Federal Court  Cour fédérale

Date: 20170531

Docket: T-1525-15

Citation: 2017 FC 534

Ottawa, Ontario, May 31, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PETER ROULEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Peter Rouleau, seeks judicial review of the Social Security Tribunal (SST)-Appeal Division's ("Appeal Division") refusal to grant him leave to appeal a decision of the SST-General Division ("General Division"). The General Division held that he did not have a "severe and prolonged" disability as required to access Canada Pension Plan (CPP) disability benefits and the Appeal Division was satisfied that an appeal of that decision of the General Division did not have a reasonable chance of success. For the reasons that follow, the application for judicial review is dismissed.

[2] While decisions of the Appeal Division on the merits may be the subject of a judicial review before the Federal Court of Appeal, decisions to deny leave may be the subject of a judicial review application before this Court. This is one such case.

I. Background

[3] The applicant, currently 55 years old, was involved in a motor vehicle accident in 2005. Although he was taken to the hospital, but was not admitted and x-rays were not taken following that accident, he claims that he began experiencing medical troubles after that accident. He was dismissed from his last job in July 2010 when it seems that he could not continue fulfilling the requirements of the position and his employer could not accommodate him. He received employment insurance (EI) benefits for a time following his termination. He first applied for CPP disability benefits in May 2011 without success. His request for reconsideration produced a second negative decision in April 2012.

[4] As was the state of the law at the time, the applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT). However, the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19 directed that any appeals, filed with the OCRT before April 1, 2013 and not yet heard, were deemed to have been filed with the newly-created SST-General Division. That was the case with the applicant's appeal filed with the OCRT. Thus the matter was transferred and the applicant's General Division hearing occurred on February 25, 2015. The General Division issued its negative decision on March 2, 2015.

II. The General Division

[5] The General Division proceeded to review evidence of the applicant's medical condition and work capacity. The applicant testified that he was unable to work because of severe depression with psychotic episodes and chronic pain. He claims that he cannot stand or walk for long periods, has severe headaches, has pinched nerves in his left spine, which cause leg pain, sleeps poorly, and is unable to bend or do heavy lifting. He would have made one suicide attempt in December 2010 for which he was not hospitalized.

[6] The medical evidence, as reviewed by the General Division, shows that the applicant had seen a number of health practitioners. X-rays and MRIs showed mild degenerative disk disease as well as spine scoliosis and foraminal stenosis together with mild chord impingement and diffuse disc bulge. The family doctor concluded that there are functional limitations while a chiropractor wrote that the condition will generate some degree of impairment. A neurologist noted that there is no evidence of neuropathy of radiculopathy in muscles. A rheumatologist was consulted and he concluded, according to the decision, that there is chronic neck pain but essentially normal findings and range of motion. The applicant also saw a psychiatrist for his depression symptoms; the depression was confirmed. The February 2012 report discusses the effect of various abuses on depression, with diagnoses being dysthymia, chronic pain, alcohol abuse in early remission, and marijuana dependence. A number of recommendations are listed, including cognitive behavioral therapy, sleep disorder clinic and treatment for drug abuse. Notes from the applicant's family physician show that his symptoms persisted, but at times he was "doing better."

[7] On the other hand, the applicant selected two physicians and sought their treatment without referrals, Dr. Turner (a psychiatrist) and Dr. Boucher (a pain expert), to complete an assessment to support his CPP disability benefits application. Dr. Turner diagnosed him with moderate to severe depression with psychotic features in partial remission, commenting that he "would be expected to meet requirements for CPP disability." He specifically disagreed with the other psychiatrist's diagnosis and suggested that at the time the applicant was seen by the other psychiatrist, he was suffering from a major depression in partial remission. Dr. Boucher reported that the applicant "is incapable of regularly pursuing any substantially gainful occupation."

[8] The General Division also considered the applicant's work history to assess evidence of work capacity. He was terminated from his last job described as a "line cook / prep cook" in July 2010 because the employer could not accommodate the applicant complaining of headaches and numbness in his arms. He received EI benefits in 2010 and 2011. He interviewed with a catering company, unsuccessfully, for another position in 2010. For all intents and purposes, that appears to end the applicant's work history since being terminated in 2010.

[9] To qualify for CPP disability benefits, applicants must meet the criteria set out in the *Canada Pension Plan*, RSC, 1985, c C-8 [the CPP Act] at paragraph 44(1)(b): the person must be younger than 65 years old, not entitled to a retirement pension and have made CPP contributions for not less than the minimum qualifying period (MQP). Whether an applicant is "disabled" is defined at paragraph 42 (2) (a), which reads:

42 (1) In this Part,	**42 (1)** Les définitions qui suivent s'appliquent à la présente partie.
…	(…)
When person deemed disabled	***Personne déclarée invalide***
(2) For the purposes of this Act,	**(2)** Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	**a)** une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	**(i)** une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	**(ii)** une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[10] The nature of disability benefits is that they are conditional. The disability must be severe and prolonged in order to qualify. Evidently, the criteria described in subparagraph 42(2)(a) are characterized by employability. The severity of the disability is measured against the incapacity

to regularly pursue any substantially gainful occupation (see *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703 [*Granovsky*]). Thus, the Social Security Tribunal is tasked with determining how severe is the disability by considering how employable an applicant is. As put by Binnie J in *Granovsky*., "(a) related consideration is the variety of functions against which the limitations of a person with a disability may be measured. In the context of the CPP, the yardstick is employability. An individual may suffer severe impairments that do not prevent him or her from earning a living." (para 28).

[11] In its analysis, the General Division recognized, as per *Villani v Canada (Attorney General)*, 2001 FCA 248, [2002] 1 FCR 130 [*Villani*], that such cases "must be assessed in a real world context" considering factors such as the applicant's age, level of education, language proficiency, and past work and life experiences. In *Villani*, the Court of Appeal had to decide what was the level of disability required in order to have access to a pension (para 36). Prior to *Villani*, there was uncertainty as to whether subparagraph 42(2)(a)(i) allowed for the circumstances of individuals to be taken into account in considering how employable someone is. Is it total disability, a complete incapacity to work, that constitutes the appropriate criterion? The Court of Appeal found instead that subparagraph 42(2)(a)(i) must be applied in a "real world" context. As the Court put it at para 38, "it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience." Hence, the test is not whether a person is incapable of pursuing any conceivable form of occupation, but rather that the assessment be made in a real world context.

[12] Next, the General Division concluded that because the applicant had some capacity to work, it should apply *Inclima v Canada (Attorney General),* 2003 FCA 117 [*Inclima*], which requires applicants with work capacity to show that efforts to obtain and maintain employment have been unsuccessful due to their health condition. The tribunal found that the applicant had made no attempts to look for alternate work after his last interview in 2010.

[13] The General Division weighed the medical evidence. Less weight was given to the reports from Dr. Turner and Dr. Boucher as the applicant self-referred "with the sole purpose of being evaluated regarding his application for CPP disability benefits." In the view of the General Division, without impugning the reputations, "these assessments must be placed in context" (para 56).

[14] Based on "investigative findings", the General Division was of the view that there was no demonstration of "any significant abnormalities that would suggest that the appellant is incapable of working". The General Division concluded that the applicant has "some limitations, but is unable to conclude that the [applicant] is incapable of some type of gainful employment." As such, he does not meet the criterion of subparagraph 42(2)(a)(i) which requires that the disability be so severe that the person is incapable regularly of pursuing any substantially gainful occupation. The tribunal did not assess whether his disability was "prolonged."

III. Decision under review

[15] The applicant must seek leave to appeal the General Division's decision to the Appeal Division, pursuant to subsection 56(1) of the *Department of Employment and Social*

Development Act, SC 2005, c 34 [the Act]. There is no appeal as of right to the Appeal Division. Under the Act, subsections 58(1) and (2), the Appeal Division refuses leave if it is satisfied that the appeal "has no reasonable chance of success". Furthermore, the Act provides specifically that only the enumerated grounds of appeal can be considered by the Appeal Division:

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 refuse d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du 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.

Thus, the Appeal Division would grant leave to appeal only if one of these three grounds of appeal is present. However, even if these grounds of appeal are raised, it will still be open to the Appeal Division to refuse leave if satisfied that the appeal has no reasonable chance of success. Subsection 58(2) reads:

Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is	**(2)** La division d'appel rejette la demande de permission d'en

satisfied that the appeal has no reasonable chance of success.	appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

[16] The applicant's leave application alleged several errors of law and facts. The Appeal Division considered each argument and ultimately dismissed the leave request on August 11, 2015, finding that none of the arguments had a reasonable chance of success. I have summarized the arguments most relevant to the present judicial review.

[17] First, the applicant argued the General Division erred in law by concluding that his EI benefits were relevant to assessing his work capacity. The Appeal Division disagreed. This fact was relevant to determining whether the applicant had shown that his health condition prevented him from regularly pursuing substantially gainful employment, as it is a step taken by the applicant after he stopped working as a cook. In order to receive EI benefits, the applicant had to declare himself good and ready to work in 2011. The evidence shows his attempts at finding work were negligible as he attended only one interview. In the view of the Appeal Division, there is no error of law that can ground an appeal in noting that receiving EI benefits in 2011 indicates that the applicant was then able to perform gainful employment.

[18] Second, the applicant argued that the General Division erred in applying *Inclima* because he had no work capacity after his last job ended in July 2010. The Appeal Division found that the General Division was merely stating the principle of law for which *Inclima* stands, that is that where "there is evidence of work capacity, [an applicant] must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition" (para 3).

[19] I note that, when read in context, the General Division was in fact concluding that there was evidence of work capacity after the applicant was terminated from his last job. That merely showed a disagreement with counsel who was arguing that there was no capacity for gainful employment. He received EI benefits and he went for one job interview. Other than that, there was no evidence that he looked to alternate work. The Appeal Division saw no error of law in the statement of law made by the General Division.

[20] Third, the Appeal Division considered the support letter of the family physician which reported on a condition of fibromyalgia (June 2012) which would have been questioned by the General Division. The General Division had concluded that there was no such diagnosis: in fact, the applicant was seeing that physician on an irregular basis. Indeed, it was not even mentioned by other doctors. The applicant's application for leave to appeal is nebulous as to what is the ground of appeal raised. The Appeal Division found that such an argument cannot ground an appeal. At any rate, that issue was not raised on judicial review.

[21] The applicant also challenged the fact that the General Division questioned the family doctor statement according to which the symptoms started in 2009 rather than after the accident in 2005. The applicant contends that he returned to work following the accident and that his symptoms worsened in 2009-2010. That also appears to be a red-herring and the argument was not replicated on judicial review.

[22] Fourth, the applicant argued that the General Division erred in placing less weight on the Turner/Boucher assessments because they were self-referrals. In fact, the ground of appeal

speaks of the Tribunal having presumed that these were one time assessments by the medical practitioners. The Appeal Division disagreed, holding first that the weight to be given a piece of evidence is in the General Division's purview. The Appeal Division found that the General Division set out "specific, sound reasons for the way in which it weighed each of the health care practitioners' reports, including that investigative findings did not demonstrate any significant abnormalities that would suggest that the Applicant was incapable of working." As for the contention that the General Division was wrong to give less weight as it "presumes that these were one time assessments" , the Appeal Division concluded that it is simply inaccurate as the General Division's decision acknowledges that the two doctors relied on by the applicant saw the applicant on a regular basis. There was not any support for the argument that the General Division was mistaken in presuming that the evidence of the two doctors was based on one time assessments. The decision establishes the opposite.

[23] Finally, the applicant suggested that the reliance by the General Division on visits to the family doctor in early 2012 that resulted in comments that the applicant was doing better was misplaced, as the evidence of Dr. Turner, the psychiatrist the applicant chose to consult, would tend to suggest a more severe condition later in 2013. The Appeal Division merely repeats that the position taken by the General Division concerning the weight to be given is appropriate and reasonable. An appeal on that basis would not have a reasonable chance of success.

[24] As a result, the Appeal Division considers that none of the grounds of appeal would give rise to an appeal that would have a reasonable chance of success.

IV. Standard of review

[25] Federal Court case law consistently applies a reasonableness standard in reviewing the merits of the SST-Appeal Division's leave decisions: *Tracey v Canada (Attorney General)*, 2015 FC 1300 [*Tracey*] at para 17; *Canada (Attorney General) v Hoffman*, 2015 FC 1348 at paras 26-27; *Canada (Attorney General) v Hines*, 2016 FC 112 at para 28; *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 11. There is no reason to depart from that case law, especially where the grounds of appeal examined by the Appeal Division relate to questions of law or fact. Appeals based on the violation of natural justice principles would be controlled on the correctness standard of review.

[26] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], explains that the reasonableness standard is

> […] concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (at para 47).

V. Arguments

[27] The applicant made several arguments in his judicial review which he framed as errors of law, together with a "basket clause" whereby he challenged "the process of medical fact finding [which] is perverse or capricious under the circumstance" (memorandum of fact and law, para 2(e)). First, he argued that the General Division erred in law in according less weight to the Turner/Boucher reports on the basis that they were self-referrals. Second, he argued that the

General Division erred in law in applying *Inclima* by assuming residual capacity only because the applicant received employment insurance. Third, the applicant claims that is an error of law to conclude to a "presumption" of residual capacity exists 5 years after he was terminated from his last job, given that he was terminated because of his inability to meet the scheduling obligations due to medical reasons. Fourth, the applicant contends that there is an error of law in the conclusion that the *Villani* factors are not met. Fifth, as indicated earlier, the fact finding process is said to be perverse and capricious.

[28] The respondent argues that the Appeal Division's decision, taken as a whole, is reasonable.

VI. Analysis

[29] The burden on an application for judicial review is not to satisfy the reviewing court that it ought to reach a different outcome than that reached by the Appeal Division. Even more so, the reviewing court will not examine the decision of the General Division with a view to assessing its value. Rather, the reviewing court considers whether the finding of the Appeal Division that the grounds of appeal do not have a reasonable chance of success is reasonable. Reasonableness is a deferential standard of review.

[30] Even questions of law are reviewed on a standard of reasonableness. It is only a few questions of law which are reviewed on a standard of correctness (*Dunsmuir*, paras 55 to 61). Since *Dunsmuir*, the Supreme Court of Canada has created a presumption that a question of law concerned with the tribunal's own statute or statutes connected to its function deserves the

deference that comes with the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers' Association*], at para 34).

[31] This application presents a single question: was the Appeal Division's decision to refuse leave to appeal reasonable? Given that leave to appeal a decision of the General Division is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success, the applicant must satisfy this Court, on a balance of probabilities, that the decision to deny leave was unreasonable. This Court will not re-weigh the evidence. It will not substitute its view of the evidence. It will consider if the decision under review, that of the Appeal Division, falls in a range of possible acceptable outcomes in view of the law and the facts, and if there is justification, transparency and intelligibility within the decision-making process.

[32] The Court will limit itself to the arguments offered by the applicant. I will analyze each of the applicant's above arguments except the fourth, which was not at all put before the Appeal Division.

A. *The "Villani factors"*

[33] The respondent argues that the fourth "error of law" is raised for the first time before this Court. As such, the argument should not be entertained. Since the Court is reviewing the reasonableness of the Appeal Division's decision, it cannot review a ground that the tribunal did not consider.

[34] The respondent is right to raise the decision in *MacKenzie v Canada (Attorney General)*, 2015 FCA 201 [*MacKenzie*] where the Court of Appeal stresses that powers of reviewing courts on judicial review are limited. Reviewing courts do not retry cases, they do not reweigh the evidence and they do not re-do what the tribunal did. They consider the administrative tribunal's decision for its legality: has it been made in a reasonable fashion? Where a particular issue has not even been raised before the administrative tribunal, there cannot be a judicial review of that which has not been heard and decided.

[35] Here, the *Villani* factors were considered by the General Division (para 52), but according to the respondent, not by the Appeal Division. That assertion was not disputed by the applicant. A review of the decision of the Appeal Division does not support any contention that the matter was before the Appeal Division.

[36] Where a matter is not even raised before the administrative tribunal, it can hardly be said that it has been considered and that the decision is unreasonable. There is, in fact, no decision to review.

[37] In my view, this is an appropriate case to refuse to consider the matter on judicial review: there is no decision to review, whatever standard of review would be appropriate. The ability of a reviewing court to refuse to consider an issue raised for the first time on judicial review is well established. In *Alberta Teachers' Association*, the Supreme Court found as follows:

> [22] The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The

> ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, per Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies."
>
> [23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta*, Local 160 v. *Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, at para. 4).

[38] The question, had it been put to the Appeal Division, would have been whether the issue would have a reasonable chance of success. From that decision, there can be a judicial review; but in this case, there is no such decision. The Court should refrain from dealing with an issue that should have properly been put to the tribunal whose function is to review leave application and whose expertise is recognized by Parliament (see *Alberta Teachers' Association*, paras 24 to 27). It is not for this Court to substitute itself for the appropriate administrative body, especially where the issue of the so-called "*Villani* factors" was so squarely addressed by the General Division. The issue could have been raised before the Appeal Division but was not.

[39] At any rate, what is framed as a question of law is not such. The applicant argues that the *Villani* factors were not used to his benefit. What he would have had to do is not merely show a

disagreement with the findings of fact of the General Division, but rather that the finding was perverse or capricious such that, had the matter been raised before the Appeal Division, the conclusion that the appeal had no reasonable chance of success was not reasonable. That was not done.

B. *Should the other grounds be considered?*

[40] Regarding the other grounds of appeal, it was very difficult to ascertain what the error of law is; in fact, each "error of law" was what the applicant considered to be an inappropriate finding of fact, a disagreement with the finding made.

[41] During the hearing, the applicant's counsel clarified that his proposed grounds of appeal properly fell under paragraph 58(1)(c) of the Act, which allows an appeal if 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." That constitutes a significant change not only concerning the basis on which the judicial review application was presented, but also from the basis on which the leave to appeal was heard by the Appeal Division. Therefore, the recasting of the questions of law as errors of fact would have made the task of the Appeal Division not simply to assess whether the applicant has a chance of successfully arguing that the General Division erred in law, but whether the General Division made a perverse or capricious error or made its decision without considering the evidence presented. That is not an easy test to meet for the applicant.

[42] I agree with the respondent that the grounds of appeal do not permit the Appeal Division to reweigh evidence, nor is this the role of the Federal Court on judicial review (*Tracey* at paras 33 and 46; *MacKenzie*, at paras 12-13). To put it another way, re-weighing the evidence heard by the General Division is not a ground of appeal that can be entertained. The test is quite different. The only ground allowed is if the finding of fact was made in a capricious or perverse manner or without considering the evidence by the General Division. Anything else will fall short of the mark. Once that ground of appeal is raised, the Appeal Division may conclude that there is no reasonable chance of success that the requisite level of error can be shown. The applicant's task is to show that alleged errors of fact were found not to be perverse or capricious by the Appeal Division in an unreasonable way. That, in turn, means that the exercise of the broad discretion conferred on the Appeal Division does not fall within the range of possible, acceptable outcomes defensible in respect of the facts and the law, or that there is no justification, transparency or intelligibility within the decision-making process. That is the demonstration that must be made by the applicant. Once distilled to its essence, he had to show that the Appeal Division's findings fell outside of the range of possible acceptable outcomes, not that there was a better or different outcome possible. In my view, such demonstration has not been made in this case and deference has not been displaced.

[43] The applicant largely argued his case before the Appeal Division as being errors of law. That could have been enough to dispose of the matter without more. Presumably, the Appeal Division would have been right to readily conclude that the alleged errors of law had no reasonable chance of success since the applicant concedes, rightly in my view, that they are not errors of law. However, I read the Appeal Division's decision as finding broadly that the grounds

of appeal as stated have no reasonable chance of success. I have chosen to consider the matter as if the applicant had been consistent and had argued his case before the Appeal Division by arguing that the alleged errors were in effect of the "capricious and perverse" variety under paragraph 58(1)(c) instead of the errors of law under paragraph 58(1)(b). Given the way the case was argued, I prefer to examine the alleged errors on their merit.

C. *Self-referral*

[44] The applicant bases his first argument, according to which the Appeal Division should have granted him leave on the self-referral issue, primarily on Supreme Court of Canada jurisprudence on admissibility of expert evidence (specifically, *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 [*White*]). This case considered the role to be played by trial judges on the admissibility of expert evidence. Traditionally, the role of the trier of fact has been to assess the weight to be given to expert testimony. A lack of objectivity, for instance, would go to weight that testimony would carry. In *White*, the Court finds a gate-keeper role for the trial judge. If it is found that the expert is unable or unwilling to carry out his duty to the court to provide fair, non-partisan and objective assistance, the trial judge may rule the testimony inadmissible.

[45] The applicant's reasoning, largely based on *White*, seems to be that if a court cannot bar an expert witness on the basis that she was retained by one of the parties, the General Division cannot give less weight to reports from doctors to whom the applicant self-referred for the purpose of supporting his CPP application. *White* is of no assistance to the applicant. With respect, I am afraid the applicant misreads *White*. As the respondent pointed out, admitting and

weighing evidence are distinct. They have different thresholds. Just because a court admits an expert witness paid by one of the parties does not mean that the judge or jury is prevented from giving that witness's testimony less weight: see *White* at paras 33-34, 40, 45. In fact, *White* stands for the exact opposite proposition: independence and impartiality go to weight but may, in some circumstances where the threshold of *White* is met, go to admissibility of their testimony. In other words, the innovation in *White* is that independence and impartiality, which always go to weight together with other factors, may also go to the admissibility of expert testimony. The basis on which the applicant made his argument is faulty on its face: it cannot succeed.

[46] The applicant argues that there is no presumption in law that self-referrals imply some sort of conflict of interest. He is right. The problem for the applicant is that no such presumption was asserted by the General Division. That is simply not an issue that arises here.

[47] The Appeal Division found that the General Division made no error in weighing the two self-referral reports against the other evidence. After reviewing the entire record, I am satisfied that the Appeal Division's decision was reasonable. There was nothing capricious or perverse. The General Division faced conflicting medical evidence, both on the applicant's mental and physical conditions, and it was responsible for reviewing this evidence and choosing which reports it accorded more or less weight. Furthermore, I read the Turner/Boucher reports and while both support the applicant's CPP application, neither provides extensive analysis on how his conditions prevent him from performing some type of work in the "real world", in the words of *Villani*.

[48] My conclusion on this matter is restricted to its factual context. It should not be read as blanket authority for the proposition that any medical report produced through a self-referral deserves less weight. However, it was open to the General Division to assess the evidence and find that some evidence carried more weight than other. There was significant evidence that the applicant's condition was not so severe that there existed work incapacity in the view of the General Division. The Appeal Division's decision was one possible acceptable outcome as the range of defensible and acceptable outcomes is relatively wide where the decision is mainly factual (*Gaudet v Canada (Attorney General)*, 2013 FCA 254).

[49] As in *MacKenzie*, the applicant is dissatisfied with the weight given to some medical evidence which was somewhat discounted because the applicant chose these particular physicians for the purpose of supporting the granting of a disability pension. In *MacKenzie*, the Court of Appeal declined to reweigh the medical evidence which was found to be lacking in objectivity and substitute its own findings. In that case, the Court of Appeal was conducting its own judicial review of the decision of the Appeal Division on the merits of an appeal. We are in this case one step further removed as it is merely the refusal to grant leave that is the subject of the judicial review application. Not only cannot this Court reweigh the evidence presented, but its job is limited to the examination of the leave to appeal decision. The task of the applicant on the leave application was to establish that the finding of fact by the General Division was wrong to the point of being perverse or capricious. Once the Appeal Division is satisfied that such demonstration has no reasonable chance of success, the leave is denied. It suffices at this stage that the decision to refuse has been reasonable in these circumstances. It was a possible acceptable outcome.

D. *The use of the EI benefits received in 2010-2011*

[50] In his second argument, the applicant complained that the Appeal Division should have found he had grounds to appeal the General Division's use of his EI benefits and 2010 job dismissal as evidence of work capacity on his MQP date. In his view, the General Division erred in applying *Inclima* because he had shown there was no work capacity post 2010. The Appeal Division's decision that he likely could not succeed on this ground was reasonable, since the argument made was that the General Division assumed residual capacity based only on EI benefits received in 2010-2011. That is not the case.

[51] In an effort to find an error, the applicant mischaracterizes the use that was made of *Inclima* and the evidence. The General Division had noted that following his termination in 2010, the applicant had to declare himself ready and able to perform gainful employment in order to receive EI benefits, which he did. He also applied for a job at a catering company. Contrary to the applicant's suggestion, the General Division did not base its *Inclima* conclusion of work capacity exclusively on the fact that the applicant received EI. On the contrary, the decision-maker listed in the decision the significant evidence of numerous practitioners (family physician, rheumatologist, psychiatrist, chiropractor, neurologist) for the conclusion that there is residual capacity under *Inclima*.

[52] As a result, the General Division applied *Inclima* because it concluded on the evidence that there was residual work capacity. It considered all the evidence it had before it about the applicant's attempts to find work up until the MQP date: his job dismissal in 2010, EI benefits in

2010 and 2011, and an unsuccessful interview. Beyond these events, it found "no evidence that the [applicant] continued to look for any alternate work."

[53] The applicant contends that *Inclima* does not apply to his case because he was suffering from a severe and prolonged disability. However, that is tautological. The applicant is again disagreeing with the factual finding of residual capacity. *Inclima*, at paragraph 3, requires an applicant to show that efforts to obtain a job have been unsuccessful due to their health condition if there is evidence of work capacity. The applicant argues that the medical evidence was sufficient to show there was no work capacity, hence there was no basis to apply *Inclima*. But that can be true only if the medical evidence shows an absence of work capacity. And there lies the disagreement between the applicant and the General Division. With some work capacity, the applicant under *Inclima* had to show he was denied work by reason of that health condition. The evidence showed that there was no such attempt after 2011.

E. *Process of medical fact finding was perverse and capricious*

[54] The applicant mischaracterized the medical evidence on this record by not acknowledging that it is far from unanimous. The General Division decision is an assessment of the evidence available to conclude that there is evidence of work capacity. Applying *Inclima*, the General Division concludes that there was no effort at obtaining and maintaining employment. The assessment of the evidence is a question of fact. For an appeal to succeed, the applicant had to show that the alleged erroneous finding of fact – that there was evidence of work capacity – was made in a perverse or capricious manner, or without regard for the material before the tribunal. There was evidence before the General Division. The applicant prefers the evidence of

the two practitioners he chose to consult. That does not show that the decision is made in a capricious or perverse manner.

[55] Once again, the applicant's argument before this Court boils down to argue that the evidence ought to be reweighed in order to reach a different conclusion, not that the conclusion reached was capricious or perverse. Other than stating that the "only conclusion available to the General Division on the evidence on a reasonable basis is that the applicant qualifies for CPP" (memorandum of fact and law, para 18), there is no demonstration that is even attempted. The Appeal Division did not find the standard of paragraph 58(1)(c) was met simply on the basis of the opinions of Dr. Turner and Dr. Boucher, as the applicant wishes. The rest of the evidence had to be factored in for the General Division to assess it in its entirety. The General Division was entitled to discount the weight of these opinions. It also had to consider the rest of the information. Thus, the view taken by the General Division was neither capricious nor perverse and reflected the material before it. The finding of the Appeal Division has not been shown to be unreasonable.

[56] By recasting his argument as he did by indicating that his arguments are all under paragraph 58(1)(c) of the Act (finding of fact made in a capricious or perverse manner, or without regard for the evidence), it becomes in fact redundant to consider the "basket clause" according to which the process of medical fact finding was perverse or capricious. At the heart of the dispute in this case is the issue of the work capacity of the applicant. The various grounds are dressed up originally as questions of law; however, as acknowledged by the applicant, they all point to a finding of fact of residual work capacity as made by the General Division. At the end

of the day, the applicant disagrees with the assessment of the evidence which concludes that there was work capacity. The burden on the applicant to show that the finding was capricious or perverse was not discharged.

VII. Conclusion

[57] The applicant was right to focus his case on paragraph 58(1)(c) of the Act. His specific grievances were not errors of law. The law as stated by the General Division and the Appeal Division was stated adequately. More precision and a better articulation would have been beneficial and may have avoided litigation. However, to prevail, the applicant had to do more than seeking to reweigh the evidence in this Court. He had to show that the findings of fact of the General Division were capricious and perverse such that the Appeal Division was unreasonable in its conclusion that he had no reasonable chance of success. That is a high bar. It is the failure to show that it was not reasonable for the Appeal Division to find no reasonable chance of success that is fatal. Merely showing that the findings of fact are debatable does not reach the high bar of "perverse or capricious or without regard for the material" before the General Division. The judicial review is dismissed.

VIII. Costs

[58] The applicant sought costs; the respondent did not. Accordingly, no costs are awarded.

JUDGMENT in T-1525-15

THIS COURT'S JUDGMENT is that the judicial review application is dismissed without costs.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	PETER ROULEAU v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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