Citation: *P. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1428

Appeal No: AD-15-987

BETWEEN:

P. K.

Applicant

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: December 14, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 18, 2015. The General Division conducted a teleconference hearing on May 13, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that his disability was not "severe" at his minimum qualifying period of December 31, 2014. The Applicant filed an application requesting leave to appeal on September 10, 2015. The Applicant alleges that the General Division made a number of errors. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[3] The Applicant bases his appeal on the grounds that the General Division failed to observe a principle of natural justice, as follows:

(a) he worked and made contributions to the Canada Pension Plan for more than 35 years until he was diagnosed with severe and painful carpal tunnel syndrome and degenerative nerve damage in his arms and hands, and resultant traumatic stress and depression;

(b) his disability is genuine and medically documented. Surgery on his left arm was unsuccessful. He has more surgeries pending in the near future on his right arm, which he submits will cause further restrictions. He offered to provide additional medical information as it becomes available. He questions why the General Division failed to consider "this" (which I presume refers to the future surgeries);

(c) he suffers a diminished quality of life, and his disabilities impair his ability to regularly pursue any substantially gainful occupation; and

(d) there was no representative acting for the Respondent during the teleconference. He submits that this suggests that the decision was already pre-determined.

[4] On October 28, 2015, I invited the Applicant to provide additional submissions and to identify other grounds of appeal, such as any errors of law or any erroneous findings of fact which the General Division might have made. I requested the Applicant provide any reply within 31 days. Not having received any response, I will consider the leave application on the basis of the application requesting leave to appeal filed on September 10, 2015.

[5] The Respondent has not filed any written submissions.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) enumerates the only grounds of appeal as follows:

(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.

[7] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[8] I note that the Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(a) Contributions to the Canada Pension Plan

[9] The Applicant submits that he has over 35 years of contributions to the Canada Pension Plan. The Applicant seems to be suggesting that, given the length and amount of his contributions to the Canada Pension Plan, there is some entitlement as of right to a disability pension.

[10] The Federal Court of Appeal in *Miceli-Riggins v. Attorney General of Canada*, 2013 FCA 158 examined the objectives of the *Canada Pension Plan.* The Court of Appeal stated:

> [69] … The *Plan* is not supposed to meet everyone's needs. Instead, it is a contributory plan that provides partial earnings- replacement in certain technically-defined circumstances. It is designed to be supplemented by private pension plans, private savings, or both. See *Granovsky v. Canada (Minister of Employment and Immigration*), 2000 SCC 28 (CanLII), 2000 SCC 28 at paragraph 9, 2000 SCC 28 (CanLII), [2000] 1 S.C.R. 703.
>
> [70] Indeed, it cannot even be said that the *Plan* is intended to bestow benefits upon demographic groups of one sort or another. Instead, it is best regarded as a contributory-based compulsory insurance and pension scheme designed to provide some assistance – far from complete assistance – to those who satisfy the technical qualification criteria.
>
> [71] Like an insurance scheme, **benefits are payable on the basis of highly technical qualification criteria**.
>
> . . .
>
> [74] In the words of the Supreme Court,
>
> > The *Plan* was designed to provide social insurance for Canadians who experience a loss of earnings due to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which **Parliament has defined both the benefits and the terms of**

> **entitlement**, including the level and duration of an applicant's financial contribution.
>
> (*Granovsky*, *supra* at paragraph 9.)

(My emphasis)

[11] The *Canada Pension Plan* operates like an insurance scheme, where entitlement is dependent on contributions. A disability pension is not available to everyone who suffers from a disability. It is not enough to have made contributions to the Canada Pension Plan. It is clear that an applicant must meet other requirements in order to qualify for a disability pension under the *Canada Pension Plan*. The fact of contributions alone is insufficient. I am not satisfied that the appeal has a reasonable chance of success on the basis that the Applicant has made significant contributions to the Canada Pension Plan.

(b) Severity and impact of his disabilities

[12] Under paragraph 42((2)(b) of the *Canada Pension Plan,* the issue is not whether an applicant has health problems, but whether he has a disability that is both severe and prolonged so as to render an applicant disabled within the meaning of the *Canada Pension Plan.* The applicant submits that he meets the definition of disability as he has been diagnosed with severe and painful carpal tunnel syndrome and degenerative nerve damage in his arms and hands, and has resultant traumatic stress and depression. He notes that surgery on his left arm was unsuccessful and that he has future surgeries pending on his right arm in future, which he anticipates will cause further restrictions. The Applicant notes that he suffers a diminished quality of life. He submits that his disabilities impair his ability to regularly pursue any substantially gainful occupation.

[13] The Applicant submits that the General Division failed to consider the fact that he will have future surgeries on his right arm, and the impact it will have on him. This evidence is set out in paragraph 14 of the decision of the General Division. In fact, the General Division considered this evidence at paragraph 23.

[14] The Applicant's submissions essentially call for a reassessment and re-weighing of the evidence, which is beyond the scope of a leave application. As the Federal Court held

in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[15] The Applicant indicates that additional medical information will be forthcoming, but they would not be relevant to a leave application, unless they relate to any of the grounds of appeal enumerated under subsection 58(1) of the DESDA.

[16] If the Applicant intends to provide additional medical records in an effort to rescind or amend the decision of the General Division, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision, which in this case is the General Division. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires an application 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 facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so, which in this case is the General Division.

(c) Pre-determined outcome

[17] The Applicant submits that as there was no representative for the Respondent during the teleconference, the outcome was pre-determined. This is a very serious allegation that the outcome was pre-determined, but the allegation is based purely on speculation. The Applicant has not provided anything to substantiate these allegations. Indeed, the General Member considered and analyzed the evidence, including the Applicant's testimony. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) Standard of proof

[18] Subsection 58(1) of the DESDA enables the Appeal Division to determine if there is an error of law, whether or not the error appears on the face of the record.

[19] In addressing the medical evidence before it, the General Division wrote that the evidence "leaves some doubt as to the severity of [the Applicant's] symptoms as of the [minimum qualifying period]". This suggests that the General Division might have erred and applied a stricter standard of proof when it indicated that it was left with "some doubt" as to the severity of the Applicant's symptoms. Yet, at the same time, the General Division also wrote at paragraph 21 that the Applicant must prove "on a balance of probabilities" that he had a severe and prolonged disability and, at paragraph 27:

> [27] Having considered the totality of the evidence and the cumulative effect of the [Applicant's] medical conditions, the Tribunal **is not satisfied on the balance of probabilities** that he suffers from a severe disability.
>
> (My emphasis)

[20] Had the General Division not set out the legal standard of proof which the Applicant was required to meet and also referred to this standard when it summarized its findings, I might have been satisfied that the appeal has a reasonable chance of success. It seems that the General Division was alive to the standard of proof which the Applicant was required to meet, and that its expression "some doubt" was an unfortunate slip. I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[21] Given the considerations above, the application for leave to appeal is denied.

Janet Lew
Member, Appeal Division