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

Citation: *B. S. v. Minister of Employment and Social Development*, 2018 SST 194

Tribunal File Number: AD-17-590

BETWEEN:

**B. S.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: February 28, 2018

## DECISION AND REASONS

## DECISION

[1] The Appellant, B. (B.) S., alleges that it was "unfair" for the General Division to not allow a psychiatrist's report into evidence.

[2] I have decided to allow the appeal.

## OVERVIEW

[3] This appeal comes before me via a somewhat circuitous route.

[4] Mr. B. S. applied for disability benefits under the *Canada Pension Plan* (CPP) in April, 2014. The Minister denied his application initially and upon reconsideration. Mr. B. S. appealed that decision to the General Division. A teleconference hearing was scheduled for, and held on, May 3, 2016. On May 2, 2016, Mr. B. S. filed a medical report of Dr. Rebecca Tudhope, a psychiatrist, dated April 28, 2016.[1] The General Division member refused to consider Dr. Tudhope's report as part of the evidence before him.

[5] Mr. B. S. sought leave to appeal to the Appeal Division. In a decision dated February 23, 2017, the Appeal Division refused his application for leave.[2] He then sought judicial review of that decision by the Federal Court. On a motion made by the Minister, with Mr. B. S.'s consent, the Federal Court issued an order on August 15, 2017, allowing the application for judicial review and remitting the matter back to the Appeal Division to be dealt with by another member, with directions that leave to appeal be granted.

[6] This matter came before me and I duly granted leave to appeal on December 12, 2017.[3]

[7] In a letter to the Appeal Division dated January 17, 2018,[4] counsel for the Minister conceded that the General Division failed to observe a principle of natural justice by not addressing the content of Dr. Tudhope's report or explaining why it was not considered as part

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[1] GD11.
[2] *B. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 63.
[3] *B. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 728.
[4] AD3.

of the evidence. The Minister submits that the appeal should be allowed and the matter sent back to the General Division for reconsideration by a different member.

## ISSUE

[8] The following issues arise on this appeal:

**Issue 1:** Does the General Division's failure to consider Dr. Tudhope's report constitute a breach of the principles of natural justice?

**Issue 2:** Did the General Division err in law by failing to consider the totality of the Appellant's medical condition?

## ANALYSIS

### Issue 1: Does the failure to consider Dr. Tudhope's report constitute a breach of the principles of natural justice?

[9] The Appellant argues that it was unfair of the General Division to not allow Dr. Tudhope's report into the evidence because, in his submission, "it is beneficial to prove my case".[5]

[10] The failure to consider all relevant evidence adversely affects a party's right to a fair hearing and will constitute a breach of the principles of natural justice. In the present case, I find that by refusing to admit Dr. Tudhope's report, the General Division member failed to consider relevant evidence and, therefore, he breached a principle of natural justice within the scope of s. 58(1)(*a*) of the DESDA.

[11] The General Division member did not refer to Dr. Tudhope's report in his reasons. However, contrary to the Minister's submission that the member did not explain why he did not consider Dr. Tudhope's report as part of the evidence, he did so at the hearing. At the outset of the teleconference hearing, the member stated that he had before him electronic versions of GD1 through GD11, and noted that the last was a report of Dr. Tudhope, dated April 28, 2016, that had been filed by the Appellant with the Tribunal on May 2, 2016. Near the end of the hearing,[6] the Appellant asked the member to consider Dr. Tudhope's report. The member stated

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[5] AD1-2.
[6] Audio recording, time: 1:05:51.

that he would not consider the report for two reasons: because it had been filed past the deadline for filing documents and also because the Minister had not had an opportunity to respond to the report, given the late filing.

[12] I agree that there are times when late-filed documents should not be accepted into evidence, but every case must be decided on its particular facts to ensure justice is done. The factors to consider when deciding whether to admit a late-filed document include the relevance of the document and its probative value, the explanation for the delay, whether the document could have been provided by the deadline and any prejudice to the other party that would result from accepting the document into evidence.

[13] Before the General Division, the Appellant had the burden to prove that it was more likely than not that he had a severe and prolonged disability on or before the minimum qualifying period (MQP) date of December 31, 2011. The General Division member noted in his summary of the evidence that, according to the January 9, 2016, report of the Appellant's family physician, Dr. Wolder,[7] the Appellant "was receiving psychotherapy for depression in October 2008 but could not afford to continue because the WSIB[8] would not fund it" and "a diagnosis of depression has resulted in a referral to a psychiatrist (Dr. Tudhope)."[9] The member also noted in his summary of the evidence that Dr. Howard Granville, a psychologist, had seen the Appellant in 2008 in relation to psychological issues. The Appellant also testified about seeing Dr. Granville about his psychological issues.

[14] Dr. Wolder made a referral to Dr. Tudhope, who saw the Appellant on April 14, 2016. In her report, Dr. Tudhope reviewed in detail the Appellant's history of depression, which he reported as starting in 1993. She concluded "[the Appellant has] a longstanding history of depression, with alcohol use disorder—currently in remission, and likely panic disorder, as well."[10] Although Dr. Tudhope's report is dated well after the MQP date of December 31, 2011, in it she reviewed the Appellant's history of depression going back to 1993 through to 2016. Without pronouncing on what weight, if any, might be given to Dr. Tudhope's report, I

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[7] GD9-2.
[8] Ontario Workplace Safety and Insurance Board.
[9] Reasons, para. 18.
[10] GD11-8.

find the report is relevant to the Appellant's medical condition at his MQP date and has some probative value in relation to this issue.

[15] The Notice of Hearing sent on February 1, 2016,[11] advised the parties that the deadline for filing documents was March 4, 2016. Although the report was indeed filed late, the Appellant provided a reasonable explanation for this. Dr. Tudhope's April 28, 2016, report did not exist before the March 4 deadline. The Appellant explained to the General Division member at the hearing that he did not receive the report from Dr. Tudhope until May 2, 2016, a fact that was also noted by the Appellant on the cover page to the report when he filed it that day with the Tribunal.[12]

[16] With respect to the second basis on which the member determined he would not admit Dr. Tudhope's report into evidence, this goes to the issue of prejudice to the Respondent. In the circumstances, I do not believe the fact that the Minister had not filed submissions responding to the report in time for the hearing was fatal to the Appellant's request to have the report considered as evidence. The Minister chose not to attend the *de novo* hearing before the General Division and, having made that decision, would be in no position to complain that he had no opportunity to make submissions on the admissibility of Dr. Tudhope's report. If the member was of the view that the Minister should have an opportunity to make submissions, the member could have admitted Dr. Tudhope's report into evidence, heard the Appellant's testimony and submissions in relation to the report, and directed that written submissions be sought from the Minister to be filed after the hearing.

[17] In the particular circumstances of this case, I conclude that, in ruling Dr. Tudhope's report inadmissible, and thereby failing to consider its contents, the General Division member excluded relevant evidence. This resulted in an unfair hearing and breached a principle of natural justice, an error falling within the scope of s. 58(1)(*a*) of the DESDA.

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[11] GD0.
[12] GD11-2.

**Issue 2: Did the General Division err in law by failing to consider the totality of the Appellant's medical condition?**

[18] In assessing whether a claimant's disability is severe under the CPP, the General Division is to consider the totality of the Appellant's medical condition.[13] In this case, although there was evidence in the record that the Appellant suffered from depression in 2008 (Dr. Granville's report) and in 2016 (Dr. Wolder's report and his referral of the Appellant to a psychiatrist), as well as in the Appellant's testimony that he suffered from depression throughout this period, the General Division member did not refer to or consider the Appellant's psychological issues in his analysis of whether the Appellant's disability was severe as of the MQP date.

[19] I conclude that the General Division member committed an error of law under s. 58(1)(*b*) of the DESDA by failing to consider the totality of the Appellant's medical condition in his determination of whether the Appellant suffered from a severe disability, within the meaning of the CPP, on or before his MQP date.

**Summary**

[20] The General Division's errors are not dispositive of the Appellant's claim for disability benefits; indeed, the Appellant's entitlement to such benefits continues to be contested by the Minister. It is appropriate, therefore, to refer this matter back to the General Division for reconsideration. It will be the task of the General Division member to determine the weight to be given to the evidence and to make findings as to whether the Appellant's disability was severe and prolonged in accordance with the requirements under the CPP.

[21] Before concluding, I wish to deal with one final matter. As part of his appeal before the Appeal Division, the Appellant filed a "psychological consultation initial report" dated October 20, 2012, signed by Dr. Henry Svec, psychologist.[14] This document was not before the General Division.

[22] New evidence is generally not admitted before the Appeal Division, given that its role is to review the record that was before the General Division to determine whether an error falling

[13] *Villani v. Canada (Attorney General)*, 2001 FCA 248, and *Bungay v. Canada (Attorney General)*, 2011 FCA 47, at para. 8.
[14] AD1A.

within s . 58(1) of the DESDA was committed.[15] Accordingly, I have not considered Dr. Svec's report or its contents in making my decision on this appeal. The Appellant may wish to file the document with the Tribunal and seek to have it admitted into evidence before the General Division when it reconsiders this matter.

**CONCLUSION**

[23] The appeal is allowed. Pursuant to s. 59(1) of the DESDA, this matter is referred back to the General Division for reconsideration.

Nancy Brooks
Member, Appeal Division

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| METHOD OF PROCEEDING: | On the record |
| PARTIES AND REPRESENTATIVES: | B. (B.) S., Appellant, Self-represented<br><br>Minister of Employment and Social Development, Respondent<br><br>Stéphanie Yung-Hing, Counsel for the Respondent |

[15] *Marcia v. Canada (Attorney General)*, 2016 FC 1367.