Federal Court  Cour fédérale

Date: 20170411

Docket: T-1043-16

Citation: 2017 FC 356

Ottawa, Ontario, April 11, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

JOYCE TSAGBEY

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This application raises the question as to whether a party may seek judicial review of a decision that ruled in their favour because it did not go as far as they would have preferred.

[2] The Attorney General of Canada seeks judicial review of a decision of the Social Security Tribunal – Appeal Division (SST-AD), dated May 31, 2016, under section 18.1 of the *Federal*

Courts Act, RSC, 1985, c F-7. The SST-AD granted the Minister of Employment and Social Development (Minister) leave to appeal from the decision of the Social Security Tribunal – General Division (SST-GD) which determined that the respondent, Joyce Tsagbey, was eligible for a disability pension under the *Canada Pension Plan*, RSC, 1985, c C-8 [CPP]. However, the SST-AD accepted only one of the Minister's three arguments that the SST-GD had erred, as a valid ground for leave to appeal. The Attorney General seeks to overturn that decision and to have the Minister's appeal proceed on all three arguments before a different Member of the Appeal Division.

II. BACKGROUND

[3] Ms. Tsagbey was born in Ghana on July 27, 1957. She received a grade 6 education before immigrating to Canada in 1989. While in Canada, she worked in the health care field for approximately 25 years, first as a Health Care Aide and then as a Personal Support Worker in a long-term care facility.

[4] On January 12, 2007, Ms. Tsagbey sustained an injury to her left wrist/hand while assisting a patient. After taking a few days off to recover, she returned to work on modified duties but could only work sporadically until August 2008. She has not worked in any remunerated capacity since then.

[5] On August 13, 2007, an orthopaedic surgeon diagnosed Ms. Tsagbey with wrist cartilage (TFCC) tear and chronic pain in her left wrist and hand. The surgeon recommended that she wear a splint and avoid heavy lifting and twisting. On September 4, 2008, Ms. Tsagbey's

physiotherapist reported that her work restrictions are permanent but that she had the potential to perform at a sedentary level.

[6] Following her injury, Ms. Tsagbey completed the Workers Safety Insurance Board (WSIB) rehabilitation program and the Labour Market Re-entry (LMR) and Vocational Rehabilitation Services (VRS) programs. The respondent also completed a WSIB work placement training for the position of Customer Service Clerk.

[7] On April 26, 2013, Ms. Tsagbey submitted an application for a CPP disability pension. She was then 55 years of age. Her application was denied at initial determination on August 20, 2013, and upon reconsideration on February 21, 2014. These decisions were based on the assessment that she could be employed in a sedentary position. On April 1, 2014, Ms. Tsagbey appealed the reconsideration decision to the SST-GD.

[8] On October 26, 2015, the SST-GD conducted a hearing by way of teleconference. In a decision dated October 27, 2015, the SST-GD concluded that Ms. Tsagbey was eligible for a disability pension under the CPP, as it found her disability was "severe and prolonged" as of the minimum qualifying period (MQP) of December 31, 2009. On January 26, 2016, the Minister sought leave to appeal the SST-GD's decision to the Appeal Division.

[9] The SST-AD granted the Minister's request for leave, in part, on May 31, 2016. It concluded that the SST-GD may have made an erroneous finding of fact when it found that Ms. Tsagbey's disability was "severe" on the basis of secondary conditions for which there was no

objective evidence at the time of MQP. This was just one of the three arguments upon which the Minister had sought leave to appeal the SST-GD findings. The SST-AD Member dismissed the application for leave to appeal on the other two arguments.

[10] This application for judicial review was then brought by the Attorney General of Canada, on behalf of the Minister, on June 30, 2016. The Attorney General seeks an Order setting aside the SST-AD's decision and referring the matter back to a different member of the SST-AD for determination, with directions to grant the Minister's application for leave to appeal on the two refused arguments.

[11] I have used the term "arguments" rather than "grounds" in describing the contentious points at issue in these proceedings for reasons which will become apparent below.

III. DECISION UNDER REVIEW

A. *SST-GD's Decision*

[12] The sole issue before the General Division was whether it was more likely than not that Ms. Tsagbey had a severe and prolonged disability on or before the date of the MQP, which the General Division Member determined to be December 31, 2009. Ms. Tsagbey provided oral testimony at the hearing, which the Member found to be credible and straightforward. There is no dispute as to that finding in these proceedings.

[13] The SST-GD Member noted the applicable law as paragraph 44(1)(b) of the CPP, which sets out the eligibility requirements for the CPP disability pension, and paragraph 42(2)(a) of the CPP, which defines disability as a physical or mental disability that is severe and prolonged.

[14] The SST-GD reviewed Ms. Tsagbey's application materials for a CPP disability pension and her oral evidence. The Member noted that all of the medical evidence in the hearing file was carefully reviewed. He then set out those pieces of evidence that he considered to be most pertinent. In doing so, the Member assessed evidence both prior to and post the MQP date.

[15] Having reviewed the documentary evidence and the submissions of the parties, the SST-GD proceeded to conduct an analysis of whether, on a balance of probabilities, Ms. Tsagbey's disability was "severe and prolonged" on or before the MQP date of December 31, 2009. In doing so, the Member first set out the guiding principles in the jurisprudence and then applied those principles to the facts of the case at bar.

[16] Relying on the Federal Court of Appeal's decision in *Villani v Canada (Attorney General)*, 2001 FCA 248, [2001] FCJ No 1217 [*Villani*], the Member noted that the "severity" requirement must be assessed in a "real world" context. Moreover, factors such as a person's age, education level, language proficiency, and past work and life experiences must be considered when determining the "employability" of the person.

[17] The Member also noted that all possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada*

(Attorney General), 2011 FCA 47 [*Bungay*]; *Barata v MHRD* (January 17, 2001) CP 15058 (PAB). The Member further stated that, where there is evidence of work capacity, Ms. Tsagbey must establish that she has made efforts at obtaining and maintaining employment but was unsuccessful because of her health: *Inclima v Canada (Attorney General),* 2003 FCA 117, [2003] FCJ No 378 [*Inclima*].

[18] The SST-GD found that as of the MQP, and continuously thereafter, Ms. Tsagbey lacked the capacity to pursue any form of gainful employment on a regular and consistent basis. The Member reached this conclusion based on Ms. Tsagbey's oral evidence as well as the extensive medical documentation.

[19] The SST-GD specifically stated that if the disabling condition was limited to the left wrist injury, then Ms. Tsageby would not be precluded from all forms of gainful employment. However, the SST-GD found that the cumulative effect of Ms. Tsagbey's other conditions and limitations meant that she could not have pursued, "with consistent frequency and truly remunerative occupation": *Villani,* above, at para 38. The "other" conditions included sleep disturbance, elevated blood pressure, diabetic complications, swollen legs, and follow up after parathyroid surgery.

[20] As such, the SST-GD was satisfied that Ms. Tsageby could not have been a predictable and regular employee due to her health conditions. The SST-GD was also satisfied that Ms. Tsagbey pursued medical treatment and made her best efforts to continue working and/or to pursue alternative employment. Therefore, the Member was satisfied, on a balance of

probabilities, that Ms. Tsagbey was suffering from a severe disability in accordance with the CPP requirements as of the MQP and continuously thereafter.

[21] The SST-GD's analysis of the "prolonged" prong of the definition of disability under paragraph 42(2)(a) of the CPP was brief in comparison to its discussion of severity. In essence, the SST-GD found that Ms. Tsagbey's disabling conditions have been present since her workplace injury in January 2007, and despite extensive treatment, her overall condition continues to deteriorate. Based on the foregoing, the SST-GD concluded that Ms. Tsagbey had a severe and prolonged disability as of August 2008.

B. *SST-AD's Decision*

[22] The SST-AD Member set out the applicable law at the leave stage under the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESDA] citing subsections 56(1), 58(1), 58(2), and 58(3).

[23] Pursuant to subsection 58(2) of the DESDA, the sole issue for the SST-AD to determine was whether the appeal had a reasonable chance of success.

[24] The Minister submitted that the SST-GD based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it. In raising this ground, the Minister highlighted three separate instances where, it was argued, the SST-GD made erroneous findings of fact. The SST-AD summarized those instances as follows:

- The finding that all of the respondent's medical conditions and impairments were present and disabling as of the MQP, when in fact some were not symptomatic until years later;

- The finding that the respondent was disabled in the absence of objective medical evidence of a severe and prolonged disability as of the MQP; and,

- The finding that the respondent lacked the capacity for employment even though the available evidence, both before and after the MQP, showed she had the capacity to work at a sedentary occupation.

[25] The SST-AD noted that for leave to be granted, there has to be some arguable ground upon which the proposed appeal might succeed: *Kerth v Canada (Minister of Human Resources Department)*, [1999] FCJ No 1252; *Fancy v Canada (Minister of Social Development)*, 2010 FCA 63, [2010] FCJ No 276.

[26] With respect to the medical conditions secondary to the left wrist and right shoulder pain, the SST-AD found that there is an arguable case that the SST-GD made an erroneous finding of fact in a perverse or capricious manner or without regard to the material before it.

[27] The Member found that it is an error to take into account subjective complaints that have no basis in evidence. The Member further noted that his review of the relevant medical reports did not disclose any independent confirmation that sleep disturbance, elevated blood pressure, diabetic complications, swollen legs or follow up after parathyroid surgery were problematic prior to the MQP date of December 31, 2009.

[28] With respect to the main medical condition of left wrist and right shoulder pain, the SST-AD found that there was no arguable case to appeal. The Member noted the existence of imaging reports, orthopedic assessments and functional assessment evaluations which provided objective evidence of the existence of the main medical impairment prior to the MQP. Relying on *Simpson v Canada (Attorney General),* 2012 FCA 82, [2012] FCJ No 334 [*Simpson*], the SST-AD concluded that the SST-GD was acting within its jurisdiction in assessing the relevant facts and evidence in arriving at that conclusion.

[29] With respect to the issue of Ms. Tsagbey's capacity for sedentary work, the SST-AD concluded that the SST-GD conducted a good faith, albeit brief, assessment of all aspects of Ms. Tsagbey's functionality in paragraphs 54, 55 and 58 of its decision. In essence, the SST-AD concluded that the Minister was seeking to have it re-weigh the evidence in her favour. As such, the SST-AD did not find a reasonable chance of success on this issue either.

[30] Ultimately, the SST-AD granted the Minister's request for leave on the ground that the SST-GD may have made an erroneous finding of fact when it concluded that the respondent's disability was "severe" on the basis of secondary conditions which was not supported by objective evidence at the time of MQP. The SST-AD also invited the parties to make submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[31] The appeal remains pending before the SST-AD.

[32] The relevant legislation referred to above and below is set out in an Annex attached to this Judgment and Reasons.

IV. ISSUES

[33] The Court was informed at the hearing that this application was brought because the applicant considers that there is no mechanism within the legislative scheme to contest decisions restricting the scope of an appeal before the SST-AD, other than by an application for judicial review. Notwithstanding her success on the leave application, the applicant wants to be able to argue all of the alleged factual errors raised by the Minister on the appeal including the two which the SST-AD found to not raise a reasonable chance of success.

[34] The respondent contends that the application is premature prior to a final determination on the merits of the appeal.

[35] Having considered the submissions of the parties, I would frame the issues as follows:

(1) Is the scope of the decision to grant leave subject to judicial review in this Court

(2) Was the SST-AD's rejection of two of the Minister's arguments for leave reasonable?

V. ARGUMENTS AND ANALYSIS

A. *Is the scope of the decision to grant leave to appeal subject to judicial review in this Court?*

(1) Applicant's Submissions

[36] The applicant's position is that the SST-AD's decision to refuse leave to appeal on two of the three arguments raised in the application for leave is final as it is determinative and dispositive of the rights of the parties: *Canada (Attorney General) v O'Keefe*, 2016 FC 503, [2016] FCJ No 796 at para 24 [*O'Keefe*]. Leave decisions are not subject to appeal: DESDA, s 68. As a result, the Minister would be prevented from raising arguments for which leave had not been granted, including the two alleged factual errors which were not accepted as raising a reasonable basis for appeal.

[37] If either party disagrees with the leave decision, the sole recourse is to seek judicial review in this Court. Once the SST-AD grants or refuses leave, they are *functus officio* with respect to their decision under section 58 of the DESDA and cannot consider the merits of any other issue raised in the leave application: *O'Keefe,* above, at paras 25–26, 31; see also *Federal Courts Act*, ss 18(1) and 26.

[38] The applicant submits that an appeal before the SST-AD is not *de novo*, and the scope upon which the appeal will be heard is carved out by the leave decision: *O'Keefe,* above, at para 28; see also DESDA, s 58(5). The SST-AD determined which individual arguments have a

reasonable chance of success, and therefore, it finally determined the scope of the appeal on the merits.

(2) Respondent's Submissions

[39] The respondent disputes the applicant's argument that the Appeal Division's decision on leave to appeal "finally determines" the scope of the appeal on the merits. The applicant is not precluded, she submits, from arguing the other two factual issues identified in its application for leave to appeal as they both fall within the ground on which leave was granted.

[40] The respondent relies on subsection 58(3) of the DESDA to argue that the SST-AD only has the power to "grant or refuse" leave. If leave is granted, subsection 58(5) of the DESDA provides that the application for leave becomes the notice of appeal. As such, the respondent submits, the grounds pleaded on leave become the grounds on appeal: see *Social Security Tribunal Regulations*, SOR/2013-60, at para 40(1)(c) [SSTR].

[41] The Minister's application for leave alleged three instances in which the SST-GD had made erroneous findings of fact. The respondent contends that the SST-AD has the jurisdiction to consider, and the Minister is free to argue, all three instances on appeal. Further, the respondent submits, on an application for leave the SST-AD can only grant or refuse leave; the legislation does not give the SST-AD authority to limit the scope of an appeal at the leave stage.

[42] The SST-AD's disposition in this case was in the Minister's favour. The applicant is not seeking to reverse the grant of leave to appeal, and therefore, she is not seeking a different

disposition. The respondent submits that the crux of the applicant's concern is with the reasons given by the SST-AD in making its decision, not the actual decision itself. There is no basis to bring an application for judicial review of a tribunal's reasons, the respondent submits, unless a party is seeking a different disposition by the tribunal: *GKO Engineering v Canada*, 2001 FCA 73, [2001] FCJ No 369 at paras 2-3 [*GKO Engineering*]; *Rogerville v Canada (Public Service Commission Appeal Board),* 2001 FCA 142, [2001] FCJ No 692 at paras 1, 28 [*Rogerville*].

[43] The respondent submits that the Minister has not exhausted all available and effective recourses in the CPP administrative process as there is an ongoing appeal process that provides an adequate and effective forum. The SST-AD is a specialized tribunal with the expertise to decide issues within the scope of its own appeal jurisdiction and governing statute. In essence, the respondent submits, the applicant could raise the issue about scope on appeal, and it would then be for the SST-AD to determine whether the scope of the appeal can be limited by a leave decision. That decision would be subject to judicial review before the Federal Court of Appeal under paragraph 28(1)(g) of the *Federal Courts Act*.

[44] The respondent points to at least three other SST-AD decisions where the Minister has raised the same jurisdictional issue that she now seeks to litigate in this Court: *JR v Minister of Employment and Social Development*, 2015 SSTAD 1461 at paras 14–15 [*JR*]; *PM v Minister of Employment and Social Development*, 2016 SSTADIS 12 at para 16 [*PM*]; *BK v Minister of Employment and Social Development*, 2015 SSTAD 761 at paras 12, 13 [*BK*].

[45] The SST-AD has not had as yet the opportunity to address the issue of whether a leave decision can limit the scope of appeal, the respondent submits. Accordingly, the Federal Court of Appeal would not have the benefit of the SST-AD's findings on the issue should an application for judicial review be brought from the SST-AD's determination of the appeal. Such findings may be "suffused with expertise, legitimate policy judgments and valuable regulatory expertise": *CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61, [2010] FCJ No 274 at para 32 [*CB Powell*]. Without reasons from the Appeal Division on this issue, the respondent argues, this Court cannot be properly respectful of procedural choices made by the administrative decision maker: *Income Security Advocacy Centre v Mette*, 2016 FCA 167, [2016] FCJ No 587 at para 5 [*Mette*].

[46] The respondent submits that there are no exceptional circumstances in this case that should allow the applicant to proceed to the courts when the administrative process has not run its course: *CB Powell*, above, at paras 31-32. Thus, the respondent argues, the application for judicial review is premature.

[47] Finally, the respondent distinguishes *O'Keefe*; a case heavily relied on by the applicant. The respondent notes that in *O'Keefe,* above, the applicant was seeking to overturn the granting of leave to Mr. O'Keefe. The Federal Court concluded that the application was not premature because the SST-AD has no jurisdiction to review a leave decision: *O'Keefe,* above, at paras 1, 16, 26, and 29. In the case at bar, however, the applicant agrees with the granting of leave, but wishes to challenge the reasons given in making the decision.

(3) Analysis

[48] At first impression, the respondent's arguments are attractive. The Minister was successful at the leave stage in that the request for leave to appeal was allowed, albeit not on all of the arguments raised by the Minister in challenging the SST-GD's decision. The Attorney General seeks a determination from this Court that would maintain the SST-AD's decision to grant leave but quash the SST-AD's decision to not accept the other arguments presented by the Minister. Thus, it appears that this Court is not being asked to review the decision to grant leave but rather the reasons on which it was granted.

[49] Subsection 58(1) of DESDA provides for three grounds of appeal from a decision of the General Division:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(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.

[50] Only the third ground, which is set out in paragraph 58(1)(c), was raised in the Minister's Application for Leave to Appeal and Notice of Appeal. The Minister cited three separate instances where the SST-GD allegedly based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Those instances were described in the Application for Leave as follows:

> (a) The SST-GD erred in its determination that all of the Respondent's medical conditions were present and limiting as of the MQP;
>
> (b) The SST-GD erred in its determination that the Respondent was disabled as per the CPP in the absence of objective medical evidence at MQP; and
>
> (c) The SST-GD erred in finding that the Respondent lacked capacity to work.

[51] These are distinct allegations of erroneous findings of fact but they all fall within just one of the grounds of appeal recognized by the statute. As such, it cannot truly be said that the Minister raised three separate grounds of appeal, as the applicant argues. Strictly speaking, the Minister raised only one of the three grounds of appeal permitted under the statute, but argued that there were three instances of how that ground was satisfied by the alleged errors committed by the General Division. The Appeal Division agreed with just one of the three. As such, I am inclined to agree with the respondent that the Attorney General is seeking judicial review of the SST-AD's reasons, not its disposition.

[52] I agree with the respondent that the issue of whether or not the scope of the appeal will be limited is a procedural matter that falls within the expertise of the tribunal. However, subsection 58(3) provides that the Appeal Division "must either grant or refuse leave to appeal." It does not on its face allow the Appeal Division to restrict the scope of the appeal if leave is granted. The language of the statute provides for only one result without qualification.

[53] In *PM*, above, the SST-AD had to decide whether the appeal on the merits was limited to the grounds of appeal that had previously been found to have a reasonable chance of success. Ultimately, the SST-AD considered each ground of appeal raised. The appeal in that case was not restricted to the grounds that were found at the leave stage to have a reasonable chance of success: *PM*, above, at para 16.

[54] I note in passing that the language used by the SST-AD in this case to address the two other issues could be interpreted as limiting the scope of the appeal on the merits. The Member referred to the other two issues as "grounds" and found that those two grounds did not have a reasonable chance of success. Similar language is found in other SST-AD decisions relied upon by the parties, such as: *J.M. v Minister of Employment and Social Development*, 2016 SSTADIS 474; *S.F. v Canada Employment Insurance Commission*, 2017 SSTADEI 1; *G.S. v Minister of Employment and Social Development*, 2016 SSTADIS 400. In my view, this usage is imprecise; to refer to all sub-issues or instances of error raised as "grounds" is problematic as it obscures a reviewing court's task on judicial review.

[55] The language of the statute is clear that there are only three grounds of appeal and that appeal is either granted or refused. As such, since the Attorney General is not seeking a different disposition from this Court, the applicant has no basis upon which to bring a judicial review application prior to the completion of the appeal proceedings: *GKO Engineering*, above, at para 3.

[56] I agree with the respondent that this application is premature. At the conclusion of its decision, the SST-AD invited the parties to provide submissions on whether a further hearing is required and, if so, what type of hearing is appropriate. In doing so, the Member was likely guided by paragraph 43 (b) of the SSTR, which provides that:

> **43** After every party has filed a notice that they have no submissions to file—or at the end of the period set out in section 42, whichever comes first—the Appeal Division must without delay
>
> (a) make a decision on the appeal; or
>
> (b) if it determines that further hearing is required, send a notice of hearing to the parties.

[57] Notably, neither party made further submissions or requested a further hearing.

[58] The respondent submits that the legislation does not give the SST-AD authority to limit the scope of an appeal. I note that there is no express authority under the DESDA to limit the scope of the appeal; however, there is also nothing in the statute to suggest that the SST-AD would be prohibited from doing so either. In any case, I agree with the respondent that the SST-AD is a specialized tribunal with the expertise to interpret the scope of its own appeal jurisdiction and governing statute.

[59] At the hearing, the applicant referred to a recent case of the SST-AD where the Federal Court of Appeal's decision in *Mette* was applied by the same Member, Neil Nawaz, who decided Ms. Tsagbey's case. The applicant filed this decision with the Court, at my request, following the hearing: *L.G.C. v Minister of Employment and Social Development*, AD-16-830 (March 7, 2017) [*L.G.C.*].

[60] In that case, the SST-AD was asked to address, "to what extent does the Appeal Division have jurisdiction to restrict grounds of appeal at leave?" In answering this question, Member Nawaz distinguished *Mette*, above, and found that he remained within the parameters of section 58(1) of the DESDA when he specifically restricted the "grounds" at the leave to appeal stage.

[61] In *L.G.C.*, therefore, the SST-AD was given an opportunity to consider the issue and interpret its home statute. If the appellant in that case were to seek a judicial review of the decision, the Federal Court of Appeal would be in a position to consider the SST-AD's reasoning and interpretation of the DESDA to determine the reasonableness of its decision.

[62] I refer to *L.G.C.* to reiterate the point that the administrative process should be given an opportunity to run its course before an application for judicial review is brought. In the case at bar, the applicant is not prevented from raising this issue directly on appeal, even as a preliminary question, and give the Appeal Member an opportunity to address it.

[63] As a result, I would dismiss the application for judicial review and leave it to the SST-AD to complete its process. Any decision that it may reach on the merits of the appeal would be

subject to judicial review before the Federal Court of Appeal under paragraph 28(1)(g) of the *Federal Courts Act*, including the rulings on the scope of the appeal. The Court of Appeal would be in a better position to address this matter as it would have the benefit of reviewing the SST-AD's complete reasoning on the issue.

[64] In the event that I am found to have erred in these conclusions, I will set out my views on the reasonableness of the SST-AD's findings on the other arguments for leave.

B. *Was the SST-AD's rejection of two of the Minister's arguments for leave reasonable?*

[65] The parties agree and I concur that the standard of review applicable when reviewing a decision of the SST-AD to grant or deny leave to appeal is reasonableness: *Tracey v Canada (Attorney General),* 2015 FC 1300, [2015] FCJ No 1410 at paras 17–23*; Canada (Attorney General) v Hines,* 2016 FC 112, [2016] FCJ No 84 at para 28; see also *Canada (Attorney General) v Hoffman,* 2015 FC 1348, [2015] FCJ No 1511 at paras 26–27; *Bergerson v Canada,* 2016 FC 220 at para 6.

[66] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] SCJ No 9 at paras 47–49.

(1) Applicant's Submissions

[67] The applicant submits that an arguable case was raised that the SST-GD erred in finding that Ms. Tsagbey's left wrist and right shoulder conditions were disabling at her MQP, in the absence of objective medical evidence to that effect. The applicant argues that the SST-AD mischaracterized this ground as a request to reweigh the evidence.

[68] In essence, the applicant submits that Ms. Tsagbey failed to adduce objective medical evidence to support her claim for a disability pension contrary to the established jurisprudence requiring such evidence: *Warren v Canada (Attorney General),* 2008 FCA 377, [2008] FCJ No 1802 at para4 [*Warren*]; *Villani,* above, at para 50; *Belo-Alves v Canada (Attorney General),* 2014 FC 1100, [2014] FCJ No 1187 at para 94. The applicant further submits that a disability determination cannot be based solely on the subjective evidence of the claimant and that a claimant's suffering is not an element on which the test of disability rests: *Canada (Minister of Human Resources Development) v Angheloni,* 2003 FCA 140, [2003] FCJ No 473 at para 27 [*Angheloni*].

[69] The applicant points to specific pieces of medical evidence that were assessed by the SST-GD to argue that the objective medical evidence in the record was not sufficient to establish severe and prolonged disability based on the left wrist and shoulder pain prior to the MQP date of December 31, 2009.

[70] The SST-GD found that "if [Ms. Tsagbey's] disabling conditions were only the limitations arising from her left wrist injury the Tribunal would agree with the [Minister] that her limitations and restrictions do not preclude all forms of gainful employment". It is the applicant's position that, although the respondent's left wrist and shoulder pain may have been limiting at the time of the MQP, these conditions were far from amounting to a finding of "severity" under the CPP. As such, the applicant submits that the SST-AD erred in denying leave respecting this finding on the basis that the SST-GD was entitled to make its own analysis on the evidence.

[71] With respect to Ms. Tsagbey's capacity to work, the applicant submits that the record establishes that she retained the capacity for lighter work within her restrictions. The applicant argues that the SST-AD mischaracterized this argument as a request to reweigh the evidence.

[72] In dismissing this issue, the Appeal Division found that the SST-GD made a brief but good-faith assessment of all aspects of the respondent's functionality at paragraphs 54, 55 and 58 of its decision. The applicant submits that a review of those three paragraphs suggests that the SST-GD failed to properly apply the legal test for disability.

[73] The applicant further argues the respondent was found by various professionals to have the capacity to work at a sedentary level at the time of her MQP. Therefore, the applicant submits that the SST-GD made erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it.

[74] Moreover, the applicant contends that the SST-GD concluded that Ms. Tsagbey lacked the capacity to pursue any form of gainful employment on a regular and consistent basis by relying on her oral evidence as well as her "multiple disabling conditions". However, the SST-AD found that there was no independent confirmation of Ms. Tsagbey's multiple conditions being problematic as of her MQP. As such, it was unreasonable for the SST-AD to deny the Minister leave on this ground when the SST-GD's finding regarding Ms. Tsagbey's lack of capacity was, in part, based on her secondary medical conditions.

[75] The applicant submits that the evidence suggests that at the time of her MQP, Ms. Tsagbey was capable of pursuing substantially gainful occupation. Therefore, this issue also had a reasonable chance of success on appeal, and the SST-AD committed an error in law by denying leave on this ground.

(2) Respondent's Submissions

[76] The respondent submits that the SST-AD did not fail to consider the factor of objective evidence. Rather, the SST-AD was satisfied that there was "some objective evidence" of the respondent's disability as required by *Warren*, above, at paragraph 4. The SST-AD was further satisfied that there was such evidence before the SST-GD, which it considered and discussed at length.

[77] The respondent further argues that the SST-AD properly relied on the Federal Court of Appeal's decision in *Simpson*, above, when it found that the SST-GD had acted within its role as the trier of fact when it assessed and assigned respective weight to the medical evidence:

Simpson, above, at para 10. In essence, the respondent argues, it was reasonable for the SST-AD to find that the Minister was seeking to have the evidence reweighed. Notably, this Court has found that the possibility that the evidence might be reassessed in the applicant's favour does not give rise to an arguable case or a reasonable chance of success sufficient to grant leave to appeal: *Bellefeuille v Canada*, 2014 FC 963, [2014] FCJ No 1080 at paras 9 and 31.

[78] With respect to her capacity to work, the respondent submits that the SST-AD found that the SST-GD provided a full inventory of the evidence and an assessment of all aspects of the respondent's functionality, both for and against the respondent's claim. The respondent pointed to several pieces of evidence which indicate that she made multiple efforts to return to work but lacked work capacity.

(3) Analysis

[79] There is ample objective medical evidence in the record which establishes that Ms. Tsagbey suffered a serious injury to her left wrist in January 2007, and that her condition was present at the time of her MQP, December 31, 2009. In at least one pre-MQP report from Susan Cowling, Physiotherapist and Return To Work Co-ordinator, Ms. Tsagbey's left wrist injury is described as a "chronic issue". In a post-MQP report, Susan Leitch, Occupational Therapist, noted that due to the osteoarthritic changes, Ms. Tsagbey's wrist injury is "expected to be an ongoing limitation".

[80] Notwithstanding this evidence, with respect to the wrist injury and right shoulder pain alone, the objective medical evidence was that Ms. Tsagbey's condition was limiting, but not

disabling to the extent that she would be incapable of performing sedentary level work. I have some difficulty understanding how one of the examples of such work provided, such as dry cleaning or a store clerk, can be described as "sedentary". In any event, even though the subjective suffering of the respondent is well documented in the record, it is not an element on which the test of "disability" rests: *Angheloni,* above, at para 27.

[81] The SST-GD specifically noted that if Ms. Tsagbey's disabling conditions were only the limitations arising from her left wrist injury, then the Tribunal would agree with the Minister that her limitations and restrictions do not preclude all forms of gainful employment. In other words, but for the secondary medical conditions, the SST-GD would have found that Ms. Tsagbey did not lack the capacity to pursue any form of gainful employment on a regular and consistent basis.

[82] The Appeal Division found pre-MQP objective evidence relating to Ms. Tsagbey's left wrist and right shoulder, including imaging reports, orthopedic assessments and functional assessment evaluations, which would seem to establish a severe and prolonged disability under the CPP. In my view, it was within the range of reasonable outcomes for the SST-AD to find that the Minister did not have a reasonable chance of success on this issue.

[83] With respect to Ms. Tsagbey's capacity to work in a sedentary occupation, I agree with the respondent that the applicant is merely seeking to re-argue this issue through a re-weighing of the evidence.

[84] The jurisprudence has consistently held that an applicant must not only adduce medical evidence in support of her claim that her disability is "severe" and "prolonged", but also evidence of her efforts to obtain work and to manage her medical condition: *Klabouch v Canada (Minister of Social Development),* 2008 FCA 33, [2008] FCJ No 106 at para 16 [*Klabouch*]; see also *Villani*, above, at para 50; *Inclima*, above, at para 3.

[85] It is clear from the record that Ms. Tsagbey has made significant efforts at obtaining and maintaining employment but was unsuccessful by reason of her health condition. She attempted to return to work on modified duties, but for over a year, her employer was unable to place her in any job suitable to her limitations.

[86] Moreover, Ms. Tsagbey completed several programs to upgrade her skills and return to work, including the WSIB rehabilitation program, the LMR and VRS programs. She also completed a WSIB work placement for a Customer Service Clerk. The evidence also shows that Ms. Tsagbey was regarded as hardworking and dedicated when participating in such programs. However, a pre-MQP psycho-vocational assessment prepared by Dr. De Araujo noted that the respondent achieved low scores in her intellectual capacity and below-average scores in all tested aptitudes. In the circumstances, it would seem that the assessment that she could be gainfully employed in a sedentary capacity was unduly optimistic.

[87] The applicant takes issue with the fact that some of the relevant evidence on Ms. Tsagbey's capacity to work post-dates the MQP of December 31, 2009. However, in my view,

the post-dated evidence demonstrates the continuing effect of her health condition on her ability to find and maintain any substantially gainful employment.

[88] The SST-AD explicitly considered the principle that it is not the diagnosis, but the capacity to work, that determines the severity of a claimed disability under the CPP: *Klabouch*, above, at para 14. The SST-AD noted that its review of the SST-GD's analysis of the medical reports and functional assessments show no indication that the General Division ignored this principle. In fact, the SST-AD was satisfied that the SST-GD considered the evidence both for and against Ms. Tsagbey's claim, and assigned the evidence the appropriate weight.

[89] I see no reason to interfere with the SST-AD's finding on this issue as it falls within the range of reasonable outcomes.

[90] In the result, therefore, I would find that the Appeal Division's determination of the other two factual issues raised by the Minister was reasonable. As no costs were requested by the respondent, none will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No costs are awarded.

"Richard G. Mosley"

Judge

ANNEX A

***Department of Employment and Social Development Act*, SC 2005, c 34**	***Loi sur le ministère de l'Emploi et du Développement social*, L.C. 2005, ch. 34**
Appeal — time limit	**Modalités de présentation**
52 (1) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,	**52 (1)** L'appel d'une décision est interjeté devant la division générale selon les modalités prévues par règlement et dans le délai suivant
(a) in the case of a decision made under the Employment Insurance Act, 30 days after the day on which it is communicated to the appellant; and	**a)** dans le cas d'une décision rendue au titre de la Loi sur l'assurance-emploi, dans les trente jours suivant la date où l'appelant reçoit communication de la décision;
(b) in any other case, 90 days after the day on which the decision is communicated to the appellant.	**b)** dans les autres cas, dans les quatre-vingt-dix jours suivant la date où l'appelant reçoit communication de la décision.
Extension	**Délai supplémentaire**
(2) The General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.	**(2)** La division générale peut proroger d'au plus un an le délai pour interjeter appel.
Decision	**Décisions**
(2) The General Division must give written reasons for its decision and send copies to the appellant and the Minister or the Commission, as the case may be, and any other party.	**(2)** Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et, selon le cas, au ministre ou à la Commission, et à toute autre partie.

Appeal

55 Any decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision and any other prescribed person.

Appel

55 Toute décision de la division générale peut être portée en appel devant la division d'appel par toute personne qui fait l'objet de la décision et toute autre personne visée par règlement.

Leave

56 (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.

Autorisation du Tribunal

56 (1) Il ne peut être interjeté d'appel à la division d'appel sans permission.

Exception

(2) Despite subsection (1), no leave is necessary in the case of an appeal brought under subsection 53(3).

Exception

(2) Toutefois, il n'est pas nécessaire d'obtenir une permission dans le cas d'un appel interjeté au titre du paragraphe 53(3).

Appeal — time limit

57 (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

(a) in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and

Modalités de présentation

57 (1) La demande de permission d'en appeler est présentée à la division d'appel selon les modalités prévues par règlement et dans le délai suivant :

a) dans le cas d'une décision rendue par la section de l'assurance-emploi, dans les trente jours suivant la date où l'appelant reçoit communication de la décision;

(b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

b) dans le cas d'une décision rendue par la section de la sécurité du revenu, dans les quatre-vingt-dix jours suivant la date où l'appelant reçoit communication de la décision.

Extension

(2) The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

Délai supplémentaire

(2) La division d'appel peut proroger d'au plus un an le délai pour présenter la demande de permission d'en appeler.

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(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.

Moyens d'appel

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

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

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

Critère

(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.

Decision

(3) The Appeal Division must either grant or refuse leave to appeal.

Décision

(3) Elle accorde ou refuse cette permission.

Reasons

(4) The Appeal Division must give written reasons for its decision to grant or refuse leave and send copies to the appellant and any other party.

Motifs

(4) Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et à toute autre partie.

Leave granted

(5) If leave to appeal is granted, the application for leave to appeal becomes the notice of appeal and is deemed to have been filed on the day on which the application for leave to appeal was filed.

Permission accordée

(5) Dans les cas où la permission est accordée, la demande de permission est assimilée à un avis d'appel et celui-ci est réputé avoir été déposé à la date du dépôt de la demande de permission.

Decision

59 (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

Décisions

59 (1) La division d'appel peut rejeter l'appel, rendre la décision que la division générale aurait dû rendre, renvoyer l'affaire à la division générale pour réexamen conformément aux directives qu'elle juge indiquées, ou confirmer, infirmer ou modifier totalement ou partiellement la décision de la division générale.

Reasons

(2) The Appeal Division must give written reasons for its decision and send copies to the appellant and any other party.

Powers of tribunal

64 (1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

Canada Pension Plan

(2) Despite subsection (1), in the case of an application relating to the Canada Pension Plan, the Tribunal may only decide questions of law or fact as to

(a) whether any benefit is payable to a person or its amount;

(b) whether any person is eligible for a division of unadjusted pensionable earnings or its amount;

(c) whether any person is eligible for an assignment of a contributor's retirement pension or its amount; and

(d) whether a penalty should be imposed under Part II of that Act or its amount.

Motifs

(2) Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et à toute autre partie.

Pouvoir du Tribunal

64 (1) Le Tribunal peut trancher toute question de droit ou de fait pour statuer sur une demande présentée sous le régime de la présente loi.

Régime de pensions du Canada

(2) Toutefois, dans le cas d'une demande visant le Régime de pensions du Canada, le Tribunal peut seulement trancher toute question de droit ou de fait concernant :

a) l'admissibilité d'une personne à une prestation ou le montant de cette prestation;

b) l'admissibilité d'une personne à un partage des gains non ajustés ouvrant droit à pension ou le montant de ce partage;

c) l'admissibilité d'une personne à bénéficier de la cession de la pension de retraite d'un cotisant ou le montant de cette cession;

d) l'opportunité d'infliger une pénalité en vertu de la partie II de cette loi ou le montant de cette pénalité.

Decision final

68 The decision of the Tribunal on any application made under this Act is final and, except for judicial review under the Federal Courts Act, is not subject to appeal to or review by any court.

Décision définitive

68 La décision du Tribunal à l'égard d'une demande présentée sous le régime de la présente loi est définitive et sans appel; elle peut cependant faire l'objet d'un contrôle judiciaire aux termes de la Loi sur les Cours fédérales.

***Canada Pension Plan*, RSC, 1985, c C-8**

***Régime de pensions du Canada*, L.R.C. (1985), ch. C-8**

When person deemed disabled

(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,

(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

Personne déclarée invalide

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) 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;

***Canada Pension Plan Regulations*, CRC, c 385**

68 (1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:

***Règlement sur le Régime de pensions du Canada*, C.R.C., ch. 385**

68 (1) Quand un requérant allègue que lui-même ou une autre personne est invalide au sens de la Loi, il doit fournir au ministre les renseignements suivants sur la personne dont l'invalidité est à déterminer :

(a) a report of any physical or mental disability including

a) un rapport sur toute invalidité physique ou mentale indiquant les éléments suivants:

(i) the nature, extent and prognosis of the disability,

(i) la nature, l'étendue et le pronostic de l'invalidité,

(ii) the findings upon which the diagnosis and prognosis were made,

(ii) les constatations sur lesquelles se fondent le diagnostic et le pronostic,

(iii) any limitation resulting from the disability, and

(iii) toute incapacité résultant de l'invalidité,

(iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant;

(iv) tout autre renseignement qui pourrait être approprié, y compris les recommandations concernant le traitement ou les examens additionnels;

(b) a statement of that person's occupation and earnings for the period commencing on the date upon which the applicant alleges that the disability commenced; and

b) une déclaration indiquant l'emploi et les gains de cette personne pendant la période commençant à la date à partir de laquelle le requérant allègue que l'invalidité a commencé; et

(c) a statement of that person's education, employment experience and activities of daily life.

c) une déclaration indiquant la formation scolaire, l'expérience acquise au travail et les activités habituelles de la personne.

***Social Security Tribunal Regulations*, SOR/2013-60**

***Règlement sur le Tribunal de la sécurité sociale*, DORS/2013-60**

Application for leave form and contents

Forme et teneur de la demande

40 (1) An application for leave to appeal must be in the form set out by the Tribunal on its website and contain

40 (1) La demande de permission d'en appeler est présentée selon la forme prévue par le Tribunal sur son site Web et contient :

(a) a copy of the decision in respect of which leave to appeal is being sought;

a) une copie de la décision qui fait l'objet de la demande;

(b) if a person is authorized to represent the applicant, the person's name, address, telephone number and, if any, facsimile number and email address;

b) si une personne est autorisée à représenter le demandeur, le nom, l'adresse et le numéro de téléphone de cette personne et tout numéro de télécopieur et adresse électronique qu'elle possède;

(c) the grounds for the application;

c) les moyens invoqués à l'appui de la demande;

(d) any statements of fact that were presented to the General Division and that the applicant relies on in the application;

d) l'exposé des faits présentés à la division générale que le demandeur entend invoquer à l'appui de la demande;

(e) if the application is brought by a person other than the Minister or the Commission, the applicant's full name, address, telephone number and, if any, facsimile number and email address;

e) si la demande émane d'une personne autre que le ministre ou la Commission, le nom complet, l'adresse et le numéro de téléphone du demandeur et tout numéro de télécopieur et adresse électronique qu'il possède:

(f) if the application is brought by the Minister or the Commission, the address, telephone number, facsimile number and email address of the Minister or the Commission, as the case may be;

f) si la demande émane du ministre ou de la Commission, les adresse, numéro de téléphone, numéro de télécopieur et adresse électronique du ministre ou de la Commission, selon le cas;

(g) an identifying number of the type specified by the Tribunal on its website for the purpose of the application; and

g) le numéro identificateur du type précisé par le Tribunal sur son site Web aux fins de la demande;

(h) a declaration that the information provided is true to the best of the applicant's knowledge.

h) une déclaration selon laquelle les renseignements fournis dans la demande sont, à la connaissance du demandeur, véridiques.

Time to respond

42 Within 45 days after the day on which leave to appeal is granted, the parties may

Délai pour déposer une réponse

42 Dans les quarante-cinq jours suivant la date à laquelle la permission d'en appeler est accordée, les parties peuvent :

(a) file submissions with the Appeal Division; or

a) soit déposer des observations auprès de la division d'appel;

(b) file a notice with the Appeal Division stating that they have no submissions to file.

b) soit déposer un avis auprès de la division d'appel précisant qu'elles n'ont pas d'observations à déposer.

Decision or further hearing

43 After every party has filed a notice that they have no submissions to file — or at the end of the period set out in section 42, whichever comes first — the Appeal Division must without delay

Décision ou avis d'audience

43 Une fois que toutes les parties ont déposé l'avis selon lequel elles n'ont pas d'observations à déposer ou à l'expiration de la période prévue à l'article 42, selon le premier de ces événements à survenir, la division d'appel doit sans délai :

(a) make a decision on the appeal; or

a) soit rendre sa décision;

(b) if it determines that further hearing is required, send a notice of hearing to the parties.

b) soit, si elle estime qu'elle doit entendre davantage les parties, leur faire parvenir un avis d'audience.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1043-16
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA V JOYCE TSAGBEY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 7, 2017
JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	APRIL 11, 2017

APPEARANCES:

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