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

Citation: *A. D. v. Minister of Employment and Social Development,* 2017 SSTADIS 448

Tribunal File Number: AD-16-1327

BETWEEN:

A. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: September 11, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant suffered injuries from a motocross accident in 1991 and had been granted a disability pension. Following an investigation by the Respondent in 2008, it was determined that the Applicant had ceased to be disabled as of January 31, 1995, and an overpayment was assessed.

[2] The Applicant appealed the Respondent's decision to the General Division of the Social Security Tribunal of Canada (Tribunal), and a hearing was held by videoconference on August 16, 2016. The General Division agreed with the Respondent's decision that the Applicant ceased to be disabled as of January 31, 1995, by decision dated August 22, 2016. The Applicant is seeking leave to appeal a decision of the General Division. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on November 29, 2016.

ISSUE

[3] Does the appeal have a reasonable chance of success?

THE LAW

[4] Pursuant to paragraph 70(1)(*a*) of the CPP, a disability pension ceases to be payable the month in which the beneficiary ceases to be disabled.

[5] A person is considered disabled, pursuant to paragraph 42(2)(*a*) of the CPP, if he (or she) is found to suffer from a severe and prolonged mental or physical disability. A disability is considered "severe" if a person is rendered incapable regularly of pursuing any substantially gainful occupation, and the disability is "prolonged" if it is found to be long continued and of indefinite duration or is likely to result in death.

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

Determining leave to appeal is a preliminary step to a hearing on the merits and is an initial hurdle for an applicant to meet; however, the hurdle is lower than the one that must be met at the hearing stage of an appeal on the merits.

[7] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[8] According to subsection 58(1) of the DESD Act, 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[9] The Applicant submits that the General Division erred in law, pursuant to paragraph 58(1)(*b*) of the DESD Act, in misinterpreting or failing to correctly apply the legal test for determining a "severe" disability and in erroneously concluding that the Applicant retained capacity to pursue employment on a regular basis.

[10] The Applicant submits that the General Division erred in law by failing to consider what substantially gainful occupations the Applicant was capable of pursuing as of the date on which it was deemed that he ceased to be disabled.

[11] The Applicant further submitted that the General Division based its decision on an erroneous finding of fact, pursuant to paragraph 58(1)(*c*) of the DESD Act, in finding that the Applicant was capable of pursuing an occupation "within his limitations" when there was no medical evidence in the record to support that finding.

[12] Finally, the Applicant has submitted that the General Division breached a principle of natural justice, pursuant to paragraph 58(1)(*a*) of the DESD Act, in proceeding to hear the matter by videoconference without the Respondent in attendance. This, the Applicant asserts, denied him of the opportunity to cross-examine the Respondent regarding several evidentiary issues.

ANALYSIS

<u>Did the General Division incorrectly apply the legal test for determining that the Applicant ceased to be "severely" disabled</u>?

[13] A disability pension ceases to be payable, pursuant to paragraph 70(1)(*a*) of the CPP, the month in which the beneficiary ceases to be disabled. Paragraph 42(2)(*a*) of the CPP sets out that a person is considered "disabled" only if he is determined to have a severe and prolonged mental or physical disability. According to paragraph 42(2)(*a*), a disability is "severe" if a person is rendered incapable regularly of pursuing any substantially gainful occupation. A disability is "prolonged" if it is determined to be long continued and of indefinite duration or is likely to result in death.

[14] The Applicant qualified for and was granted a disability pension in 1991. The issue before the General Division was whether the Applicant ceased to be disabled on January 31, 1995. It is the Respondent's burden to demonstrate that the Applicant ceased to be disabled. The General Division found that the Respondent had met its burden of proof.

[15] The Applicant submits that the General Division incorrectly applied the test for determining a "severe" disability. The Applicant bases this assertion on several arguments, including that the General Division failed to note any authority for the test to be applied as to whether a person is incapable regularly of pursuing any substantially gainful occupation. The Applicant also argues that the General Division's finding that he retains capacity to work was

based solely on the General Division adopting the conclusions of the medical adjudicator who completed an assessment on behalf of the Respondent. It is the Applicant's position that the General Division ought to have properly applied the correct legal test for determining disentitlement to a disability pension to the factual evidence in the record. The Applicant argues that at no time was he capable "regularly" of pursuing any "substantially gainful occupation" since 1991, as evidenced by his employment record and his earned income since that time. Finally, the Applicant argues that the General Division ought to have noted the evidence of Dr. Norton, who has been the Applicant's doctor since 1991.

[16] I find that, at paragraph 31 of the decision, the General Division correctly states that the issue to be determined was whether the Applicant ceased to be disabled. I find that the General Division stated the correct test for a cessation of disability pension benefits in its decision at paragraph 30:

> Under the CPP, a person has a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. It is not the diagnosis of a condition, or the fact of an injury that makes the disability severe, but its impact on the claimant's ability to work: *Klabouch v. Canada (Social Development)*, 2008 FCA 33. In addition, the severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[17] The Applicant's assertion that the General Division failed to note the authority for the test to be applied is incorrect.

[18] There is documentation in the record that confirms that a medical adjudicator did complete an assessment of the Applicant's file on behalf of the Respondent and that it was the opinion of the medical adjudicator that the Applicant ceased to be disabled as of January 31, 1995. She based her opinion on his being hired by the British Columbia Injury Prevention Centre (BCIPC) and on the fact that he continued this employment for several years. A bank loan application had been completed by the BCIPC on behalf of the Applicant, which reflected that the Applicant was paid $40,000 to $50,000 under the contract that he had signed with that organization.

[19] While the Applicant argues that the General Division merely maintained the opinion of the medical adjudicator in its decision, I disagree. The General Division notes the bank loan application document at paragraph 20 of the decision, but I do not find that the General Division relied on this evidence in making its decision.

[20] I have reviewed the documentary record in its entirety, and I have also listened to the recording of the hearing before the General Division. At the hearing, the Applicant was asked extensively about his employment history and earnings since he sustained his motocross accident in 1991. He confirmed that in 1995, he was hired on a contract basis with BCIPC and at that time he was also training for and attending wheelchair races in addition to attending college part-time. He earned a Business Administration diploma in 1996, but he never pursued employment in that field.

[21] The General Division, at paragraphs 32 and 33 of the decision, articulates the reasons for its finding that the Applicant ceased to be disabled in January 1995, stating:

> He has been able to train and perform well in wheelchair racing, including the Boston Marathon and a world championship. He began to do this only six months after the motocross accident. In addition, the Appellant was hired on a contract basis by the BC Injury Prevention Centre in January 1995, and successfully made presentations for them, travelling on tours to schools to educate and motivate students while attending college and racing. He has also recruited sponsors for his website to promote and market his achievements and public speaking, and to assist him to fund his racing training and career. The Appellant has also managed his athletic career, including a rigorous training schedule in two countries and his attendance and performance in numerous races. He has business skills that he hoped to use to promote his athletic career.

[22] The Applicant argues that the General Division erroneously concluded that, based on the Applicant’s accomplishments in the wheelchair racing circuit and the skills and abilities he has developed, he regained capacity regularly to pursue substantially gainful employment. He points to the fact that he has been unable to retain steady employment that provides any significant income. However, the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, stated at paragraph 7 that:

> […] the test of whether a disability is "severe", the issue here, is stated by the statute to be whether that person "is incapable regularly of pursuing

> any substantially gainful occupation . . . ." **It is the incapacity, not the employment**, which must be "regular" and the employment can be "any substantially gainful occupation". [my emphasis]

[23] According to *Bungay v. Canada (Attorney General)*, 2011 FCA 47, employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." The circumstances fall into two categories: (i) the claimant's background (age, education level, language proficiency, and past work and life experience) and (ii) the claimant's medical conditions.

[24] I have reviewed the recording of the hearing before the General Division as well as the documentary evidence. In reading the General Division decision, I do note that the decision does lack some detail with respect to the evidence that the Applicant gave during his hearing before the General Division. While the parties are entitled to decisions that reflect consideration of the evidence in the record and articulated reasons for how the issues were decided, I do not find that the General Division failed to consider the evidence, based its decision on an erroneous finding of fact, or failed to provide adequate reasons for the findings made. A lack of detail is not a ground of appeal under subsection 58(1) of the DESD Act. An administrative tribunal is also not required to refer to each and every piece of evidence before it, and it can be presumed to have considered all the evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82).

[25] The evidence before the General Division clearly showed that the Applicant is young and educated and, while he does require accommodations, the evidence he gave before the General Division is summarized as follows:

- In 1991, he sustained a motor cross accident, and six months later he began wheel chair racing.

- Between 1991 and 1997, he engaged in wheelchair racing and attended athletic events, in both Canada and the United States. He has completed 20 marathons and won five. He has completed the Boston Marathon four times. In 1997, he raced in 25 races in a nine-month period.

- He lives on the X X of Vancouver, and travels by plane or car in order to attend races. He spoke about races he had attended as far away as Atlanta and California.
- In 1995, he signed a contract to attend speaking events on behalf of BCIPC and traveled all over the province during months when schools were in session. His presentations were an hour in length, and some weeks he did one or two presentations while sometimes he only did two in a month. He was paid between $100 and $200 per presentation.
- He returned to school and graduated in 1996 with a business diploma. He attended school part-time and usually completed two or three courses per term because he was also racing, training and doing presentations at that time.
- His Notice of Assessment in 1996 reflected some professional dues paid, and he attributes those to the four television commercials he did, along with a small modelling job, and some work as an 'extra' on several television shows. He described the period of time between 1995 and 1997 as an "interesting and busy time."
- His father passed away unexpectedly in 1997, and in 1998 he cut back his sporting events to only wheelchair racing. He associated this decision with his father's passing.
- He started working part-time as a telemarketer in 2003, but left this employment because it was a "gong-show." He described the employment as unorganized, he worked primarily with teenagers, the technology was poor, and the chairs were uncomfortable. He also stated that the employers were not accommodating.
- He then worked as a car salesman for Jaguar. He could not recall whether he left this employment or if he was asked to leave, but he described the employment as "frustrating to everyone." He stated that customers were confused when they met him as they "expected to be greeted by an able-bodied person." His wheelchair left tracks on the polished floor if it was raining outside, and the environment in the dealership was "back-stabbing" and "hypocritical." He also

found taking customers on test drives awkward without a left foot throttle in the cars. He had managed to sell two cars while employed at the dealership, and felt "pressure to perform."

[26] There was no evidence that he had issues with performing activities of daily living, and there was no noted impact on his ability to pursue his chosen sporting life nationally and internationally. His achievements in this area were noted by the General Division as being significant.

[27] The Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47, stated that the severity requirement must be examined in light of the particular circumstances of the applicant and that it is the capacity of the individual to be employed that is determinative of severity under the CPP. While the General Division accepted that the Applicant's disability was prolonged, the General Division was satisfied that the evidence supported the Respondent's claim that the Applicant ceased to be disabled as of January 1995. The General Division found that the Applicant's perseverance, abilities and skills were regularly demonstrated through his speaking tours, his travel across borders to train, his completion of a college diploma, his ability to recruit sponsors for his website, and his attendance and performance at national and international races. He was found to have pursued employment options that primarily supported his wheelchair racing, and those employment options were limited with respect to earning potential. The General Division did not find that income level was determinative of a disability (*M. D. v. Minister of Human Resources and Skills Development*, July 13, 2010, CP 26312, PAB). The General Division, at paragraph 33, found that although the Applicant chose to pursue non-paying activities, his level of activity demonstrated that he had requisite "capacity."

[28] In *Canada (Attorney General) v. Hoffman*, 2015 FC 1348, the Federal Court stated that "reasons should be understandable, sufficiently detailed and provide a logical basis for the decision. Reasons should be responsive to the live issues presented by the case and the parties' key arguments." I find that the General Division has provided understandable reasons that are sufficiently detailed. The Applicant has argued that the General Division ought to have considered the evidence in the record from Dr. Norton, but I have already noted that it is not the diagnosis of the Applicant's health condition that determines disability under the CPP. This is

one consideration. Disability is to be assessed in light of the individual's particular circumstances and the General Division has provided sufficient evidence that all the Applicant's particular circumstances in this case have been considered in addition to his medical condition.

[29] I do not find that the General Division erred in applying the incorrect legal test for determining a severe disability under the CPP. Leave to appeal is not granted on this ground.

Did the General Division err in law by failing to consider what substantially gainful occupations the Applicant was capable of pursuing?

[30] The Applicant submits that the General Division erred in law by failing to consider hypothetical occupations that the Applicant was capable of pursuing. The Applicant relies on *Villani* where the Federal Court of Appeal stated at paragraph 38, "it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience."

[31] The Applicant argues that the Respondent and the General Division were obligated to identify what hypothetical occupations the Applicant was capable of pursuing. I disagree. In *Kiraly v. Canada (Attorney General)*, 2015 FCA 66, the Tribunal found that the Applicant had capacity to work and had failed to meet her legal obligation to seek employment within her limitation. The Applicant sought judicial review of the Tribunal's decision, but the Court concluded that the Tribunal's decision was reasonable. The Federal Court of Appeal in *Kiraly* found that *Villani* does not stand for the proposition that the Respondent or the Tribunal is required to identify what other employment may be within the applicant's limitations.

[32] Leave to appeal is not granted on the ground that the General Division failed to identify hypothetical occupations within the Applicant's limitations as I do not find that this argument has a reasonable chance of success.

Did the General Division base its decision on an erroneous finding of fact?

[33] The Applicant has argued that 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 as it found that the Applicant ceased to be disabled on January 31, 1995. It is the Applicant's argument that this finding would mean that on January 30, 1995, the Applicant was disabled, but that as of the next day, he was not. There was no change in the Applicant's medical condition from one day to the next so the General Division's finding, he argues, must be attributed to the General Division merely adopting the opinion of the medical adjudicator that the contract work with BCIPC was substantially gainful. The Applicant argues that the medical adjudicator was wrong in relying on an application for a bank loan contained in the record, which stated that the Applicant had earnings between $40,000 and $50,000 while employed by BCIPC.

[34] I am not persuaded by the Applicant's argument. I have already found that the General Division did not rely on the bank loan application in making its finding that the Applicant retained capacity to work. The General Division's finding was based on the evidence in the record and the Applicant's oral testimony at the hearing. The General Division found that the Applicant's capacity to work was demonstrated when he commenced his employment with BCIPC, in tandem with his training, racing and pursuing an education. The General Division considered both the Applicant's health condition and his particular circumstances and I cannot see how this amounts to an erroneous finding of fact.

[35] I do not find that this ground of appeal has a reasonable chance of success, and as a result, leave to appeal is not granted on this ground.

Did the General Division fail to observe a principle of natural justice?

[36] The Applicant submits that the General Division failed to observe a principle of natural justice, pursuant to paragraph 58(1)(*a*) of the DESD Act. He argues that, because the Respondent did not attend the hearing before the General Division, he was deprived of the opportunity to cross-examine the Respondent on several issues including:

> i. The Minister's internal procedures for determining whether [the Applicant] continued to have a prolonged and severe disability;
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> ii. What documents the Minister's employees relied upon in making their determination as to [the Applicant's] entitlement to Benefits;
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> iii. Whether the Minister's employees were aware of Dr. Norton's opinion;

iv. Whether the Minister's employees misapprehended any evidence in reaching their determination, such as the BCIPC letter in support of his application for a loan;

v. Whether the Minister's employees would have reached a different conclusion if additional information had been available to them; and

vi. The basis for the Minister's jurisdiction to demand repayment of Benefits.

[37] It is the Applicant's position that procedural fairness requires that a party ought to be afforded the opportunity to further his case and to respond to the case against him through cross-examination of evidence. In denying the Applicant this opportunity, as a result of the Respondent's absence at the hearing and the General Division's decision to proceed with the hearing as scheduled, the Applicant was denied the opportunity to fully argue his case. He further asserts that the need to cross-examine the Respondent was enhanced by the Tribunal's "reliance on the conclusions of the [Respondent's] medical adjudicator." The Applicant cites the *Innisfil Township v. Vespra Township*, [1981] 2 SCR 145, as authority for his position:

> It is within the context of a statutory process that it must be noted that cross-examination is a vital element of the adversarial system applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. Indeed the adversarial system founded on cross-examination and the right to meet the case being made against the litigant, civil or criminal, is the procedural substructure upon which the common law itself has been built. **That is not to say that because our court system is founded upon these institutions and procedures that administrative tribunals must apply the same techniques. Indeed, there are many tribunals in the modern community which do not follow the traditional adversarial road.** On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination. [my emphasis]

[38] I will note at the outset that the Tribunal does not have the authority to compel witnesses to appear before it. Whereas the former Pension Appeals Board did retain the authority to compel witnesses, the Tribunal was not vested with that authority in 2013.

[39] The General Division addressed the Respondent's failure to attend the hearing within the context of the issue of procedural fairness in its decision:

> [5] In addition, the Supreme Court of Canada has decided that although parties to a proceeding before an administrative tribunal are entitled to procedural fairness, this does not necessarily mandate that all matters be heard and decided on the basis of a hearing by personal appearance (see *Singh v. Minister of Employment and Immigration*, [1986] 1 SCR 177, Baker v. Minister of Citizenship and Immigration, [1999] 2 SCR 817). Procedural fairness requires that parties to a claim have the opportunity to fully present their case, to know and to meet the case against them.
>
> [6] In this case, the Appellant did not contend that he was not able to know, understand or meet the case against him. He had full opportunity to present his case in writing by filing documents with the Tribunal and orally at the videoconference hearing. The Appellant was not denied procedural fairness by having the appeal heard by videoconference.

[40] In the Tribunal's opinion, the Applicant was aware of the important facts of the case. In fact, he had been provided with the entire record of evidence prior to the hearing and this was confirmed by the General Division member at the start of the hearing. The Applicant was provided with the Respondent's written submissions as well as with the opportunity to address the Respondent's arguments during the hearing, which was noted by the General Division in its decision at paragraph 28, which states "[i]t is also disappointing that as a result of its non-attendance the Respondent precluded the Appellant from being able to question it although he did respond to the Respondent's submissions orally at the hearing." The Applicant therefore had knowledge of the Respondent's evidence in support of the cessation of his disability pension.

[41] With respect to the Applicant's argument that depriving a party of the opportunity to cross-examine an administrative officer (in this case the Minister's representative) equates to a deprivation of procedural fairness, I disagree. I note that the principles of natural justice are concerned with procedural fairness, which includes the Applicant being notified of his hearing date and the case to meet, being provided with adequate time to prepare his case and to defend the case being brought in reply, and being provided with a decision and reasons for how his case was decided. The Applicant was represented, but his counsel did not attend the General Division hearing. Despite the non-attendance of the Respondent or Applicant's counsel, the

Applicant was aware of the Respondent's evidence prior to appearing before the General Division, and he had ample time to prepare his case. The General Division allowed him to give oral evidence and to present his arguments in respect of the entire case before it, and the Applicant had an opportunity to dispute the Respondent's position.

[42] The Applicant has cited a number of issues, which he states he would have explored had he been provided the opportunity to cross-examine the Respondent, and without that opportunity not only was he denied procedural fairness but it is his position that the General Division came to the wrong conclusion.

[43] I do not find that this argument holds weight. Considering each of the issues cited by the Applicant, I do not find that the Respondent's internal procedures have any bearing on the legal framework for determining disability under the CPP, or on the General Division's decision-making authority or the reasons for its decision in this case. The Applicant asserts that he would have cross-examined the Respondent on what documents were relied on in making its decision, but these documents were included in the evidentiary record provided to both parties so the Applicant had full knowledge of the evidence in the record before the General Division. The Applicant also asserts that he would have cross-examined the Respondent on whether it was aware of Dr. Norton's opinion. Dr. Norton's opinion was included in the evidentiary package and, although the General Division did not refer to his opinion in the decision, it is an established principle of administrative law that a Tribunal need not refer to each and every item of evidence before it but is deemed to have considered all of it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). Additionally, whether the Respondent was aware of Dr. Norton's opinion is not relevant to the General Division's decision. Similarly, I do not find that whether the Respondent misapprehended the bank loan letter has any bearing on the General Division decision as the General Division did not rely on the letter. The Applicant has also indicated that with the opportunity to cross-examine the Respondent he would have questioned whether, with additional information, the Respondent would have come to a different conclusion. However, the Applicant has not identified what additional information is or could have been available. Finally, the Applicant would have cross-examined the Respondent on the authority to demand repayment of benefits. However, this is not an issue that is before the General Division for

consideration. The issue before the General Division was whether the Applicant ceased to be disabled as of January 31, 1995.

[44] Section 21 of the *Social Security Tribunal Regulations* (SSTR) provides that hearings may take one of four forms—in writing, by teleconference, by videoconference, or in person—and the discretion to decide how to hold a hearing lies with the General Division (*Parchment v. Canada (Attorney General)*, 2017 FC 354). Section 3 of the SSTR instructs the Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. I do not find that the Applicant's argument that the General Division ought to have changed the form of hearing to allow the Applicant to question the Respondent on the issues identified above holds weight. The Applicant has not argued, nor demonstrated, that the General Division exercised its discretion incorrectly.

[45] I do not find that the Applicant's argument that the General Division breached a principle of natural justice has a reasonable chance of success. Leave to appeal is not granted on this ground.

CONCLUSION

[46] The Application is refused.

Meredith Porter
Member, Appeal Division