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

Citation: *D. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 102

Tribunal File Number: AD-15-1181

BETWEEN:

D. M.

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: March 3, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated August 21, 2015. After conducting a hearing by videoconference, the General Division determined that the Applicant had ceased to be disabled and that the Respondent's decision to terminate his disability pension was correct. The Applicant filed an incomplete application requesting leave to appeal on October 30, 2015. He filed submissions on December 2, 2015 and January 19, 2016, in response to the Social Security Tribunal's request for clarification and additional information. 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] I understand the Applicant's submissions essentially are as follows:

(a) the General Division failed to observe a principle of natural justice, as there was only one member and no expert witnesses at the hearing. He submits that there should have been a doctor examining him at the hearing;

(b) the General Division erred in law when it focused on his condition in 2011, rather than 1986, when he was injured; and

(c) the General Division based its decision on erroneous findings of fact without regard for the material before it, as it failed to consider that his condition is not improving and rather, is getting worse; and further, the General Division did not receive and therefore did not review x-rays from his physician.

[4] The Applicant advises that he has been seeking a referral to a neurologist but his family physician has not arranged this, as he has been away. The Applicant advises that he intends to seek a new family physician and that he is waiting for additional medical records to submit, as well as an appointment with a specialist. He requested time to secure additional medical records. In his most recent letter, the Applicant wrote that he does not think that he will be able to work more than six months in a year, if that.

[5] The Applicant advises that he is finding it difficult to financially subsist.

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

ANALYSIS

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[8] 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 approved this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Natural justice

[9] The Applicant submits that the General Division failed to observe a principle of natural justice, as there was only one member and no expert witnesses at the hearing.

[10] The DESDA is quite specific that hearings shall be conducted by one-person panels. Section 61 of the DESDA states that every application to the Social Security Tribunal is to be heard before a single member. There are no provisions under either the DESDA or the *Canada Pension Plan* that allow for more than one member.

[11] The Applicant submits that there should have been a doctor examining him at the hearing.

[12] The burden of proof rests with an applicant to prove his or her case and to adduce sufficient evidence to this end. Thus, if the Applicant had wanted to adduce further medical evidence, then it was incumbent upon him to arrange to have any medical witnesses attend the hearing. That being said, I do not think that the hearing before the General Division is the appropriate forum in which a medical examination should be conducted, as this raises issues over whether adequate notice has been given to the opposing party to the proceedings. Properly, any medical witnesses would be subjected to examination-in-chief by an applicant and to cross-examination by the opposing party.

[13] I am not satisfied that the appeal has a reasonable chance of success based on the ground that the General Division failed to observe a principle of natural justice.

(b) Error of law

[14] The Applicant submits that the General Division erred when it focused on his condition in 2011, rather than 1986.

[15] The Applicant had been in receipt of a Canada Pension Plan disability pension until November 30, 2011, when the Respondent terminated payment of the pension then. The issue before the General Division therefore was whether the Applicant had ceased to be disabled on November 30, 2011. The General Division necessarily had to determine whether there was a change in the severity of the Applicant's disability at that time to

warrant termination of the pension. It was irrelevant whether the Applicant had been injured in 1986 or whether he has had any ongoing symptomology since then.

[16] The payment of a disability pension under the *Canada Pension Plan* is not indefinite. To continue to receive the disability pension, the Applicant had to prove that he continued to be severely disabled on a continuous basis. If there was any interruption in the severity of his disability, then he would cease to qualify for the pension. The General Division found that the Applicant could not have been severely disabled in November 2011, as he was engaged in what it found was a substantially gainful occupation.

[17] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Erroneous finding of fact

[18] The Applicant submits that the General Division based its decision on an erroneous finding of fact as it failed to consider that his condition is deteriorating and in fact is worse now, than when he was initially determined to have a severe and prolonged disability in 1990.

[19] The General Division noted the Applicant's submissions that his disability has become worse. While the Applicant's condition may be deteriorating, this was not the legal test which the General Division was required to apply in determining whether the Applicant was severely disabled.

[20] The General Division found that the evidence before it showed that the Applicant has been able to work at a substantially gainful occupation for years after the termination of the disability pension. The General Division held that, "[w]here the evidence demonstrates that an [Applicant] has demonstrated the ability to regularly pursue substantially gainful employment on a regular basis, it does not lead to a conclusion that he has a severe disability". Not only did it find that the Applicant demonstrated that he could regularly pursue substantially gainful employment, but it also found that there was insufficient evidence to contradict this conclusion. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) New facts

[21] The Applicant submits that he expects to obtain additional medical information to prove that his disability is severe.

[22] In a leave application, any new facts should relate to the grounds of appeal. It is not enough to suggest that the General Division failed to review diagnostic reports such as x-rays, if those reports had not been produced or been before it. If the Applicant is requesting that we consider any forthcoming additional facts, re-weigh the evidence and re-assess the claim in his favour, I would be unable to do so, 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 remains continuously disabled as defined by the *Canada Pension Plan*.

[23] In *Tracey*, the Federal Court determined that there is no obligation to consider any new evidence. Indeed, Roussel J. wrote:

> Under the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves* [*v. Canada (Attorney General),* 2014 FC 1100], at para 108).

[24] While section 66 of the DESDA permits a party to make an application to rescind or amend the decision of the General Division, provided certain requirements are met, the Applicant would still need to address and overcome the findings made by the General Division that the Applicant has been engaged in a substantially gainful occupation continuously since 2011.

(e) Financial situation

[25] The Applicant advises that he is finding it difficult to financially subsist.

[26] I am unable to consider the Applicant's financial circumstances as they are of no relevance to a leave application. They do not address any of the enumerated grounds of

appeal under subsection 58(1) of the DESDA and do not point to any errors or failings on the part of the General Division.

CONCLUSION

[27] The application for leave to appeal is dismissed. .

Janet Lew
Member, Appeal Division