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

Citation: *R. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 79

Tribunal File Number: AD-16-196

BETWEEN:

**R. T.**

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: February 28, 2017

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division, dated December 1, 2015, which determined that the Applicant ceased to be disabled for the purposes of the *Canada Pension Plan* as of August 1, 2006, as it found that he had the capacity regularly of pursuing any substantially gainful occupation. The Applicant applied for leave to appeal on January 21, 2016, and filed additional submissions on February 26, 2016, invoking several grounds of appeal.

## ISSUE

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

## ANALYSIS

[3] 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.

[4] Before leave can be granted, 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 of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[5] The Applicant submits that the General Division failed to observe a principle of natural justice and that it based its decision on an erroneous finding of fact that it made in a perverse and capricious manner or without regard for the material before it.

**(a) Natural justice**

[6] The Applicant alleges that the General Division failed to observe a principle of natural justice for the following reasons:

i. in failing to follow its own procedures. In particular, there was only one panel member present, rather than a panel of three members.

ii. in denying him the opportunity to fully present his case, including reading from a prepared letter, which had been filed with the Social Security Tribunal on November 20, 2015.

**Tribunal sittings**

[7] The Applicant had received a brochure from the Office of the Commissioner of Review Tribunals that explained the appeals process. The Applicant was led to believe that he could expect a panel made up of three members, including one from a prescribed health profession. However, as the Applicant's appeal was not heard before April 1, 2013, his appeal was transferred to the Social Security Tribunal pursuant to section 257 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c. 19. That section provides that any appeals filed before April 1, 2013 are deemed to have been filed with the General Division on April 1, 2013.

[8] The DESDA and the *Social Security Tribunal Regulations* (Regulations) set out the procedures which apply to both the General Division and Appeal Division of the Social Security Tribunal. Section 61 of the DESDA stipulates that every application to the Tribunal is to be heard before a single member. There are no provisions under the DESDA, the Regulations or, for that matter, the *Canada Pension Plan* that provide for more than one member to preside over a panel.

[9] Although the Applicant may have held a legitimate expectation that there would be a three-person panel, as the Federal Court held in *Belo-Alves v. Canada (Attorney General),* 2014 FC 1100, in following *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, 1975 CanLII 4 (SCC), there is no vested right to continuance of the law as it stood in the past. The Federal Court determined that the Social Security Tribunal is subject to the new legislation. Accordingly, there was no breach of natural justice when one member heard the appeal.

**Documents GT10 and GT11 in relation to the evidence**

[10] The Applicant submits that the General Division denied his representative "the right to read [her] written presentation" (GT11). The Applicant had filed these submissions on November 20, 2015, within days of the scheduled hearing date of November 24, 2015. The actual argument, which can be found at GT11-35 to 49 and which the Applicant describes as a letter, was accompanied by several medical and other records (including an ergonomic assessment dated August 2000 and operative reports from 2014 and 2015), excerpted reports and a witness statement from the Applicant's spouse. The records, however, did not specifically address the Applicant's capacity in or around August 2006, when the Respondent ceased payment of the disability pension. The Applicant had annotated the submissions and cross-referenced them against 39 appendices. The submissions spanned 114 pages.

[11] At the outset of the hearing, the Applicant's representative confirmed that she wished to read her letter, which formed part of the submissions at GT11 (at 5:19 to 5:37[1] of the recording of the hearing).

[12] In its decision, the General Division dealt with the issue of the admissibility of documents GT10 and GT11, given that both documents had been filed beyond the filing deadlines of October 15, 2015 and November 15, 2015. The Notice of Hearing (GT0C and GT0D) established clear filing deadlines. The original Notice of Hearing, dated August 27, 2014 (GT0), indicated that any late documents might not be considered by the member and would be considered only at the member's discretion.

[1] Any references to time indicate the timestamp on the recording of the hearing before the General Division.

[13] The General Division found that the Applicant did not offer a reasonable explanation for having filed GT10 and GT11 late, despite the fact that the appeal had originally been scheduled for hearing as early as February 12, April 9 and July 22, 2015, and had been adjourned several times.

[14] Document GT10 set out a list of proposed witnesses. It is a matter of good practice that parties exchange witness lists and notify the Social Security Tribunal of any proposed witnesses. In this case, the Applicant intended to call his parents as witnesses to the hearing. The General Division member did not refer to this specific document and, ultimately, the only witness who testified on behalf of the Applicant was his daughter, who also acted as his representative throughout the proceedings. The General Division did not specifically exclude this document or deem it inadmissible.

[15] The General Division, however, clearly turned its mind to assessing the admissibility of document GT11. At paragraphs 4 and 5, the member wrote:

> [4] [. . .] The additional documents are duplicates of medical information previously submitted, further medical and other documents which pre-date the Appellant's successful application for CPP disability benefits in 1998, a surgical record from August 2015 and submissions from the Appellant's daughter and mother. The documents sought to be considered are filed outside of the filing deadline, not in response to documents filed during the filing period, are not relevant to the present appeal, or were duplicate documents or documents in existence many years ago.
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> [5] At the hearing the Appellant acknowledged the documents were filed late and did not offer a reasonable explanation. The surgical record of August 2015 was in existence many months prior to the hearing and acknowledged to be in the Appellant's possession on October 15, 2015. The record is of minimal relevance to the Tribunal's decision in any event. The Appellant provided detailed oral submissions at the hearing. The Tribunal determines that the submissions of the Appellant filed on November 18, 2015 and November 20, 2015 will not be considered in the decision.

[16] A member has the discretionary authority to determine the admissibility of any records. He should be guided by the rules of evidence, even if he is not bound by them. Although the formal rules of admissibility of evidence do not apply and are relaxed in

administrative law proceedings, he should nonetheless have particular regard for the relevance and probative value of the documents to the ultimate issues. Here, the member was not satisfied that the documents contained in GT11 met those basic requirements. The Applicant did not respond to the issues raised by the member, other than to suggest that there was a right to have these documents included as part of the record. However, even if the documents had been filed in a timely manner, the Respondent could have sought and requested that medical records be struck from the record on the basis of lack of relevancy to the proceedings. In other words, there is no entitlement as of right to have documents form part of the record, without any consideration as to whether they meet basic relevancy requirements. I am not satisfied that the appeal has a reasonable chance of success, to the extent that the Applicant suggests that the medical and other evidence contained in document GT11 ought to have been deemed admissible.

**Documents GT10 and GT11 in relation to the submissions**

[17] Document GT11 also included the Applicant's submissions or argument in respect of the evidence. Although the Applicant argues that his representative was denied the opportunity to read her submissions, I see from reviewing the tape recording of the hearing that, in fact, the Applicant's representative sought to rely on the submissions in her capacity as a witness giving oral testimony, rather than as a representative providing closing argument or submissions (and normally, representatives are precluded from also being witnesses). For instance, at 24:10 of the recording, the member sought to determine why the Applicant felt compelled to work in 2006 and 2009. The Applicant's representative, in her capacity as a witness, sought to rely on her written argument as somewhat of an "aide memoire". I say somewhat, because it is evident that the Applicant's representative not only may have lacked an independent recollection, but may not have been using her letter as an aide memoire to serve as a trigger to revive any of her personal recollection. To the extent that the Applicant's representative strove to rely on her letter to give evidence, it was hearsay evidence, as the statements therein upon which she relied originated from other than the witness.

[18] Nonetheless, there may have been portions of the letter that formed part of the Applicant's submissions or argument. Natural justice must provide parties with an adequate opportunity to present their case and address the law and the facts. This includes being provided with the opportunity to make arguments on the evidence and the law. In this case, the General Division member concluded that the obligation to provide the Applicant with an opportunity to present his case was fulfilled by way of oral submissions. At paragraph 5, the member noted that the Applicant had provided detailed oral submissions at the hearing. The Applicant contends that this was deficient and suggests that, as a result, he was unable to direct the member's focus to the more salient issues. The Applicant maintains that the member ought to have included his written argument as part of the hearing file. I have not examined the Applicant's letter, but the Applicant should be prepared to demonstrate that, despite being permitted the opportunity to make oral submissions, he was nonetheless deprived of the opportunity to fairly present his case.

[19] I am satisfied that the appeal has a reasonable chance of success on this ground.

**(b) Erroneous finding of fact**

[20] The Applicant alleges that the General Division based its decision on erroneous findings of fact made without regard for the material before it.

[21] The Applicant argues that the General Division ignored or failed to consider supporting documentation. In response to a letter dated January 27, 2016 from the Social Security Tribunal seeking clarification on this ground, and in particular, a request that the Applicant identify the documentation that the General Division is alleged to have ignored, the Applicant prepared a document titled "Statement of Facts" (at AD1A), in which he provided his medical history. The Applicant also directed me to several portions of the hearing file, which he claims should have been considered by the General Division. These include extensive portions of the medical file dating to 1999 and the family physician's clinical records for the period from 2005 to 2010, as well as employment-related documentation, including an employer questionnaire. The Applicant also referred me to his physician's medical report of December 3, 2010 (GT1-176).

[22] I am mindful of the words of the Federal Court of Appeal in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, where at para. 50, Stratas J.A. remarked that:

> […] trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[23] As well, I note that the Supreme Court of Canada has determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all the issues and jurisprudence before it. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada remarked that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391).

[24] Although the General Division did not refer to or conduct any assessment in connection with the pre-2006 medical evidence, there was no error in this regard, as that evidence did not have any probative value to the issue as to whether the Applicant continued to be disabled as of August 2006.

[25] The General Division addressed the employment-related evidence and the issue regarding the nature of the Applicant's employment in 2006 in the evidence section and in its analysis. The General Division also analyzed the medical evidence before it, including the family physician's clinical records, which it indicated that it accepted and preferred over the Applicant's evidence.

[26] Essentially the Applicant is requesting that the Appeal Division reweigh and reassess the evidence in order to reach a different conclusion regarding his eligibility to a

disability pension. However, as the Federal Court held in *Tracey*, it is not the role of the Appeal Division to conduct a reassessment when determining whether leave should be granted or denied. This is so, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[27] Additionally, I am mindful of the words of the Federal Court in *Hussein v. Canada (Attorney General),* 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[28] I am not satisfied that the appeal has a reasonable chance of success on this ground.

**CONCLUSION**

[29] The application for leave to appeal is granted. This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division