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

Citation: *M. B. v. Minister of Employment and Social Development,* 2017 SSTADIS 149

Tribunal File Number: AD-16-466

BETWEEN:

M. B.

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 6, 2017

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division dated January 25, 2016, 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, 2013.

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] 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 submits that the evidence overwhelmingly supports a finding of a severe and prolonged disability by the end of the minimum qualifying period and that the

General Division must therefore have required that he meet a higher evidentiary standard, for it to have concluded otherwise. The Applicant suggests that the General Division must have ignored the evidence before it, and instead, based its decision on "additional documents" that had not been produced and were not part of the evidentiary record. The Applicant further submits that the General Division did not appropriately weigh the evidence.

[6] The Applicant's submissions largely call for a reassessment of the evidence in order to reach a different conclusion regarding his eligibility for a disability pension. Indeed, the written submissions generally mirror those before the General Division (GD4). 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, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[7] The Applicant suggests that the General Division applied a higher standard of proof. However, at paragraph 23, the General Division set out the onus of proof as one being on a balance of probabilities. There is no indication in the decision that the member deviated from this standard of proof.

[8] The Applicant suggests that the General Division ignored the medical evidence before it, and that it based its decision on medical reports that were not part of the evidentiary record. It was within the member's purview to draw adverse inferences from the fact that "additional documents" had not been produced, but the member did not do so. In fact, the member referred to some of the medical evidence upon which he relied. Therefore, it cannot be said that the member ignored the medical evidence altogether.

[9] The Applicant argues that the General Division did not properly weigh the evidence. However, 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 (CanLII). 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 am therefore not satisfied that the appeal has a reasonable chance of success. I cannot conclude that the General Division should have placed more weight on, or given greater consideration to, any evidence that favoured the Applicant.

[10] The Applicant suggests that the General Division did not properly consider *Villani v. Canada (Attorney General)*, 2001 FCA 248, and that it should have considered the fact that he has worked in only physically demanding environments and that he has few office or computer skills that could be used in a non-labour intensive work setting. These same submissions were referred to and considered by the member. These submissions also call for a reassessment but, as I have indicated above, it is not appropriate to conduct a reassessment at the leave or appeal stage.

[11] The Applicant suggests that the General Division should have given greater consideration to some of the evidence. I consider this a re-formulation of the argument that the General Division should have assigned greater weight to some of the evidence. The Applicant sustained several injuries in a motor vehicle accident that occurred in May 2011. He alleges that, notably, he sustained a mild traumatic brain injury with resulting cognitive dysfunction, chronic pain, post-traumatic stress disorder and depression, and that these impair his functionality and capacity. While the member did not conduct an extensive analysis of the evidence, he was mindful of and alluded to these medical issues or to the expert opinions that dealt with them. The member was aware of the experts' opinions that indicated that the Applicant was totally disabled because of his symptoms and impairments, but the member rejected them, finding that the opinions that he was totally disabled were inconsistent with the level of capacity that he demonstrated. The member accepted that the Applicant continues to experience "lingering conditions" from his accident, but found that the evidence fell short of establishing that the Applicant was severely disabled. Furthermore, the member noted that some physicians determined that, while the Applicant is unable to

return to his previous employment, he retained some capacity “albeit at different level” compared to his pre-accident level.

[12] Finally, I note that, in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, the Federal Court held 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.” In this vein, it would not be appropriate for me to second-guess whether the General Division should have weighed the evidence differently, when it is apparent that it considered all of the evidence before it.

CONCLUSION

[13] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division