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

Citation: *A. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 92

Tribunal File Number: AD-16-418

BETWEEN:

A. B.

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: Janet Lew

Date of Decision: March 9, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 18, 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 end of his minimum qualifying period of December 31, 2002.

ISSUE

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

GROUNDS OF APPEAL

[3] Subsection 58(1) of the *Department of Employment and Social Development* (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.

[4] 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.

[5] The Applicant alleges that the General Division erred in law and also 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] The Applicant submits that the General Division erred as follows:

- It assigned too much weight to the evidence regarding his school attendance.
- It failed to fully consider the fact that he received accommodations to enable him to attend school; the fact that the Workplace Safety and Insurance Board placed him under "extreme pressure" to attend school, otherwise it would have terminated his benefits and his family would have been left in financial hardship, if he failed to attend; or the fact that he struggled to attend school, despite his pain and difficulty concentrating and remaining focused.
- It assumed that he would be able to find a benevolent employer who would accommodate his limitations and inability to meet a routine workday.

[7] The issue of the weight to be ascribed to evidence does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Federal Court of Appeal has declined to interfere with a decision-maker's assignment of weight to the evidence, holding that such an exercise is a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Similarly, I would defer to the General Division's assessment of the evidence. As the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I cannot conclude that the General Division should have placed less weight on the Applicant's evidence regarding his school attendance.

[8] The Applicant suggests that the General Division failed to consider that he received accommodations to attend school. The General Division clearly was attentive to this fact. At paragraph 70 of its analysis, the member wrote, "Although the [Applicant] **received accommodation** in the more physical courses such as welding, pipefitting and carpentry […]" (my emphasis). The General Division was also mindful that the Applicant

struggled with pain and that he had concentration issues. It set out this evidence at paragraphs 10, 39, 40 and 47 of the evidence section. The General Division also acknowledged that the Applicant has issues with lack of concentration, pain and feeling groggy, although its reference in its analysis section was limited to his belief as to whether he could fulfill the duties in a control room, as opposed to being in a school setting.

[9] In any event, it is well established in the jurisprudence that a decision-maker is not required to refer to all of the evidence before it, as it is presumed to have been considered: *Simpson, supra.* This presumption can be rebutted if an applicant can establish that the evidence was of such probative value that the decision-maker ought to have considered it. Given that the member clearly was aware of the evidence, having cited portions of it and then referring to portions of it in the analysis and discussion, this indicates that the member considered it.

[10] Finally, the Applicant suggests that the General Division assumed that he would be able to find an accommodating and benevolent employer. However, the General Division did not allude to a benevolent employer and clearly determined that the Applicant did not require a benevolent employer. After all, the General Division found that the Applicant has the capacity regularly to attend sedentary work on a part-time basis, at a minimum.

[11] I am not satisfied that the appeal has a reasonable chance of success on the grounds raised by the Applicant.

CONCLUSION

[12] Given the above considerations, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division