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

Citation: *W. D. v. Minister of Employment and Social Development*, 2018 SST 595

Tribunal File Number: AD-18-218

BETWEEN:

W. D.

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: May 10, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is granted.

OVERVIEW

[2] The Applicant, W. D., has a high school education and is now 45 years old. He is a trained heat treat technician and was working as a pipe fitter when he was injured in a May 2014 motor vehicle accident. He has not worked since. Although he underwent four reparative surgeries—one to his bowel, another to his right ankle and two to his left knee—he continues to report pain in his abdomen and legs, as well as headaches and emotional issues.

[3] In October 2014, the Applicant applied for a Canada Pension Plan disability pension. The Respondent, the Minister of Employment and Social Development (Minister), refused the application after determining that his disability was not "severe and prolonged" as of the minimum qualifying period (MQP), which ended on December 31, 2016.

[4] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated December 31, 2017, it dismissed the appeal, finding that the Applicant had failed to demonstrate that he was "incapable regularly of pursuing any substantially gainful occupation" as of the MQP. The General Division found that, while the Applicant may no longer have been capable of managing the physical demands of his previous job, he had not fulfilled his obligation to investigate lighter work. The General Division also noted that the Applicant had never been diagnosed with a mental health condition and had successfully completed airplane pilot training after the MQP.

[5] On April 5, 2018, the Applicant's legal representative requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed various factual and legal errors in rendering its decision. Having reviewed the record, I have concluded that his submissions have a reasonable chance of success on appeal.

ISSUES

[6] 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]

[7] My task is to determine whether there is an arguable case based on one or more of the following questions:

Issue 1: Did the General Division properly consider the Applicant's emotional and psychological impairments and their impact on his capacity to work?

Issue 2: Did the General Division base its decision on an erroneous finding that the Applicant successfully obtained a pilot's licence after the MQP?

Issue 3: Did the General Division properly consider the Applicant's chronic pain and its impact on his capacity to work?

Issue 4: Did the General Division base its decision on an erroneous finding that the Applicant does not suffer from a prolonged disability?

ANALYSIS

[8] At this preliminary stage, I see no need to consider all of the Applicant's submissions; I will address only those arguments that, in my view, offer his best chances of success.

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

Issue 1: Did the General Division properly consider the Applicant's psychological impairments?

[9] It is clear that the General Division based its decision, in part, on a finding that the Applicant's emotional difficulties were not as disabling as claimed. In paragraph 44 of its decision, the General Division wrote:

> The Appellant denies being diagnosed as suffering from any mental illness, including depression. He has never taken medication for mental illness or seen a psychiatrist, psychologist, or other mental healthcare provider save a social worker seen briefly from December 2016 to April 2017 who indicated to the Appellant his belief the Appellant was suffering from PTSD.

[10] The Applicant argues that, in assessing the evidence, the General Division disregarded *Saadati v. Moorhead*,[4] a recent decision of the Supreme Court of Canada, which held that a disability claimant need not furnish proof of a recognized psychiatric illness to support a finding of legally compensable mental injury. It states the following:

> While relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury.

[11] I see an arguable case that the General Division may have departed from the Supreme Court's prescribed approach and focused on the absence of a psychiatric diagnosis, rather than the Applicant's professed symptoms of emotional distress. Much will depend on the extent to which the General Division assessed the balance of the evidence surrounding the Applicant's mental health. A finding of disability may not depend on a psychiatric diagnosis, but *Saadati* still requires claimants to show a "requisite degree of disturbance," and does not rule out reliance on expert evidence—or lack thereof: "To the extent that claimants do not adduce relevant expert

[4] *Saadati v. Moorhead*, 2017 SCC 28.

evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short."

[12] I also see an arguable case that the General Division may have based its decision on an erroneous finding, in paragraph 58 of its decision, that the Applicant "by his own admission has no significant psychological or mental disability." At this point, I have only cursorily reviewed the audio recording of the hearing, which reveals that the presiding General Division member spent eight minutes[5] closely questioning the Applicant about his emotional problems and the treatment he has received for them. In that time, I did not hear the Applicant make a categorical "admission" that his psychological problems were not significant, although he did concede, as he notes in his submissions, that his physical impairments were larger factors in his inability to work.

Issue 2: Did the General Division base its decision on an erroneous finding that the Applicant successfully obtained a pilot's licence?

[13] The Applicant alleges that the General Division incorrectly stated he had "acquired" a pilot's licence. He claims that, in fact, he never testified that he had successfully obtained his pilot's licence and is not, nor has he ever been, a licensed pilot.

[14] I see an arguable case on this point. The General Division placed significant weight on the Applicant's enrolment in flight school, finding that he had "obtained a pilot licence contemporaneous to his MQP, and [had] completed many hours of flight, including a solo flight."[6] The General Division's decision leaves the impression that the Applicant had earned a full licence, although the audio recording[7] indicates that he had only obtained a student licence up to that point and did not expect to ever graduate to the next level. I also note that the Applicant emphasized that he had completed his training only because he was permitted many accommodations. This went unmentioned by the General Division.

[5] From the 1:08 mark.
[6] Paragraph 55 of the General Division's decision.
[7] The relevant segment begins at 1:20.

CONCLUSION

[15] I am granting leave to appeal on all grounds put forward by the Applicant. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[16] I am also interested in receiving submissions on what remedy would be appropriate under s. 59(1) of the DESDA, should the appeal be allowed.

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

Member, Appeal Division

REPRESENTATIVES:	Nancy McAuley and Jacob Aitcheson, for the Applicant