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

Citation: ***C. N. v. Minister of Employment and Social Development*****, 2016 SSTADIS 13**

Date: ~~**January 07, 2016**~~

February 26, 2016

File number: AD-15-854

APPEAL DIVISION

Between:

C. N.

Appellant

and

Minister of Employment and Social Development

(Formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: **Hazelyn Ross, Member, Appeal Division**

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] On June 16, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision summarily dismissing the Appellant's appeal. The Appellant has filed an appeal from the decision.

Preliminary Issue

[3] The Appellant's original Notice of Appeal was deficient. It contained no reference to any ground of appeal and thus did not conform to the requirements for making an appeal set out in section 35 of the *Social Security Tribunal Regulations.* In response to the Tribunal's notice that his appeal was incomplete the Appellant submitted a second application. (AD1A) This, too, was deficient in that the Appellant once again failed to cite the ground or grounds of appeal.

[4] In the second application, (AD1A), the Appellant stated that he was appealing the General Division decision because he had good cause to do so; his back issues were long-standing; and that he had made repeated reports to the Respondent about his back condition. In a later submission (AD3) the Appellant stated that the doctors he had consulted were of the opinion that little could be done for his back and that his family doctor, Dr. Pop, had confirmed in a report that he was incapable regularly of pursuing any substantially gainful employment. The Appellant also complained that in its decision the General Division placed too much focus on the fact that he had worked. He submitted that he has explained why he worked. (AD1)

[5] The deficient appeal documents raised the question of whether the Tribunal should reject the appeal as filed, and seek further and better documents from the Appellant. The Appeal Division decided against this course for two reasons. First, the Appellant is self-represented and the Appeal Division was not satisfied that a further delay would be in his best interests. Second, the Appeal Division found that when read together, the three documents (AD1, AD1A and AD3) contained sufficient information to allow the Member to discern the ground of the appeal.

[6]

[7] The deficient appeal documents raised the question of whether the Tribunal should reject the appeal as filed, and seek further and better documents from the Appellant. The Appeal Division decided against this course for two reasons. First, the Appellant is self-represented and

[8] The Appeal Division was not satisfied that a further delay would be in his best interests. Second, the Appeal Division found that when read together, the three documents (AD1, AD1A and AD3) contained sufficient information to allow the Member to discern the ground of the appeal.

GROUNDS OF THE APPEAL

[9] Based on the arguments raised by the Appellant, the Appeal Division concluded that the appeal is based on subsection 58(1)(c) of the *Department of Employment and Social Development, (DESD), Act*, namely that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[10] The Appeal Division must decide whether in summarily dismissing the Appellant's appeal the General Division breached the provisions of subsection 58(1) of the DESD Act?

STANDARD OF REVIEW

[11] The Respondent submitted that the Appeal Division should review the General Division decision on a standard of reasonableness as the issues on appeal involve a question of mixed fact and law. The Appellant made no submission on the point. However, recent decisions of the Federal Court of Appeal and the Federal Court have taken the position that in deciding an appeal from a decision of the General Division it likely was not necessary for the Appeal Division to engage in a standard of review analysis. The Federal Court of Appeal first took this position in its decision in *Canada (Attorney General) v. Jean; Canada (Attorney General) v. Paradis*, 2015 CAF 242 (CanLII), 2015 FCA 242. Instead, the Appeal Division ought to

~~confine its inquiry to an assessment of whether or not the General Division breached any of the provisions of section 58(1) of the DESD Act.~~

~~[12] In *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII), 2015 FCA 242, the Federal Court of Appeal drew a distinction between appeals that had been heard pursuant to the transitional provisions of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, ss. 266-267, and appeals from decisions rendered by the~~ General Division of the Tribunal. The Federal Court of Appeal took the position that when the Appeal Division hears appeals under section 58 (1) of the DESD Act, the governing statute of the Tribunal, it needs must confine itself to the mandate provided by sections 55 to 69 of the Act:

[13] [19]… Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act. In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(b) of the *Act).* There is no need to add to this wording the case law that has developed on judicial review.

[14] The Federal Court of Appeal returned to the question in *Maunder v. Canada (Attorney General),* 2015 FCA 274, affirming the position it set out in *Jean /Paradis.* In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court addressed the question in the context of applications for leave to appeal from decisions of the General Division. As with the prior Federal Court of Appeal decisions, the Federal Court observed that the scope of the Appeal Division's jurisdiction when determining whether to grant leave to appeal has now been codified and set out in the DESD Act. Roussel, J. wrote:

[15] "in contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success."

[16] Thus, applying the *dicta* in *Jean, Maunder and Tracey,* the Appeal Division must determine only whether or not the General Division decision to "summarily dismiss" the Appellant's appeal demonstrates an error that would bring it within the grounds of appeal set out in section 58(1) of the DESD Act. The Appeal Division need not decide whether the decision was reasonable. For the reasons set out below, the Appeal Division finds that no error arises from the General Division decision to summarily dismiss the appeal.

The Test on a Decision to Dismiss an Appeal Summarily

[17] The test on a summary dismissal of an appeal is that the "appeal has no reasonable chance of success." The language of the applicable provision is in mandatory terms: the General Division must dismiss, summarily, an appeal if it is satisfied that it (the appeal) has no reasonable chance of success." Thus, once satisfied that an appeal has no reasonable chance of success, the General Division has no discretion to act otherwise than to dismiss the appeal.

[18] In Canada *(Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41,* the Federal Court of Appeal equated a reasonable chance of success to an arguable case. More recently, Members of the Appeal Division have articulated the test for "summary dismissal" of an appeal as "whether it is plain and obvious on the face of the record that an appeal is bound to fail." *M.C. v. Canada Employment Commission,* 2015 SSTAD 237.

SUBMISSIONS

[19] As required by section 36 of the *Tribunal Regulations* the Tribunal allowed the parties 45 days from the date the Appellant filed the appeal to make submissions. In his submissions, the Appellant took the position that on the evidence that was before it, the General Division ought to have found that he was entitled to a CPP disability pension. The Respondent submitted that the General Division had not erred and that its decision was defensible. Moreover, the General Division had properly identified the law on summary dismissal and on the facts and evidence that was before the General Division, the decision to summarily dismiss the appeal was appropriate.

ANALYSIS

[20] For the following reasons the Appeal Division dismisses the appeal.

[21] The Appellant argued that the General Division erred in two main ways. One, by placing too much reliance on the fact that he had worked; and two, by disregarding relevant medical evidence. However, on reading the submissions; and examining the Tribunal record as well as the General Division decision the Appeal Division finds that there is no basis on which to disturb the General Division decision.

Did the General Division place undue reliance on the fact that the Appellant worked post-MQP?

[22] The Appeal Division finds that the General Division did not place undue reliance on the fact that the Appellant returned to work after the end of his MQP. It is not disputed that the Appellant was employed from November 2005 to July 2008 and that this employment ended when he was laid off. It is also not disputed that the Appellant earned a one-year diploma in 2001, the year following the end of his MQP. These facts were pertinent to the determination of whether the Appellant had a severe and prolonged disability on or before the MQP in two important ways.

[23] Firstly, that the Appellant was able to participate in a diploma programme as well as to work for almost three years after his MQP ended, were important considerations. In the opinion of the General Division this was evidence that the Appellant was able to participate in the work force despite his medical condition. That the Appellant returned to work out of financial necessity was irrelevant. The fact that, despite his medical condition, he was able to do so was not. In addition to the hurdle of meeting the MQP requirement, this was an additional bar to a finding that, on or before his MQP, the Appellant had a severe disability as defined by the CPP. In the view of the Appeal Division, the General Division rightly concluded that this was evidence of retained work capacity. Secondly, the fact that the Appellant did work was evidence that was relevant to the determination of whether his MQP could be extended beyond December 31, 2000. In the circumstances, the Appeal Division finds no error on the part of the General Division in regards to its treatment of the fact that the Appellant worked post-MQP.

Did the General Division base its decision on erroneous findings of fact?

[24] In his submissions the Appellant indicates that the General Division either misapprehended or disregarded facts supportive of a finding that, on or before the MQP and continuing, he suffered from a disability that was severe and prolonged. He submitted that he qualifies for a CPP disability pension because his back issues are long standing and disabling, and that his family doctor, Dr. Pop, has confirmed that he is disabled. He argued that he has provided the Respondent with repeated explanations for why he worked. The Appellant also submitted that he recently consulted a back specialist; however, the specialist advised him that, due to previous unsuccessful back surgery, further surgical intervention would be of little value.

[25] The Appellant's minimum qualifying period, (MQP), ended on December 31, 2000. At the hearing before the General Division the Appellant had the onus of establishing, on a balance of probabilities, that he was disabled prior to this date and continuously since then. This is a pivotal requirement, one that Applicants for a CPP disability pension must bear in mind at all times.

[26] The rationale for the General Division decision is set out in paragraph 21 of the decision, namely that the General Division "determined that although the Appellant may have been severely disabled as of the date of the application, he has not reasonable chance of establishing a severe and prolonged disability on or before the December 31, 2000 MQP and continuously thereafter."

[27] The Appellant relied on, and continues to rely on, the medical opinion of Dr. Pop, with whom he first consulted in 2010, some ten years after the MQP. Dr. Pop provided two medical reports. They are dated July 7, 2012 and April 24, 2013. The Appellant placed great reliance on the April 2, 2013 report. In this report, Dr. Pop offers her professional opinion that the Appellant's condition prevents him from finding any gainful employment. (GD2-8).

[28] The Appellant was laid off in July 2008 at which time he applied for the disability pension. However, his application was made at least seven years after he last qualified for a disability pension. His additional employment from November 2005 to July 2008 did not assist him to establish a later MQP, as he had not worked long enough to establish a second qualifying

period. In this situation, Dr. Pop's 2013 medical opinion did little to assist him to establish the existence of a severe and prolonged disability prior to the MQP date of December 31, 2000. All it could do was establish his condition as of the date of the opinion. As the General Division observed the Appellant's medical condition may well have worsened over time, but there was no reliable evidence to establish what that condition was at the crucial MQP date.

[29] The Appellant had both to establish that his medical condition prevented him from pursuing any substantially gainful employment prior to the MQP date, (December 31, 2000), and that he has been continuously disabled. It was not and is not an either/or proposition. Both elements had to be present if the Appellant were to be found disabled within the meaning of the CPP. The General Division found that only one element, that the Appellant is disabled, was likely present. However, General Division made this finding in respect of a date that was more than fourteen years after the MQP. It did not relate to the Appellant's condition at the MQP. Taking all of the above into consideration, the Appeal Division is unable to find that the General Division based its decision on erroneous findings of fact.

The Decision to "Summarily Dismiss" the Appeal

[30] In answering the question "did the General Division err when it summarily dismissed the Appellant's appeal" the Appeal Division considered whether the General Division had erred either in stating the law on summary dismissal or in its application of that law. On considering the facts and evidence that was before the General Division, the Appeal Division decided that it had not. At paragraph 3 of the decision, the General Division identified the applicable law, namely section 53 of the DESD Act. The General Division noted that subsection 53 (1) of the DESD Act mandates that the General Division must summarily dismiss an appeal if it satisfied that it has no reasonable chance of success.

[31] Recent decisions of the Appeal Division have articulated a test for summary dismissal as "whether it is plain and obvious on the face of the record that an appeal is bound to fail." *M.C. v. Canada Employment Commission*, 2015 SSTAD 237. This Member of the Appeal Division is of the view that in situations where the facts are not in dispute; the applicable law is clear; and where on the undisputed facts the law supports one clear decision that is not in an appellant's favour; then this would a circumstance where the appeal would have no reasonable chance of

success. In such a case, it would be appropriate for the General Division to dismiss the appeal summarily. This is also the view urged upon the Appeal Division by the Counsel for the Respondent.

[32] In this appeal the basic facts are not in dispute. The Appellant has long-standing back issues; he stopped working for the first time in 1998; his MQP date is December 31, 2000. In the year immediately following the end of his MQP the Appellant completed a one-year diploma programme. Four years after finishing the programme he returned to work. The Appellant worked for two and a half years until he was laid off in July 2008. This additional period of work was not of a sufficient duration to alter his MQP. The Appellant's medical condition has worsened and his family doctor holds the opinion that he is disabled.

[33] The Appeal Division finds that these facts do not support a decision that is in favour of the Appellant as they do not establish, on a balance of probabilities, that the Appellant had a disability that was severe and prolonged on or before the MQP and continuing on the date of the General Division hearing. Faced with these facts, as well as with the statutory provision that mandates the summary dismissal of an appeal where the General Division is satisfied that the appeal has no reasonable chance of success, there was but one course open to the General Division, and that was to dismiss the appeal summarily.

CONCLUSION

[34] The Appellant appealed the decision of the General Division to "summarily dismiss" his appeal. Based on the foregoing, the Appeal Division finds that the General Division did not commit a breach of subsection 58(1) of the DESD Act. Specifically, the General Division did not base its decision on an erroneous finding of fact that it made perversely or capriciously or without regard for the material before it. The Appeal Division also finds that the General Division did not err in law, nor did it breach a principle of natural justice or otherwise committed an error of jurisdiction.

[35] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division