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

Citation: *D. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 153

Tribunal File Number: AD-16-298

BETWEEN:

D. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 7, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 23, 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" by the end of his minimum qualifying period on December 31, 2015. The Applicant filed an application requesting leave to appeal on February 11, 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;
>
> (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] I need to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant submits that the General Division erred under each of these grounds.

(a) Breach of natural justice

[5] The Applicant argues that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, in that he was deprived of a fair hearing. In particular, he alleges that the General Division did not provide him with an opportunity to call a witness or with an adequate opportunity to present his case. He further claims that the member was biased.

[6] The Applicant submits that the General Division did not provide him with an opportunity to call a witness, as there was insufficient time, owing to the fact that the General Division member spent considerable time questioning him and because they lost time when both he and his counsel had exited and were unable to re-gain access to the hearing room until after some time had elapsed. He claims that the witness's evidence was critical to clarifying a physician's erroneous comment, upon which the General Division relied in coming to its decision. The Applicant further submits that because of the loss of time, he did not have sufficient opportunity to make oral submissions.

[7] The Applicant submits that the cumulative effect of the following issues gives rise to a reasonable apprehension of bias:

i. the member did not provide the Applicant with an opportunity to properly present his case, and instead, "cherry-pick[ed] certain aspects of the … records," and therefore failed to consider the totality of the evidence before her;

ii. the member dismissed "overwhelming [medical] evidence" that established that the Applicant is not functionally capable of working in any occupation;

iii. the member gave no weight to the family physician's observations or opinions, despite the fact that he sees the Applicant more frequently than other health caregivers, and is therefore in the best position to assess his level of functionality;

iv. the member failed to consider the possibility that gaps in the Appellant's memory might reflect the severity of his condition and the side-effects of medication, or of the "broken telephone" effect of being seen by multiple treatment providers who rely on the information contained in the records of others, when that information may not always be accurate; and

v. the member made several inaccurate and misleading statements.

[8] I am not satisfied that these issues necessarily give rise to a reasonable apprehension of bias. For instance, the courts have consistently upheld the principles that a decision-maker need not refer to all of the evidence before it, including any evidence that is supportive of a party's position; that the trier of fact is presumed to have considered all of the evidence before him; and that it is the prerogative of the trier of fact to assess the evidence and determine the appropriate amount of weight to assign to that evidence. These principles can be set aside when the probative value of the evidence that is not expressly discussed is such that it should have been discussed: *Singer v. Canada (Attorney General)*, 2010 FC 607, at paragraph 20. Yet, although the Applicant alleges that the General Division failed to consider the totality of the evidence, he has not referred me to the evidence that he maintains was dismissed or overlooked, nor does he indicate how any of this evidence is of any probative value.

[9] The Applicant contends that the General Division failed to consider possible gaps in the Applicant's memory, the side-effects of medication or the "broken telephone" effect, but fails to provide any evidentiary basis to support these submissions.

[10] Members of the Social Security Tribunal are entitled to conduct proceedings in the manner they deem appropriate for the circumstances, but they are nonetheless required to respect principles of natural justice. Natural justice is concerned with ensuring that an applicant has a fair and reasonable opportunity to make his or her case, that he or she has a fair hearing and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. If some of these allegations are borne out by the audio recording of the hearing, there may have been a breach of the principles of natural justice. On that basis, I am prepared to grant leave to appeal. This does not, however, mean that the Applicant has established that a breach necessarily occurred. For instance, if the Applicant's counsel ultimately elected not to call the

witness because she determined that her evidence was no longer material, generally, this would not show that the General Division had deprived the Applicant of an opportunity to call a witness.

(b) *Villani* and paragraph 90 of the General Division decision

[11] The Applicant argues that the General Division failed to properly apply the principles enunciated by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248, namely, that it failed to engage in a "real world" analysis in assessing his capacity to retrain or to regularly pursue any substantially gainful occupation. The Applicant alleges that the General Division failed to consider his ongoing psychiatric difficulties, or the fact that his education, training, past work, and life experience render him suitable only for occupations that require interaction with others. The Applicant maintains that the General Division failed to consider how his medical issues affect his ability to pursue any truly remunerative occupation with consistent frequency.

[12] The Applicant's alleged mental health issues are the bedrock upon which these submissions are made. Although the Applicant complained of several mental health issues, the General Division found that "his claims of [post-traumatic stress syndrome], anxiety, depression, and bipolar disorder rest on shaky foundations." Yet, the General Division was mindful of these complaints when assessing the severity of his disability and when determining whether he held any capacity regularly of pursuing any substantially gainful occupation. The General Division relied on the opinions of several physicians, including a psychiatrist, in arriving at its decision. It was against this backdrop that the General Division turned to conducting a "real world" analysis under *Villani*, at paragraph 90. While the General Division did not fully set out the details of the Applicant's education or skills, the member signaled that she considered them. The member wrote, "The Tribunal notes […] that the [Applicant] is relatively young, is English-speaking, has a good education, and has many transferable skills."

[13] In *Villani*, the Federal Court of Appeal cautioned against interfering with a decision-maker's assessment of an applicant's circumstances, provided that he or she applies the correct legal test for severity, as he or she is in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. I am

mindful also that, in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, the Federal Court stated 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." Given that the member considered the Applicant's personal characteristics and his alleged mental health issues, and conducted a "real world" analysis, I am not satisfied that the appeal has a reasonable chance of success on this particular submission.

(c) Erroneous findings of fact

[14] The Applicant alleges that the General Division based its decision on several erroneous findings of fact. Not all of the Applicant's submissions under this heading properly fall within this category, but I will address them under this heading, as that is how they have been presented.

Paragraphs 72 to 75

[15] Some of these alleged erroneous findings of fact center on the member's findings regarding the reliability of the Applicant's evidence. The Applicant now seeks to respond to and explain some of the contradictions identified by the General Division. For instance, at paragraph 74, the member found that there were three different accounts of the termination of his employment in X, two of which were contained in the records of a former psychiatrist, Dr. J. Gilbert. The Applicant claims that Dr. Gilbert must have been mistaken in her account and that he had intended to call his spouse to give evidence to refute that the incident involving her did not occur. Even if this had occurred and the Applicant's spouse had given evidence to this effect, and the General Division had accepted her evidence, two differing accounts of the Applicant's termination from his employment would have persisted.

[16] Further, while the Applicant's spouse may well have provided a different account than the one recorded by Dr. Gilbert, the fact is that this evidence was before the General Division, and the General Division was entitled to rely on the veracity of the records, not as evidence of the "proof of fact," but as evidence that the reporting had been made by the Applicant to Dr. Gilbert. Even if the Applicant's spouse had testified, it is doubtful that she would have been able to dispel the fact that the reporting of an incident had been made to Dr. Gilbert.

[17] At paragraph 73, the member cited one example where she found that the Applicant had offered incorrect information to health professionals. The member found that, although the Applicant had informed a psychiatrist that another psychiatrist, Dr. Zamar, had diagnosed him with post-traumatic stress disorder, there was no indication in Dr. Zamar's notes that he had ever diagnosed the Applicant with post-traumatic stress disorder. The Applicant now explains that Dr. Zamar may have casually offered him this diagnosis without documenting it, or he may have actually received the initial diagnosis from his family physician. While that may be so, an appeal does not offer the opportunity to re-litigate a matter and introduce new evidence that, had it been accepted by the member, might have elicited a more favourable outcome.

[18] It has now become well-settled law that new evidence generally does not constitute a ground of appeal before the Appeal Division. As the Federal Court recently held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367, "New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*." It would have been appropriate for the Applicant to explain any inconsistencies or gaps in the evidence at the hearing before the General Division, as there is no jurisdiction under the DESDA to consider new evidence for this purpose.

[19] This reasoning also applies to the alleged erroneous findings of fact set out in paragraph 72, where the member outlined the Applicant's evidence regarding his work history, which the member found was contradictory, and to the submissions regarding paragraph 75. The appeal does not provide parties with an opportunity to introduce new evidence or submissions to respond to matters that could have been addressed during the proceedings before the General Division. Had the General Division's interpretation of the facts been made without any evidentiary foundation or basis, this might have called for greater scrutiny, but otherwise, if those facts remain unchanged, it is not for me to determine whether the General Division ought to have come to an interpretation that was more favourable to the Applicant.

[20] For the most part, the Applicant is seeking a reassessment. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied.

Paragraph 77

[21] The Applicant contends that the member erred at paragraph 77,[1] in finding that he provided a psychologist with an inconsistent account of an incident, when in fact he was recounting nightmares, not an actual incident (AD1-17). The Applicant writes that the General Division suggested in paragraph 77 that he "has credibility issues because he advised [a psychologist] that he was beaten up by faceless men on top of him." Even if the member erred in suggesting that the Applicant had been describing an actual incident, rather than his nightmares, the member listed other accounts that she found to be contradictory. In any event, the psychologist's report could have lent itself to the member's interpretation. The psychologist wrote, "[the Applicant] experienced restless sleep and ongoing nightmares about the kidnapping, being beat up by faceless men on top of him" (GD10-7). From this, the member could have understood that, to some extent, the nightmares reflected what had transpired during the kidnapping."

Paragraphs 78 and 79

[22] The Applicant suggests that there were shortcomings in some of the medical records and reports, in part because he was initially reticent to disclose an incident to Dr. Zamar and because Dr. Zamar withheld details in his reports to the Applicant's employer. The Applicant suggests that the member should not have relied upon those records and reports in concluding that the Applicant therefore did not have post-traumatic stress disorder. The General Division, however, was not responsible for any shortcomings in the medical records; the member should have been able to rely on the veracity and completeness of the reports. Had there been any deficiencies in any of the medical opinions, it was incumbent upon the Applicant to identify and address them, whether by explaining them to the member or by obtaining supplementary medical opinions.

[23] The Applicant argues that the member erred in concluding that he could not possibly have a post-traumatic stress disorder as he was "only threatened with rape" and it could not have been that traumatic of an event. In fact, the General Division ultimately rejected that the kidnapping incident, during which he was reportedly threatened with rape, had ever occurred.

[1] The Applicant's submissions mistakenly refer to paragraph 78.

Similarly, the member was unprepared to accept that the threat of rape had ever happened and therefore concluded that he had not experienced a traumatic event such as to trigger a post-traumatic stress disorder.

[24] The Applicant submits that the member nevertheless erred in concluding that he did not have a post-traumatic stress disorder, as he exhibited symptoms and was diagnosed with it, and as several treating psychiatric and psychological assessors were of the opinion that he had a post- traumatic stress disorder. The Applicant argues that the member should not have discounted these medical opinions. However, the member noted that the diagnosis of a post-traumatic stress disorder was predicated on only the "unsupported statements of the [Applicant] some seven or eight years after the incident is said to have occurred." I am satisfied that this raises an arguable case, as to whether the member was entitled to reject the assumptions upon which medical opinions were based, and thereby reject those very medical opinions.

Paragraph 80

[25] The Applicant argues that, at paragraph 80, the General Division should not have dismissed the family physician's opinion that he has a major depressive disorder, on account of the fact that he is a general practitioner, rather than a specialist, such as a psychiatrist or psychologist. The member wrote, "Dr. Choi appeared to accept the [Applicant's] description of his condition, but he is not a psychiatrist or psychologist." The statement, however, needs to be placed in context because it is apparent that the member was explaining why she was assigning less weight to the opinion of the family physician.

[26] In the same paragraph, the Applicant argues that the General Division erred in relying on the differences in his global assessment of functioning (GAF) scores, to find that he lacks credibility, because such scores are of limited utility in that they represent a snapshot at a particular point in time. However, the member did not actually suggest that the Applicant lacked credibility because he had differing GAF scores. Indeed, she referred to the GAF scores to suggest that, at the time of assessment, his major depressive disorder could not have been that severe.

[27] The Applicant argues that the member misread the medical opinion of one of the psychiatrists, who reported that he displayed histrionic and narcissistic personality traits. At paragraph 80, the member wrote, "She also reported that the [Applicant] has histrionic and narcissistic personality traits, an observation that casts some doubt on his veracity." The Applicant argues that the psychiatrist did not express any opinion on his credibility and that the member was therefore wrong in suggesting that she had. On the face of it, the Applicant's interpretation of the member's statement is reasonable. However, when comparing the statement to the member's summary of the psychiatrist's opinion at paragraph 42, it is clear that the observation belongs to the member, rather than to the psychiatrist.

[28] The Applicant asserts that the member misinterpreted the opinion of the psychologist, in finding that he had qualified his opinion that the Applicant has a major depressive disorder by noting that the Applicant has a potentially high level of distortion. The Applicant suggests that significant portions of the assessment section of the psychologist's report should be considered, to provide some context, as his opinion "specifically indicates that the scoring and the configuration of the clinical scales suggests the severity of symptoms" (AD1-23).

[29] The psychologist's report spans 33 pages. In the clinical formulation, the psychologist reviewed the medical records that had been provided to him. He diagnosed the Applicant with post-traumatic stress disorder as well as a severe major depressive disorder with a need to rule out bipolar disorder. There were also indicators of a possible obsessive-compulsive disorder (GD10-32 and 33). I do not readily see any reference or qualification by the psychologist in his conclusions that "there was potentially a high level of distortion." At paragraph 48, the member cited GD10-27 of the psychologist's report, stating that the Applicant's pattern on the Personal Assessment Inventory (PAI) Interpretative Report "does not necessarily indicate a level of distortion that would render the test results uninterpretable […],"and suggesting that the qualification is found earlier in the psychologist's report, rather than in the conclusions. The psychologist appeared to acknowledge that while there could be an element of marked exaggeration, or what the member termed as a "high level of distortion," it could also indicate other features, and "given the context of the clinical interview, [these] hypotheses appear[ed] more viable." It is not apparent from the member's decision that this was taken into account,

and it may have led to an erroneous finding of fact. I am prepared to find that there is an arguable case to be made and that the appeal has a reasonable chance of success on this ground.

Paragraph 82

[30] The Applicant claims that the General Division based its decision on an erroneous finding of fact that he does not have cognitive issues, which it defined as problems with concentration and memory. He claims that the General Division misinterpreted the medical-legal report dated July 30, 2015, from Dr. Bodenstein, a psychologist (GD10-3 to 36). The Applicant notes that the psychologist wrote, "There was no evidence of any cognitive difficulties or of a formal thought disorder." The Applicant argues that the psychologist was ruling out certain conditions, such as schizophrenia, but that this did not mean that the Applicant otherwise did not experience any cognitive difficulties or that he was not experiencing mental health issues. Indeed, in the same medical report, the psychologist wrote that the Applicant's "[cognitive difficulties likely stem from the synergy of his anxiety and depression as well as fatigue]" and also that, "Given the deleterious combination of his [post-traumatic stress disorder], depression, likely bipolar disorder, anger and [obsessive-compulsive disorder], it his highly unlikely that he will be able to return to work." The Applicant also notes that Dr. A. B. Ahmed, a psychiatrist, diagnosed him with bipolar disorder with cognitive impairment, among other things.

[31] At paragraph 82, the General Division addressed the Applicant's allegations that he has cognitive issues. The member noted, in particular, Dr. Bodenstein's and Dr. Ahmed's reports, and also the opinion of Dr. MacIntyre, which was reproduced in part in Dr. Bodenstein's report. The member noted, on the one hand, that Dr. Bodenstein stated that there was no evidence of cognitive difficulties, but on the other hand, stated that his cognitive difficulties were a contraindication for training. The member found it significant that Dr. MacIntyre did not see any role for cognitive restructuring, in contrast to Dr. Ahmed's opinion that the Applicant would benefit from cognitive behavioural therapy. Upon considering the opinions of Drs. Bodenstein, Ahmed and MacIntyre, the member was unconvinced that the Applicant has cognitive issues; otherwise, she did not say anything at paragraph 82 about the Applicant's alleged mental health issues.

[32] Dr. Bodenstein's statement that, "there was no evidence of any cognitive difficulties or of a formal thought disorder" is set out at page GD10-4 of the hearing file, under the subheading "Clinical Presentation." There was no reference anywhere within the subheading to any medical conditions, such as schizophrenia. Following the initial outward clinical presentation, Dr. Bodenstein reviewed the medical records and proceeded to conduct several tests, all of which led to his clinical formulation. He noted the Applicant's complaints of poor concentration to his family physician. The psychologist appeared to accept that the Applicant has some degree of cognitive difficulties (GD10-32), and then finally, recommended a cognitive behavioural approach for the Applicant. It is highly doubtful that the psychologist would have made this recommendation if he did not believe that the Applicant has cognitive difficulties, notwithstanding the Applicant's initial clinical presentation.

[33] While the General Division was entitled to draw findings based upon the evidence before it, if it misconstrued or misinterpreted that evidence, it could have led to an erroneous finding of fact. In this regard, I am satisfied that there is an arguable case to be made and that the appeal has a reasonable chance of success.

Paragraph 83

[34] In response to the Applicant's submission that he has undergone multiple therapies, the General Division noted the Respondent's submissions that the Applicant had failed to fully engage in appropriate treatment for his symptoms "notably by refusing to take medication in spite of pressing recommendations from Dr. Seli and Dr. Gilbert." The member accepted the Respondent's submissions in this regard, indicating that she found the Applicant's explanation against taking medication unreasonable. The member also found that the Applicant had failed to participate in an anger management program, as Dr. Seli had recommended.

[35] The Applicant argues that the General Division erred in finding that he failed to fully engage in appropriate treatment, pointing to the psychiatric report dated April 9, 2015, in which Dr. Ahmed wrote that he has been compliant with his appointments and medication regimen. The Applicant notes that Dr. Ahmed has not recommended that he attend anger management counselling because this is one of the issues Dr. Ahmed is addressing. The Applicant notes that he has seen numerous mental health professionals since 2011, has participated in a hospital day

program for mental illness, saw a family counsellor with his wife, and participated in cognitive behavioural therapy. However, the member focused on whether the Applicant was taking medications and on whether he had participated in an anger management program, in determining whether he had been compliant with all reasonable treatment recommendations.

[36] The Applicant submits that it was unreasonable for the member to find that he did not take recommended medication because "he did not want to put chemicals in his body." The Applicant argues that the member failed to consider the fact that he experienced adverse side-effects and had past negative experiences from some of the medications, that he was unable to build a trusting relationship with Ds. Seli and Gilbert, and that the medications would not have made any significant difference to his mental health in any event "based on the fact that multiple medical regimes that he has tried since have failed to ameliorate his condition and improve his functionality." In other words, he claims that there was a reasonable explanation for his non- compliance.

[37] The Applicant also explains that it was reasonable for him not to participate in an anger management program, as he was seeing Dr. Ahmed. The Applicant says that it is clear from the note dated May 6, 2015 that he was discussing and dealing with his anger management issues with Dr. Ahmed. The General Division addressed this particular issue and the Applicant's submissions. It rejected the Applicant's advice that Dr. Ahmed was counselling him, noting that the psychiatrist's notes did not corroborate this.

[38] The records indicate that the Applicant had reported that he did not tolerate anti-depressants well and that he thought they exacerbated his symptoms. Nonetheless, Dr. Seli recommended that he attempt a low dose of an atypical antipsychotic and that he participate in an anger management program (GD2-147). It is also clear that the General Division considered the reasonableness of the Applicant's non-compliance.

[39] Essentially, the Applicant is seeking a reassessment on the issue of whether it was reasonable that the Applicant did not pursue recommended treatment. As I have indicated above, a reassessment is not a ground of appeal under subsection 58(1) of the DESDA.

Paragraph 84

[40] The General Division found that the Applicant had difficulty establishing a therapeutic relationship with mental health professionals, but found that this fact alone did not reflect or was not determinative of the severity of his disability. The Applicant concedes that he had testified that he had difficulty establish therapeutic relationships, but claims that he explained that he eventually established a relationship with Dr. Zamar, who passed away in 2012, and with Dr. Ahmed, who he continues to see, and who has been able to convince him of the need to find an effective medication regime.

[41] The Applicant argues that the General Division erred in finding that he had difficulties establishing a relationship with Drs. Gilbert and Seli because of "medication issues" but says that this finding is undermined by paragraph 63, where the member wrote that both physicians "made him feel that he was under attack" and that Dr. Gilbert kept a dog in the room during their sessions, even though he advised her that he was afraid of dogs. In this regard, the Applicant submits that the General Division failed to consider the totality of the evidence in finding that he had difficulty forming a therapeutic relationship with Drs. Gilbert and Seli because of "medication issues" when such was not the case.

[42] At paragraph 84, the General Division wrote that the Applicant seemed to have had difficulties with Drs. Seli and Gilbert, "apparently partly on the basis that he declined to take the medications they repeatedly recommended" (my emphasis). Although the member did not specify all of the factors that accounted for the difficulty in establishing a relationship with Drs. Seli and Gilbert, it is apparent, with her use of the expression "partly on the basis," that the member was aware that there were other reasons. I am not satisfied that the appeal has a reasonable chance of success on this ground.

Paragraph 86

[43] The Applicant argues that the member failed to understand the nature of his body pain and its etiology, as it found that his body pain could not have been that severe if he had not been referred to or seen by a neurologist. The Applicant notes that Dr. Bodenstein indicates that stress and anxiety aggravate the Applicant's neck, shoulder and back pain. The Applicant

advises that he has seen other specialists for his body pain and is following treatment recommendations. He notes that he has seen a neurologist in connection with his headaches.

[44] At paragraph 86, the General Division wrote:

> The Appellant's main complaints appear to be related to his mental health. The Federal Court of Appeal has held that it is necessary to "tak[e] into account [his or] her entire condition," and not just the main ailment (*Bungay v. Canada (A.G.)*, 2011 FCA 47, at para. 17). The Appellant's main physical complaints, it seems, are pain all over his body and headaches. He is receiving medication for both these conditions, and there is no indication that he has been referred to a neurologist for his body pain. The Tribunal is not persuaded that these are serious medical conditions.

[45] From this paragraph alone, it appears that the member concluded that the Applicant could not have a serious medical condition, as treatment for his "body pain" was limited to medication, and as he had not been referred to a neurologist. There is an arguable case that using these two factors as a measurement for severity of the Applicant's body pain was an error.

Paragraphs 87 to 89

[46] The Applicant argues that his failed attempt to return to work in 2012 "is indicative of his inability to function in the workforce." The Applicant worked between early March 2012 and July 2012. The General Division wrote the following:

> The [Applicant] provided various explanations for the termination of his employment in July of that year, including a complaint from his wife or former girlfriend. He told Mr. I. A. that he had managed his resignation well. The Tribunal also notes that the Appellant evidently did not see his family doctor between June 2012 and May 2013, or have counselling with Mr. I. A. between June and October 2012. He did not begin seeing a psychiatrist until November 2012. Although the [Applicant] suffered from various serious stresses related to his work and personal life, the evidence does not support the conclusion that the [Applicant] left work for reasons related to his health.
>
> [88] . . . In the present case, there is no indication that the Appellant made any efforts to seek employment after leaving his job with the parking office in X in July 2012. At the hearing, he reported that this was because Dr. Ahmed thought he should not work while his medications were being adjusted.

[47] At paragraph 89, the General Division referred to some of the medical opinions regarding the Applicant's mental health, noting that they had recently provided "various accounts of the [Applicant's] ability to work," ranging from encouraging the Applicant to work, to finding him unable to work. After considering the range of opinions, the member determined that the evidence was not persuasive that the Applicant was disabled from all work.

[48] The Applicant argues that although his physicians and specialists were initially optimistic that he might be able to improve with treatment, his condition has continued to deteriorate, he has remained resistant to treatment, and the resounding consensus is that the prognosis is poor.

[49] The Applicant urges me to consider the "abundance of medical evidence in 2011 and 2012" that he claims proves that he was struggling to function in the workplace. He also urges me to consider *Foden v. Co-operators Insurance Association (Guelph)* 1978 CanLII 1622 (Ont. S.C.), where the court found that, "there was no better evidence of incapacity to perform a task than the failure of an honest and sustained attempt to do it."

[50] Essentially, the Applicant is seeking a reassessment of the issues set out in paragraphs 87 to 89. However, the General Division fully considered and addressed the issue of the Applicant's return to work and ultimately found that there were other explanations why he left his employment. As I have indicated above, a reassessment is not a ground of appeal under subsection 58(1) of the DESDA and, accordingly, I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[51] I have found that there is a reasonable chance of success on the grounds that I have identified above: (1) the General Division may have failed to observe a principle of natural justice and (2) the General Division may have erred at paragraphs 78 to 79, 80, 82 and 86 of its decision. This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division