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

Citation: *Minister of Employment and Social Development v. J. B.,* 2017 SSTADIS 592

Tribunal File Number: AD-16-1255

BETWEEN:

Minister of Employment and Social Development

Applicant

and

J. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: November 2, 2017

Canada

REASONS AND DECISION

DECISION

The application for leave to appeal is granted, but the appeal is limited to the one ground upon which leave to appeal is granted.

OVERVIEW

[1] The Respondent sustained a workplace injury to his left arm in November 2003. He sustained serious damage to his arm and continues to experience significant pain. In addition to the physical injury, he also suffers psychological difficulties, including problems sleeping, depression and anxiety. He was diagnosed with dyslexia in grade 5, and he has been suffering from it ever since.

[2] The Respondent applied for a disability pension under the *Canada Pension Plan* (CPP) in October 2011, but the Applicant refused the application. The Respondent also applied for a Division of Unadjusted Pensionable Earnings (DUPE) in October 2011. The DUPE application was granted. The Respondent asked the Applicant to reconsider his CPP disability application, but the Applicant refused the application on reconsideration as well.

[3] The Respondent appealed the Applicant's reconsideration decision to the General Division of the Social Security Tribunal (Tribunal), and he was found to suffer from a severe and prolonged disability and entitled to a disability pension.

[4] The Applicant seeks leave to appeal the General Division decision on the basis that the General Division erroneously concluded that the Respondent had demonstrated that:

- he suffered a severe health condition, which impacted his ability to work;
- the Respondent followed recommended treatment options intended to mitigate his health condition;
- despite his efforts for treatment, he remained incapable regularly of pursuing any substantially gainful occupation;

- his lack of capacity to work was demonstrated by failed attempts to obtain employment or retrain for employment within his limitations; and
- his attempts to work or retrain were unsuccessful because of his physical and psychological health conditions.

[5] The Applicant filed, with the Tribunal's Appeal Division, an application for leave to appeal (Application) the General Division's decision. The Applicant argues that the General Division made several findings that were not supported by the evidentiary record and that it also overlooked relevant evidence. The Applicant also believes that the General Division misapplied the legal principle that requires individuals who apply for a disability pension to prove that they have tried to find employment or retrain for future employment but have failed as a result of their health condition. Finally, the Applicant believes that the General Division miscalculated the date on which the Respondent was entitled to begin receiving payments for a disability pension as a result of the DUPE.

ISSUES

[6] Is there an arguable case that the General Division erred in fact under paragraph 58(1)(*c*) of the DESD Act in finding that the Respondent had followed recommended treatment with the intention of mitigating his health condition?

[7] Is there an arguable case that the General Division erred in law under paragraph 58(1)(*b*) of the DESD Act in finding that the Respondent had capacity to work but that he had failed to demonstrate efforts to obtain employment or retrain?

[8] What is the correct date for the commencement of payments of the disability pension with the DUPE?

LEGAL TEST

[9] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted."

[10] 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."

[11] 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.

ANALYSIS

Is there an arguable case that the General Division erred in finding that the Respondent had followed recommended treatment with the intention of mitigating his health condition?

[12] No. I do not find that this ground of appeal has a reasonable chance of success.

[13] The Applicant has argued that the General Division was incorrect to find that the Respondent had followed treatment recommended by his attending physicians. The Applicant has also argued that the General Division was incorrect to find that the Respondent had attempted to mitigate his health condition by following recommended treatment. I find that these two arguments are closely interrelated and, because they are so interrelated, I will address both of them at this point.

[14] The Applicant argues that the Respondent failed to attend counselling after Dr. Beg had recommended it in 2009 and after Dr. Clendenning had recommended it in 2011. According to

the Applicant, the Respondent's failure to attend counselling constitutes a failure to make "good faith efforts" to mitigate his health condition. The Applicant also submits that the Respondent failed to take prescribed medications for his psychological condition, and that he did not provide a reasonable explanation for his refusal to take them.

[15] There is jurisprudence that sets out what is required of individuals seeking to demonstrate that they have reasonably attempted to mitigate their health condition. In *Lombardo v. Minister of Human Resources and Development* (2001) CP 12731, the Pension Appeals Board (PAB) concisely set out the following principle:

> The Board has, over the years emphasized the need for applicants for disability entitlement to demonstrate **good faith preparedness** to follow obviously appropriate medical advice and, as well, to take such retaining [*sic*] or educational programs as will enable one to find an alternative employment when it is obvious that one's prior employment is no longer appropriate. [my emphasis]

[16] Although not binding on the Appeal Division, I find the PAB's reasoning in *Lombardo* is persuasive.

[17] Paragraph 39 of the General Division's decision summarizes the General Division's findings on this issue. I have also reviewed the recording of the hearing before the General Division and reviewed the documentary record as well. I note that paragraph 39 does lack some detail with respect to the evidence that the Respondent gave during his hearing. 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. Although the General Division decision lacks detail in some paragraphs, 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).

[18] The General Division's findings are supported by evidence that has been summarized in paragraphs 8 to 25 of the decision. The details of the evidence found in those paragraphs, most

relevant to the issue of following advised treatment and efforts to mitigate the Respondent's health condition, are that:

- the Respondent had had four surgeries on his left arm to repair the damage and remove the hardware once sufficient healing had occurred;
- the Respondent had also attended more than one beneficial treatment assessment with a specialist, and he had followed up by attending physiotherapy sessions once per week for 10 months as recommended by a London specialist;
- with respect to the medications that he had been prescribed, he regularly used medical marijuana for his depression, anxiety and pain management since 2011.
- he also ingested six Advil per day for his physical pain.
- he had attended counselling with Dr. Ross for two years before his funding for counselling ended;
- he then attended the Sudbury Counselling Centre for counselling, which was provided to him at no cost. He did not find the sessions there as helpful as the ones with Dr. Ross.

[19] This evidence satisfied the General Division that the Respondent had demonstrated "good faith preparedness" to follow recommended treatment, and the General Division confirms this finding at paragraph 39 of the decision.

[20] The Applicant suggests that the General Division should have addressed the fact that Dr. Clendenning had stated that the Respondent's was not on any psychoactive medications to alleviate his psychological conditions, and that the General Division had failed to analyze the Respondent's failure to pursue psychiatric support. The General Division was required to consider the reasonableness of any non-compliance that the Respondent demonstrated where his counselling and medication are concerned. The Applicant has not identified any medications that the Respondent's physicians had prescribed and that he subsequently refused to take. Alleging that the Respondent refused to take prescribed medications but failing to identify any

medications he refused to take does not meet the Applicant's burden of proof in demonstrating that an arguable case exists.

[21] The General Division found that the evidence in the record and the Respondent's oral evidence demonstrated good faith preparedness to follow recommended treatments, as well as good faith efforts to mitigate his health conditions based on the evidence (summarized in paragraph 18 above). There is sufficient evidence to support the General Division's decision that the Respondent had demonstrated good faith preparedness to follow advised treatment and to mitigate the impact of his health condition on his ability to work or retrain.

[22] It may be that the Applicant is asking me to reassess the evidence, but I am restricted to considering only those grounds of appeal that fall within subsection 58(1) of the DESD Act. The subsection does not permit me to reassess or reweigh the evidence, and I am not permitted to intervene in the General Division's findings simply because I may have decided an issue differently. Although the Applicant may disagree with the General Division's findings, this is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act. It would be an improper exercise of the delegated authority conferred upon the Appeal Division to grant leave to appeal on grounds not included in subsection 58(1) of the DESD Act (*Canada (Attorney General) v. O'Keefe*, 2016 FC 503).

[23] It is the Appeal Division's role to review the underlying record and determine whether the General Division failed to account for any evidence, misconstrued evidence, or whether the General Division overlooked evidence that it ought to have considered in reaching its decision. Leave to appeal should normally be granted where this review of the underlying record demonstrates that the evidence was not appropriately considered (*Joseph v. Canada (Attorney General)*, 2017 FC 391).

[24] I do not find that the Applicant has raised an arguable case with respect to the General Division's findings on the Respondent's issue demonstrating "good faith preparedness" to follow advised treatment in order to mitigate his health condition. I do not find that the General Division failed to account for evidence, misconstrued evidence or overlooked evidence. Therefore, leave to appeal is not granted on this ground.

Is there an arguable case that the General Division erred in finding that the Respondent lacked capacity to work, and that he had made efforts to find employment or retrain?

[25] No, I do not find that the Applicant's argument on this issue has a reasonable chance of success.

[26] The Applicant submits that the General Division erred in law in finding that the Respondent lacked capacity to work. Further, the Applicant argues that, because the Respondent does have capacity to work, he must demonstrate that he has made efforts to obtain employment within his limitations or to retrain for future alternate employment if he is unable to return to his former occupation. The Applicant relies on the Federal Court of Appeal's decision in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, to support this position.

[27] The Applicant acknowledges that the Respondent suffers both physical and psychological barriers with respect to his ability to work or retrain for employment within his limitations. However, the Applicant argues that there have not been any definitive findings by medical physicians or assessors ruling out the possibility that the Respondent retains capacity to work. The Applicant relies on a 2005 Labour Market Re-Entry Report and a Psycho-Vocational Test, which, the Applicant argues, found the Respondent capable of academic upgrading and identified suitable job alternatives within his abilities and considering his limitations. The Applicant asserts that the General Division failed to consider this evidence. This report is not referred to in the General Division decision, but this is does not necessarily mean that the evidence was not considered. The General Division is not required to refer to every piece of evidence before it, and it can be presumed that all of the evidence was considered. (*Simpson*)

[28] I note as well that the 2005 Labour Market Re-Entry Report relied on by the Applicant predated the Respondent's minimum qualifying period (MQP) date by six years. Since the report had been rendered, the Respondent demonstrated that he had attempted to follow some of the recommendations in that report, but he was unsuccessful. The General Division decision does analyze the evidence of his failed attempts, and this evidence is closer to the Respondent's MQP date than the 2005 report.

[29] The General Division's decision notes that, despite being identified as capable for academic upgrading, the Respondent enrolled in a Mechanical Engineering diploma program at

St. Clair College with significant learning supports in place, but that he failed after his second semester due to the heavy workload, psychological difficulties and medical appointments for his arm. He then enrolled in a Civil Engineering program at Cambrian College in 2010 but, in his oral testimony, he stated that he failed the first semester because he had missed two or three days per week because of his arm.

[30] The General Division clearly states at paragraph 32 of the decision that considerable weight was being given to the October 2009 Psychological Assessment by Dr. Beg, which cited the Respondent's "significant difficulties with reading, comprehension, spelling, math and studying for tests." He reported that the Respondent had "put forth concerted effort to re-enter the workforce in a meaningful capacity but recognize[d] that he will have to improve his level of education in order to do so and find employment where there will not be excessive requirements for use of left arm." The Respondent was found to experience "Weakness in initial encoding and immediate recall of verbally presented information. Low average to average range commensurate with his intellectual functioning. Reading and math scores were significantly impaired," and he demonstrated "clinically significant levels of emotional/psychological distress as reflected in his highly elevated depression and anxiety scores […]" (GT1-31)

[31] The Respondent testified that he had attended counselling with Dr. Ross for two years. Dr. Ross reported in November 2009 that "[t]he current plan is to continue to meet with this man approximately every second week to ascertain that he is able to maintain a good state of emotional health while he re-enters the academic environment." (GT1-32)

[32] The Respondent testified that he had attempted to work as a painter for his father's property maintenance company. He was unable to maintain this employment because of his injured arm. He was able to paint only 30 minutes at a time, and this rate of working was too slow for the success of his father's business. He also considered computer-based employment, as it was suggested that sedentary work would better suit him. However, the keyboard work aggravated his wrist and the bone spur that remained in his arm caused pain and made his fingers "freeze up." At paragraph 15 of the General Division's decision, it is noted that the Respondent had enlisted the help of March of Dimes to secure employment, and although he

had been referred to janitorial and gas attendant work, he did not receive a return phone call once he had applied.

[33] At paragraph 25 of the Applicant's submissions, it is argued that the General Division "did not consider whether or not [the Respondent's] efforts to obtain or maintain employment were unsuccessful by reason of his health condition." The Respondent is not obligated to demonstrate efforts to obtain employment or retrain where no capacity for employment is found. The General Division did not find that he had capacity regularly to pursue gainful employment. Therefore, *Inclima* does not apply in this case. I do not find that the General Division erred in law as the Applicant has argued, and leave to appeal is not granted on this ground.

What is the correct date for the commencement of payments of the disability pension with the DUPE?

[34] The General Division found that the Respondent was entitled to a disability pension as of July 2010. However, the Respondent applied for the DUPE in October 2011. The Applicant has argued that the Respondent's DUPE application was granted and that he established an MQP date of December 31, 2011. Without the DUPE, the Applicant argues that the Respondent would not be able to establish a valid MQP date.

[35] The Applicant cites subsection 55.2(9) of the CPP, which states the following:

> Where there is a division under section 55.1 and a benefit is or becomes payable under this Act to or in respect of either of the persons subject to the division for a month not later than the month following the month in which the division takes place, the basic amount of the benefit shall be calculated and adjusted in accordance with section 46 and adjusted in accordance with subsection 45(2) but subject to the division, and the adjusted benefit shall be paid effective the month following the month in which the division takes place but in no case shall a benefit that was not payable in the absence of the division be paid in respect of the month in which the division takes place or any prior month.

[36] The Applicant argues that the Respondent would not have been eligible for a disability benefit without the DUPE to establish his MQP date. The earliest date of payment to the Respondent then, pursuant to subsection 55.2(9), is the month after the one in which the DUPE was approved. That month is November 2011.

[37] The General Division decision does not address the issue of the Respondent's DUPE. The date for commencement of payments, according to the General Division, is determined pursuant to section 69 of the CPP, which states that pension payments commence four months after the deemed date of disability. In no case can a person be deemed disabled more than 15 months before the Applicant received their disability pension application. The General Division found that, together, these provisions of the CPP entitled the Respondent to disability payments commencing in November 2010. The General Division did not consider the impact of the DUPE in this case.

[38] On reading subsection 55.2(9), I see that the General Division may have erred in calculating the commencement date for disability payments with the DUPE, and I find that the Applicant has raised a ground of appeal that has a reasonable chance of success. Leave to appeal is granted on the ground that the General Division may have erred in calculating the commencement date for payment of the pension with the DUPE.

CONCLUSION

[39] The Application is granted.

[40] The appeal is limited to the one ground upon which leave to appeal has been granted: that being whether the General Division erred in calculating the date on which payment of the Respondent's disability pension had become payable with the DUPE.

[41] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Meredith Porter
Member, Appeal Division