Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. W. v. Minister of Employment and Social Development*, 2016 SSTADIS 84

Tribunal File Number: AD-15-904

BETWEEN:

J. W.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 24, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 29, 2015. The hearing was held by teleconference. The General Division 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 August 13, 2015. The Applicant raises a number of grounds of appeal. To succeed on this leave 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] In the Application Requesting Leave to Appeal, the Applicant submitted that 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. In particular, the General Division placed undue reliance and weight on the medical report of a physician who based his opinion on records produced in 2005, rather than on a personal examination of the Applicant.

[4] The Applicant submitted that his overall condition has deteriorated since 2011, to the point where he now suffers from high blood pressure, hypertension, numbness in the right foot, leg and back pain. The Applicant also noted that he was recently diagnosed with diabetes, which had not been diagnosed in 2011, and that he has failing eyesight.

[5] The Applicant submitted that "in light of [his] extensive work experience and effort to improve his health" he was entitled to present additional medical evidence in support of his case. The Applicant requested that the leave application be held in

abeyance to enable him to attend various medical appointments and obtain medical opinions.

[6] Finally, the Applicant requested a reconsideration of his appeal, on the strength of "cumulative" health issues.

[7] On August 19, 2015, the Social Security Tribunal wrote to the Applicant's counsel at the time, as follows:

> On August 13, 2015, you filed an Application Requesting Leave to Appeal to the Appeal Division. The Applicant requested time in which to attend various medical appointments and to obtain medical opinions.
>
> Any new records or reports should fall into or relate to one of the grounds of appeal set out under subsection 58(1) of the *Department of Employment and Social Development Act*, namely 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.
>
> If you intend to file and rely upon any additional reports, they should relate to the grounds of appeal under subsection 58(1) of the *Department of Employment and Social Act*, otherwise they will not be considered for the purposes of a leave to appeal application with the Appeal Division.
>
> In other words, you should address how each of the reports support any claim that the General Division either failed to observe a principle of natural justice, or that it made an error of law or an erroneous finding of fact?

[8] The Tribunal requested any additional information that addressed the grounds set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), by no later than October 16, 2015, or the Applicant could otherwise request an extension of time, if required.

[9] On September 2, 2015, counsel for the Applicant filed a letter with the Social Security Tribunal, advising that the deadline of October 16, 2015 was insufficient to allow for the return of various medical test results. Counsel suggested an extension to the first week of December 2015. Counsel also responded to the question as to how the proposed new medical records addressed any of the grounds of appeal under subsection 58(1) of the DESDA. He explained as follows:

> These new test results are necessary to show that at the time of the Tribunal decision in 2011, the Honourable Tribunal mis-construed the statements of Dr. Duncan as if the doctor was providing medical diagnoses at that time. The application for leave therefore relates to the third ground under s. 58(1) of the *Department of Employment and Social Development Act*, namely:
>
> > (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.
>
> Dr. Duncan was only — and could only — speak as a surgeon whose role was performing surgery. He did not order a new test in 2011, even though he was relying on medical results that were almost 6 years old at the time. The only reasonable interpretation of Dr. Duncan's statement was that it was a statement of a surgeon who is asked to prepare for surgery, not a diagnosis.
>
> In that case, it is necessary to obtain these test results to show Mr. W.'s medical conditions.

[10] On September 3, 2015, on the basis of this further request, the Appeal Division granted a further extension to file additional information by December 7, 2015.

[11] On December 18, 2015, the Social Security Tribunal wrote to counsel for the Applicant as follows:

> Further to your request of August 25, 2015 for an extension of time to the first week of December 2015, and our letter of September 3, 2015, granting the request to December 7, 2015, please advise as to the current status of this matter.
>
> If a further extension is being sought, please provide supporting documentation to show what steps, if any, the Applicant has undertaken to obtain any records or secure further investigations.

> In light of *Tracey v. Canada (Attorney General)*, 2015 FC 1300 at para. 29, where Roussel J. held that the introduction of new evidence is no longer an independent ground of appeal, and that there is therefore no obligation to consider any new evidence in determining whether an application for leave to appeal has a reasonable chance of success, how do any of the proposed new records or reports address any of the grounds of appeal?

[12] On December 28, 2015, counsel for the Applicant asked to be removed from the record, as he would no longer be representing the Applicant. Counsel confirmed the Applicant's last-known address and contact information.

[13] On January 5, 2016, the Social Security Tribunal wrote to the Applicant, enquiring if he had any final submissions or additional records which addressed any of the grounds of appeal under subsection 58(1) of the DESDA.

[14] On January 13, 2016, the Applicant filed medical records, including various diagnostic examinations, ED triage report, consultation report of Dr. A. Cheng, Discharge Notification and a diabetes report. The Applicant indicated that an updated report of Dr. Cheng would be forthcoming. The Applicant did not indicate how these additional records addressed any of the grounds of appeal under subsection 58(1) of the DESDA.

[15] The Social Security Tribunal provided a copy of the leave materials to the Respondent, but the Respondent did not file any written submissions.

ANALYSIS

[16] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to 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.

[17] 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.

[18] Much of the Applicant's submissions before me consist of argument that properly ought to have been brought before the General Division, as they address the merits of the claim for a disability pension, rather than any of the grounds of appeal under subsection 58(1) of the DESDA. Neither the leave nor the appeal affords an opportunity to review and reassess the evidence. I am not satisfied that the appeal has a reasonable chance of success based on any submissions that do not address any of the grounds of appeal under subsection 58(1) of the DESDA and solely call for a reassessment of the evidence.

(a) Alleged erroneous finding of fact – undue reliance on report

[19] The Applicant submits that the General Division based its decision on an erroneous finding of fact, as it placed undue reliance or weight on the medical report of a physician who did not conduct a physical examination of the Applicant and who based his opinion on records prepared in 2005. This does not speak to the type of erroneous finding of fact contemplated by paragraph 58(1)(c) of the DESDA. That paragraph requires that the erroneous finding of fact to have been made in perverse or capricious manner, or without regard for the material before the General Division. The Applicant alleges neither.

[20] If the Applicant is suggesting that the General Division erred in its assignment of weight, this does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. I note, in any event, that the Federal Court of Appeal refused to interfere with the decision-maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General),* 2012 FCA 82. I would defer to the General Division in this regard as well. As

the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. Unlike its predecessor the Pension Appeals Board, the Appeal Division does not hear appeals on a *de novo* basis. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Deterioration since 2011

[21] The Applicant submits that his condition has deteriorated since 2011. That may be so, but this does not speak to an error or failing on the part of the General Division that falls within the enumerated grounds of appeal under subsection 58(1) of the DESDA.

(c) Reconsideration based on "Cumulative" health issues

[22] Essentially the Applicant is seeking a reassessment. This is beyond the scope of a leave application. I am not satisfied that the appeal has a reasonable chance of success on this basis.

(d) New Facts

[23] The Applicant has provided additional medical opinions and records and proposes to file an updated report of Dr. Cheng. In a leave application, any new facts should relate to the grounds of appeal. The Applicant has not indicated how the additional facts and records might fall into or address any of the enumerated grounds of appeal. If he is requesting that we consider these additional facts, re-weigh the evidence and re-assess the claim in the Applicant's favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan.*

[24] The new facts as presented by the Applicant do not raise nor relate to any grounds of appeal and I am therefore unable to consider them for the purposes of a leave application.

CONCLUSION

[25] For the reasons set out above, the Application for leave to appeal is refused.

Janet Lew
Member, Appeal Division