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

Citation: *C. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 407

Tribunal File Number: AD-16-622

BETWEEN:

C. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: July 25, 2017

DATE OF DECISION: August 11, 2017

Canada

REASONS AND DECISION

IN ATTENDANCE (via videoconference)

Appellant:	C. L.
Representative for the Appellant:	R. L. (spouse)
Representative for the Respondent:	Laura Penny (counsel)
	Carole Vary (counsel—observer)
	Emma Skowron (articling student— observer)
	Rachel Gopaul (summer student—observer)

INTRODUCTION

[1] This is an appeal of the General Division decision dated February 20, 2016, which determined that the Appellant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability had not been ”severe” by the end of her minimum qualifying period on December 31, 2015. I granted leave to appeal on February 27, 2017, on the ground that the General Division may have erred in law, in failing to consider the reasonableness of her limited use of medications.

[2] The hearing of this appeal was by videoconference, given the availability of videoconferencing facilities.

ISSUES

[3] The issues before me are as follows:

a. Did the General Division err in law in failing to consider the reasonableness of the Appellant’s limited use of medications?

b. If so, what is the appropriate disposition of this matter?

GROUNDS OF APPEAL

[4] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal. It reads:

> **58. (1)** The only grounds of appeal are that
>
> (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.

[5] The Appellant raised several issues in her application requesting leave to appeal. For the most part, I determined that the Appellant was seeking a reassessment of her claim for a disability pension, which is not a proper ground of appeal under subsection 58(1) of the DESDA. The Appellant also argued that the General Division had provided an incomplete summary of the evidence, but I largely found that the facts she pointed to were of limited probative value, or that the General Division had not based its decision upon them for the purposes of paragraph 58(1)(*c*) of the DESDA.

[6] The Appellant suggests that the General Division erred at paragraphs 20 and 52, in finding that she could not have been severely disabled, because she took limited amounts of medications for pain relief. Her physicians had recommended that she take certain medications on an "as needed basis." The Appellant maintains that, although she is in severe pain, she is unable to take any pain relief medication and, in particular, any opioids such as OxyContin, because she fears addiction, given her family history. In written submissions, the Appellant argued that, although the General Division acknowledged that she feared addiction, it had otherwise failed to consider that she had other explanations to account for her limited use of medications.

[7] In *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, the Federal Court of Appeal held that the "real world" context that a decision-maker

must consider when assessing the severity of an individual's disability included examining whether that individual's refusal to undergo treatment is unreasonable and what impact that refusal might have on his or her disability status should the refusal be considered unreasonable. Similarly, in *Kambo v. Canada (Human Resources Development*), 2005 FCA 353, the Federal Court of Appeal also determined that an applicant is required to reasonably comply with treatment recommendations.

[8] I granted leave to appeal on the basis that the General Division may not have considered whether the Appellant's limited use of medication was reasonable.

[9] The Appellant argues that part of her explanation against using medication is set out in paragraph 20 of the decision, where the General Division wrote:

> She mentioned she does not like to take medication and she tries to take as little as possible. The Appellant further mentioned there is addiction in her family and therefore she does not want to take a lot of medications. She takes Baclofen 10 mg once or twice per month, Tramadol two or three times per month, Cyclobenzapine one to two times per month. She takes probiotics, multi-vitamins every day. She rarely takes Arthrotec 75 mg.

[10] The Appellant claims that she had also testified before the General Division that she avoided medications because she found that they were ineffective and because she experienced adverse side-effects, such as being unable to function clearly while on them. She also claims that she testified that long-term use of medication increased resistance, resulting in higher doses, and that she faces long-term health risks from taking medication. The General Division decision does not refer to this purported testimony and, having listened to the audio recording, I was unable to find any supporting testimony to this effect either. The Appellant testified that she avoids taking medication for her fibromyalgia because she wants to avoid becoming addicted, but otherwise I was unable to locate any testimony regarding side-effects or other concerns (39:06 of recording of hearing).

[11] I also reviewed the documentary record that was before the General Division, but was unable to find any reported complaints of side-effects, or any other explanation why she might have avoided taking some of her medications more frequently, apart from a solitary reference in an internist's May 2012 report that she is allergic to codeine, morphine and Demerol (GD2-123), and the family physician's CPP medical report dated July 2, 2013, in which he noted that the Appellant has had a limited response to medications (GD2-66/169/173). However, the Appellant is taking other pain relief medication, apart from codeine, morphine and Demerol. Yet, there is no record in the hearing file or in any of the medical records establishing why she avoids taking these other medications, other than her fear of addiction. The family physician suggests that the Appellant has had a limited response to medications, but it is clear from the Appellant's evidence that she finds them useful; after all, when she requires pain relief, she turns to medications that she ordinarily avoids. The August 9, 2013 entry in the family physician's clinical records also indicates that the Appellant found a good response with Baclofen for muscle spasms.

[12] In addition, the June 20, 2013 entry in the family physician's clinical records indicates that the Appellant had enquired about exploring other pain relief medication; at the time, she was already using Advil and Tylenol (GD2-148). This would seem to suggest that the Appellant was not avoiding all forms of medication and that she was prepared to undergo a trial of pain relief medication.

[13] The Respondent, on the other hand, argues that the General Division never considered the issue of the Appellant's compliance with the use of medications, finding that, at most, her physicians had recommended that she take them on an "as needed" basis. The Respondent submits that because the General Division never considered the issue of the Appellant's compliance with taking medications, there was no issue regarding the reasonableness of her compliance with taking medications. The Respondent argues that the issue with the Appellant's use of medications was whether her limited use was representative of the severity of her disability. The General Division found that, as the Appellant was taking limited amounts of medication, she could not have been severely disabled. The General Division wrote:

> [52] The Tribunal finds that the use of the medication with the frequency taken, as explained by the Appellant, is not supportive of the existence of severe disabling pain. She takes Baclofen 10 mg once or twice per month, Tramadol two or three times per month, Cyclobenzapine [*sic*] one to two times per month. She takes probiotics, multi-vitamins every day. She rarely takes Arthrotec 75 mg.

[14] The Respondent maintains that, as the General Division did not suggest that there was an issue regarding the Appellant's compliance with pain relief medications, there was no issue and no error regarding the Appellant's compliance with taking pain relief medications.

[15] However, the Appellant's various health caregivers have recommended that she take pain relief medication on an "as needed" basis. The General Division understood that if the Appellant generally was not taking the pain relief medication, she could not have been experiencing severe pain and therefore did not need to take the pain relief medication.

[16] While the physicians' recommendations for take pain relief medication were far less tangible than, say, if they had recommended that the Appellant take a certain medication three times daily, it is nevertheless a recommendation that the Appellant has not followed. The Appellant maintains that the pain is severe but she refuses to take the pain relief medication for her fibromyalgia because of her fears of addiction. She denies that her limited use of medication is illustrative of any capacity regularly of pursuing a substantially gainful occupation.

[17] The General Division should have considered whether the Appellant's refusal to regularly take pain relief medication was reasonable, in light of her concerns, before proceeding to find that her limited use of medications necessarily meant that she could not be severely disabled.

[18] The Respondent submits that, even so, overall the General Division provided a fair and balanced review of the evidence. The Respondent argues that, in addition to considering the Appellant's use of medications, the General Division also considered the

Appellant's alternative attempts to alleviate her pain by means of stress reduction, self-hypnosis, journaling and sketching. The Respondent contends that the frequency and use of medication was one of only several factors that the General Division considered in its analysis of the severe criterion, as it focused on, for instance, the Appellant's age, education, work and life experience, lack of physical findings and lack of attempt to find an alternative employment, even on a part-time basis, within her functional limitations and medical condition. The Respondent notes that the Appellant did not contest these other factors.

[19] The Respondent asserts that the General Division was not required to cite all the evidence before it and argues that reasons may not include all the arguments, statutory provisions, jurisprudence and other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under the reasonableness analysis: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paras. 14 to 16, 18 and 20 to 22. The Respondent denies that she is asking that I conduct a reasonableness review, as this has been soundly rejected (see *Canada (Attorney General) v. Paradis*; *Canada (Attorney General) v. Jean*, 2015 FCA 242; and *Maunder v. Canada (Attorney General)*, 2015 FCA 274), but suggests that the Appellant has still failed to establish that she had been fully compliant with other treatment recommendations, or that her non-compliance was reasonable under the circumstances.

[20] The General Division found that the Appellant had not attempted to quit smoking, despite longstanding recommendations in this regard, and had not attempted physiotherapy, massage therapy or an intensive rehabilitation program. The Appellant now advises that she has been trying to quit smoking and, indeed, has reduced her consumption from two to half a pack of cigarettes daily. She also advises that she has attempted chiropractic treatment, but is tender on palpation, and therefore cannot tolerate such therapy. However, this evidence was not before the General Division, so it is irrelevant for the purposes of this appeal.

[21] Although the Appellant's physicians have recommended that she quit smoking, the evidence is tenuous that it would have ameliorated her pain condition. She reported having a chronic cough in mid-2013, but there is no indication that her coughing or that any smoking-related issues have contributed to her inability to regularly pursue a substantially gainful occupation, or that they have any impact on her disability status. Had this recommendation been the sole basis on which the General Division had determined that the Appellant had been non-compliant, I would have found that the General Division had erred, in failing to examine what impact her refusal has on her disability status.

[22] But, in this case, the Appellant's family physician had apparently recommended that she continue with conservative measures, such as physiotherapy or massage therapy. There is no indication that the Appellant had explained to the General Division why she had not pursued these treatment options.

[23] I see also from a review of the hearing file that there was little medical documentation concerning the Appellant's fibromyalgia. The medical records indicate that the Appellant has been seen by other specialists in connection with other medical concerns, but that she had not been referred to a specialist for further investigation or treatment of her fibromyalgia or, for that matter, for other complaints, including headaches and anxiety, both of which are referred to in the family physician's 2012 clinical records. (The family physician had referred the Appellant to a neurologist in mid-2012, but one particular neurologist was unavailable, and it does not appear from the documentary record that there was any follow-up or a referral made to another neurologist, although there is a notation in the August 31, 2012 entry that she was awaiting a consultation with a neurologist [page GD2-142].) The documentary records go to December 2013 only. There were no medical records provided for 2014 and 2015.

[24] The first reference in the records to any widespread pain was in the April 2013 entry in the clinical records. The general practitioner indicated that she would await the conclusions of a report and, if they were negative, she would consider a diagnosis of fibromyalgia. The next reference to any fibromyalgia was in June 20, 2013, when the Appellant reported that she had not worked in over a year, which she attributed primarily to

fibromyalgia. It is unclear whether a definitive diagnosis of fibromyalgia had actually been made by this time, given that there were no reports or any indication that other possible diagnoses had been ruled out. During this visit, the Appellant expressed an interest in obtaining pain relief medication. Certainly, none of the clinical records suggest that any investigations or recommendations had been made in regard to the Appellant's pain complaints or fibromyalgia. The family physician then prepared a CPP medical report, dated July 2, 2013 (GD2-167 to 170). The General Division summarized the contents of this report at paragraph 34.

[25] There were no discussions between the Appellant and any of the general practitioners at the medical clinic regarding her fibromyalgia, other than the initial reference in April 2013, and then subsequently in June 2013 and in November 14, 2013, when she requested a medical report from her family physician for her application for a disability pension. Indeed, the remainder of the Appellant's 2013 visits to the medical clinical were largely for other medical concerns, rather than for her widespread pain or fibromyalgia. There is no indication that either the medical clinic or the family physician referred the Appellant to anyone for further investigation.

[26] Simply, there was insufficient medical evidence before the General Division to enable it to conclude that the Appellant suffered from a severe disability. The General Division alluded to this—that a simple diagnosis is insufficient and that there must be sufficient supporting medical evidence to establish severity as well as sufficient efforts undertaken to pursue all reasonable treatment options. As the General Division noted, had the Appellant suffered from severe pain, as she alleges, it is unusual that she neglected to mention it during many of her visits to the medical clinic after April 2013.

NEW EVIDENCE

[27] The Appellant filed submissions on April 7, 2017, which included an undated letter from her family physician, as well as a copy of a consultation report dated February 28, 2017 from a rheumatologist.

[28] The Respondent subsequently requested a section 4 ruling that any new evidence be excluded from the record and that any submissions that referred to or were based on the new evidence be struck from the record.

[29] On May 16, 2017, I rendered a section 4 ruling. I referred to *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28; *Marcia v. Canada (Attorney General)*, 2016 FC 1367, at para. 34; and *Glover v. Canada (Attorney General)*, 2017 FC 363, in determining that new evidence is generally not admissible at the Appeal Division, as it is limited to the grounds in subsection 58(1).

[30] I was unconvinced that the medical records fell into the list of exceptions and therefore concluded that the new evidence was not admissible and should not form part of the evidentiary record, and that any submissions that referred to or were based on the inadmissible new evidence be struck from the Appeal Division record.

[31] That said, I am cognizant that the Appellant relies on these records to support her claim to a disability pension. However, the rheumatologist's report lists recommendations for management of the Appellant's fibromyalgia and other medical issues. Even if this medical report had been before the General Division, it likely would have found that treatment options had yet to be exhausted and, until then, the Appellant therefore could not be found to be severely disabled under the *Canada Pension Plan.*

CONCLUSION

[32] Given the considerations above, the appeal is dismissed.

Janet Lew
Member, Appeal Division