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

Citation: *R. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 307

Tribunal File Number: AD-16-292

BETWEEN:

R. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 30, 2017

REASONS AND DECISION

OVERVIEW

[1] This is an appeal of the General Division decision rendered on

November 10, 2015. The General Division had determined that the Appellant was not severely disabled for the purposes of the *Canada Pension Plan* at the time of the hearing. The General Division had also determined that the Appellant has a minimum qualifying period ending on December 31, 2016. I granted leave to appeal on the issue of whether the General Division had 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, when it found that the Appellant used Percocet "infrequently."

[2] I have determined that a further hearing is unnecessary and that this appeal can proceed on the basis of written submissions.

ISSUE

[3] The sole issue before me is whether the General Division erred in finding that the Appellant used Percocet infrequently.

PERCOCET

[4] In its summary of the evidence, the General Division wrote that the Appellant received a prescription for Percocet one and a half years earlier and that, although it helped to reduce his pain, he "[did] not use it very often" (paragraph 32). At paragraph 47, the General Division wrote:

> In a letter dated October 30, 2013, Dr. Volz, family physician, states that the Appellant suffers from chronic pain in his neck, lower back and knees. The extent of his pain made it necessary for him to taking medication. He currently is taking Gabapentin 600 mg at bedtime and one tablet of Percocet three times daily. He is making an appointment for the Appellant to be evaluated by a physiatrist (GD4-60).

[5] In its analysis, the General Division found that, "[a]lthough he was prescribed Percocet a year and a half ago, but [*sic*] uses it infrequently" (paragraph 62). The Appellant argues that the General Division erred in finding that he takes Percocet infrequently.

[6] As I noted in my leave to appeal decision, the Appellant claims that he in fact takes three to four Percocet daily. The Appellant reported similar usage to his family physician, who indicated in his report dated October 30, 2013 that the Appellant had advised that he was taking one tablet of Percocet three times daily (GD4-60).

[7] At the hearing before the General Division, the Appellant testified that he had begun taking Percocet approximately one and a half years earlier (13:37 to 14:18 of part 1 of the recording of the hearing). The Appellant also testified that Percocet helps but, otherwise, he does not appear to have testified about how frequently he uses it.

[8] The Respondent submits that the General Division did not err in its findings and that, essentially, the Appellant is requesting that I reweigh the evidence in his favour. The Respondent further argues that, read as a whole, the decision is reasonable, as it is based on the evidence before the General Division, and that I should therefore defer to the General Division's decision. In particular, the Respondent says that the General Division "used different words to describe [the use of Percocet]." The Respondent suggests that the description that the Appellant "does not use [Percocet] very often" and uses it "infrequently" accurately portrays the Appellant's use of Percocet two to three times daily.

[9] The most recent evidence of the Appellant's frequent use of Percocet is the family physician's report of October 30, 2013. It is unclear on what basis the General Division concluded that the Appellant uses Percocet infrequently, given the preponderance of evidence.

[10] By any account, taking one tablet of Percocet at least three times daily can hardly be considered "infrequent." In this regard, this constitutes a misapprehension of the evidence, akin to that in *Murphy v. Canada (Attorney General)*, 2016 FC 1208. In that case, the General Division found that Ms. Murphy had been able to work for "numerous years," but the Federal Court found that, "[t]here was in fact no evidence that [Ms. Murphy] was

able to work for a single year, let alone the "'numerous years'" found by the SST-GD. The facts of this case do not support the finding that she 'was able to work for numerous years'." The Federal Court determined that a "critical misapprehension" of the evidence had occurred. The Federal Court also determined that the finding was of central importance because it misstated the nature of Ms. Murphy's ability to work, and did so in a manner that was not defensible on the record because it was contrary to the record.

[11] In this regard, the Respondent argues that if the General Division had in fact mischaracterized the Appellant's use of Percocet, it is, in any event, irrelevant to the outcome. The Respondent explains that any mischaracterization is irrelevant because the General Division determined that the Appellant was not severely disabled, largely on the basis of gaps in the medical record and the fact that the Appellant's testimony was unsupported by the documentary evidence.

[12] The Appellant had submitted medical reports dating back to 1993. The General Division found that the Appellant had failed to reasonably explain the large gap between 2001 and 2011 in the medical evidence. Yet, the Appellant's minimum qualifying period ended on December 31, 2016, a significant fact that the General Division appears to have overlooked in assessing whether the Appellant could be found disabled by the time of the hearing. Additionally, the Appellant complained that his pain is now worse —"twice as bad as it used to be"—so the General Division's focus on any gaps in the past medical records was somewhat misplaced. In any event, I note that the Appellant had disclosed in the questionnaire accompanying his disability application that he had worked until March 2011, when he was laid off from his employment, so any gaps between 2001 and 2011 were of little significance.

[13] The Appellant described his functional limitations and restrictions in the questionnaire. The General Division relied on these in determining that the Appellant had a residual capacity to work. This might have been a reasonable conclusion to draw, had it not been for the fact that the Appellant had steadfastly maintained that his pain (and presumably his limitations) had gotten worse over time. Therefore, the Appellant may not have been experiencing the same extent of limitations as he had when he completed the questionnaire

in April 2013. In other words, the questionnaire may not have been a reliable reflection of the Appellant's current functionality. Given that the minimum qualifying period ended on December 31, 2016, the General Division should have examined the Appellant's current restrictions and limitations, rather than those he faced in 2013.

[14] I am aware that the General Division determined that the Appellant had not experienced any deterioration in his overall medical condition. At paragraph 58, the General Division "was unable to find any evidence that the Appellant's medical condition declined or was markedly different from what it was when he was participating in substantially gainful employment." That is why the General Division's findings regarding the Appellant's use of Percocet as being "infrequent" is critical. For one, the Appellant had not been taking Percocet when he was "participating in substantially gainful employment." And two, by the time of the hearing, he was taking one Percocet three times a day. The fact that his medications had changed and that he was taking Percocet three times a day suggested that his overall condition might have been deteriorating. The General Division failed to recognize this. The General Division also suggested that the Appellant could not have had a severe disability if he was not regularly taking any pain relief medication. This conclusion was flawed given that it was based on an erroneous finding of fact.

[15] The Appellant relied on medical reports dated February 13, 2013 and October 30, 2013 from his family physician. The Appellant also relied on a medical report dated January 25, 2013, from a physiatrist. In January 2013, the Appellant was reportedly taking medical marijuana. In his February 2013 report, the family physician noted that the Appellant was not taking any prescription medication. The family physician indicated that this changed by October 2013, as the Appellant was by then taking Gabapentin 600 mg at bedtime and one tablet of Percocet three times daily.

[16] The General Division rejected the Appellant's testimony because it found that it was unsupported by the contemporaneous documentary evidence. Yet, the fact that the Appellant was taking both Gabepentin and Percocet by October 2013—when he had not been taking any prescription medication earlier that year—suggested that there had been some change or deterioration in the Appellant's overall condition. If he had been taking

Percocet infrequently, or only occasionally, the fact that he was on it may not have been important in establishing a change in his overall condition. The Appellant maintains, however, that he was taking it regularly.

[17] The General Division determined that the Appellant was taking Percocet infrequently, yet, the only evidence before it regarding his frequent consumption of Percocet was the family physician's medical report. The Appellant was reportedly taking one tablet of Percocet three times daily. There was no evidentiary basis otherwise upon which the General Division could conclude that the Appellant was taking Percocet infrequently.

[18] The finding regarding the Appellant's use of Percocet was important in this case because it misstated the evolving nature and deterioration of the Appellant's medical condition and, hence, perhaps the Appellant's ability regularly of pursuing a substantially gainful occupation.

[19] Finally, the Respondent notes that the General Division did not find the Appellant credible because of inconsistencies in his evidence. However, the inconsistencies that were raised—whether the Appellant had worked as a foreman or a sheet metal worker-—were irrelevant to the central issues.

NEW EVIDENCE

[20] The Appellant filed updated medical records in support of his claim. The General Division did not have copies of these updated medical records.

[21] It has now become well-established law that new evidence generally is not permitted on an appeal under section 58 of the DESDA, unless it falls within any of the exceptions, such as whether it addresses any of the grounds of appeal. For instance, in *Tracey v. Canada (Attorney General)*, 2015 FC 1300, Roussel J. wrote that "[u]nder the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves*, at para 108)."

[22] More recently, in *Glover v. Canada (Attorney General)*, 2017 FC 363, the Federal Court adopted and endorsed the reasons in *Canada (Attorney General) v. O'Keefe*, 2016 FC

503, in concluding that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The Court also noted that the DESDA makes provisions under section 66 for the General Division to rescind or amend a decision where new evidence is presented by way of application.

[23] Based on the facts before me, I am unconvinced that there are any compelling reasons why I should admit the report, as there is no indication that it falls into any of the exceptions. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for new evidence.

[24] The Appellant also re-filed medical records that were before the General Division, expecting a reassessment of the evidence. However, a review or reassessment of the evidence does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or to reweigh the factors that the General Division considered in assessing whether the Appellant is severely disabled under the *Canada Pension Plan*.

CONCLUSION

[25] As I have determined that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, the appeal is allowed and the matter is returned to the General Division for a redetermination on the merits.

Janet Lew
Member, Appeal Division