Citation: *C. M. v. Minister of Employment and Social Development,* 2015 SSTAD 448

Appeal No. AD-15-15

BETWEEN:

C. M.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet Lew

DATE OF DECISION: March 31, 2015

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division dated October 3, 2014. The Applicant has been in receipt of *Canada Pension Plan* disability benefits, effective March 2008, but appealed to the General Division for greater retroactivity of payments. The General Division determined that the Applicant was not "continuously incapacitated … for the minimum period of time, one year prior to the date he filed his application for [*Canada Pension Plan* disability benefits]", and as such, was ineligible for greater retroactivity of CPP disability benefits.

[2] The Applicant submits that the General Division erred in its assessment as to whether he was continuously incapacitated between June 2007 and June 2008. The Applicant alleges that the General Division acted with malice, in assessing his claim without the benefit of additional expert opinion which he claims would prove that he was incapacitated throughout the material time. The Applicant further submits that the General Division thus violated his rights under the *Canadian Charter of Rights and Freedoms*.

[3] To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

ISSUES

[4] The issues before me are as follows:

(a) As the Applicant alleges that his rights under the *Canadian Charter of Rights and Freedoms* have been breached, has he complied with section 20 of the *Social Security Tribunal Regulations* and section 57 of the *Federal Courts Act*, which require that he serve each of the Attorneys General of Canada with a notice of a constitutional question?

(b) If there has been proper service of the notice of a constitutional question, were the Applicant's rights under the *Charter* infringed? And if so, can the infringement be saved under section 1 of the *Charter*?

(c) If there has been an infringement which cannot be saved under section 1 of the *Charter*, what is the appropriate remedy or remedies?

(d) Notwithstanding any *Charter* considerations, are there any grounds of appeal which have a reasonable chance of success?

SUBMISSIONS

[5] The Applicant seeks leave on the following grounds, that:

(a) the General Division breached his equality rights by assessing his appeal without providing him with an opportunity to provide expert opinion. He alleges that the expert opinion would have shown that he was continuously incapacitated during the material time and would have also said that there was no medical information at the time to prove the severity of his spinal injuries, as "they were only discovered in late 2012". The Applicant states that there was a "lack of medical care within those specified dates".

(b) the General Division violated his equality rights under the *Canadian Charter of Rights and Freedoms,* in that it acted maliciously.

[6] The Respondent has not filed any submissions.

COMMUNICATIONS WITH THE APPLICANT REGARDING THE GROUNDS OF APPEAL

[7] Although the Applicant has not specifically identified any sections of the *Charter* which may have been breached, I presume that he refers to subsection 15(1) of the *Charter*, that he has the right to the equal protection and equal benefit of the law without discrimination based on mental or physical disability.

[8] On January 16, 2015, the Social Security Tribunal (the "Tribunal") wrote to the Applicant, seeking clarification of his Leave Application. Responses to the following questions were posed:

1. If the Applicant intends on advancing an appeal under the *Canadian Charter of Rights and Freedoms,* has the Applicant complied with the *Federal Courts Act,* which requires that a Notice of Constitutional Question be served on each of the Attorneys General in Canada? If so, the Applicant should provide proof of service to the Social Security Tribunal.

2. If service of a Notice of Constitutional Question on each of the Attorneys General in Canada has not been fully effected, does the Applicant intend on pursuing a *Charter* argument? If so, what steps, if any, has he taken to effect service and when does he expect to have served each of the Attorneys General in Canada?

3. What section(s) of the *Canadian Charter of Rights and Freedoms* does the Applicant say was or were violated?

4. The Applicant states that he had intended on obtaining and relying upon a "medical expert report" which would support a finding that he was incapacitated between June 2007 and June 2008, but that the General Division denied him the opportunity to obtain such a report.

    a. What steps, if any, did the Applicant undertake to obtain any medical expert report after June 5, 2009, when he filed his application for disability benefits under the *Canada Pension Plan*?

    b. From whom did the Applicant intend to obtain a medical expert report?

    c. Did the Applicant undertake any efforts to obtain any other medical documentation from this expert, such as his or her clinical records? If so, when were these efforts undertaken?

    d. Was there any other medical documentation from this expert in the evidence before the General Division?

5. If the Applicant expects that the proposed medical expert would say that there was no medical information between 2006 and 2007 that would show the severity of his spinal injuries, how does he reconcile this with the requirement that he was continuously incapacitated for that timeframe?

[9] The Tribunal requested that any responses be made in writing, by February 23, 2015. The Applicant responded by e-mail on January 29, 2015, advising that due to his continued disability, he would be unable to participate any further in these proceedings, and that his appeal would "be turned over to his lawyers". He suggested that expert reports would be forthcoming.

[10] The Tribunal responded to the Applicant by letter dated February 12, 2015, requesting that he have his lawyer contact the Tribunal and provide it with his or her contact information, along with a signed Authorization to Disclose. The Tribunal's letter also reminded the Applicant that it had previously requested responses to the questions set out in its letter dated January 16, 2015, to be provided by no later than February 23, 2015. The Tribunal also advised the Applicant or his counsel that it would "consider any reasonable requests". (The Tribunal's letter omitted to include the balance of text that the Tribunal would consider "any reasonable requests for an extension of time to respond".)

[11] To date, the Tribunal has not received any responses to its questions of January 16, 2015, nor has it been contacted by any counsel whom the Applicant may have retained to represent him. There have been no requests to extend the time for filing any additional submissions.

ANALYSIS

[12] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, some arguable ground upon which the proposed appeal might succeed is required for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an application has a reasonable chance of success.

[13] Subsection 58(1) of the *Department of Employment and Social Development Act* ("DESDA") states that the only grounds of appeal are the following:

> (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.

[14] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[15] The Applicant has at least 10 days before the date set for the hearing of any appeal to provide proof of service that he has complied with the *Federal Courts Act*, and in particular, that he has served each of the Attorneys General of Canada with the notice of a constitutional question. The Applicant does not have to satisfy me that service has been effected for the purposes of this leave application.

[16] At the same time, the Applicant does not have to satisfy me, for the purposes of this leave application, that any *Charter* rights were indeed breached and that they cannot be saved under section 1 of the *Charter*. However, if the Applicant alleges that his rights under the *Charter* have been breached, then he should identify what rights were breached and how the General Division breached them. Notwithstanding the fact that the Applicant alleges a breach of his *Charter* rights, an applicant still needs to satisfy me that the appeal has a reasonable chance of success. It is unsufficient to say that the General Division breached his *Charter* rights by virtue of the fact that it proceeded with assessing his appeal.

[17] This leaves me to determine whether there are any other grounds upon which the proposed appeal might succeed. The Applicant has not incorporated the language set out in subsection 58(1) of the DESDA in his submissions, but that is not fatal to his Leave Application. The Applicant suggests that the General Division moved his claim along hastily, without providing him with an opportunity to obtain an expert's report to address the incapacity issue, in an effort to position the appeal for failure. Although he has identified this as a breach of his *Charter* rights, and hence, an error of law, it could have been characterized as a potential failure by the General Division to observe a principle of natural justice. The Applicant also alleges that the General Division acted maliciously in coming to its decision. This too could qualify as a failure to observe a principle of natural justice.

[18] Did the General Division proceed with assessing the appeal without providing the Applicant with an adequate opportunity to secure supporting medical documentation?

[19] It appears that the Department of Human Resources and Skills Development first notified the Applicant of the incapacity provisions in December 2010 and then again in January 2011 (pages GT1-11 to GT1-13 and GT1-731 of the hearing file). In his Notice of Appeal, dated February 25, 2011, the Applicant advised that he would be sending the "same information" (page GT1-667). The Office of the Commissioner of Review Tribunals (the "OCRT") also wrote to the Applicant in May 2011 (page GT1-272) and requested information regarding his incapacity claim. The OCRT provided the Applicant with a copy of *Attorney General (Canada) v. Danielson*, 2008 FCA 78, a decision of the Federal Court of Appeal, which set out some of the criteria used to assess incapacity.

[20] However, it appears that the Applicant may have been alive to the incapacity issue before December 2010. He obtained a Declaration of Incapacity – Physician's Report dated June 2, 2009 from his family physician (page GT1-29). Dr. Ng declared the Applicant to be incapacitated as of March 2006.

[21] The General Division referred to the Declaration, at paragraph 24 of its decision, and considered it at paragraph 36. Ultimately the General Division assigned little weight to the Declaration, as Dr. Ng was not the Applicant's attending family physician until after his alleged incapacity arose. Rather, the General Division noted that the Applicant was being seen by Dr. Schick at the time of the alleged incapacity. The General Division also noted that Dr. Schick found the Applicant to be mentally oriented, which it determined contradicted the Applicant's claim of incapacity.

[22] If the Applicant had filed a Notice of Readiness indicating that he was ready to proceed with hearing of the appeal, this would undermine his submissions that the General Division proceeded before he had an opportunity to obtain supporting documentation. If, however, the Applicant notified the Tribunal or the General Division that he was unable to proceed as he continued to await an expert's opinion, notwithstanding the fact that he had been notified of the issue as early as December 2010, that would be another matter

altogether. Under those circumstances, the General Division would be faced with a number of questions, including but not limited to the following:

(a) from whom the Applicant expected to obtain a medical expert opinion;

(b) when the Applicant requested his expert provide an opinion;

(c) what efforts or steps did the Applicant undertake to obtain any medical expert's opinion in a timely manner;

(d) was there any other medical documentation or opinion form this expert in the evidence before the General Division?

(e) whether the Applicant undertook any efforts to obtain any other medical documentation from this expert, such as his or her clinical records? If so, when were these efforts undertaken?

(f) when he expected the expert to provide the opinion;

(g) what opinion was the expert expected to provide, and

(h) whether he sought an adjournment of the hearing of the appeal before the General Division. (It should be noted that the appeal proceeded on the record.)

[23] The Applicant did not file a Notice of Readiness. The Applicant submitted an e-mail dated August 25, 2014, requesting an extension to file documents. The subject line of his e-mail reads, "To extend filing period to end of August 2014". The Applicant advised that "more medical confirmation will be forthcoming in the next 12 months with Neurologist Dr. Gordon Mackie". (The Applicant had been seen by Dr. Mackie in November 2005 [pages GT1-127 to GT1-129] and was scheduled to see him again on October 9, 2014. The Applicant also wrote, "I am asking for this extension to file more precise medical findings. These new documents are now ready, and can be faxed by the end of August 2014".

[24] The Tribunal granted the Applicant's request for an extension to August 31, 2014. The Tribunal also advised the Applicant as follows:

> Please note that the issue we are dealing with is the Appellant's incapacity between February 2006 and 2008. All new documents regarding current health are irrelevant to this decision as the Appellant is already in receipt of a CPP disability pension.

[25] The Tribunal did not regard the Applicant's statement that more medical information would be forthcoming as a request for an extension of time beyond August 31, 2014.

[26] The Applicant submitted an e-mail dated August 31, 2014 detailing his medical history and treatment. The e-mail attached a trip summary prepared by Ms. Robin Clarke, covering the period from February 11, 2007 to February 18, 2007.

[27] On September 11, 2014, the Respondent filed an Addendum to its earlier submissions. This was copied to the Applicant. The General Division issued its decision on October 3, 2014.

[28] There is no evidence that the Applicant sought an extension beyond August 31, 2014, or an adjournment of the hearing of the appeal. Indeed, he wrote in his e-mail of August 25, 2014, that new documents were "now ready".

[29] The only medical evidence which the Applicant suggested he would be obtaining was from Dr. Mackie, whom he initially saw in November 2005 and was scheduled to see again on October 9, 2014. It is not apparent how Dr. Mackie would have been able to provide an opinion on the Applicant's medical condition for 2007 to 2008, as the Applicant did not see him during this time. There is no evidence also as to what attempts, if any, the Applicant had undertaken to see Dr. Mackie after December 2010, or to obtain Dr. Mackie's complete medical file. And, assuming that the appointment with Dr. Mackie scheduled for October 9, 2014 proceeded, the Applicant has yet to provide even a consultation report following this visit. While I would not have considered any new records or reports from Dr. Mackie for re-assessment purposes, I might have found it germane to the issue of whether there was a failure by the General Division to observe a principle of natural justice.

[30] In summary, the Applicant sought an extension of time to file documents. The Tribunal granted the extension. The Applicant did not seek a further extension of time. Even had the Applicant sought a further extension, it was open to the General Division to exercise its discretion, after having considered the balance of interests and any prejudice to the Applicant if it were to proceed. There was no indication to the General Division that any outstanding medical evidence would have been relevant and material to the issues before it. Against this backdrop, the Applicant has not satisfied me that there is a reasonable chance of success on the ground that the General Division may have failed to observe a principle of natural justice.

NEW INFORMATION

[31] There may be other remedies available to the Applicant. If the Applicant is able to obtain any new medical records or reports that speak to the incapacity issue for the timeframe from June 2007 and June 2008, he could consider filing an application to rescind or amend the decision of the General Division.

[32] However, the medical evidence was not the only basis upon which the General Division decided that the Applicant was not incapacitated. The General Division also looked to the activities of the Applicant. These would need to be reconciled.

[33] The Applicant should note that if he chooses to proceed with an application to rescind or amend the decision of the General Division, he would have to comply with the requirements set out in sections 45 and 46 of the Regulations. He would also need to file the application for rescission or amendment with the General Division, as it is that Division's decision which he seeks to rescind or amend.

[34] There are strict deadlines and requirements that must be met to succeed in an application for rescinding or amending a decision. Subsection 66(2) of the DESDA requires an applicant to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[35] The Leave Application is refused.

Janet Lew
Member, Appeal Division