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

Citation: *L. B. v. Minister of Employment and Social Development*, 2018 SST 160

Tribunal File Number: AD-17-882

BETWEEN:

L. B.

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: February 15, 2018

DECISION AND REASONS

DECISION

Leave to appeal is granted.

OVERVIEW

[1] The Applicant, L. B., was born in 1968 and left high school at age 17, although he later earned a General Equivalency Diploma. He worked for many years in manual jobs, mostly as a welder. In November 2009, while working at John Deere, he sustained an injury to his back. He continued to work, despite pain, until the plant closed. He then took a job at a shipyard and worked there until April 2010, when he was laid off. Except for brief periods as a machine operator and taxicab driver, he has not worked since.

[2] In March 2015, Mr. L. B. applied for a disability pension under the *Canada Pension Plan* (CPP), claiming that he was no longer capable of substantially gainful employment. The Respondent, the Minister of Employment and Social Development (Minister), refused Mr. L. B.'s application because he had failed to demonstrate that he suffered from a "severe and prolonged" disability, as defined by paragraph 42(2)(*a*) of the CPP, as of the minimum qualifying period (MQP), which ended on December 31, 2015.

[3] Mr. L. B. appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada. Following a hearing by videoconference, the General Division issued a decision on October 16, 2017, denying Mr. L. B. the disability pension. While the General Division acknowledged that Mr. L. B. was no longer capable of working as a welder or in any occupation involving manual labour, it found that he had not seriously pursued retraining for lighter work.

[4] On November 14, 2017, Mr. L. B.'s legal representative filed an application requesting leave to appeal[1] with the Tribunal's Appeal Division, alleging that the General Division had committed the following errors:

[1] A page was missing from the original application; it was added on December 20, 2017.

(a) In paragraph 36 of its decision, the General Division found that Dr. Baillie "took the entirety of the Appellant's medical condition into account" before concluding that Mr. L. B. was a candidate for retraining. In fact, Dr. Baillie's June 2016 report[2] did not consider organic changes in Mr. L. B.'s cervical spine—including a herniated disc at C6-7 and effacement of the thecal sac—which were apparent in his May 2012 MRI.

(b) In paragraph 38, the General Division relied on Dr. Griffiths' finding[3] that Mr. L. B.'s neck pain had resolved. In fact, Mr. L. B. testified that his neck problems are ongoing, as supported by subsequent MRI findings that show cervical spine herniation.

(c) In paragraph 38, the General Division placed considerable weight on Dr. Tokar's[4] characterization of the May 2012 MRI, which she said revealed "no spinal cord compromise" and only "moderate stenosis of the left neural foramina"—findings that Dr. Tokar concluded were not significant enough to warrant surgery or to explain Mr. L. B.'s symptoms. Mr. L. B. submits that the General Division failed to consider the context of Dr. Tokar's assessment, which was done primarily to investigate the source of his ongoing bilateral arm pain.

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,[5] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[6]

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[2] Report of Dr. Nigel Baillie, pain specialist, dated June 13, 2016, GD2-73.
[3] Report of Dr. G. Griffiths, rheumatologist, dated April 28, 2010, GD2-67.
[4] Report of Dr. Judith Tokar, neurologist, dated June 19, 2017, GD14-2.
[5] DESDA at subsections 56(1) and 58(3).
[6] DESDA at subsection 58(1).

The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[7]

[6] I must determine whether any of Mr. L. B.'s submissions fall into one of the three grounds enumerated under section 58 of the DESDA and whether any of them raise an arguable case.

ANALYSIS

[7] Having reviewed the General Division's decision against the underlying record, I am satisfied that Mr. L. B. has an arguable case. At this juncture, I will address only the argument that, in my view, offers Mr. L. B. his best chance of success on appeal.

[8] As Mr. L. B. notes, Dr. Tokar's neurological report played a central role in the General Division's reasoning, even though it was prepared—at the request of his own legal representative—several years after the end of the MQP. The General Division summarized the report at considerable length at paragraph 21of its decision and later relied on it to minimize the seriousness of the changes indicated by the May 2012 MRI of the spine. This MRI was particularly important to Mr. L. B.'s case because it offered what, on the face of it, was the starkest evidence of organic pathology underlying his back pain. Once a neurologist saw little to "explain his symptoms," then a major component of Mr. L. B.'s claim was neutralized.

[9] However, a question remains: What "symptoms" was Dr. Tokar talking about? Her very detailed three-page report was almost entirely concerned with Mr. L. B.'s complaints of bilateral arm pain and the investigations, treatment and prognosis for it. Mr. L. B.'s back pain—the reason he stopped working and the impetus for his disability claim—was barely mentioned, and Dr. Tokar referred to the spinal MRI only to rule out his back as a source of pain radiating down his upper extremities:

> His clinical examination on that occasion revealed a degree of weakness involving the ulnar-innervated muscles of the left hand, although there were sensory deficits that suggested the possibility of a C8 radiculopathy.

[7] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

It seems that Dr. Tokar examined the May 2012 MRI only for the purpose of eliminating the above possibility:

> He was also sent for an MRI study of his cervical spine because of the possibility that he might have an associated nerve root entrapment in his neck. That study was completed on May 18, 2018 in St. Catharines and demonstrated no spinal cord compromise…

[10] The remainder of Dr. Tokar's report focused on Mr. L. B.'s carpal tunnel syndrome and its effect on his dexterity. She ended on an optimistic note but, again, appeared to view Mr. L. B.'s vocational prospects largely as a function of his ability to recover use of his arms. His longstanding complaints of back pain seemed to be an afterthought, if that.

[11] Mr. L. B. has a reasonable chance of success on appeal if he can convince me that the General Division ignored the context of Dr. Tokar's report and thereby drew overly broad inferences from it.

CONCLUSION

[12] For the reasons discussed above, I am granting Mr. L. B. unrestricted leave to appeal. Should the parties choose to make further submissions, they are also free to offer their views on whether an oral hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVE:	Donald Porter