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

Citation: *G. C. v. Minister of Employment and Social Development*, 2018 SST 1029

Tribunal File Number: AD-18-356

BETWEEN:

G. C.

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: October 19, 2018

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, G. C., is a former truck driver and building contractor. He is now 52 years old. In September 2006, he sustained a cervical fracture in a motor vehicle accident (MVA). He has not worked since.

[3] In September 2015,[1] the Applicant applied for a disability pension under the *Canada Pension Plan* (CPP), claiming to be disabled by neck and back pain, a hiatus hernia, arthritis, and a brain injury, among other conditions. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that the Applicant's disability was not severe and prolonged, as defined by the CPP, as of his minimum qualifying period (MQP), which ended on December 31, 2009.

[4] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada. The General Division held a hearing by teleconference and, in a decision dated March 9, 2018, dismissed the appeal, finding on balance that the Applicant was capable of substantially gainful work as of the MQP. The General Division acknowledged that the Applicant experienced intermittent neck and back pain but found insufficient evidence that it interfered with his usual activities.

[5] On June 4, 2018, the Applicant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division's decision was unfair and "personal." He also complained that he had had bad representation. In a letter dated June 6, 2018, the Tribunal advised the Applicant that, because he had used the wrong form to request leave to appeal, his application was incomplete. It enclosed the correct form and asked him to provide additional reasons for his appeal by July 9, 2018.

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[1] The Applicant had previously applied, unsuccessfully, for Canada Pension Plan disability benefits in 2014.

[6] On September 27, 2018, the Applicant returned the completed form. In it, he expressed his belief that the General Division had made an error by refusing to believe him or his doctors. In particular, he alleged that the General Division had unjustly called him a liar when he attempted to explain why he had not been honest with an emergency room doctor.

[7] At this point, Tribunal staff declared the Applicant's application requesting leave to appeal complete. Although his application was deemed late, I am satisfied that the Applicant did, in fact, meet the 90-day filing deadline specified in s. 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA). The General Division issued its decision on March 9, 2018, and it was mailed to the Applicant on the same day. On June 4, 2018—87 days later—the Applicant submitted his initial request for leave to appeal. In my view, even though the Applicant had used the nominally incorrect form, it otherwise contained all the information required under s. 40(1)(*c*) of the *Social Security Tribunal Regulations* (SSTR). 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 for leave to appeal 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 therefore be decided by a member of the Appeal Division; the latter, according to s. 40(1)(*c*) of the SSTR, requires only "grounds for the application." It does not say anything about the quality of those grounds, nor does it require compliance with the requirements of s. 58(2) of the DESDA. By that minimal standard, the Applicant's grounds of appeal, however simple or brief they may have been, fulfilled the filing requirements set out in the SSTR.

[8] That said, having reviewed the General Division's decision against the underlying record, I have concluded that the Applicant has not advanced any grounds of appeal that would have a reasonable chance of success.

ISSUES

[9] According to s. 58(1) of the DESDA, there are only three valid 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 grants leave to appeal,[2] but the Appeal Division must first 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]

[10] I must determine whether the Applicant has raised an arguable case based on the following questions:

Issue 1: Did the General Division err by refusing to accept the opinions of the Applicant's doctors?

Issue 2: Did the General Division err when it dismissed the Applicant's explanation for misrepresenting his status to various doctors?

Issue 3: Is any remedy available to the Applicant if he was the victim of poor legal representation?

ANALYSIS

Issue 1: Did the General Division err by refusing to accept the opinions of the Applicant's doctors?

[11] I do not see an arguable case based on this question. It is true, as the Applicant alleges, that the General Division dismissed or gave little weight to some of the medical evidence on file that seemed to favour his claim; however, this, by itself, is not a valid ground of appeal. For example, the General Division attached little weight to Dr. Nicolson's November 2017 opinion that the Applicant had cognitive deficits as a result of a severe closed-head injury, but it did so for defensible reasons that it explained in its decision: there were no reports of head trauma around the time of the MVA. Dr. Nicolson wrote his report nearly eight years after the MQP, and he was not treating the Applicant between 2006 and 2012.

[12] It must be kept in mind that assessing disability under the CPP is a legal question as much as it is a medical one, and a physician's assertion is not necessarily the final word on the matter. While Dr. Nicolson strongly supported the Applicant's disability claim, his evidence was

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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.

only one factor, among many, that the General Division had to consider. While the Applicant may not agree with the General Division's conclusions, it was within its authority to assess the available evidence as it saw fit. In *Simpson v. Canada*,[5] the Federal Court of Appeal held the following:

> [A]ssigning 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.

[13] In this case, the General Division made its decision after conducting what appears to be a reasonably comprehensive survey of the evidentiary record. It reviewed all of the Applicant's medical complaints and analyzed their impact on his capacity to regularly pursue a substantially gainful occupation during the MQP. I see no indication that the General Division mispresented, ignored or gave inadequate consideration to any significant component of the evidence that was before it.

Issue 2: Did the General Division err when it dismissed the Applicant's explanation for misrepresenting his status to various doctors?

[14] It is clear that the Applicant objects to paragraph 9 of the General Division's decision, which reads as follows:

> The [Applicant] did not always testify in a straightforward fashion. He claimed, for example, that he had been untruthful when he told one doctor that he was working—she was attractive and he wanted to impress her. He also stated that he had not been snowmobiling as he told the emergency room doctors in December 2013; instead, he had been beaten up and was afraid of reprisals if he disclosed this. Under such circumstances, it is necessary for me to rely to a greater extent on the medical record in arriving at my decision.

This passage suggests that the General Division was troubled by what it identified as inconsistencies between the Applicant's testimony and what he had previously told some of his treatment providers, as documented in their reports. However, I do not see an arguable case that the General Division erred in its assessment of the competing evidence.

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

[15] At the hearing, the General Division quite properly asked the Applicant about these inconsistencies, providing him with an opportunity to explain why, at various times, he gave differing accounts of his injuries and his capacity to work. He admitted to having misled his doctors but offered rationalizations for doing so. In this context, the General Division was within its authority, as trier of fact, to assess those rationalizations and make a finding on the Applicant's overall credibility. In finding the Applicant's credibility lacking, I see nothing to indicate that the General Division violated of any of the criteria listed in s. 58(1) of the DESDA.

Issue 3: Is any remedy available to the Applicant if he was the victim of poor legal representation?

[16] The Applicant has not explained how he was ill-served by his former lawyer at the hearing before the General Division, but even if he was, there is nothing, unfortunately, that the Appeal Division can do about it.

[17] The grounds of appeal permitted under s. 58(1) of the DESDA are narrowly defined and few. Under these parameters, I do not see an arguable case that the General Division can be held responsible for the failings of counsel. In any event, it is well established in jurisprudence that inadequate legal representation does not, in and of itself, justify overturning a decision.[6]

CONCLUSION

[18] Since the Applicant has not identified any grounds of appeal under s. 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	G. C., self-represented

[6] See, for example, *Cornejo Arteaga v. Canada (Citizenship and Immigration)*, 2010 FC 868.