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

Citation: *R. B. v. Minister of Employment and Social Development*, 2018 SST 920

Tribunal File Number: AD-18-495

BETWEEN:

R. 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: September 19, 2018

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, R. B., has a Grade 10 education and is a qualified journeyman welder. In March 2014, he injured his right shoulder while working as a pipefitter. At the time, he was 41 years old. He has not worked since.

[3] In February 2016, the Applicant applied for disability benefits under the *Canada Pension Plan* (CPP), claiming that he could no longer work because of severe pain and stiffness in his right shoulder. The Respondent, the Minister of Employment and Social Development (Minister), refused the Applicant's application on the ground that he had produced insufficient medical evidence that his disability was "severe and prolonged," as defined by the CPP, as of the minimum qualifying period (MQP), which was to end 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 videoconference and, in a decision dated April 28, 2018, found that the Applicant was, more likely than not, able to perform substantially gainful work. The General Division acknowledged that the Applicant experienced pain, but found that he had made insufficient effort to look for alternative work that might be better suited to his limitations.

[5] On August 7, 2018, the Applicant applied for leave to appeal from the Tribunal's Appeal Division, alleging that the General Division had failed to review all of his medical evidence. The Applicant specifically mentioned imaging reports of his shoulder, neck, and lower back, which, he submits, the General Division accepted into evidence but then neglected to address in its written reasons. The Applicant also submitted with his leave to appeal application 28 pages of medical records, all of which were generated after the General Division issued its decision.

[6] On August 10, 2018, the Tribunal asked the Applicant to provide additional reasons for his appeal. The Applicant responded by forwarding a July 2014 *Globe and Mail* opinion piece, "Seven reasons why disabled Canadians are losing CPP benefits." The Applicant also promised further submissions, although, to date, the Tribunal has yet to receive them.

[7] Having reviewed the General Division decision against the underlying record, I have concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

PRELIMINARY MATTER

[8] In his submissions, the Applicant offered an explanation for having filed his leave to appeal application "late." Having reviewed the record, I do not believe that the Applicant was, in fact, late; rather, it appears that he submitted his application within the 90-day filing deadline specified in s. 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA). The record shows that the Tribunal mailed the General Division's decision to the Applicant's address of record on April 30, 2018.[1] According to s. 19(*a*) of the *Social Security Tribunal Regulations* (SST Regulations), a decision is deemed to have been communicated to a party 10 days after the date on which it was mailed. The Applicant submitted his request for leave to appeal on August 7, 2018—89 days after he was presumed to have received the decision.

[9] Upon receipt of his application for leave to appeal, Tribunal staff advised the Applicant that his stated reasons for appeal were deficient—and that may have been true for determining whether to grant leave to appeal, but not for merely registering the application as complete. The former, according to s. 58(2) of the DESDA, requires an applicant to show that their grounds of appeal stand a "reasonable chance of success" and must be adjudicated by a member of the Appeal Division; the latter, according to s. 40(1)(*c*) of the SST Regulations, requires only "grounds for the application." The SST Regulations do not say anything about the quality of those grounds, nor do they require strict compliance with the requirements of s. 58(2) of the

[1] In his application for leave to appeal, the Applicant indicated that he received the decision on April 28, 2018 (AD1-2). I find this unlikely, if not impossible, because the General Division finalized its decision on that same day.

DESDA. By that minimal standard, the Applicant's grounds of appeal, however simple or brief they may have been, fulfilled the filing requirements.

ISSUES

[10] According to s. 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 failed to observe a principle of natural justice; erred in law; or 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.[2] To grant leave to appeal, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[11] The issues before me are as follows:

Issue 1: Does the Applicant have an arguable case that the General Division failed to consider key items of evidence?

Issue 2: Can the Appeal Division consider the Applicant's recent medical information?

ANALYSIS

Issue 1: Does the Applicant have an arguable case that the General Division failed to consider key items of evidence?

[12] On March 19, 2018, approximately two weeks before the hearing date, the Applicant submitted to the Tribunal a 58-page package of documents,[5] which included:

- General medical information, drawn from brochures and websites, on such topics as shoulder impingement syndrome and cervical degenerative disc disease;
- A report dated March 9, 2018, by Dr. Mohamed Boodhun, neurologist;

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[2] DESDA at ss. 56(1) and 58(3).
[3] *Ibid*. at s. 58(2).
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[5] Labelled GD9 in the hearing file.

- Reports from Nighthawk Radiology detailing second opinions on (i) a CT scan of the Applicant's lumbar spine dated December 21, 2009; (ii) an MRI of his lumbar spine dated December 15, 2010; (iii) an MRI of his cervical spine dated September 23, 2015; and (iv) an MRI of his right shoulder dated September 23, 2015.

[13] On March 22, 2018, the Applicant forwarded another Nighthawk Radiology second opinion report,[6] this one a review of a prior CT scan of the chest, dated May 3, 2016.

[14] The Applicant alleges that the General Division "broke the law" by failing to review relevant evidence, but I do not see a reasonable chance of success for this argument. It is true that the General Division made no reference to the Nighthawk Radiology second opinions in its decision, but that does not mean it ignored them. I have reviewed the audio recording of the April 9, 2018, hearing and I note that the Applicant's submissions of March 15, 2018, and March 22, 2018, were the subject of an extended discussion.[7] The presiding General Division member specifically asked about the Nighthawk reports and, being satisfied that they had some relevance, admitted them into evidence. I do not think it can be fairly said that the General Division disregarded this material.

[15] In any event, 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.[8] While the Applicant may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, and decide how much weight to assign each item. I can only assume that the General Division chose to give lesser weight to the Nighthawk reports; in doing so, it acted within its authority.

[16] Beyond that, I have reviewed the General Division's decision and have found no indication that it ignored or gave inadequate consideration to any significant aspect of the Applicant's case. The General Division summarized what it determined were the most relevant

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[6] GD10.
[7] Heard from 6:25 to 11:00 of the recording.
[8] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

items in the Applicant's medical file and conducted a meaningful analysis of his reported medical conditions—principally shoulder and back pain—and their impact on his capacity to regularly pursue substantially gainful employment. Invoking *Inclima v. Canada*,[9] the General Division found that, despite his limitations, the Applicant had residual capacity, yet had not fulfilled his duty to seek alternative employment. I see no error of either fact or law in this determination.

[17] In the absence of detailed reasons, I find this claimed ground of appeal to be so broad as to amount to a request to retry the entire claim. If the Applicant is asking me to reassess the evidence and substitute my judgment for the General Division's, I am unable to do so. My authority as an Appeal Division member permits me to determine only whether any of an applicant's reasons for appealing fall within the grounds specified under s. 58(1) of the DESDA and whether any of these reasons have a reasonable chance of success.

Issue 2: Can the Appeal Division consider the Applicant's recent medical information?

[18] I note that the Applicant has submitted medical reports that were prepared after the General Division's decision was issued. The General Division cannot be faulted for failing to consider evidence that was not yet in existence at the time of hearing. I cannot consider these documents as a result of the constraints of s. 58(1) of the DESDA, which does not permit the Appeal Division to admit new evidence or hear arguments on the merits of disability. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised, although a claimant does have the option of making an application to the General Division to rescind or amend its decision.[10]

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

[10] A claimant seeking to rescind or amend a decision of the General Division must comply with the requirements set out in s. 66 of the DESDA and ss. 45 and 46 of the SST Regulations, which impose strict deadlines and require an applicant to demonstrate that any new facts are material and could not have been discovered at the time of the hearing without exercise of reasonable diligence.

CONCLUSION

[19] Because the Applicant 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

REPRESENTATIVE:	R. B., self-represented