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

Citation: *W. J. v. Minister of Employment and Social Development*, 2017 SSTADIS 711

Tribunal File Number: AD-17-364

BETWEEN:

**W. J.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Neil Nawaz

Date of Decision: December 7, 2017

Canada

## DECISION AND REASONS

## DECISION

Leave to appeal is refused.

## OVERVIEW

[1] The Applicant, W. J., who is now 60 years old, suffers from limited mobility caused by arthritis. He has held a variety of occupations over the years, most recently as a seasonal driver, a job that ended in October 2011 when he was laid off. The Respondent, the Minister of Employment and Social Development (Minister), refused his application for a disability pension under the *Canada Pension Plan* (CPP), because it found no indication that his medical condition prevented him from performing less strenuous forms of work.

[2] Mr. W. J. appealed the Minister's refusal to the General Division of the Social Security Tribunal (Tribunal). It found that, while he suffered from a number of impairments, they did not amount to a "severe and prolonged" disability as of the minimum qualifying period (MQP), which ended on December 31, 2012.

[3] On May 2, 2017, Mr. W. J. filed an application requesting leave to appeal with the Tribunal's Appeal Division. In a letter dated May 4, 2017, the Tribunal informed Mr. W. J. that his application put forward insufficient grounds and asked him to explain, in more detail, the reasons for his appeal. On June 5, 2017, he submitted a letter that made the following points:

- He experienced severe pain in 2011–2012, which continues to this day, leaving him unable to perform any kind of work;
- The reports signed by Dr. Angela Mailis of the Pain Wellness Centre should be disregarded because her staff, not her, performed the medical examination and, in the process, got significant facts wrong;
- The General Division ignored the first section of Dr. Dammerman's report dated February 5, 2017;

- He attempted to perform modified work at Canadian Tire on a part-time basis, but pain in his lower back and right foot made it impossible for him to carry on;
- Although he had requested an in-person hearing, the General Division unfairly chose to interview him by teleconference, a format that left him confused and intimidated.

[4] Mr. W. J. also submitted several medical reports, all of which, it appears, had previously been submitted to the General Division. I have reviewed the decision against the underlying record and concluded that Mr. W. J. has not advanced any grounds that would have a reasonable chance of success on appeal.

**ISSUES**

[5] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[1] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[6] I must determine whether Mr. W. J. has an arguable case on the following questions:

Issue 1: Did the General Division ignore evidence of his severe pain or any other disabling condition?

Issue 2: Did the General Division mischaracterize Dr. Mailis's report?

Issue 3: Did the General Division disregard a material portion of Dr. Dammerman's report?

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[1] DESDA at subsections 56(1) and 58(3).
[2] Ibid. at subsection 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

Issue 4: Did the General Division misconstrue Mr. W. J.'s attempt to work at Canadian Tire?

Issue 5: Did the General Division act unfairly in holding a hearing by teleconference rather than by personal appearance?

## ANALYSIS

### Issue 1: Did the General Division ignore relevant evidence?

[7] Mr. W. J. suggests that, in dismissing his appeal, the General Division failed to take into account certain aspects of the evidence, but I see no arguable case on this ground.

[8] In *Simpson v. Canada*,[4] the Federal Court of Appeal stated that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence. *Simpson* goes on to state that assigning weight to evidence, whether oral or written, is the job of the trier of fact.

[9] Mr. W. J. is essentially requesting that I reweigh the evidence that was before the General Division on its merits in the hope that I will come to a different conclusion. This is beyond the scope of an appeal to the Appeal Division, which may not substitute its view of the evidence for that of the trier of fact. The DESDA does not contemplate a reassessment of the evidence at the leave stage. It does, however, require an applicant to satisfy the Appeal Division that there is at least one reviewable error that has a reasonable chance of success, and the Applicant has not done so in this regard.

### Issue 2: Did the General Division mischaracterize Dr. Mailis's report?

[10] I do not see a reasonable chance of success on this ground.

[11] Dr. Mailis wrote two reports on Mr. W. J., one dated October 28, 2016, and another dated January 25, 2017. Although the General Division summarized both reports in its decision, it does not appear that it placed any great reliance on either of them in finding that Mr. W. J.

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

was not disabled. In its analysis, the General Division's sole reference to Dr. Mailis came at paragraph 69:

> Dr. Mailis stated that the Appellant had experienced "substantial biomedical pathology since the fracture of his right big toe in 2012." This information was based on self-reporting by the Appellant, who did not fracture his big toe in 2012, but the following year. The Tribunal is not persuaded by Dr. Mailis's opinion because it was based on inaccurate information.

[12] Mr. W. J. argues that the General Division should have disregarded Dr. Mailis's reports but, in fact, it appears that it did just that—although not for the precise reasons the Applicant suggested. Oddly enough, given Mr. W. J.'s criticism of her, Dr. Mailis appears to have been broadly supportive of his disability claim. It is true that Dr. Mailis appears to have, as Mr. W. J. suggested, gotten some of her facts wrong—she wrote that he broke his toe in 2012, rather than 2013—but the General Division explicitly noted this error and used it as a rationale to discount her evidence completely. One may debate whether its decision to do so was justified, but based on his submissions, Mr. W. J. should have had no trouble with it.

**Issue 3: Did the General Division ignore a material portion of Dr. Dammerman's report?**

[13] Mr. W. J. argues that the General Division overlooked the first section (entitled "Osteoarthritis, Right Big Toe") of Dr. Dammerman's February 5, 2017, report and referred in its decision only to section 2 ("Chronic Mechanical Back Pain and Sciatica").

[14] I am not convinced there is an arguable case here. As already noted, there is the presumption that the General Division considered all the evidence, and this would include all parts of Dr. Dammerman's report. Moreover, contrary to Mr. W. J.'s allegation, the General Division's decision comprehensively summarized Dr. Dammerman's February 2017 report (at paragraphs 48 and 49) and explicitly referred to the family physician's findings about his toe under the heading "Right Foot Pain." The General Division noted that there were no office notes about this issue at the time of the MQP and, although Dr. Dammerman later wrote that Mr. W. J. had experienced chronic foot pain since 2011, he "did not indicate that it was consistently severe from that time." Referring to Dr. Dammerman's February 2017 report, the General Division added:

> Dr. Dammermann [*sic*] wrote in February 2017 that the Appellant had a severe disability as of December 2012 that prevented him from working at any gainful employment. This opinion was provided several years after the events in question, and is in conflict with contemporaneous medical evidence; as a result, the Tribunal gives it very little weight.

[15] Mr. W. J. may not agree with the decision to discount Dr. Dammerman's opinion about the debilitating effect of his toe injury, but there is no question that the General Division gave it at least some consideration. Mr. W. J. is arguing, in essence, that the General Division did not weigh the evidence to his liking, but this is not a ground of appeal under subsection 58(1) of the DESDA. I see no need to interfere with a finding of the General Division, where it has exercised its authority as trier of fact to assess the available evidence and come to a defensible conclusion.

**Issue 4: Did the General Division misconstrue Mr. W. J.'s Canadian Tire job?**

[16] At the hearing, Mr. W. J. testified about his last attempt to work, which the General Division described as follows:

> [54] […] In 2016, he tried working as a part-time service attendant at Canadian Tire, where he was given a number of accommodations, such as a special chair and limited carrying duties. He worked from January to April 2016, when severe back and foot pain forced him to stop work. These work attempts did not jeopardize his ODSP payments. He testified that, although he used a computer at the Canadian Tire job, he would not be able to do sedentary work because he could not sit for prolonged periods of time.

[17] Mr. W. J. criticizes the General Division for failing to appreciate that his low back and right foot pain forced him to quit his job at Canadian Tire. However, the General Division's reasons indicate that it recognized Mr. W. J.'s last job as a failed work trial:

> [81] The Appellant's work efforts in 2015 and 2016 may be considered failed work attempts, since they did not last very long and were not substantially gainful. However, by that time his medical condition had evidently deteriorated, so that the results of these experiments cannot be read back to the time of his MQP. Moreover, Dr. Dammermann [*sic*] wrote that it was the Appellant's back condition, not his foot problems, that led to his departure from the Canadian Tire job. While the Appellant may not have been able to maintain his position at Canadian Tire because of his health condition, it was not a health condition that had been serious at the time of the MQP.

[18] In finding that the failed work trial was too remote from the MQP to have significant probative value, the General Division offered a defensible reason for assigning this event lesser weight.

**Issue 5: Did the General Division act unfairly in hearing the appeal by teleconference?**

[19] Section 21 of the *Social Security Tribunal Regulations* states that the General Division may hold a hearing by one of several methods, including written questions and answers, teleconference, videoconference or personal appearance. Use of the word "may" in the text in the absence of qualifiers or conditions suggests that the General Division has discretion to make this decision. I would not suggest that the General Division's discretion to make such a decision can be completely divorced from reason. The Federal Court of Appeal has confirmed that setting aside a discretionary order requires an appellant to prove that the decision-maker committed a "palpable and overriding error,"[5] but I see nothing like that here.

[20] The Supreme Court of Canada dealt with the issue of procedural fairness in *Baker v. Canada*,[6] which held that that a decision affecting the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. The concept of procedural fairness, however, is variable and is to be assessed in the specific context of each case. *Baker* then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case, including the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[21] I accept that the issues in this matter are important to Mr. W. J., but I also place weight on the nature of the statutory scheme that governs the General Division. The Tribunal was designed to provide for the most expeditious and cost-effective resolution of disputes before it. While the General Division has wide discretion to rule on this matter, its decision to hold the hearing by teleconference was not made on a whim, but for reasons explained in its decision.

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[5] *Imperial Manufacturing Group Inc. and Home Depot of Canada Inc. v. Décor Grates Incorporated*, 2015 FCA 100; *Horseman v. Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139.

[6] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699.

Mr. W. J. alleges that the General Division failed to observe a principle of natural justice by holding the hearing by teleconference. He said that he found the format intimidating and suggested that his memory was impaired by medication, although he did not explain how an in-person hearing would have helped to improve his memory. However, I note that Mr. W. J.'s then-lawyer had previously returned a form[7] in which he stated that his client did not object to any type of hearing, and whatever the eventual format, Mr. W. J. was given an opportunity to present his case orally and reply to the Minister.

[22] The General Division's discretion to decide how to hear appeals should not be unduly fettered. I see no reasonable chance of success on this ground of appeal.

**New Documents**

[23] Finally, I note that Mr. W. J.'s leave to appeal application was accompanied by several medical reports—some that had already been made available to the General Division, others that had not.

[24] As mentioned, the Appeal Division does not rehear evidence on its merits, given the constraints of subsection 58(1) of the DESDA, but neither does it consider new evidence. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations*. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[7] Hearing Information Form dated July 31, 2016 (GD10).

## CONCLUSION

[25] As Mr. W. J. has not identified any grounds of appeal that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division