Federal Court  Cour fédérale

Date: 20141009

Docket: T-1093-13

Citation: 2014 FC 963

Ottawa, Ontario, October 9, 2014

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

EDDIE BELLEFEUILLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Proceeding

[1] This case is an application pursuant to section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision by the Appeal Division of the Social Security Tribunal [the SST] established under Part 5 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the DESDA]. By written Reasons dated May 7, 2013, the Appeal Division of the SST [the Appeal Division] refused the Applicant leave to appeal a

decision of a review tribunal [the RT] which had denied the Applicant a disability pension under the *Canada Pension Plan*, RSC 1985, c C-8 [the CPP].

[2] The Applicant now applies to this Court to set aside the decision of the Appeal Division and remit the matter to another member of the Appeal Division for reconsideration. The Applicant also wants costs in respect of this application.

II. Preliminary Order regarding Style of Cause

[3] At the outset of the hearing of this application, the parties affirmed their consent to an Order to make the Attorney General of Canada the Respondent in this case instead of the Minister of Human Resources and Skills Development. The parties requested such an order in February, 2014, but it has not yet been issued. The parties are correct that the Attorney General of Canada is the proper Respondent under Rule 303(2) of the *Federal Courts Rules*, SOR/98-106. Hence, it is hereby ordered that the Attorney General of Canada be named as the Respondent in this application and that the style of cause be amended accordingly.

III. Background

[4] The Applicant applied for a disability benefit from the CPP on October 21, 2010. A medical adjudicator with Service Canada rejected that application on February 3, 2011, on the basis that the Applicant did not have a disability that was both severe and prolonged. The Applicant then requested a reconsideration of this determination. On August 16, 2011, a second

medical adjudicator rejected the application for a disability benefit, again on the basis that the Applicant did not have a disability that was both severe and prolonged.

[5] Following these negative decisions the Applicant appealed to the RT pursuant to what was then section 82(1) of the CPP. The RT dismissed the Applicant's appeal in a written decision dated January 2, 2013. The RT's decision considered not only the evidence of the Applicant and the Applicant's spouse but also numerous reports from medical and other health care practitioners. Based on the evidence before it and the submissions of the Applicant's counsel, the RT determined that, although the Applicant was not able to do his former job as a construction worker, the Applicant retained the capacity to perform some alternative sedentary occupation; and so, the RT was not convinced that the Applicant's disability was severe enough to entitle him to a disability pension from the CPP. The RT concluded that it was not necessary to make a finding on the prolonged criterion since it found that the Applicant's disability was not severe.

[6] The Applicant then applied on March 28, 2013, for leave to appeal to the Pension Appeals Board [the PAB] under what was then section 83(1) of the CPP. The Appeal Division of the SST inherited this application for leave effective April 1, 2013, pursuant to section 260 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, which provides as follows:

260. Any application for leave to appeal filed before April 1, 2013 under subsection 83(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to be an application for leave to appeal	260. Toute demande de permission d'interjeter appel présentée avant le 1er avril 2013, au titre du paragraphe 83(1) du *Régime de pensions du Canada*, dans sa version antérieure à l'entrée en vigueur de l'article 229, est réputée être

filed with the Appeal Division of the Social Security Tribunal on April 1, 2013, if no decision has been rendered with respect to leave to appeal.	une demande de permission d'en appeler présentée le 1er avril 2013 à la division d'appel du Tribunal de la sécurité sociale si aucune décision n'a été rendue relativement à cette demande.

IV. Decision of the Appeal Division of the Social Security Tribunal

[7] In a written decision dated May 7, 2013, a single member [the Member] of the Appeal Division refused the Applicant leave to appeal the RT's decision.

[8] The Appeal Division identified the issue before it as whether the Applicant's appeal in respect of the RT's decision had a reasonable chance of success; and, in addressing this issue, looked to this Court's decision in *Canada (Attorney General) v Zakaria*, 2011 FC 136, [2011] FCJ No 189 (QL) [*Zakaria*], noting that the Applicant needed to demonstrate that one ground of appeal had a reasonable chance of success and that this could be done by adducing new evidence, or by identifying an error of law or an error of significant fact by the RT.

[9] The Appeal Division determined that many of the Applicant's arguments were, essentially, disagreements with the weight the RT gave to the evidence before it and its conclusions with respect to such evidence. The Appeal Division, noting the Federal Court of Appeal decision in *Simpson v Canada (Attorney General)*, 2012 FCA 82, [2012] FCJ No 334 (QL), stated that in deciding whether to grant leave to appeal a tribunal could not substitute its view of the persuasive value of the evidence for that of the tribunal that made the findings of

facts; and so, the Appeal Division concluded that the Applicant's arguments did not raise grounds of appeal that had a reasonable chance of success.

[10] The Appeal Division further determined that none of the other grounds of appeal raised by the Applicant had a reasonable chance of success. Specifically, the Appeal Division rejected the grounds that:

a. the RT had misinterpreted the term "symptom magnification";

b. the RT had erred in finding that the Applicant had some capacity to work without identifying any specific occupation; and

c. the RT had failed to consider the Applicant's circumstances in a real world context as set out by the Federal Court of Appeal in *Villani v Canada (Attorney General)*, 2001 FCA 248, [2002] 1 FCR 130 [*Villani*].

In reaching its decision to refuse the application for leave, the Appeal Division noted that the mere recitation of facts also did not disclose a ground of appeal, and that:

> [14] Finally, the Applicant promises that further medical reports will be provided when they become available. He did not request any additional time to provide this evidence. No further reports have been received. I find that the mere promise of new evidence is not a ground of appeal that has a reasonable chance of success.

V. Federal Court Jurisdiction

[11] As noted above, the Appeal Division of the SST inherited the former jurisdiction of the PAB in respect of any application for leave to appeal filed but undecided before April 1, 2013. In the past, this Court typically assumed jurisdiction to judicially review decisions of a designated member of the PAB to grant or refuse leave (see: *Canada (Attorney General) v Landry*, 2008 FC

810 at paras 20-21, 334 FTR 157). Although paragraph 28(1)*(g)* of the *Federal Courts Act*, now assigns to the Federal Court of Appeal the jurisdiction to judicially review most decisions of the Appeal Division, leave decisions are specifically excepted from the jurisdiction of the Federal Court of Appeal as follows:

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
…	[…]
(g) the Appeal Division of the Social Security Tribunal established under section 44 of the Department of Employment and Social Development Act, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the Canada Pension Plan, section 27.1 of the Old Age Security Act or section 112 of the Employment Insurance Act;	*g)* la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la Loi sur le ministère de l'Emploi et du Développement social, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du Régime de pensions du Canada, à l'article 27.1 de la Loi sur la sécurité de la vieillesse ou à l'article 112 de la Loi sur l'assurance-emploi;
[Emphasis added]	[Je souligne]

Section 58 of the DESDA provides as follows:

58. (1) The only grounds of appeal are that	58. (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	*a)* la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence ;
(b) the General Division erred in law in making its decision, whether or not the error appears on the 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
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.
(3) The Appeal Division must either grant or refuse leave to appeal.	(3) Elle accorde ou refuse cette permission.
(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.	(4) Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et à toute autre partie.

[12] The decision of the Appeal Division in question in this application was made under section 58 of the DESDA, and since such a decision is expressly carved out of the Federal Court of Appeal's jurisdiction under paragraph 28(1)*(g)* of the *Federal Courts Act*, this Court therefore

has jurisdiction to review the Appeal Division's decision to refuse the Applicant's request for leave to appeal.

VI. The Parties' Submissions

[13] The Applicant submitted, in summary, that the SST Member applied the wrong test for determining whether leave should be granted, that she failed to properly consider a number of the arguments made by the Applicant, and that she acted unfairly by not awaiting the delivery of additional medical evidence.

[14] The Respondent submitted that the only issue to be decided in this application is whether it was reasonable for the SST Member to refuse the Applicant leave to appeal. The Respondent also challenged the admissibility of a vocational rehabilitation assessment report by Mr. Robert Lychenko dated May 21, 2013, which was included as an exhibit to the affidavit of Mr. Alec Gowland, sworn to on July 17, 2013, and filed as part of the Applicant's record.

VII. Issues and Standard of Review

A. *Can Mr. Lychenko's rehabilitation assessment be considered?*

[15] The Respondent noted at the hearing of this application that a vocational rehabilitation assessment report by Mr. Lychenko dated May 21, 2013 was not part of the certified tribunal record before the Appeal Division and, accordingly, should not be considered in this Court's review of the SST Member's decision.

[16] I agree with the Respondent that the Lychenko report should not be considered in this Court's review of the Appeal Division's decision. The record for judicial review is usually limited to that which was before the decision-maker; otherwise, an application for judicial review would risk being transformed into a trial on the merits, when a judicial review is actually about assessing whether the administrative action was lawful (see: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14-20, 428 NR 297, cited in *Gaudet v Canada (Attorney General)*, 2013 FCA 254 at para 4, [2013] FCJ No 1189 (QL)). It was not possible for the Appeal Division to determine whether the Applicant's appeal had a reasonable chance of success or if there was an arguable case on the basis of anticipated evidence that was not before it (see: *Villeneueve v Canada (Attorney General)*, 2013 FC 498 at para 46, 432 FTR 234).

B. *Did the Appeal Division act unfairly?*

[17] The Applicant submitted that the Appeal Division acted unfairly by deciding the application for leave to appeal without either waiting for the Applicant to produce the promised new medical evidence or contacting the Applicant to ask about such evidence.

[18] It is acknowledged that the Appeal Division owed the Applicant a general duty of fairness at common law (see: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653, 24 DLR (4th) 44); but, as the Supreme Court of Canada stated in *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 42, [2011] 2 SCR 504:

> [42] … The duty of fairness is not a "one-size-fits-all" doctrine. ….the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. …

[19] In this regard, the Court notes paragraph 41*(a)* of the *Social Security Tribunal Regulations*, SOR/2013-60 ["SSTR"]:

41. Before granting or refusing an application for leave to appeal, the Appeal Division may	41. Avant d'accorder ou de refuser la permission d'en appeler, la division d'appel peut :
(a) request further information from the applicant by way of written questions and answers;	*a)* demander des renseignements supplémentaires au demandeur en lui adressant des questions écrites auxquelles il répond par écrit;

[20] Although paragraph 41*(a)* permits the Appeal Division to request further information from an applicant before refusing or granting an application for leave to appeal, this power is discretionary and created no specific duty owed to the Applicant by the Appeal Division. The level of fairness required in the particular circumstances of this case did not require the Appeal Division to wait for further evidence or to inquire into its existence before deciding to refuse leave to appeal. Although the Appeal Division could potentially have taken the initiative and asked about the alleged new evidence before rendering its decision, I do not think any duty of fairness required it to do so.

[21] Furthermore, paragraph 66(1)*(b)* of the DESDA should also be noted:

66. (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if	66. (1) Le Tribunal peut annuler ou modifier toute décision qu'il a rendue relativement à une demande particulière :
…	[…]
(b) in any other case, a new	*b)* dans les autres cas, si des

material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.	faits nouveaux et essentiels qui, au moment de l'audience, ne pouvaient être connus malgré l'exercice d'une diligence raisonnable lui sont présentés.
(2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.	(2) La demande d'annulation ou de modification doit être présentée au plus tard un an après la date où l'appelant reçoit communication de la décision.

[22] There is no evidence that the Applicant applied to the Appeal Division to amend or rescind its decision to deny leave after his receipt of the Lychenko report, even though that report was received by the Applicant well within the limitation period set by section 66(2).

[23] In my view, paragraph 66(1)*(b)* of the DESDA afforded the Applicant with an avenue by which the Lychenko report (assuming it represented a new material fact) could have been brought to the Appeal Division's attention by the Applicant. For the Applicant now to argue that the Appeal Division somehow acted unfairly by deciding the application for leave without either waiting for the Applicant to produce the promised new medical evidence or contacting the Applicant to ask about such evidence is, essentially, to impose a duty on the Appeal Division that the Applicant could have fulfilled or satisfied himself.

C. *Standard of Review*

[24] The parties did not submit any case reviewing a decision of the SST. However, the recent decision of the Federal Court of Appeal in *Atkinson v Attorney General of Canada*, 2014 FCA

187, [2014] FCJ No 840 (QL) [*Atkinson*], deserves note. In *Atkinson*, the Federal Court of Appeal remarked as follows:

> [30] The creation of the SST represents a major overhaul of the appeal processes regarding claims for employment insurance and income security benefits. It was intended to provide more efficient, simplified and streamlined appeal processes for Canada Pension Plan, Old Age Security and Employment Insurance decisions by "offering a single point of contact for submitting an appeal" (online: Social Security Tribunal – Canada.ca http://www.canada.ca/en/sst/). The changes made are not limited to the composition and structure of the SST, but also to the rules of practice (see the *Social Security Tribunal Regulations*, SOR/2013-60).
>
> [31] In my view, the differences between the SST and the PAB's structure, membership and mandate do not diminish the need to apply a deferential standard in reviewing the SST's decisions. One of the SST's mandates is to interpret and apply the CPP and it will encounter this legislation regularly in the course of exercising its functions. Moreover, subsection 64(2) of the DESDA also restricts the type of questions of law or fact that the Tribunal may decide with respect to the CPP, presumably in order to better ensure that the SST is only addressing issues that fall within its expertise. These factors suggest that Parliament intended for the SST to be afforded deference by our Court, as it has greater expertise in interpreting and applying the CPP.

[25] With respect to the SST's predecessor, the PAB, Rennie J. recently summarized the applicable law with respect to a designated member's decision to grant or deny leave in *Grein v Canada (Minister of Human Resources and Skills Development)*, 2014 FC 650, [2014] FCJ No 678 (QL):

> [6] The review of a decision of a PAB Member to grant or deny leave to appeal involves two issues: whether the correct test was identified (arguable case); and, secondly, whether that test was adequately applied. The choice of the legal test is governed by the standard of review of correctness; its application by that of reasonableness.

> [7] The test for granting leave to appeal is whether the application raises an "arguable case." An arguable case is raised if significant new or additional evidence is adduced with the application or if the application raises an issue of law or of significant facts not appropriately considered by the RT in its decision: *Callihoo v Canada (Attorney General)* [2000] FCJ No 612 (TD) at paras 15 and 22*; Canada (Attorney General) v Zakaria*, 2011 FC 136 at paras 35-36 and 38.

D. *Did the Appeal Division err in its choice of the test for leave?*

[26] The Applicant argued that the SST Member conflated and confused the "arguable case" test for leave with that of the "no reasonable chance of success" test now codified in section 58(2) of the DESDA.

[27] The Respondent argued that the so-called "new test" in section 58(2) of the DESDA was narrower than the "old test" of arguable case, in that the only grounds of appeal after April 1, 2013 are those now explicitly stated in section 58(1) of the DESDA and such grounds do not contemplate a reasonable chance of success on appeal being demonstrated by adducing new evidence or identifying an error of law or an error of significant fact made by a review tribunal.

[28] Whether there is any real or substantive difference between what the Respondent labels as the "old test" with respect to leave decisions of the PAB, and the "new test" with respect to leave decisions of the Appeal Division of the SST, is an issue that should not be definitively decided in this case since the factual underpinnings giving rise to the Applicant's request for leave of the PAB decision predated April 1, 2013. That issue should be decided when the Court is squarely faced with a decision of the General Division of the SST in respect of which leave to appeal to the Appeal Division of the SST is sought.

[29] In any event, it is my view that the Appeal Division did not err in selecting the correct test for granting leave to appeal in the present case. Although the Appeal Division's decision speaks in terms of whether the grounds of appeal raised by the Applicant had "a reasonable chance of success" as stated in section 58(2) of the DESDA, and not in terms of whether the Applicant had an "arguable case" as established by prior case law, the SST Member (at para 8 of her decision) correctly identified and adopted this Court's decision in *Zakaria* as the basis for her analysis and assessment of the Applicant's application for leave. As de Montigny J. remarked in *Zakaria* at paragraph 37: "…the question of whether the respondent has an arguable case at law is akin to determining whether the respondent, legally, has a reasonable chance of success: *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41, at para 37; *Fancy v Canada (Minister of Social Development)*, 2010 FCA 63, at paras 2-3".

E. *Was the decision of the Appeal Division of the Social Security Tribunal unreasonable?*

[30] In my view, the decision of the Appeal Division was reasonable. This Court cannot intervene if the Appeal Division's decision is transparent, justifiable, intelligible, and defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). These criteria are met in the present case since the Appeal Division's reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

[31] At paragraph 9 of its decision, the Appeal Division dismissed many of the Applicant's alleged grounds of review, saying that they only challenged the weight assigned to the evidence. The possibility that the evidence before the RT might be reassessed in the Applicant's favour upon an appeal does not give rise to an arguable case or a reasonable chance of success sufficient to grant leave to appeal.

[32] With respect to "symptom magnification", the Applicant stated in his grounds of appeal that the RT misinterpreted this term to include an element of intentional deception. However, there is no indication that the RT misunderstood Dr. Tepperman's report in this regard. The RT found that the Applicant was not credible because his medication regime was conservative and he did not continue physiotherapy or explore other ways to manage his alleged pain; and where the RT talked about the signs of symptom magnification, it was merely observing that they were consistent with that finding. It was reasonable for the Appeal Division to decide that this ground of appeal had no reasonable chance of success.

[33] The Applicant alleged that the RT misapplied the *Villani* test. The RT had concluded at paragraph 54 of its decision that the Applicant "retained the capacity to perform some alternate more sedentary occupation". This conclusion, the Applicant says, was contrary to the guidance in *Villani* at paragraphs 47-48, which condemned other decisions for using vague categories of labour such as "semi-sedentary work" to ground a finding that a disability was not severe. However, the RT was clearly cognizant of the *Villani* factors and it was reasonable for the Appeal Division to conclude that this ground of appeal had no reasonable chance of success. Given the onus on the Applicant to prove that his disability was severe, and his lack of credibility

as assessed by the RT, this ground of appeal would have no reasonable chance of success unless the Applicant could disturb the RT's factual findings, something which the Appeal Division reasonably found should not be done.

[34] The Applicant further argued that the RT inappropriately required the Applicant to have sought work without evaluating whether it was reasonable to expect him to do so. At paragraph 45 of its decision, the RT stated that "where there is evidence of work capacity, [the appellant] must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of the health condition". I do not think it was unreasonable for the Appeal Division to dismiss this ground of appeal raised by the Applicant since the RT's language was borrowed almost verbatim from the Federal Court of Appeal's decision in *Inclima v Canada (Attorney General)*, 2003 FCA 117, [2003] FCJ No 378 (QL), where at paragraph 3 the Court of Appeal stated:

> [A]n applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

Given the RT's finding that the Applicant did have some capacity to work, it is understandable and reasonable that the Appeal Division found that this ground of appeal had no reasonable chance of success.

[35] Finally, the Appeal Division's conclusion at paragraph 14 of its decision that "the mere promise of new evidence is not a ground of appeal that has a reasonable chance of success" is reasonable for the reasons noted above concerning the Lychenko report.

[36] In the result, therefore, I find the application for judicial review should be dismissed and, since, the Respondent has not asked for costs, none will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

THIS COURT'S FURTHER JUDGMENT is that the style of cause is hereby amended to replace the name of the Respondent Minister of Human Resources and Skills Development with the Attorney General of Canada.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1093-13
STYLE OF CAUSE:	EDDIE BELLEFEUILLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 18, 2014
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	OCTOBER 9, 2014

APPEARANCES:

Robert W. Becker	FOR THE APPLICANT
Vanessa Luna	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowland, Boriss Barristers and Solicitors Peterborough, ON	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Gatineau, QC	FOR THE RESPONDENT