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

Citation: *L. B. v. Minister of Employment and Social Development*, 2018 SST 732

Tribunal File Number: AD-17-882

BETWEEN:

L. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 13, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, L. B., was born in 19XX 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 for a heavy equipment manufacturer, 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.

[3] In March 2015, the Appellant 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 the Appellant'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.

[4] The Appellant 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 the Appellant the disability pension. While the General Division acknowledged that the Appellant 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.

[5] On November 14, 2017, the Appellant's legal representative filed an application requesting leave to appeal with the Tribunal's Appeal Division, alleging various errors on the part of the General Division.

[6] In my decision dated February 15, 2018, I granted leave to appeal because I saw a reasonable chance of success on appeal for the Appellant's submissions.

[7] Having reviewed the parties' oral and written submissions, I have concluded that none of the Appellant's reasons for appealing have sufficient merit to warrant overturning the General Division's decision.

ISSUES

[8] The Appellant has raised the following issues:

Issue 1: Did the General Division err by finding that Dr. Baillie "took the entirety of the Appellant's medical condition into account"?

Issue 2: Did the General Division err by relying on Dr. Griffiths' finding that the Appellant's neck pain had resolved?

Issue 3: Did the General Division ignore the context of Dr. Tokar's June 2017 report and thus draw overly broad inferences from it?

ANALYSIS

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[10] How much deference should the Appeal Division show to the General Division's decisions? In *Canada v. Huruglica*,[1] the Federal Court of Appeal held administrative tribunals

[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

must look first to their home statutes for guidance in determining their role: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent…."

[11] Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. By contrast, the wording of paragraph 58(1)(*c*) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be **based** on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division commits a material factual error that is, not merely unreasonable, but clearly egregious or at odds with the record.

Issue 1: Did the General Division err by finding that Dr. Baillie "took the entirety of the Appellant's medical condition into account"?

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

[13] I see little merit in this submission. In his report dated June 13, 2016, Dr. Baillie wrote:

> I ordered an MRI for him after the initial visit, and this was done on May 3, 2016, at X site. This showed anular tears in the 4 o'clock position at L3-4 and L4-5 with mild stenosis at that level as well. At the L5-S 1, there was a mild bulging disk. There were bulging disks at the other levels as well.

[2] Report of Dr. Nigel Baillie, pain specialist, dated June 13, 2016, GD4-4.

[14] It is true that Dr. Baillie apparently did not consider, or have access to, the Appellant's May 2012 MRI, but he did order a fresh MRI of the cervical spine in May 2016. Coming soon after the Appellant's MQP, it had high relevance. It, like the previous MRI, revealed significant organic changes, which Dr. Baillie took into account when he concluded that the Appellant had the capacity to work in physically undemanding jobs, such as a security guard or telemarketer.

[15] In that context, I must conclude that the General Division did not err by finding that Dr. Baillie considered the "totality" of the Appellant's condition. The Appellant did not identify an error on the part of the General Division so much as argue that Dr. Baillie's report was assigned excessive weight. However, it is open to an administrative tribunal, as trier of fact, to sift through the relevant evidence and assess its quality, while determining what, if anything, to accept or disregard. The Federal Court of Appeal addressed this topic in *Simpson v. Canada*,[3] in which the claimant's counsel argued that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted selected medical reports. In dismissing the application for judicial review, the Court held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

[16] The Appellant has not demonstrated that the Baillie report was fatally flawed, and I do not see how the General Division's reliance on it can be taken as an indictment of the entire decision. In any event, it was, in the end, only one of many factors that the General Division took into account when arriving at its decision.

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

Issue 2: Did the General Division err in relying on Dr. Griffiths' finding that the Appellant's neck pain had resolved?

[17] The Appellant alleges that the General Division erroneously relied on Dr. Griffiths' finding[4] that his neck pain had resolved. In fact, says the Appellant, he testified that his neck problems are ongoing, as indicated by a May 2012 MRI showing cervical spine herniation.

[18] I am not persuaded by this submission. In paragraph 38, the General Division wrote:

> The medical evidence supports a finding that the Appellant has chronic back pain and some hand discomfort arising from carpal tunnel syndrome. The Appellant mentioned neck pain at his hearing. However, a report from Dr. Griffiths dated April 28, 2010 stated that the Appellant's neck pain had resolved.

[19] My examination of the report in question indicates that the General Division accurately relayed Dr. Griffith's April 2010 account of the Appellant's history:

> He also describes that he got his neck and shoulders caught as well in the cab. The latter have resolved, but the low back symptoms have persisted.

[20] The Appellant submits that the General Division relied on this report at the expense of other evidence that supported his disability claim. However, the General Division's decision indicates that it noted the Appellant's testimony about his unresolved neck pain and, in paragraph 35, addressed the MRI. It ultimately decided to give more weight to Dr. Baillie's June 2016 opinion, which specifically found the Appellant capable of low-impact work. As noted above, the General Division is to be given some latitude in how it weighs the evidence. I do not see an error, under subsection 58(1) of the DESDA, in the General Division's reliance on Dr. Griffith's and Dr. Baillie's reports, particularly where it is clear that the General Division also considered competing evidence.

[4] Report of Dr. G. Griffiths, rheumatologist, dated April 28, 2010, GD2-67.

Issue 3: Did the General Division ignore the context of Dr. Tokar's June 2017 report and thus draw overly broad inferences from it?

[21] In paragraph 38 of its decision, the General Division placed considerable weight on Dr. Judith Tokar's[5] 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 the Appellant's symptoms. The Appellant 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.

[22] In my leave to appeal decision, I noted that Dr. Tokar's neurological report played a central role in the General Division's reasoning, even though it was not prepared until several years after the end of the MQP. The General Division summarized the report at considerable length at paragraph 21 of its decision and later relied on it to minimize the seriousness of the changes seen in the 2012 MRI of the cervical spine. This MRI was particularly important to the Appellant's case because it offered what, on the face of it, was the starkest evidence of organic pathology underlying his back pain. I also noted that Dr. Tokar's detailed three-page report barely mentioned the Appellant's back pain—the reason he stopped working and the motivation for his disability claim—and was almost entirely concerned with the investigations, treatment and prognosis for his bilateral arm pain.

[23] Having had an opportunity to consider submissions from both parties on this issue, I am satisfied that the General Division's treatment of the Tokar report did not fall into any of the grounds of appeal set out in subsection 58(1) of the DESDA. I have seen nothing to suggest that Dr. Tokar's practice is focused on carpal tunnel syndrome to the exclusion of other neurological disorders. Dr. Tokar referred to the 2012 MRI to rule out the Appellant's neck as a source of radicular pain, but she also provided a broader perspective on the changes in his spine and their potential impact on his functionality. While the MRI showed clear evidence of disc herniation at C6-7, Dr. Tokar focused on the absence of any spinal cord compromise, finding "at most" moderate stenosis.

[5] Report of Dr. Judith Tokar, neurologist, dated June 19, 2017, GD14-2.

[24] At this point, it is important to note that Dr. Tokar, who had not seen the Appellant in more than four years, prepared her June 2017 report at the request of counsel. It is clear from her report that Dr. Tokar was aware her findings would be used in proceedings for workers' compensation and CPP benefits. One can reasonably assume that Dr. Tokar, in her role as consultant, adopted a mandate to assess the entirety of the Appellant's neurological condition. Had there been anything in the May 2012 MRI to signify significant disability, I am confident that she would have said so.

[25] I see further indications that Dr. Tokar considered the entirety of the Appellant's condition. Her report contains a detailed medical and vocational history and documents a comprehensive clinical examination, noting:

> [H]e has also been prone to neck pain which can radiate into his left shoulder with coughing. He also experiences headaches along with this and manages these with Advil. He has been aware of a "clicking" sensation in his neck whenever he attempts to throw a Frisbee to one of his dogs
>
> On examination today, cervical spine range of motion appears full and painless with no apparent bony deformities or tenderness in the paracervical muscles. BP is 130/85 in the right arm and 138/91 in the left arm, sitting with a resting normal heart rate of approximately 80 bpm.

[26] The General Division noted Dr. Tokar's opinion that the changes seen in the 2012 MRI could not explain the Appellant's complaints. The General Division also noted that Dr. Tokar did not rule out work. The Appellant's representative suggested that Dr. Tokar "recanted" her previous findings of December 2011 and April 2013 but, since neither of these reports were on file, they could not have been considered by the General Division.

[27] In my view, the scope of Dr. Tokar's June 2017 report was wide enough to permit the General Division to draw inferences about the Appellant's capacity to work. As held in *Simpson*,[6] assigning weight to evidence is the province of the trier of fact, and, in this case, the General Division's use of the Tokar report must be afforded a measure of deference. In the end, I

[6] *Supra*.

do not see an error here, much less one that is “perverse or capricious” or made “without regard for the material.”

CONCLUSION

[28] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds listed in subsection 58(1) of the DESDA.

[29] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	June 28, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. B., Appellant Donald Porter, Representative for the Appellant Viola Herbert, Representative for the Respondent