal are 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.

[7] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development).*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada (A.G.).*[2]

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the applicant does not have to prove the case.

**ISSUE**

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

**SUBMISSIONS AND ANALYSIS**

[10] The Applicant submitted a letter with his application for leave that contained detailed commentary and annotation of the General Division's decision. He cited many instances in which he alleged the General Division failed to observe a principle of natural justice, committed an error of law or based its decision on an erroneous finding of fact. I have categorized, summarized and addressed his allegations as follows:

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

**Alleged Breaches of Natural Justice**

***Bias***

[11] The Applicant alleges the General Division was "potentially" biased against him, as the member commented on his lack of legal representation. He had been unaware that he was allowed to have a lawyer present, as there was no mention of this in prior correspondence.

[12] Having reviewed the General Division's decision, as well as the audio recording of the hearing in its entirety, I see no arguable case on this ground. The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[3] has stated that test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough, and the fact that a disposition has gone against a claimant is not proof by itself of impartiality. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues. In this case, the Applicant points to an observation, which in my view was mildly delivered by the General Division member presiding over the hearing, that he was unrepresented. I can conceive of no circumstance in which such a comment would create an apprehension of bias, particularly since claimants before the Tribunal frequently represent themselves. As an aside, while the Applicant claims that he was surprised to hear he could have brought a lawyer, the Hearing Information Form, which he completed on January 5, 2016, specifically asked whether he was represented (he replied that he was not).

[13] I not persuaded that an informed and reasonable person, viewing this matter realistically and practically, would conclude that the General Division was biased.

***Treatment of Witness***

[14] The Applicant alleges that the General Division member unfairly forced him and his witness, Dr. Koch, to answer questions separately at the hearing. When the Applicant asked if he and Dr. Koch could give evidence jointly, he was told, "This is not a conversation." The

[3] *Committee for Justice and Liberty v. Canada (National Energy Board)* 1976 2 (SCC), 1978 1SCR.

Applicant complains that he was not allowed to speak during Dr. Koch's testimony, nor was he permitted to qualify her evidence. In particular, he was prevented from giving context and background on the following subjects:

- His home exercise plan, which Dr. Koch designed, but which he had difficulty executing due to medication side effects;
- Job opportunities that were brought to his attention by his school as he was nearing the end of his program in late 2009.

[15] Under section 3 of the *Social Security Tribunal Regulations*, members of the Tribunal are given wide latitude to conduct hearings as they see fit, as long as rules of fairness and natural justice are observed. The Applicant's account of the hearing does not correspond with what I heard in the audio recording, which indicates that the General Division member generally permitted the Applicant and his chiropractor to give evidence freely. I heard nothing to suggest that the General Division member unduly fettered the Applicant's testimony, and he was given ample opportunity to address issues that he felt were important to his case.

[16] It is true that, near the outset of the hearing, the General Division member alluded to the rule of witness exclusion, indicating that she preferred to question Dr. Koch first, presumably to prevent her testimony from being coloured by the Applicant's. It is also true that the General Division member uttered the phrase, "This is not a conversation," but she did so in response to the Applicant's suggestion that he and his witness be allowed to give joint testimony. In my view, the General Division was justified in insisting on separate and discrete phases of testimony for fear of comingling evidence. Had the General Division prevented the Applicant from putting questions to Dr. Koch, then he might have been able to argue that he was unfairly denied his right to present his case as a self-represented party. However, I heard no such restriction, nor did I hear, at any point, the Applicant ask the General Division if he could directly examine Dr. Koch in a bid to clarify her evidence or bring out desired points. He cannot now complain his hearing was procedurally unfair, having failed to raise an objection to the General Division's conduct at the opportune time.

[17] The applicant has not persuaded me that he has an arguable case on this ground.

***Disregard of Psychological Conditions***

[18] The Applicant also alleges that the General Division essentially ignored evidence regarding his poor mental state, giving it very little attention during the hearing. As he has noted in his submission to the Respondent and the General Division, at least half of his complaints and symptoms are related to his mental health. He notes that there were three psychological reports included in his file, documenting his diagnoses of adjustment disorder and moderate depression, which remain persistent.

[19] I see no reasonable chance of success on this ground. An administrative tribunal need not refer to each and every item of evidence in its reasons, but in this case I see that the General Division did address Dr. Gouws' September 2011 psychological report, which described the Applicant's "moderately high and persistent" depression and adjustment issues.

**Alleged Error of Law – Misapplication of Severity Criterion**

[20] The Applicant alleges that the General Division erred in refusing his appeal despite the law, which permits part-time work, modified or otherwise. The CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he is incapable regularly of pursuing any substantially gainful occupation. Dr. Koch testified she believed the Applicant was severely disabled from gainful employment.

[21] My review of the General Division's decision suggests that it was aware of the correct standard for disability, having referred to it in paragraph 5 and again in paragraph 46. I saw no indication in its analysis that the General Division found the Applicant ineligible merely because he may have been contemplating part-time employment; rather, the General Division conducted an investigation into whether the Applicant's capacity might include the ability to perform "substantially gainful" employment. In doing so, the General Division took into account the fact that several health professionals had recommended his participation in work hardening programs. The General Division also drew an adverse inference from what it found was insufficient effort on the Applicant's part to comply with those recommendations and attempt alternate work within his limitations. While Dr. Koch may have testified as to her belief

that the Applicant was severely disabled, the General Division was within its authority to weigh it against other evidence and not simply regard it as the final word on the matter.

[22] The Applicant has not persuaded me that this ground has a reasonable chance of success on appeal.

**Alleged Errors of Fact**

***Dr. Mazza-Whelan – July 2009***

[23] In paragraph 14, the General Division referred to a July 23, 2009, note by Dr. Mazza-Whelan, who wrote that the Applicant had advised her that, as school would be finished shortly, he believed his pain would improve and he could find work. The Applicant avers that, at the time, he was hoping he would recover from his motor vehicle accident, finish school, and seek employment, but eventually it became clear that he was not recovering.

[24] Having examined this entry in the family doctor's office notes, I see nothing to indicate that the General Division erred in summarizing its contents. The General Division was within its authority to rely on this item of evidence, just as it was open to the Applicant to explain, qualify or counter it before, or during, the hearing, if he so wished.

[25] I see no arguable case on this ground.

***Dr. Koch – Assessments of March 2010 and February 2011***

[26] In paragraph 17, the General Division referred to Dr. Koch's assessment that the Applicant was fit to attempt a trial of modified work. The Applicant alleges that, while Dr. Koch did recommend that he attempt to find either modified part-time or voluntary work, the General Division disregarded the fact that she was very concerned about his deteriorating mental state and expressed concerns that he was becoming a hermit. This is why she suggested that he try a work trial.

[27] Again, the Applicant is not claiming that the General Division erred in its representation of Dr. Koch's assessment, only that there were other facts to which he feels it should have also referred. The courts have previously addressed this issue in other cases where it was alleged

that administrative tribunals "cherry-picked" from the evidence or failed to consider all of it. In *Simpson v. Canada (A.G.)*[4], the Appellant's counsel identified a number of medical reports that she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> [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. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact […]

***Job Search***

[28] The Applicant alleges that the General Division distorted the evidence to imply that he was looking for work:

- In paragraph 18, the General Division referred to the Applicant's testimony that he applied for four or five jobs in either 2010 or 2011 and received an interview with the police department.
- In paragraph 19, the General Division noted Dr. Koch's August 2010 treatment plan, in which she stated that he was looking for modified, lighter employment and he had presented for a number of interviews.
- In paragraph 27, the General Division noted Dr. Koch's August 2011 comment that the Applicant was looking for lighter employment.
- In paragraph 28, the General Division noted Dr. Koch's October 2011 comment that the Applicant had been independently looking for employment in his field of education and training for the past six months.

[29] The Applicant insists these statements are untrue; he was not looking for work in March 2010, nor has he ever looked for work since his motor vehicle accident (MVA). Instead, he

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[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

specifically testified that this job search occurred in January and February of 2011 and only after his lawyer instructed him to apply for jobs "in order to move the litigation process further."

[30] My review of the documentary evidence and audio recording of the hearing suggests that the General Division's statements, as enumerated above, accurately capture what was in fact said and/or written about the Applicant's job search. When the Applicant says these statements are "untrue", it appears he is referring to their substantive content, not the fact that they were made in the first place.

[31] At several points during the hearing, the General Division member pointed out what she identified as a contradiction between the Applicant's claim of disability as of December 31, 2010, and written evidence from that time that he was conducting a job search. She properly questioned the Applicant and Dr. Koch about this contradiction, but their responses apparently did not resolve it to her satisfaction. In the end, she chose to place more weight on the documents.

[32] As he has done repeatedly in the submissions accompanying his application for leave, the Applicant is attempting here to introduce evidence or make submissions that could or should have been made before the General Division. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the decision of the General Division, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP. An appeal to the Appeal Division is not an opportunity for an applicant to reargue elements of their case, and I see no reasonable chance of success on this ground.

***Physiotherapy and Exercise Regime***

[33] In paragraph 22, the General Division noted Dr. Mazza-Whelan's February 2010 report in which it was noted that the Applicant's shoulder pain was improving and he was doing his own physiotherapy, at home and at the YMCA, three times a week. In fact, says the Applicant, the YMCA and home exercises did not happen. The YMCA membership was spearheaded by

Dr. Koch and paid for by his insurance company, but he was unable to proceed due to side effects from Cymbalta and he later suffered a major relapse of his physical condition.

[34] My review of Dr. Mazza-Whelan's February 2010 note indicates that she did say that the Applicant's improving shoulder meant that he was suited to a self-administered physiotherapy and exercise program. If this note was in error and the Applicant never undertook such a program, it was open to the Applicant to correct the record during the hearing. My review of the audio recording suggests that he did not do so, even though the General Division afforded him ample opportunity.

[35] An appeal to the Appeal Division is not an occasion in which to introduce new evidence or submissions, and I see no arguable case on this ground.

***Occupational Therapy Report – April 2010***

[36] The Applicant alleges that in paragraph 23 of its decision, the General Division "incorrectly translated" the contents of the April 2010 occupational therapy report: "Aside from the opportunities set up by the school in late 2009 (of which there was only one interview) the only job search that I had performed was in early 2011, which I had testified. This job search was a failure, and I feel that I should not be faulted for trying."

[37] Again, my review suggests the General Division did not misrepresent the contents of this report, which reads in part: "Mr. J. D. stated that he is currently job searching for suitable employment in the IT sector. He stated that he has attended employment interviews, however, has not successfully secured employment to date." The Applicant had an opportunity to correct or contextualize this statement at his hearing and, in the absence of any indication that the General Division distorted or ignored material evidence, he cannot do so now before the Appeal Division.

[38] I see no arguable case on this ground of appeal.

***Number of Psychotherapy Sessions***

[39] In paragraph 25, the General Division referred to Dr. Gouws' report, in which it was mentioned that the Applicant had been approved for 10 psychological treatments. In fact, the Applicant says the correct number was 12.

[40] I agree with the Applicant that Dr. Gouws' report documented his attendance at 12 sessions, but in my view this error was not material. I see no indication in the decision that the General Division in any way based its decision on this relatively minor misapprehension of fact.

***Occupational Therapy Report – October 2012***

[41] In paragraph 34, the General Division cited an October 2012 occupational therapy report that referred to the Applicant's need for housekeeping assistance because of his full-time engagement in school. In fact, says the Applicant, this was a request for funding driven by a future care cost report ordered by his lawyer in case he recovered from his whiplash injuries. The report should not be viewed as an indication that he was able to work.

[42] Again, the Applicant's submission amounts to an attempt to reargue a point that he already raised before General Division. The very next paragraph (35) of the decision indicates that the General Division was cognizant of the Applicant's claim that he never returned, or intended to return, to school. The General Division also noted the Applicant's testimony that the OT report did not report this information accurately.

[43] I see no arguable case on this ground.

***Reliability of Applicant's Testimony***

[44] In paragraph 42, the General Division wrote that the Applicant appeared to have difficulty remembering time frames and sequence of events. Although the General Division acknowledged that the Applicant answered questions to the best of his recollection and ability, it preferred, where necessary, to rely on information in medical documents. The Applicant claims that most of the information in this paragraph is untrue. In fact, his testimony was detailed and specific, as he has had to repeatedly tell his story to medical professionals over the years.

[45] I see no reasonable chance of success on this ground. The Applicant may disagree with the General Division's assessment of his reliability as a witness, but he has not identified a specific error that falls under one of the grounds enumerated in subsection 58(1) of the DESDA. In the end, paragraph 42 expresses no more than the General Division's preference for documentary evidence—which was prepared contemporaneously to the MQP—over oral evidence. This preference, which the General Division explains with defensible reasons, is not in my view reasonable grounds for an appeal.

***Dr. Koch's Testimony***

In paragraph 47, the General Division found, based on her assessments from early 2010 and in 2011, that Dr. Koch had encouraged the Applicant to attempt a trial of modified work within his capabilities. The Applicant denies this and points to Dr. Koch's testimony that she at no time ever told him that he was capable of work. He insists the General Division had no reason to dismiss Dr. Koch's oral evidence in favour of earlier written statements that were easily explainable.

[46] This submission highlights the contrast between Dr. Koch's reports from 2010-11 and the her testimony at the hearing of April 26, 2016. As with the Applicant's own testimony, when faced with a discrepancy, the General Division preferred to rely on documents, although I note that the General Division did seek clarification from Dr. Koch about this issue. I would not second-guess the General Division's right to sort through the relevant facts, assess the quality of the evidence, and determine what to accept or disregard. As has already been noted,[5] it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions. In my view the Applicant has not rebutted that presumption, and I see no reasonable chance of success on this ground.

[5] *Simpson, supra.*

**CONCLUSION**

[47] As the Applicant has submitted no grounds of appeal that would have a reasonable chance of success, the application is refused.

Member, Appeal Division