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

Citation: *P. A. v. Minister of Employment and Social Development*, 2016 SSTADIS 103

Tribunal File Number: AD-15-1304

BETWEEN:

P. A.

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 September 21, 2015. The General Division rendered a decision on the record 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, 2007. The Applicant filed an application requesting leave to appeal on January 7, 2016, alleging a number of grounds of appeal. He filed further submissions on February 1, 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] The Applicant submits that the General Division erred in law and that it based its decision on erroneous findings of fact without regard for the material before it.

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

ANALYSIS

[5] 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.

[6] 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) Alleged errors of law

[7] The Applicant submits that the General Division erred when it required him to have sufficient earnings and contributions to the Canada Pension Plan, and have made valid contributions to the Canada Pension Plan for at least 25 years, for the purposes of calculating his minimum qualifying period. The Applicant explains that the army had medically released him in 2004 with a 24-month medical pension, which "takes away the period to apply for CPP disability".

[8] The calculation of the minimum qualifying period was not raised as an issue before the General Division. Indeed, the General Division wrote at paragraph 6 that the parties agreed that the minimum qualifying period is December 31, 2007.

[9] It seems that the Applicant is suggesting that he should not be restricted by his medical release from the army from being able to extend his minimum qualifying period beyond 2007. The *Canada Pension Plan* does not provide for any exceptions to the rules for calculating the minimum qualifying period. The Applicant would have had to continue to have made valid earnings and contributions to the Canada Pension Plan, to extend the minimum qualifying period beyond 2007.

[10] The Applicant refers to his letter of October 28, 2013 (GD1A-4 to GD1A-6). It seems that the Applicant is also suggesting that he qualifies for a disability pension because

he met the contributory requirements under the *Canada Pension Plan.* There is no dispute that the Applicant met the contributory requirements, but it is not sufficient to just meet the contributory requirements to qualify for a disability pension, as there are other requirements which an applicant is required to meet under paragraph 44(1)(b) of the *Canada Pension Plan.* The General Division set these out at paragraph 3. An applicant must also be found disabled, as defined by the *Canada Pension Plan*.

[11] The fact that the army found the Applicant disabled is of no relevance under the *Canada Pension Plan.* The *Canada Pension Plan* strictly defines disability and the Applicant is still required to prove that he is disabled as defined by the *Canada Pension Plan.*

[12] The Applicant further submits that the General Division erred in its assessment that he is not incapable regularly of pursuing any substantially gainful occupation. He refers to the definition of "disability" under subparagraph 42(2)(a)(i) of the *Canada Pension Plan,* which defines a disability as being severe if the person is incapable regularly of pursuing any substantially gainful occupation. The Applicant submits that it should be apparent that he is not capable regularly of pursuing any substantially gainful occupation, given his training as a vehicle mechanic in the mid-1970s.

[13] In part, these submissions call for a reassessment, but they also suggest that the General Division failed to apply *Villani v. Canada (Attorney General)*, 2001 FCA 248, by not considering the Applicant's personal characteristics. The General Division explicitly referred to *Villani* and also considered the Applicant's personal characteristics at paragraph 17.

[14] 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. Neither the leave nor the appeal provides opportunities to re-litigate or re-prosecute the claim. I am not satisfied that the appeal has a reasonable chance of success on the ground that I should reconsider the evidence and determine whether the Applicant is incapable regularly of pursuing any

substantially gainful occupation, given his training in the mid-1970s and his particular work skill set.

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

(b) Alleged erroneous findings of fact

[16] To qualify as an erroneous finding of fact under subsection 58(1) of the DESDA, the General Division had to have based its decision on that erroneous finding of fact, and the erroneous finding of fact had to have been made in either a perverse or capricious manner or without regard for the material before it.

[17] The Applicant refers to page GD1-3 of the hearing file, which is a copy of the Respondent's reconsideration decision dated March 15, 2013. In that decision, a representative on behalf of the Respondent wrote:

> According to your physical medicine and rehabilitation specialist's report of September 29, 2010, you were not capable of medium to heavy type of work but your condition should have allowed sedentary or light work.

[18] The Applicant submits that the decision of the General Division conflicts with this passage.

[19] The statement at page GD1-3 was prepared by a representative on behalf of the Respondent. The General Division and the Appeal Division of the Social Security Tribunal are fully independent and impartial bodies, separate from and unrelated to any of the parties involved in these proceedings. Neither the General Division nor the Appeal Division was involved in either the initial determination or reconsideration decisions made by the Respondent. The General Division is not bound by any policy or factual decisions made by the Respondent.

[20] Even so, I do not see any conflict, as the General Division found that there was evidence to suggest that the Applicant would be able to work in a sedentary or light duty position.

[21] The Applicant further submits that a full-time, part-time or seasonal position requires “all your strength”. This particular submission does not speak to any of the grounds of appeal under subsection 58(1) of the DESDA and also calls for a reassessment. The DESDA does not provide for reassessments.

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

CONCLUSION

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

Janet Lew
Member, Appeal Division