Federal Court  Cour fédérale

Date: 20170510

Docket: T-1708-16

Citation: 2017 FC 468

Ottawa, Ontario, May 10, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CARL EBY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated September 8, 2016 of the Appeal Division of the Social Security Tribunal [Appeal Division], refusing an application requesting leave to appeal a decision made on January 28, 2016 by the General Division of the Social Security Tribunal [General Division]. These decisions dismissed successive levels of

appeals of the denial of the Applicant's application for a disability pension under the *Canada Pension Plan*, RSC 1985, c C-8 [CPP].

[2] This application is allowed, as I have found that the Appeal Division made an unreasonable decision. As explained in more detail below, in considering whether the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, the Appeal Division erred by failing to take into account relevant evidence and by misinterpreting the decision of the General Division.

II. Background

[3] The Applicant, Mr. Carl Eby, was involved in a motor vehicle accident on April 14, 2011, which resulted in significant orthopaedic and other injuries. Mr. Eby describes these injuries as including a complex fracture of his left tibia and fibula and a tear to the left medial meniscus, both of which required surgery, constant pain in his lower back, neck, right hip, left leg and left knee, cognitive issues with respect to concentration, focus and memory, and emotional sequelae/depression.

[4] Mr. Eby has not worked since his accident. Prior to the accident, he had been employed as a custodian for the Waterloo Catholic District School Board since June 2008. Mr. Eby completed high school in Kitchener, Ontario and also completed a building service worker diploma and supervisor certificate in Alberta. Before his employment with the School Board, he was employed in various capacities, including as a meat cutter, a custodial worker in hospital and

nursing home settings, a position with Service Master of Canada scrubbing, stripping, and waxing floors including a supervisory position, a load supervisor, and a licensed truck driver.

[5] My. Eby explains that, despite his significant pain, he tries to remain active by attending the gym and using the stationary bike, the pool and the hot tub, and that he also tries to do work around the house. He advises that he is often prevented from performing these activities by pain and physical limitations.

[6] Mr. Eby submitted medical evidence with his pension application to substantiate his claim of a severe and prolonged disability. This evidence included reports from his treating orthopaedic surgeon, Dr. Grosso, and his physiatrist, Dr. Scott Garner. It also included a January 2013 report [the 2013 Report] authored by Maria Ross and Katrina Kotsopoulos resulting from a two-day Functional Capacity Evaluation at Ross Rehabilitation and Vocational Services [Ross Rehabilitation]. Following this assessment, Mr. Eby followed up with Dr. Grosso and was also assessed by orthopaedic surgeon Dr. Rick Ogilvie. He also continued with physiotherapy, mainly for his left knee, with Jan Volkes.

[7] Mr. Eby applied for CPP disability benefits on August 26, 2013, when he was 51 years old. His minimum qualifying period date [MQP Date], i.e. the date by which he must have been found to be disabled in order to be eligible for disability benefits under the CPP, is December 31, 2014. Mr. Eby's application was denied both initially and upon reconsideration. On June 11, 2014, he appealed the reconsideration decision to the General Division. An oral hearing took place before the General Division on December 23, 2016. At the hearing, the tribunal allowed

Mr. Eby to submit a Medical-Legal Situational Assessment report, which had been completed by Maria Ross and Alex Blair of Ross Rehabilitation on May 28, 2015 [the 2015 Report].

[8] In a decision on January 28, 2016, the General Division denied Mr. Eby's application for CPP disability benefits, finding that, on a balance of probabilities, he had the capacity to pursue and/or retrain for alternative suitable employment and therefore did not suffer from a severe disability within the meaning of the CPP. The General Division acknowledged that Mr. Eby was involved in a serious accident and was unable to return to his previous physically demanding employment as a school custodian. However, it found that he had residual capacity to pursue less physically demanding alternative employment and therefore was obliged to make reasonable efforts to do so. Finding that Mr. Eby had made no such efforts, the General Division concluded that he had failed to establish on a balance of probabilities a severe disability in accordance with the CPP criteria.

[9] On April 28, 2016, Mr. Eby requested leave to appeal the decision of the General Division, pursuant to s. 53(3) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESDA]. In its decision dated September 8, 2016, which is the subject of this judicial review, the Appeal Division denied Mr. Eby's appeal.

III. The Appeal Division Decision

[10] The Appeal Division considered whether Mr. Eby's application for leave to appeal raised arguments that had a reasonable chance of success on appeal. First, it considered Mr. Eby's

submissions that the General Division failed to consider particular evidence and that it had mischaracterized some of the information contained in the relevant medical reports.

[11] The Appeal Division concluded that the General Division had not disregarded the 2015 Report. The Appeal Division observed that the findings in the 2015 Report were summarized and discussed by the General Division. The Appeal Division also observed that the General Division found there were inconsistent conclusions in the 2013 Report and the 2015 Report, even though they shared an author. The Appeal Division also considered Mr. Eby's argument that the General Division was incorrect to say that his attendance at the May 2015 Situation Assessment fell short of an attempt to pursue alternative employment. However, the Appeal Division did not find this conclusion unreasonable. As the General Division had already found that the January 2013 functional assessment did not fulfill Mr. Eby's obligation (under *Inclima v Canada (Attorney General)*, 2003 FCA 117 [*Inclima*]) to mitigate his impairments, the Appeal Division stated that it was difficult to see how Mr. Eby's attendance at a similar assessment in 2015 could be characterized as an effort to upgrade his skills or pursue alternative employment.

[12] With respect to the evidence from Dr. Grosso, Dr. Garner, and Dr. Ogilvie, the Appeal Division found no error by the General Division in highlighting certain passages from their reports as showing that none of Mr. Eby's treatment providers had ruled out some form of alternative work.

[13] The Appeal Division then considered the finding that Mr. Eby failed to sufficiently mitigate his impairments, and his assertion that the General Division erred in law in requiring

him to demonstrate that he physically attempted to return to employment or the classroom. Again, the Appeal Division found this submission to have no reasonable chance of success on appeal. The General Division determined that Mr. Eby had made no efforts to upgrade his work skills or to pursue alternative employment, and the Appeal Division saw no reason to overturn that finding. The General Division had drawn an adverse inference from the fact that Mr. Eby made no attempt to remain in the workforce despite having residual capacity. The Appeal Division noted that Mr. Eby was arguing that he had no residual capacity, but it found no error in the General Division's disagreement with this submission.

[14] The Appeal Division also found that the General Division took into account the test prescribed by *Villani v Canada (Attorney General)*, 2001 FCA 248 [*Villani*], requiring assessment of the severity of disability in a "real world context", considering factors such as age, education level, and past work and life experiences, but found that none of these factors prevented Mr. Eby from seeking and maintaining suitable, less physical gainful employment. The Appeal Division determined that the General Division applied the correct legal tests and that Mr. Eby's submissions were essentially a request to reassess the evidence.

[15] Finally, the Appeal Division considered Mr. Eby's argument that the General Division erred in its treatment of his chronic pain, including its dismissal of his pain contrary to the opinion of Ross Rehabilitation which concluded that he was not capable of less physically demanding employment. The Appeal Division found that the General Division was cognizant of Mr. Eby's pain complaints and that it gave lesser weight to the 2015 Report because it appeared to contradict the 2013 Report which had been co-authored two years earlier by one of the same

assessors. In the absence of an error, the Appeal Division found no reason to challenge this finding.

[16] Concluding that Mr. Eby had not identified grounds of appeal that would have a reasonable chance of success, the Appeal Division refused the application for leave.

IV. Issues

[17] While the Applicant sets out a longer list of issues in his Memorandum of Fact and Law, his written arguments addressed the following issues on that list:

A. The Appeal Division erred in law and fact by concluding that the General Division had grounds to find that Mr. Eby had the capacity to work, in the absence of any evidence to support that conclusion;

B. The Appeal Division erred in law and fact by concluding that the General Division had grounds to find that Mr. Eby had the capacity to work, in the face of direct evidence to the contrary;

C. The Appeal Division erred in law by misapplying the *Inclima* principle and concluding that the General Division was justified in finding that the Applicant was not severely disabled because he had not physically attempted to go back to work or school; and

D. The Appeal Division erred in law in finding that the General Division had properly applied the real world principle as set out in *Villani*.

[18] The Respondent characterizes the sole issue as whether the Appeal Division erred in refusing the application for leave to appeal because the appeal did not have a reasonable chance of success.

[19] At the hearing of this application for judicial review, counsel for Mr. Eby further narrowed his characterization of the issues raised by this application. He explained that the central issue Mr. Eby is raising surrounds the evidentiary foundation for the General Division's determinative finding, that he had residual capacity to pursue less physically demanding alternative employment, and more specifically the Appeal Division's finding that he did not have a reasonable chance of success in raising this issue in his application for leave to appeal. My analysis below is based on this issue as articulated by the Applicant.

V. Standard of Review

[20] The parties agree that, in reviewing a decision regarding leave to appeal from the Social Security Tribunal, the applicable standard of review is reasonableness (see *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at para 7; *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paras 17-23; *Atkinson v Canada (Attorney General)*, 2014 FCA 187, at paras 22-33). I agree that reasonableness is the standard applicable to the issue raise by Mr. Eby.

VI. Procedural Issue

[21] As a preliminary procedural issue, the Respondent's counsel submits that the Applicant has improperly named the Respondent in the style of cause in this application. The Applicant has

named as Respondents the Attorney General of Canada, the Social Security Tribunal of Canada, and The Ministry of Human Resources and Skills Development. Relying on Rule 303(2) of the *Federal Courts Rules*, RSC c F-7, the Respondent's counsel submits that only the Attorney General of Canada should be named.

[22] At the hearing of this application, the Applicant's counsel agreed with the Respondent's position on this point. As such, my Judgment in this matter will amend the style of cause by removing the Social Security Tribunal of Canada and The Ministry of Human Resources and Skills Development as Respondents.

VII. Analysis

[23] The sections of DESDA relevant to appeals from the General Division to the Appeal Division provide as follows:

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du

face of the record; or	dossier;
(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

[24] Mr. Eby's principal arguments focus upon the treatment by the General Division of the 2013 Report and the 2015 Report, and the Appeal Division's consideration of that treatment. As characterized by the Respondent, Mr. Eby's principal arguments amount to a submission that s. 58(1)(c) of DESDA applies and that the Appeal Division erred in its consideration of his position that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[25] The parties do not disagree on the expression of the law as derived from *Inclima*, to the effect that an applicant seeking to demonstrate a severe disability under the CPP must not only show a serious health problem but, where there is evidence of work capacity, must also demonstrate that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health problem. Nor do the parties disagree that the obligation to demonstrate such efforts does not arise in the absence of evidence of work capacity. Rather, the issue between them surrounds the General Division's finding that Mr. Eby has residual work capacity, such that

failure to demonstrate mitigating efforts precluded the success of his claim, and the Appeal Division's consideration of that finding.

[26] As noted above, Mr. Eby's arguments on this issue surround the two reports issued by Ross Rehabilitation. He submits that the only evidence (or at least a critical piece of evidence), as to his capacity to be retrained to perform sedentary work, is found in the 2015 Report. That report expressed the following conclusions with respect to Mr. Eby:

> His vocational aptitudes are in the low average for general learning, verbal and numerical aptitudes, which falls below the requirements of the majority of sedentary level occupations available and rules out many formal academic retraining options.

[27] Mr. Eby submits, and submitted to the Appeal Division in his application for leave, that the General Division ignored this finding in the 2015 Report.

[28] The Appeal Division considered the General Division's treatment of the 2015 Report in several portions of its decision. First, in rejecting Mr. Eby's argument that the 2015 Report was admitted by the General Division but disregarded in its decision, the Appeal Division noted paragraphs in the General Division's decision that both summarized and discussed the 2015 Report. The Appeal Division also observed the General Division to have noted the conclusions of the 2015 Report to be at odds with those of the 2013 report, even though the reports shared an author, and the Appeal Division rejected Mr. Eby's argument that the General Division unreasonably found that his attendance at the May 2015 situational assessment fell short of an attempt to pursue alternative employment.

[29] However, as emphasized by the Applicant in oral argument before the Court, his submission to the Appeal Division was not that the General Division had ignored the 2015 Report in its entirety, but rather that it ignored the finding in the 2015 Report that the results of Mr. Eby's vocational assessment did not indicate any plausible retraining options given his physical abilities, education and aptitude levels. The above analysis by the Appeal Division does not consider this particular finding or demonstrate any consideration of whether that finding was considered by the General Division.

[30] Moreover, the paragraphs in the General Division's decision that are referenced by the Appeal Division demonstrate no consideration of this finding. Rather, the General Division appears to have focused on the conclusion in the 2015 Report, that Mr. Eby is completely disabled from any occupation for which he is suited by way of his education, training or experience. The General Division correctly noted that such conclusion was expressed in relation to a test different from that applicable under the CPP, which requires a determination whether a person is regularly incapable of pursuing any form of substantially gainful employment. However, the portion of the General Division's decision referenced by the Appeal Division does not demonstrate any consideration of the finding as to Mr. Eby's vocational aptitudes and their impact on his ability to pursue sedentary employment. As such, the Appeal Division's first consideration of the General Division's treatment of the 2015 Report does not reasonably engage with Mr. Eby's submission that the General Division ignored this finding in the 2015 Report.

[31] Later in the Appeal Division's decision, in considering Mr. Eby's submissions on the application of *Inclima*, it noted that the General Division drew an adverse inference from the fact

that Mr. Eby made no attempt to remain in the workforce despite heavy residual capacity. The Appeal Division observed that the essence of Mr. Eby's submissions was that he had no residual capacity but that the General Division had disagreed, and the Appeal Division found no error that might justify overturning that conclusion. Again, this portion of the Appeal Division's decision demonstrates no analysis of the finding in the 2015 Report upon which Mr. Eby's argument was based or his argument that this finding was overlooked by the General Division.

[32] Finally, in considering Mr. Eby's argument related to chronic pain, the Appeal Division noted his submission that the General Division's dismissal of his chronic pain was contrary to the opinion provided by Ross Rehabilitation, which concluded that he was not capable of less physically demanding employment. In finding no error by the General Division in its consideration of Mr. Eby's pain complaints, the Appeal Division noted that the General Division had given less weight to the 2015 Report because it appeared to contradict a report co-authored two years earlier by one of the same assessors.

[33] It is difficult to tell whether this portion of the Appeal Division's decision may be a reference to the 2015 Report's findings on Mr. Eby's vocational aptitudes. However, even if it is such a reference, the Appeal Division's description of the General Division's reasons appear to demonstrate a misapprehension of both those reasons and the evidence in the Ross Rehabilitation reports. The Appeal Division correctly identified that the General Division observed that Maria Ross was one of the authors of the 2013 Report which indicated that Mr. Eby was currently functioning at a sedentary category of work level. However, as argued by Mr. Eby in this

application, the General Division did not make a finding that the 2013 Report and 2015 Report had reached inconsistent conclusions.

[34] Moreover, there does not appear to be any inconsistency in the conclusions expressed in the two reports. While the 2013 Report concludes that Mr. Eby is functioning at a sedentary category of work, this conclusion is accompanied by findings as to his physical limitations and reads as a conclusion as to his physical capabilities. It does not express an opinion as to whether sedentary employment may be available to him. Rather it recommends vocational exploration to determine if alternative employment may be accessible. The 2015 Report reflects the results of such vocational exploration and expresses the conclusions surrounding Mr. Eby's aptitudes upon which his arguments in this application rely. I am conscious that the Court's role in this application is to consider the reasonableness of the Appeal Division's decision, not that of the General Division. However, in the absence of any apparent inconsistency in the conclusions in the two Ross Rehabilitation reports, or a finding to that effect by the General Division, the Appeal Division's analysis based on such a finding by the General Division does not fall within the range of possible acceptable outcomes.

[35] In the Court's recent decision in *Griffin v Canada (Attorney General)*, 2016 FC 874, at paragraph 20, Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal under s. 58(1) of DESDA:

> [20] It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., *Tracey*, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 at para 52, [2016] F.C.J. No 155. Nevertheless, the requirements of subsection 58(1) should not be

> applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 at para 10, [2016] F.C.J. No. 585.
>
> (Emphasis added.)

[36] For the reasons explained above, my conclusion is that the Appeal Division has not reached a reasonable decision, because it has not addressed in a reasonable manner Mr. Eby's arguments that the General Division failed to take into account the findings in the 2015 Report. In considering whether the General Division based its decision on an erroneous finding of fact made without regard for the material before it, the Appeal Division erred by failing to take into account relevant evidence and by misinterpreting the decision of the General Division.

[37] I should note that, in reaching this conclusion, I have considered the Respondent's argument that the 2015 Report was issued after the MQP Date, raising the question whether the evidence represented by that report is probative of whether Mr. Eby suffered from a severe and prolonged disability as of the MQP Date. The Respondent has not identified any indication in the record before me that that this question was raised before either the General Division or the Appeal Division. Rather, as submitted by Mr. Eby, the 2015 Report was accepted and considered by the General Division. It was also considered by the Appeal Division, although not in the manner Mr. Eby argued in his application for leave. There is also no indication that Mr. Eby's vocational aptitudes, which are the subject of the findings that he argues were not taken into account, deteriorated in the roughly 5 months between the MQP Date and the issuance of the report. As such, the timing of the 2015 Report does not assist the Respondent.

[38] I am therefore allowing this application for judicial review and setting aside the Appeal Division's decision. While Mr. Eby's written materials requested that the Court grant his application for leave to appeal the General Division's decision, he acknowledged in oral argument that the Court has discretion in selecting the appropriate relief if granting judicial review. The Respondent expressed the position that, if Mr. Eby was successful, the Court should not grant leave but rather should quash the Appeal Division's decision and return the matter to that body for redetermination. I agree with the Respondent's position on the appropriate relief. My decision to grant judicial review turns on the Appeal Division failing to properly consider the evidence underlying Mr. Eby's arguments in support of his application for leave to appeal and the General Division's treatment of such evidence. It is therefore appropriate that the matter be returned to the Appeal Division to consider such evidence and arguments in accordance with these Reasons.

[39] Although the Notice of Application claimed costs, counsel for each of the parties confirmed at the hearing that no costs were being claimed. As such, no costs are awarded.

JUDGMENT in T-1708-16

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended by removing the Social Security Tribunal of Canada and The Ministry of Human Resources and Skills Development as Respondents.

2. This application for judicial review is allowed, the decision of the Appeal Division of the Social Security Tribunal dated September 8, 2016 is set aside, and the matter is returned to a differently constituted panel of the Appeal Division for redetermination.

3. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1708-16
STYLE OF CAUSE:	CARL EBY v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 2, 2017
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	MAY 10, 2017

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