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

Citation: *B. B. v Minister of Employment and Social Development*, 2018 SST 1260

Tribunal File Number: AD-18-403

BETWEEN:

B. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: December 3, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] B. B. (Claimant) completed high school before joining the paid workforce. He worked in a number of physically demanding positions. His last job was moving and recharging batteries. He has many medical conditions, including back pain, migraine headaches, depression, anxiety, deep vein thrombosis, irritable bowel syndrome, and fibromyalgia.

[3] The Claimant applied for a Canada Pension Plan disability pension and claimed that he was disabled by these conditions. The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal, finding that the Claimant's disability was not severe because he had some work capacity and had not demonstrated that efforts to obtain and maintain employment were unsuccessful because of his medical condition. His first application for leave to appeal this decision to the Tribunal's Appeal Division was dismissed. The Claimant applied for judicial review of this decision, and the Federal Court decided that the Appeal Division decision was unreasonable. It referred the matter back to the Appeal Division.

[4] The Tribunal's Appeal Division then granted leave to appeal this decision because the appeal had a reasonable chance of success on the basis that the General Division may have based its decision on an erroneous finding of fact made without regard for a medical report written in June 2009. The legal test to be granted leave to appeal is whether a ground of appeal has a reasonable chance of success on appeal.[1] This is a preliminary test, and it is easier to meet than the legal test to succeed on the merits of an appeal. The fact that a claimant has been granted leave to appeal does not guarantee that they will succeed on the merits of the appeal itself. This appeal is dismissed because the General Division did not base its decision on an erroneous finding of fact made without regard for the June 2009 medical report.

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[1] *Department of Employment and Social Development Act* (DESD Act), s 58(2).

PRELIMINARY MATTERS

[5] The Claimant did not attend the Appeal Division hearing. His lawyer was present. There is no specific written authorization for this lawyer to represent the Claimant filed with the Tribunal. However, the lawyer represented the Claimant at the Federal Court and explained that he was attending the appeal hearing as part of that retainer. The Tribunal accepts that the lawyer is authorized to represent the Claimant.

ISSUE

[6] Did the General Division base its decision on an erroneous finding of fact made without regard for Dr. Silverberg's medical report from June 2009?[2]

ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error 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 before it.[3] The Claimant argues that the General Division based its decision on an erroneous finding of fact made without regard for all of the material that was before it. To succeed on this basis, the Claimant must prove three things: that a finding of fact was erroneous, that it was made without regard for all of the material that was before the General Division, and that the decision was based on this finding of fact.

[8] The Claimant argues that the General Division's statement that "[n]one of his physicians told him he could not work"[4] is an erroneous finding of fact because, in June 2009, Dr. Silverberg wrote that the Claimant was not employable in the workplace in any capacity. However, this statement must be read in context. It is in the section of the General Division decision that summarized the evidence before it, specifically the Claimant's testimony. Also in

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[2] GD3-74.
[3] DESD Act, s 58(1).
[4] General Division decision para 9.

the same paragraph as this statement, the decision refers to the Claimant's testimony that he could not return to his regular job because his back was getting worse, that his chiropractor recommended light duties, and that Dr. Silverberg had told him that he should work in a sedentary position. Therefore, this statement is not a finding of fact, but a recitation of the Claimant's evidence.

[9] Dr. Silverberg's June 2009 report is only one of many of his reports that were before the General Division. In January 2008, Dr. Silverberg wrote that the Claimant had mechanical low back pain from bending and lifting at work and suggested that the Claimant retrain for a sedentary job.[5] In July 2010, Dr. Silverberg concluded that the Claimant's condition would not improve completely and that he was unable to return to any job that required standing, sitting, walking, or bending. In addition, the General Division had reports before it from the Claimant's family physician, a physiotherapist, a psychiatrist, and other treatment providers.[6] Only the family physician consistently stated that the Claimant could not work.

[10] The General Division's mandate is to receive evidence from the parties and weigh it to reach a decision. In its decision, the General Division analyzed Dr. Silverberg's evidence and referred specifically to Dr. Silverberg's June 2009 report and to his 2010 report that set out the Claimant's restrictions.[7] The General Division also considered the Claimant's testimony—particularly the Claimant's testimony that he was capable of part-time work—and the written evidence from the other treatment providers. Based on this evidence, the General Division concluded that the Claimant had the capacity to work. Because he had this capacity, the Claimant was required to prove that efforts to obtain and maintain alternative work were unsuccessful because of his health.[8] The Claimant had not done so. Therefore, the General Division dismissed the appeal.[9]

[11] The General Division did not base its decision on an erroneous finding of fact. It considered all of the evidence and reached a conclusion based on its weighing of the evidence

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[5] General Division decision para 14.
[6] Medical evidence is summarized in the General Division decision at paras11–26.
[7] General Division decision paras 33–34.
[8] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[9] General Division decision para 38.

and the law. It is not for the Appeal Division to reweigh the evidence to reach a different conclusion.[10]

[12] In addition, Dr. Silverberg's June 2009 report should not be given more weight simply because it was dated close to the Claimant's minimum qualifying period (MQP - the date by which a claimant must be found to be disabled to receive the disability pension) which was December 31, 2009. The General Division considered medical evidence that was prepared both before and after the MQP and based its decision on the preponderance of evidence. This is not an error.

CONCLUSION

[13] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	November 27, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Lorne Gershuny, Counsel for the Appellant Marcus Dirnberger, Counsel for the Respondent

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