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

Citation: *S. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 756

Tribunal File Number: AD-17-384

BETWEEN:

S. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: December 20, 2017

DECISION AND REASONS

DECISION

Leave to appeal is refused.

OVERVIEW

[1] The Applicant, S. H., who is now 53 years old, has been trained and certified as an accountant, real estate agent and auctioneer. For nearly 20 years, she owned and operated a real estate agency until, she claims, mental exhaustion forced her to put it up for sale in late 2014. She has been diagnosed with anxiety and degenerative disc disease.

[2] In January 2016, the Respondent, the Minister of Employment and Social Development (Minister), refused Ms. S. H.'s application for a disability pension under the *Canada Pension Plan* (CPP). The Minister acknowledged that she experienced limitations as a result of her medical conditions, but found that they would not prevent her from performing suitable work.

[3] Ms. S. H. appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada (Tribunal). On March 16, 2017, the General Division convened a hearing by teleconference but ultimately found that Ms. S. H. had not produced sufficient evidence that her disability was "severe," as defined by the CPP, nor had she made any effort to seek less stressful employment.

[4] On May 11, 2017, Ms. S. H. requested leave to appeal from the Tribunal's Appeal Division. Accompanying her application for leave to appeal was a brief that contained annotated commentary of the General Division's April 19, 2017, decision. For the most part, it recapitulated evidence and arguments that had already been presented to the General Division, although she did make a number of specific allegations of error:

- The General Division did not assess the evidence impartially;
- The General Division violated labour relations laws by obliging her to work, even though her doctors advised against it;

- The General Division refused to accept the opinions of her treatment providers, including Dr. Goddard and Dr. Wilson, that she suffers from a prolonged and severe disability and cannot work;
- In paragraph 12, the General Division ignored evidence that many of her symptoms have been caused by one of her drugs, which is known to be associated with abdominal problems;
- In paragraph 17, the General Division mentioned that Ms. S. H.'s daughter had been removed from her care because of her marijuana use, but did not note the many extenuating circumstances surrounding that event;
- In paragraph 22, the General Division suggested that she had a simple colonoscopy; in fact, she underwent major surgery, in which an entire section of her colon was removed and reattached;
- The General Division did not look at the totality of her condition and, in particular, minimized her longstanding stomach and colon problems.

[5] On May 16, 2017, The Tribunal asked Ms. S. H. to provide additional reasons for her appeal, and she responded by way of a fax dated June 5, 2017. She made the following additional points:

- Both the Minister and the General Division misrepresented themselves when they demanded additional medical opinions and then refused to accept them;
- The Minister committed fraud by denying her disability benefits even though she paid into the system for 38 years;
- The way in which the Minister and the General Division approach disability claims is a form of cruelty that is likely to lead many Canadians to early deaths.

[6] Having reviewed the General Division's decision against the underlying record, I have concluded that Ms. S. H. has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[7] According to subsection 58(1) 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]

[8] My task is to determine whether any of the grounds that Ms. S. H. has put forward fall into the categories specified in subsection 58(1) of the DESDA and whether any of them would have a reasonable chance of success on appeal.

ANALYSIS

Did the General Division assess the evidence impartially?

[9] I see no arguable case on this ground. Ms. S. H. has made a general allegation of bias against the General Division, but other than expressing disagreement with the dismissal of her appeal, she did not specify how the General Division breached a principle of natural justice in the conduct of her hearing.

[10] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[4] has stated that the test for bias is the following: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough. Not every favourable or unfavourable disposition attracts the label of impartiality. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues.

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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.
[4] *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

[11] If Ms. S. H. believes that the General Division dismissed evidence without reason or improperly substituted its own medical opinions for those of medical practitioners, then I see no basis for either suggestion. Having reviewed the General Division's decision, I am not persuaded that an informed and reasonable person, viewing the matter realistically and practically, would conclude that the General Division was biased.

Did the General Division violate labour relations laws by obliging Ms. S. H. to work?

[12] I see no arguable case on this ground. It is true that the General Division drew an adverse inference from its finding that Ms. S. H. had not made any attempt to find less stressful work, but it was permitted to do so, having found residual capacity, according to case law led by the Federal Court of Appeal decision, *Inclima v. Canada*.[5] In any case, an administrative tribunal is obliged to do no more than apply the prevailing law to the relevant facts and, where it has done so in good faith, it cannot be held accountable for how a claimant reacts to its decision.

Did the General Division consider the opinions of Ms. S. H.'s treatment providers?

[13] Ms. S. H. alleges that the General Division erred by discounting or disregarding the opinions of Dr. Goddard and Dr. Wilson, both of whom concluded that she suffers from a prolonged and severe disability.

[14] I see no arguable case on this ground. An assessment of disability under the CPP involves medical evidence, but it also requires that such medical evidence be assessed in the light of a legal standard. The meaning of "severe" and "prolonged" according to the CPP does not necessarily correspond to the meaning of those words in a clinical context or in everyday usage. While Drs. Goddard and Wilson made unequivocal statements in support of Ms. S. H.'s disability claim, their opinions were not the final word on the matter, and the General Division was also obliged to consider competing evidence, some of which, it appears, did indicate residual capacity.

[5] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[15] Since Dr. Goddard's and Dr. Wilson's opinions that Ms. S. H. was unable to work were not necessarily determinative, the General Division was within its authority to assign weight to competing evidence in finding that she had residual capacity.

Did the General Division ignore evidence that Ms. S. H.'s drugs cause symptoms?

[16] I do not see an arguable case on this ground. My review of its decision indicates that the General Division was aware of Ms. S. H.'s evidence of her side effects from taking medications for her primary conditions:

> [29] […] She said she does not agree with her doctors that stress causes her to vomit, because she does not get sick at particular moments. At the hearing, the Appellant opined that one explanation was her stomach lining had been damaged by taking Accutane, but that her doctors could not confirm this.

Did the General Division disregard circumstances surrounding her daughter's removal?

[17] I see no arguable case on this ground. While the General Division made a passing reference to the temporary removal of Ms. S. H.'s daughter from her care, it did so only in service of her larger, and more relevant, point that she had been using marijuana in an attempt to manage her back pain. There is no indication that the General Division attached any significance to the intervention of child protection authorities, and I see nothing to suggest that it needed to contextualize this episode.

Did the General Division minimize Ms. S. H.'s colon surgery?

[18] Ms. S. H. alleges that the General Division suggested that she merely had a colonoscopy when, in fact, she underwent major surgery.

[19] I see no arguable case on this ground. Ms. S. H. refers to paragraph 22 of the decision, which summarizes a medical report that documented her endoscopy in October 2015. However, the same paragraph describes a subsequent procedure, in which "Dr. Hanks surgically removed polyps from the Appellant's colon." In my view, these words accurately represent the contents

of the operative report dated November 17, 2015.[6] Although the surgery also involved "resection of the left colon and proximal sigmoid colon," the General Division's omission of this fact was, in my view, immaterial, since post-operative complications did not appear to have been a significant component of Ms. S. H.'s disability claim, and subsequent pathology studies showed no signs of "atrophy, metaplasia, dysplasia or malignancy."

Did the General Division fail to consider the totality of Ms. S. H.'s conditions?

[20] Ms. S. H. alleges that the General Division erred in failing to consider the totality of the impairments that rendered her disabled.

[21] I do not see an arguable case on this ground. It is settled law that an administrative tribunal charged with finding fact is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions.[7] That said, I have reviewed the General Division's decision and found no indication that it ignored, or gave inadequate consideration to, any significant aspect of Ms. S. H.'s claimed conditions.

[22] The General Division's decision contains a comprehensive summary of the medical evidence, including many reports that documented investigations and treatment of the Applicant's various medical problems. Contrary to Ms. S. H.'s suggestion, I saw no indication that the General Division glossed over her stomach and colon symptoms, which were discussed in detail. The decision closes with an analysis that suggests the General Division meaningfully assessed the evidence before concluding that, given her age, education and work experience, she had residual capacity to regularly pursue some form of substantially gainful employment.

CONCLUSION

[23] The balance of Ms. S. H.'s submissions mirror evidence and arguments that she previously presented to the General Division. Unfortunately, the Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their

[6] Found at GD2-55.
[7] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

submissions that falls into the grounds of appeal enumerated in subsection 58(1) of the DESDA.

[24] It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP. If Ms. S. H. is requesting that I reconsider and reassess the evidence and substitute my decision for the General Division's in her favour, I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[25] Since Ms. S. H. 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