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

Citation: *L. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 322

Tribunal File Number: AD-16-791

BETWEEN:

L. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 7, 2017

REASONS AND DECISION

DECISION

[1] An extension of time and leave to appeal are granted.

INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated March 17, 2016. The General Division had previously conducted an in-person hearing and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because it found that his disability was not "severe" prior to the end of his minimum qualifying period (MQP) on December 31, 2010.

[3] On June 2, 2016, the Applicant filed an incomplete application for leave to appeal with the Tribunal's Appeal Division. Following a request for further information, the Applicant perfected his application for leave to appeal on November 18, 2016, beyond the time limit set out in paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

THE LAW

Department of Employment and Social Development Act

[4] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[5] Pursuant to paragraph 57(1)(*b*) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. Under subsection 57(2), the Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an

application be made more than one year after the day on which the decision is communicated to the applicant.

[6] The Appeal Division must consider and weigh the criteria as set out in case law. In *Canada v. Gattellaro*,[1] the Federal Court stated that the criteria are as follows:

(a) A continuing intention to pursue the appeal;

(b) The matter discloses an arguable case.

(c) There is a reasonable explanation for the delay; and

(d) There is no prejudice to the other party in allowing the extension;

[7] The weight to be given to each of the *Gattellaro* factors may differ in each case and, in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served—*Canada v. Larkman.*[2]

[8] According to subsection 58(1) of the DESDA, the only grounds of appeal are 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 made in a perverse or capricious manner or without regard for the material before it.

[9] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

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[1] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[10] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[3] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[4]

[11] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

Canada Pension Plan

[12] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

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[3] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ISSUE

[15] The Appeal Division must decide whether an extension of time to file the application for leave to appeal should be granted. This question depends, in part, on whether the appeal has a reasonable chance of success.

SUBMISSIONS

[16] In his application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) The General Division erred in fact and law by failing to assess the "severity" of the Applicant's impairments in compliance with the legislative requirements. Specifically, the General Division failed to consider the following:

  (i) The Applicant's 2008 right hand "crush" injury, which led to Dr. MacDonald diagnosing him with chronic pain disorder just after the MQP. In multiple reports, Dr. MacDonald linked the Applicant's condition to his workplace injury and declared him unfit to work despite his attempts to retrain.

  (ii) The Applicant's right knee injuries, as documented by the September 23, 2010 MRI, which showed a full-thickness cartilage tear, a torn lateral meniscus, a suspected ligament strain/sprain affecting the ACL and patellar chondromalacia.

  (iii) The Applicant's right shoulder injury, as documented by the March 17, 2011 MRI showed a partial-thickness tear of the supraspinatus and mild subscapularis tendinosis.

(b) The General Division questioned why the Applicant could not have sought alternative work after rehabilitation for the crush injury to his right hand. This was addressed in a December 14, 2010 letter to the Workplace Safety and Insurance Board from Dr. Wong, which stated that the Applicant was suffering

from chronic pain and had become depressed due to his situation. Dr. Wong had given him Cipralex, and this had proven helpful.

(c) Contrary to the General Division's suggestion, the Applicant did not refuse or decline further pain treatment—as confirmed by Dr. Clarke in his February 27, 2013 report, which described a prescriptive regiment that was established after many months and years of trial and error. In fact, the Applicant made valiant efforts to follow the recommended treatments, none of which turned out to be successful.

(d) The General Division erred in law by failing to assess the Applicant's subjective pain levels, as required by the Supreme Court of Canada in *Nova Scotia v. Martin*,[5] which held that, "[d]espite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real."

(e) The General Division noted that the Applicant was attending school between 2010 and 2013 and saw in this fact evidence of functionality despite his sore knee, hand and shoulder. However, *Fraser v. Canada*[6] holds that each case turns on its own facts: "There is no principle of law equating the applicant's experience with a position in the workforce of modified or light duty." The Applicant submits that school is not employment no matter how rigorous it may be. In this case, Dr. MacDonald documented that the Applicant was unable to handle even the modest demands imposed by his retraining program. In fact, Dr. MacDonald went further and stated that continuing his schooling would actually pose a risk to the Applicant. For the General Division to presume that school is equivalent to a sedentary job simply ignores the evidence before it and has no basis in the law or the facts. The General Division consistently confused the Applicant's "motivation" with his actual ability to complete school, let alone regularly report for any job. According to Dr. MacDonald, he could do neither.

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[5] *Nova Scotia (Worker's' Compensation Board) v. Martin*, [2003] 2 SCR 504.
[6] *Fraser v. Canada (Minister of Human Resources Development)* (September 20, 2000) CP 11086.

(f) The General Division turned the evidence surrounding the Applicant's attempt to return to the workforce on its head. The fact that the Applicant attempted to attend school is actually an indication of his well-meaning and genuine attempt to return to work pursuant to the requirements imposed by case law, but it was not an indication of his capacity to return to work. If he had in fact finished his schooling and been qualified to work, this might have been an indicator of capacity, but he did not return to work, nor was he able to do so.

[17] The Respondent did not file any submissions other than a brief letter dated December 16, 2016, advising the Tribunal that it took no position on whether an extension of time should be granted or refused.

ANALYSIS

[18] I find that the application requesting leave to appeal was filed after the 90-day limit. The record indicates that the General Division's decision had been mailed to the Applicant on March 18, 2016, and that the Tribunal received the Applicant's incomplete request for leave to appeal on June 2, 2016. In a letter dated June 13, 2016, the Tribunal advised the Applicant that his request for leave to appeal was missing a signed declaration that the information he had provided was true to the best of his knowledge, as required by subsection 40(1) of the *Social Security Tribunal Regulations*. The Tribunal did not receive said declaration until November 18, 2016—eight months after the General Division's decision had been mailed, and well after the 90-day filing deadline set out in subsection 57(1) of the DESDA.

[19] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[20] Although the Applicant did not perfect his application for leave to appeal until five months after the statutory limitation, I am willing to assume that he had a continuing intention to pursue the appeal, since his first (incomplete) submission to the Appeal Division came shortly after the expiry of the filing deadline.

Reasonable Explanation for the Delay

[21] In an email dated January 3, 2017, the Applicant's representative wrote that his client's request for leave to appeal was not completed on time because the deadline specified in the Tribunal's reminder letter had been inadvertently not entered into his office's "bring forward" system. When the oversight was discovered, it was immediately corrected.

[22] I find this explanation for the delay plausible and understandable.

Prejudice to the Other Party

[23] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests, given the relatively short period of time that has elapsed following the expiry of the statutory deadline. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

Arguable Case

[24] It must be noted that much of the Applicant's submissions recapitulate evidence and arguments that, from what I can gather, were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that falls into the grounds of appeal enumerated in subsection 58(1) of the DESDA. It is insufficient for an applicant to merely state their disagreement with the General Division, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[25] That said, the Applicant has made a number of specific allegations against the General Division's decision that demand closer scrutiny:

(a) Failure to Consider Evidence of Severity

[26] It is an established principle of administrative law that a tribunal is presumed to have considered all the evidence and need not refer to each and every item of evidence before it.[7] Nevertheless, I have reviewed the General Division's decision against the record but see no indication that it wantonly disregarded material evidence. Contrary to the Applicant's suggestion that Dr. MacDonald's findings were given insufficient weight, the General Division summarized the psychologist's reports dated February 28, 2011 and March 6, 2014 and discussed them in some detail in its analysis (paragraphs 40 to 41). The Applicant also complains that the General Division failed to consider the MRI of the right knee dated September 23, 2010, yet its main finding—a meniscal tear—was duly noted at paragraphs 9 and 37 of its decision.

[27] However, I believe the Applicant stands on firmer ground in highlighting the General Division's treatment of the March 17, 2011 MRI of the right shoulder. The General Division dismissed the changes revealed in that imaging report as "mild," yet, as the Applicant notes, it showed a partial tear in the thickness supraspinatus. I think there is an arguable case that the General Division may have mischaracterized the damage to the Applicant's right shoulder and, in so doing, based its decision on an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it.

(b) Sufficiency of Effort to Find Sedentary Work

[28] There is no doubt that the General Division drew an adverse inference from what it had found was the Applicant's insufficient effort to secure sedentary work, as indicated by its remarks in paragraph 49 of its decision:

> Here, in answer to questions from the Tribunal, inconsistences and what seemed like a convenient memory in his testimony regarding dates of rehabilitation efforts did not assist the Appellant. There was no explanation given as to why he did not seek employment between 2008 and 2010 in a vocation that would have avoided the restriction suggested by Dr. MacDonald of no physically demanding work.

[29] The Applicant denies that there was "no explanation," pointing to Dr. Wong's December 14, 2010 letter that blamed chronic pain and depression for his patient's inactivity.

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[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

While I understand that the General Division was likely referring to the Applicant's testimony in finding "no explanation," I see an arguable case that it overlooked documentary evidence addressing this question. I say this bearing in mind the Federal Court of Appeal's injunction, in *Inclima v. Canada*,[8] that the trier of fact must first make a finding of residual capacity before undertaking an investigation into whether a claimant made a sufficient effort to mitigate his or her impairments.

(c) Refusal of Treatment

[30] Again, it is clear that the General Division based its decision, at least in part, on the Applicant's supposed refusal of recommended treatment for his pain:

> [42] … The Psychologist reported in February 2011 that various medical interventions for his injuries are still pending and "he will require time off of school to recover from surgery if and when such occurs". The Appellant denied in his testimony that he was to have surgery. This leaves the Tribunal with some uncertainly as to the motivation of the Appellant to undertake all suggested treatments. He demonstrated in his testimony a memory loss related to time and dates when he was actually attending school. The pain specialist offered pain interventions which were rejected by the Appellant.
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> [47] It is necessary for those seeking a CPP disability pension to show good faith in following appropriate, recommended medical advice and treatment options. The case law establishes that the Tribunal must determine whether or not the Appellant's refusal of treatment is reasonable (*MSD v. Gregory* (October 28, 2005), CP 22759). The Tribunal heard no explanation from the Appellant as to why he did agree to submit to the pain mitigation strategies suggested by the doctor.

[31] The Applicant points to Dr. Clarke's February 27, 2013 report in support of his claim that he made "valiant" efforts to follow recommended treatments. However, Dr. Clarke is a psychologist and presumably had limited first-hand knowledge of the Applicant's various treatment regimes. Moreover, the General Division's finding of non-compliance appeared to have a solid foundation: As noted in paragraph 19, Dr. Wong, in his report of August 9, 2011, did in fact recommend physiotherapy and a referral to an orthopedic specialist. The Applicant rejected both options (GD2R-72).

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[8] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[32] I do not see an erroneous finding of fact here, nor do I see a reasonable chance of success on this argument.

(d) Assessment of Chronic Pain

[33] The Applicant submits that the General Division failed to assess his claims of chronic pain in accordance with the precepts established in *Martin*, but I do not see an arguable case on this point.

[34] The decision indicates that the General Division was well aware that chronic pain was a significant component of the Applicant's disability claim, and it spent a considerable portion of its analysis on the inter-relationship between his psychological and physiological conditions. *Martin* does not require claims of chronic pain to be taken at face value; rather, it suggests that they be taken seriously and be assessed in consideration of, not just medical reports, but also factors such as the claimant's testimony and his or her capacity to undertake non-vocational activities.

[35] In this case, the General Division considered Dr. MacDonald's evidence, noting the psychologist's shifting assessment of the Applicant's depression and anxiety. It also took note of the fact that the Applicant was able to attend college and, most importantly, it found that his testimony on the subject of his functionality—or lack thereof—was unreliable. This was not a case in which the Applicant's claim of chronic pain was dismissed out of hand. Instead, the General Division arrived at its conclusion after what appears to be careful consideration of a number of relevant factors.

(e) Attendance at School

[36] The Applicant is correct in noting that the law does not equate regular work with the capacity to perform modified duties. I also accept the Applicant's premise, by extension, that an applicant's ability to complete college courses does not necessarily mean that he or she is capable of substantially gainful work as defined by paragraph 42(2)(*a*) of the CPP. However, precedent has consistently required decision-makers to consider a multitude of factors in determining CPP disability entitlement, but no case, to my knowledge, has held that capacity to undergo retraining is completely irrelevant.

[37] The General Division's decision leaves little doubt that the Applicant's return to school was a factor in dismissing the appeal:

> The Tribunal accepts that the Appellant was attending school and obtaining courses for some uncertain time between 2010 and 2013. Given the fairly rigorous routine in attending the collage [*sic*] this is comparable to sedentary work thus supporting the submission that he retained capacity to work after December 2010.

[38] However, it is also clear that the General Division was aware that the college courses, by themselves, could not determine the matter:

> While going to school is not the same as having to submit to the rigors and reliable schedules expected in the competitive work world, it is certainly evidence of functionality for which he was capable with his sore knee, hand and shoulder.

[39] In this case, the Applicant's return to school was a factor in the General Division's reasoning, but it was but one among many others, including the medical evidence surrounding his physical and emotional condition, as well as his purported failure to mitigate his impairments by refusing to accept recommended treatment or pursue alternative occupations. On this point, I see no error of law or fact that would warrant intervention.

(f) Attempt to Return to Workforce

[40] A question that frequently arises in appeals of this kind is whether an applicant's attempts to return to work are evidence of functionality or disability. In the case at hand, the General Division took the Applicant's return to school as an indicator of functionality, but its analysis did not appear to come to terms with evidence (briefly noted in paragraph 11 of its decision) that the Applicant had cut short his education because of pain and stress, nor did it address the Applicant's testimony that he had unsuccessfully approached former employers for modified work.

[41] I think there is an arguable case that the General Division may have committed an error of mixed fact and law in either disregarding or misapplying the vocational mitigation principle from *Inclima*.

CONCLUSION

[42] As the Applicant has fulfilled all four *Gattellaro* factors, I have determined that this is an appropriate case in which to allow an extension of time to appeal beyond the 90-day limitation pursuant to subsection 57(2) of the DESDA.

[43] Furthermore, given the history of proceedings and the considerations above, I am satisfied that the Applicant has an arguable case on appeal that the General Division may have:

- mischaracterized the Applicant's March 17, 2011, right shoulder MRI;
- overlooked evidence that explained why the Applicant did not seek alternative employment between 2008 and 2010; and
- disregarded *Inclima* by failing to appreciate that the Applicant's attempt to return to work was unsuccessful by reason of his disability.

[44] The appeal will proceed on only these questions. I invite the Respondent to submit its position on this appeal; the parties are also free to make submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[45] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Member, Appeal Division