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

Citation: *G. B. v Minister of Employment and Social Development*, 2018 SST 1295

Tribunal File Number: AD-18-776

BETWEEN:

G. 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: December 14, 2018

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, G. B., is a high school graduate who has held a series of short-term jobs, most recently as a cleaner in an underground mine. He claims that he is disabled by depression, anxiety, asthma, and sleep apnea. He is 28 years old and has been unemployed since May 2015.

[3] In February 2016, the Applicant applied for a disability pension under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development (Minister), refused the application because the Applicant had failed to demonstrate that he suffered from a "severe and prolonged" disability, as defined by section 42(2)(a) of the CPP, as of the minimum qualifying period (MQP), which ended on December 31, 2017.

[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 videoconference and, in a decision dated August 26, 2018, dismissed the Applicant's appeal, finding it more likely than not that he remained capable regularly of performing substantially gainful employment. In particular, the General Division found that the Applicant's medical conditions, considered with his personal characteristics, were not so severe to prevent him from learning new skills.

[5] On November 23, 2018, the Applicant'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] Having reviewed the Applicant's submissions against the record, I have concluded that none of the Applicant's submissions has a reasonable chance of success on appeal.

ISSUES

[7] According to section 58 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 before it. An appeal may be brought only if the Appeal Division grants leave to appeal,[1] but the Appeal Division must first be satisfied that the appeal 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]

[8] I must determine whether the Applicant has raised an arguable case on the following issues:

Issue 1: Did the General Division breach a principle of natural justice by making negative inferences about the Applicant's credibility without giving him an opportunity to address the alleged inconsistencies on which those inferences were based?

Issue 2: Did the General Division err by making findings about the Applicant's sleep apnea that were not based on the evidence?

Issue 3: Did the General Division err when it found that, contrary to his testimony, the Applicant had been recommended for counselling?

Issue 4: Did the General Division err by relying, at the expense of more relevant evidence, on Dr. Rajender Kumar's psychiatric report,[4] which was prepared more than four years before the end of the MQP?

ANALYSIS

Issue 1: Did the General Division breach a principle of natural justice by making negative inferences about the Applicant's credibility without giving him an opportunity to address the alleged inconsistencies on which those inferences were based?

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[1] DESDA, ss 56(1) and 58(3).
[2] *Ibid*., s 58(2).
[3] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[4] GD2-29.

[9] The Applicant alleges that the General Division ignored the substance of his testimony and based its decision on minor inconsistencies—such as the number of times he saw a given doctor—without giving him the chance to address them at the hearing.

[10] I do not see an arguable case for this submission. In paragraph 14 of its decision, the General Division expressed "concerns" with the Appellant's credibility because he had given evidence that was "inconsistent with the medical evidence on file and because some of his testimony simply did not have the ring of truth." In paragraph 15, the General Division pointed to discrepancies between the information on file and the Applicant's oral evidence, beginning with his account of how often he saw his psychiatrist:

> For example, on July 26, 2016 the Appellant wrote to the Respondent and stated that he sees his psychiatrist once a month and sometimes twice a month. This conflicts with the evidence of Dr. Kumar. In November 2016, Dr. Kumar reported that he had seen the Appellant on four occasions that year. Dr. Kumar's other reports indicate the dates of those consultations as February 10, 2016, April 27, 2016, July 13, 2016 and October 17, 2016. I looked to see whether the Appellant saw Dr. Kumar monthly in 2015, but he did not. Dr. Kumar reported that he saw the Appellant a total of 5 times in 2015. Reports from those consultations are on record and they show that the Appellant had appointments on January 19, 2015, April 14, 2015, July 8, 2015, October 14, 2015 and December 11, 2015.

[11] Having reviewed the file, I can confirm that the General Division correctly summarized the frequency of the Applicant's documented interactions with Dr. Kumar. The Applicant suggests that the General Division placed undue weight on relatively minor differences between what he said in his testimony and what was indicated in the psychiatric reports. However, the General Division, as trier of fact, is allowed a measure of deference in how it weighs the evidence and in what conclusions it draws from it.[5] In this case, the General Division based its finding that the Applicant was less than credible on not one, but three, instances where his testimony was at odds with the written record. The inconsistencies cited by the General Division were not trivial; they addressed the key questions of how much treatment the Applicant needed for his medical conditions and whether they prevented him from performing substantially gainful work.

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

[12] As for the Applicant's submission that the General Division should have given him an opportunity to address inconsistencies on which it later relied, again, I cannot see an arguable case. There is, of course, the famous rule in *Browne v Dunn*[6] that prevents a cross-examiner from relying on evidence that contradicts the testimony of a witness without first putting that evidence to the witness and giving them an opportunity to reconcile the contradiction. However, this is an appreciably different situation: the General Division is an adjudicator, not a litigant, so its role is to hear evidence, not to produce it. The Applicant seems to be suggesting that he was ambushed by the General Division's decision, but the inconsistencies identified by the General Division arose from his own evidence; before and during the hearing, it was open to—indeed, incumbent upon—the Applicant to find weaknesses, contradictions, or inconsistencies in his case and counter them. The General Division cannot be blamed for paying close attention to the Applicant's evidence; it was entitled to rely on whatever contradictions it happened to find in it.

[13] In any event, having listened to the entire audio recording of the August 2018 hearing, I am satisfied that the presiding General Division member did, in fact, put the two of the three evidentiary discrepancies directly to the Applicant. At 30:50 of the audio recording, the member can be heard asking the Applicant how he managed the workload of his personal support worker courses if he had missed as many classes as claimed. At 32:45, the member confirmed that the Applicant was not terminated from his last job because of performance, even though he had just testified that he missed an average of three out of five workdays.

Issue 2: Did the General Division err by making findings about the Applicant's sleep apnea that were not based on the evidence?

[14] In paragraph 8 of its decision, the General Division noted that, in his report dated June 13, 2013, Dr. Lawrie Oliphant indicated that the Applicant was doing well using a CPAP (continuous positive airway pressure) device. In paragraph 9, the General Division added:

> The Appellant testified that his last consultation with a sleep specialist was about three years ago. This suggests to me that the Appellant's sleep apnea remained stable for quite some time. The Appellant also testified that, since about October 2017, his CPAP device is showing that he is missing 120 breaths per night. He said he is currently on a waiting list to see a new sleep doctor because his former sleep doctor retired. I do not

[6] *Browne v Dunn* (1893) 6 R. 67, H.L.

> have any corroborating evidence about the referral to a new sleep doctor, however, even if true it appears that treatment options remain open to the Appellant. It is possible, for example, that he might simply need a new air pressure setting. Until this is sorted out, and in the absence of any medical evidence to the contrary, I cannot find that the Appellant's sleep apnea was a significant contributor to his disability by December 31, 2017.

The Applicant alleges that the General Division erred when it dismissed his testimony that he was on a waiting list to see a sleep specialist simply because that information was not confirmed in the file. The Applicant also accuses the General Division of speculating, without any evidentiary basis, about what might be wrong with his CPAP device.

[15] I do not see a reasonable chance of success for these arguments. First, the General Division did not simply dismiss the Applicant's testimony that his sleep apnea had fallen out of management; in fact, the presiding member considered the Applicant's testimony on this point but found that it did not necessarily point to a severe disability. As a trier of fact, the General Division is within its jurisdiction to weigh the available evidence, and the absence of corroboration in the documentary record was a defensible reason to discount the Applicant's testimony. Second, I do not see how the General Division engaged in speculation; if the Applicant was really attempting to see a sleep specialist, it must have been because he believed to some degree that further treatment might be available to him. Sleep apnea is widely known to be a manageable condition, and the General Division had no reason to believe that the Applicant was among those exceptional cases that are beyond medical help.

Issue 3: Did the General Division err when it found that, contrary to his testimony, the Applicant had been recommended for counselling?

[16] The Applicant alleges that the General Division implied that "counselling might have been recommended"[7] to him when he was hospitalized in August 2016. The Applicant denies that he was ever advised to seek counselling, and he points to Dr. Kumar's reports, which did not mention this treatment option.

[17] The General Division addresses the extent of the Applicant's mental health treatment in paragraph 13 of its decision:

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[7] AD1-5.

> Dr. Kumar's November 2016 report indicates that the hospitalization was in August 2016, but he did not provide much in the way of detail. He said the hospitalization was "only" for about three days and he did not specify that it was an involuntary admission. He also said that during the Appellant's brief admission, it was suggested (it is not clear from whom) that the Appellant undergo ECT and that the Appellant did not want to go through with that. It is not clear whether any other recommendations (such as counselling) were made. I asked the Appellant about this, and he said that counselling was not recommended to him. While I acknowledge that Dr. Kumar's November 2016 report makes no mention of counselling of any kind (including sessions with a social worker), it is not clear whether this is because it was not recommended or because Dr. Kumar was unaware of everything recommended to the Appellant during his stay in the hospital.

[18] I do not see an arguable case for the Applicant's submissions. The above passage represents the General Division's attempt, given fragmentary evidence, to assess the significance of the Applicant's August 2016 hospitalization. Contrary to the Applicant's allegations, the General Division does not (i) make a definite finding that any of his treatment providers advised him to seek counselling or (ii) ignore the fact that Dr. Kumar's report made no mention of counselling. In the end, I see no indication that the General Division drew any inference from the Applicant's failure to receive counselling. I might add that, even if the General Division had drawn such an inference, I still would not have found an arguable case that the General Division erred: a lack of treatment can be taken as a sign that a disability falls short of severe.

Issue 4: Did the General Division err by relying, at the expense of more relevant evidence, on Dr. Kumar's psychiatric report,[8] which was prepared more than four years before the end of the MQP?

[19] The Applicant takes issue with what he sees as the General Division's reliance on Dr. Kumar's December 2013 report, which assigned the Applicant a Global Assessment of Functioning (GAF) score of 80, indicating less than severe impairment. The Applicant argues that he never claimed to be disabled as of December 2013.

[20] I do not see an arguable case on this point. In paragraph 12 of its decision, it is clear that the General Division referred to the Applicant's December 2013 GAF score only to make the valid point that a diagnosis is not synonymous with significant impairment: Dr. Kumar

[8] GD2-29.

diagnosed the Applicant with major depressive disorder and generalized anxiety disorder, yet he still gave him a GAF score of 80.

[21] Nor do I see an arguable case, as the Applicant alleges, that the General Division mischaracterized Dr. Kumar's November 2016 report. It is true that the General Division focused on the fact that Dr. Kumar did not specifically rule out work, but this is nothing more than an accurate reflection of what the psychiatrist wrote. The General Division noted that Dr. Kumar did not explicitly link the Applicant's inability to keep a job to his psychological condition. The General Division also referred to evidence indicating that several of the Applicant's jobs ended for reasons that had nothing to do with any impairment. Dr. Kumar concluded that the Applicant was "going to remain depressed with moderately [*sic*] severity"[9] but, as the General Division rightly noted, that did not necessarily mean that the Applicant was disabled from all forms of substantially gainful work.

CONCLUSION

[22] 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:	Terry Copes, for the Applicant

[9] GD2-11.