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

Citation: *R. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 657

Tribunal File Number: AD-16-458

BETWEEN:

R. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: October 30, 2017

DATE OF DECISION: November 17, 2017

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant trained and worked as a journeyman-boilermaker. He also worked in construction. The Appellant then worked at his family's orchard business from July 1989 until May 2012, when he stopped working, purportedly due to multiple medical issues, including testicular cancer, Crohn's disease, lower back pain, bilateral tennis elbow, bilateral carpal tunnel syndrome, plantar fasciitis, osteoarthritis, a sore right ankle, headaches, depression with associated anxiety, and bilateral shoulder bursitis. The Appellant denies that he has had any ongoing meaningful involvement in his family's business since he stopped working.

[3] The Appellant applied for a Canada Pension Plan disability pension, but the Respondent denied his claim. The Appellant appealed the decision to the General Division, which in turn also determined that he was ineligible for a disability pension under the *Canada Pension Plan*. It found that his disability had not been severe by the end of his minimum qualifying period on December 31, 2012. (An appellant's minimum qualifying period is the date by which they are required to be found disabled and is calculated based on the years that an appellant has made sufficient valid contributions to the Canada Pension Plan.) The Appellant sought leave to appeal the General Division's decision.

[4] I granted the Appellant's application for leave to appeal the General Division's decision. I was satisfied that the appeal had a reasonable chance of success, in that the General Division may have 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, regarding his involvement in his family's orchard business.

[5] The Appellant argues that the General Division erred in finding that he had been actively involved in his family's orchard business and that he was therefore capable regularly of pursuing any substantially gainful occupation. I must now decide whether the General Division erred in its findings.

[6] The Appellant argues that I should pay no deference to the General Division's findings and that I should conduct my own reassessment of the evidence, or that I should refer the matter to a different member of the General Division for a redetermination. In this regard, the Appellant argues that I should also determine whether the General Division erred in requiring him to produce objective medical evidence to substantiate his pain complaints.

ISSUES

[7] The issues before me are as follows:

> **ISSUE 1:** Does the Appeal Division have jurisdiction to conduct a reassessment?
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> **ISSUE 2:** Did the General Division err in requiring objective medical evidence to substantiate the Appellant's chronic pain complaints?
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> **ISSUE 3:** Did the General Division err in finding that the Appellant had been actively involved in his family's orchard business such that he was engaged in a substantially gainful occupation?

ANALYSIS

> **ISSUE 1:** Does the Appeal Division have jurisdiction to conduct a reassessment?

[8] The Appellant submits that the Appeal Division has the authority to reweigh the evidence and supplant the General Division's decision for its own. He urges me to reject *Tracey v. Canada (Attorney General)*, 2015 FC 1300, where the Federal Court clearly stated

that there was no role for the Appeal Division to reassess the evidence or reweigh the factors.

[9] The Appellant argues that *Tracey* has been superseded by a series of decisions rendered by the Federal Court of Appeal: *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274; and more recently, *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93. He argues that these three decisions establish that the Appeal Division should be conducting reassessments. In *Jean*, the Federal Court stated that the Appeal Division does not exercise a review and superintending power and that, in an administrative appeal context, one is to refrain from borrowing from the terminology and the spirit of judicial review. The Court held that where the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), its mandate is conferred to it by sections 55 to 69 of that Act. In *Maunder*, the Federal Court of Appeal stated that its decision in *Jean* would assist the Appeal Division.

[10] Although *Huruglica* was in the immigration context, the Federal Court of Appeal provided some guidance. It held that an administrative tribunal should look to its enabling legislation and determine legislative intent.

[11] This approach requires that the Appeal Division look to the DESDA to determine how it should conduct any appeals. Subsection 58(1) of the DESDA provides only three very narrow grounds of appeal: where the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; where it erred in law, whether or not the error appears on the face of the record; or where it 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. The subsection does not contemplate or provide for any rehearings or reassessments.

[12] I do not see that *Jean*, *Maunder* or *Huruglica* assists the Appellant in establishing any entitlement to a reassessment in appeals before the Appeal Division. At most, they indicate that the Appeal Division should refrain from conducting a standard of review analysis and that it should conduct appeals in accordance with its enabling legislation.

Hence, my role is to determine whether an appeal falls within any of the grounds listed in subsection 58(1) of the DESDA and, if so, from there, to determine the appropriate relief under subsection 59(1) of the DESDA. Subsection 58(1) of the DESDA does not confer any authority upon me to conduct a reassessment of the evidence or to conduct a rehearing.

[13] Indeed, the Federal Court of Appeal has stated that the Appeal Division can intervene in the General Division's decision only if there has been a breach of natural justice, an error of law or an erroneous finding of fact made in a perverse or capricious manner or without regard for the material that was submitted.

[14] Nevertheless, the Appellant maintains that the Appeal Division owes no deference to the General Division on issues of natural justice, or on questions of law or fact, other than on findings of credibility or on matters where the General Division enjoys a "particular advantage." He notes that the Federal Court of Appeal wrote that the Appeal Division has as much expertise as the General Division and "thus is not required to show deference."[1]

[15] It is well settled law that the Appeal Division owes no deference to the General Division in respect of jurisdictional issues and on questions of law. Where there are questions of fact, discretion or policy, deference usually applies.[2] However, under paragraph 58(1)(*c*) of the DESDA, no deference is owed to the General Division when any findings of fact are made in a perverse or capricious manner or without regard for the material before it. Both the Federal Court of Appeal[3] and Federal Court[4] have upheld this interpretation. The Federal Court held that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference. This is particularly the case where […] the [General Division] holds an oral hearing at which the Applicant gave evidence." Hence, I owe significant deference to the General Division on findings of fact, other than when they are made in a perverse or capricious manner or without regard for the material before it.

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[1] *Jean*, *ibid*, at para. 19.
[2] *Dunsmuir v. New Brunswick*, 2008 SCC 9.
[3] *Canada (Attorney General) v. Peppard*, 2017 FCA 110.
[4] *Hussein v. Canada (Attorney General)*, 2016 FC 1417.

ISSUE 2: Did the General Division err in requiring objective medical evidence to substantiate the Appellant's fibromyalgia and chronic pain issues?

[16] The Appellant maintains that the General Division should have unreservedly accepted his oral testimony regarding the severity of his disability, where his fibromyalgia and chronic pain are concerned. He argues that the General Division erred in requiring objective medical evidence. He notes that the Supreme Court of Canada[5] and the Pension Appeals Board[6] recognized that chronic pain is a compensable disability and that there may be few, if any, objective findings.

[17] In this case, I do not see that the General Division required objective findings to establish that the Appellant had fibromyalgia or chronic pain issues at or around the end of his minimum qualifying period. The General Division accepted that the Appellant had these conditions, but the existence of these conditions alone was insufficient to establish the severity of the Appellant's disability. The General Division required documentary evidence to establish severity, particularly as the Appellant was testifying approximately three years after the end of the minimum qualifying period had already passed. Ultimately, it determined that the "problem is that there is no medical evidence or reports on treatment of this disease in this Appellant or any report that suggests how and to what extent it disables the Appellant."

[18] As I indicated in my leave to appeal decision, although the General Division did not provide an extensive analysis of the medical evidence, it is clear that the member was aware of and considered the Appellant's chronic pain. The member acknowledged that the Appellant has been experiencing ongoing pain in his back, shoulder, elbow, wrist, right ankle and feet since at least 2013. The member also acknowledged that the Appellant has fibromyalgia, although he noted that there was little in the way of documentary evidence regarding treatment for the condition or its impact on any activities of daily living. The member also considered the Appellant's oral testimony, though he required corroborating medical evidence to show that it was of such severity that the Appellant complained of its

[5] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54.
[6] *Hunter v. Minister of Social Development* (February 6, 2007), CP23431 (PAB).

effect upon him to his health caregivers, or that he actively sought out investigations and any treatment.

[19] In 2014, approximately one and a half years after the minimum qualifying period had ended, the Appellant saw a rheumatologist, who diagnosed him with Crohn's disease with fibromyalgia and "most likely osteoarthritis." There is no indication when the Appellant began seeing this rheumatologist. There is nothing in the 2012 medical records to suggest that the Appellant had been referred to or had seen a rheumatologist or other specialist in regard to his fibromyalgia or chronic pain. The clinical records for 2012 suggest that any pain issues were confined largely to his hands, although he had an X-ray of his right shoulder in early 2012. The Appellant was also being followed for testicular cancer and Crohn's disease that year. An oncology report included degenerative disc disease and osteoarthritis as one of the Appellant's diagnoses, but otherwise there was no accompanying narrative indicating how these conditions affected the Appellant at that time.

[20] In my view, it is best left for the trier of fact to determine, based on the circumstances and on the evidence before them, whether an appellant's oral evidence is sufficient to prove their case, or whether corroborating evidence is required. It would seem reasonable that the General Division would have required some documentary evidence when the Appellant testified on matters that occurred several years ago. It would also seem reasonable that if the Appellant's fibromyalgia or chronic pain was of such severity, there would have been a wider documentary trail of his complaints and of his efforts at seeking treatment. There was relatively little in the way of any medical records addressing any chronic pain complaints prior to or at the end of the minimum qualifying period.

[21] The General Division did not require objective medical evidence to establish the existence of these conditions, but it required some evidence to establish their severity and to corroborate the Appellant's complaints. I see no error in the General Division's approach in this regard.

ISSUE 3: Did the General Division err in finding that the Appellant had been actively involved in his family's orchard business such that he was engaged in a substantially gainful occupation?

[22] The Appellant asserts that, because of his medical issues, he has had only very limited involvement in his family's orchard business, such that it falls well below any capacity regularly of pursuing a substantially gainful occupation. He claims that his involvement is nominal, irregular, and limited to advising his wife and daughter no more than five hours weekly. Otherwise, he regards the orchard business as simply a business investment. He claims that he is otherwise uninvolved in the management or day-to-day operations of the company. The Appellant argues that the evidence was unequivocal in this regard, and that the General Division mischaracterized this evidence, and that it also mischaracterized any income he derived from the business as employment earnings, rather than as investment income. The Appellant contends that his minimal involvement established that he was severely disabled.

[23] The Respondent argues that the Appellant is, in essence, seeking a reassessment of the evidence and a consideration of additional evidence that had not been before the General Division. This additional evidence relates to the Appellant's family's particular roles within the company and details of the Appellant's limited availability at the farm. The Respondent submits that I should defer to the findings of the General Division.

[24] New evidence is not generally admissible on an appeal under subsection 58(1) of the DESDA, except in limited situations.[7] There are no circumstances here that would enable me to consider this additional evidence regarding the family's roles within the orchard business.

[25] At paragraph 32 of its decision, the General Division found that the Appellant had provided advice on the hiring of labourers, acquired chemicals with his license and provided some time each day to these "management" responsibilities. The General Division wrote,

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[7] *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28; *Cvetkovski v. Canada (Attorney General)*, 2017FC 193, at para. 31; and *Glover v. Canada (Attorney General*), 2017 FC 363.

"For these he receives a share of the profits of the operation." It did not make any further findings regarding the Appellant's involvement in the orchard business.

[26] The Appellant does not dispute these particular findings regarding what work he does perform, but he argues that the General Division erred in concluding that this limited involvement reflected active participation or work capacity, to the level that he was capable regularly of pursuing a substantially gainful occupation. However, I do not see that the General Division made such a connection. There was no suggestion by the General Division that the Appellant was necessarily capable regularly of pursuing any substantially gainful occupation because he was involved with the business.

[27] Rather, the General Division examined the medical evidence. The General Division determined that the Appellant's constellation of medical problems did not cumulatively preclude him from continuing to manage or meaningfully contribute to the farm business. The General Division also assessed the Appellant's particular circumstances and found that they enhanced his employability in a "real world" context.

[28] The General Division noted that none of the medical practitioners had produced any reports that suggested the Appellant's fibromyalgia, his primary disabling condition, prevented him from contributing to the operations of the farm at the end of his minimum qualifying period. The General Division acknowledged the Appellant's testimony but found that it was "not wholly consistent with the medical evidence." Indeed, the General Division found that there was no medical evidence or reports on the treatment of the Appellant's fibromyalgia, and how and to what extent it affected the Appellant at the end of his minimum qualifying period.

[29] In other words, the General Division accepted that the Appellant might have had limited involvement in the orchard business, but found that, despite his limited involvement, the Appellant nevertheless exhibited residual capacity regularly of pursuing any substantially gainful occupation. The General Division was unprepared to necessarily equate the Appellant's limited involvement with the farming business with a severe disability, as it required independent corroborating medical evidence of a severe disability.

The General Division was unconvinced that the medical evidence could support a finding of a severe disability. It did not undertake an extensive or detailed analysis, but it did set out what it considered was the salient medical evidence, at paragraphs 14 to 20.

[30] The General Division specifically noted the medical evidence between October 2009 and February 2015 that indicated that the Appellant's Crohn's disease remained well controlled with medication, that his sleep disorder was "under control," that there were limited investigations or treatment for fibromyalgia and that the Appellant exhibited a sore right shoulder, elbow and wrist. The report closest to the end of the minimum qualifying period was the family physician's medical report dated November 16, 2012. The General Division noted that the family physician listed all of the diagnoses and that he wrote, "NOT all of which are disabling." In 2014, the Appellant had what a rheumatologist perceived as inflammatory arthritis, and in February 2015, the Appellant's new rheumatologist diagnosed it as multiple arthralgias. At paragraphs 26 and 27, the General Division expressed its findings regarding the Appellant's medical issues.

[31] Furthermore, the General Division determined that, despite the Appellant's multiple medical issues and despite his reportedly being unable to sit for prolonged periods exceeding one to three hours, he was nevertheless capable of sedentary employment or performing some modified duties.

[32] The Appellant has failed to convince me that the General Division found that the Appellant was actively involved in the orchard business or that any involvement in the business necessarily suggested that the Appellant had some residual capacity. In fact, the General Division accepted that the Appellant had limited involvement in the orchard business. However, given its analysis of the medical evidence, the General Division was unprepared to find that the Appellant's limited involvement in the business was tantamount to being severely disabled.

CONCLUSION

[33] Given the foregoing reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division

IN ATTENDANCE (via teleconference)

Appellant	R. A.
Representative for the Appellant	Steven R. Yormak (counsel)
	Adele Clewlow (legal assistant)
Representative for the Respondent	Sandra Doucette (counsel)