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

Citation: ***J. D. v. Minister of Employment and Social Development,*** **2016 SSTADIS 117**

Date: March 21, 2016

File number: AD-15-1344

APPEAL DIVISION

Between:

J. D.

Applicant

and

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

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Canada

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada (the Tribunal), is refused.

INTRODUCTION

[2] In a decision, issued September 30, 2015, the Tribunal's General Division found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that leave to appeal should be granted as in counsel's view the General Division either:-

a. failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
b. Erred in law in making its decision, whether or not the error appears on the face of the record; or
c. 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 other words that the General Division breached one or more of the grounds of appeal set out in subsection 58(1)(c) of the *Department of Employment and Social Development* (DESD) *Act*.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] To grant leave, the Appeal Division must be

[1] Subsections 56(1) and 58(3) of the DESD Act govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

satisfied that the appeal would have a reasonable chance of success[2]. In *Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41* as well as in *Fancy v. Canada (Attorney General),* 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[6] Section 58 of the DESD Act set out the only grounds on which an appellant may bring an appeal. The Applicant relies on all three grounds. In order to grant leave to appeal the Tribunal must be satisfied that the appeal would have a reasonable chance of success. This means that the Tribunal must first find that, were the matter to proceed to a hearing,

(a) at least one of the grounds of the Application relate to a ground of appeal; and

(b) there is a reasonable chance that the appeal would succeed on this ground. For the reasons set out below the Tribunal is not satisfied that this appeal would have a reasonable chance of success.

ANALYSIS

The Alleged Errors

[7] While accepting all the documentation regarding the Applicant's application for a CPP disability pension, law and the finding that the Applicant's minimum qualifying period, (MQP), ended on December 31, 2010; Counsel for the Applicant alleged that the General Division erred by ;misinterpreting or by failing to properly consider certain facts that were before it. In particular, Counsel for the Applicant submitted that the General Division failed to properly consider the Applicant's cognitive disabilities and his testimony regarding their impact on his ability to retrain; change(s) in his medication regime; as well as medical evidence setting out limitations on the Applicant's activities.

[8] Counsel for the Applicant submitted that the following give rise to grounds of appeal.

1. that at paragraph 49 the General Division noted the Applicant's cognitive difficulties but failed to consider their impact on his ability to

[2] The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

be properly retrained. Further at paragraphs 55 and 56 the General Division disregarded the Applicant's testimony regarding his education and retraining capacity.

2. at paragraph 51 of the decision, the General Division erred in its assessment of Applicant's treatment regime. The General Division also improperly failed to consider the implication of increase in dosage of the various medications.

3. at paragraph 52 the General Division failed to place the proper weight on the on the Applicant's mental health conditions

4. at paragraph 53 of the decision, the General Division improperly failed to consider that the Applicant's request to extend physiotherapy was denied.

5. At paragraph 54 did the General Division ignored medical evidence that prior to his MQP the Applicant's physical restrictions include prolonged static positioning. Counsel submitted that this meant that the Applicant could not do sedentary work, as sedentary work would require static positioning.

[9] In the view of the Appeal Division the General Division decision must be considered in light of the Applicant's testimony and the medical reports. On June 30, 2009, Crawford Healthcare reported on its Labour Market Re-entry assessment of the Applicant in which it identified several physical restrictions one of which was "prolonged static positioning". (see GD3-585) There is no indication in the decision that the General Division overlooked this restriction.

[10] In fact, some of the actions of Crawford Healthcare directly contradict this submission. For example, in February 2010, Crawford Healthcare reported that the Applicant could sit for a maximum of three hours. As well, Crawford Healthcare did recommend two positions that would meet the Applicant's requirements. (see GD3-570).

[11] In December 2010, when the Applicant met with his Crawford Healthcare case officer, he advised the case officer that there were no problems or issues. is statement came after the denial of the extension of physiotherapy treatment, that the WSIB received in July 2010. Had the request been approved the treatments would have been extended beyond 2010.

[12] The decision must also be considered in light of the Applicant's completion of an academic upgrading programme prior to the MQP as well as the fact that he took courses towards an Occupation Health and Safety Management Certificate at a Community college followed by a month of job search training. Seeking alternative employment or retraining so as to secure alternative employment is one of the criteria that is addressed when eligibility for a CPP disability pension is being assessed. The General Division examined the Applicant's efforts. it noted that the Applicant took longer than the time projected to complete his retraining programme. Therefore, it did not accept his subjective assessment of his performance on the final examination. The Appeal Division is not persuaded that this discloses any error on the part of the General Division.

[13] Weighing evidence is within the purview of the General Division as the "trier of fact". Thus, to the extent that the Applicant's submissions hinge on a disagreement with the conclusions of the General Division, the Appeal Division is not satisfied that they can properly ground an appeal. Leave to appeal cannot be granted because an applicant disagrees with the weight that the General Division placed on documentary evidence.

[14] The decision shows that the General Division did consider the Applicant's cognitive issues, which led the General Division to rely mainly on the documentary evidence. As stated earlier the Applicant and his counsel had no issue with the General Division statement of the medical evidence. The General Division examined the Applicant's physical and mental health conditions both prior to and post-MQP. It also examined the medications and treatments he had been prescribed as well as the efforts that he made to retrain and to find alternative work. The Appeal Division finds no error in the General Division's assessment of the medical evidence and its finding that "as it appears that the Applicant's conditions were managed with medication, physiotherapy, and counselling, the Tribunal is not persuaded that he had a serious medical condition at the time of his MQP."

[15] Furthermore, the General Division found that many of the changes in the Applicant's medical condition and treatment regime post-date the MQP. The Appeal Division agrees that this limits their relevance to a determination of the Applicant's eligibility for a CPP disability benefit on or before December 31, 2010.

CONCLUSION

[16] Counsel for the Applicant submitted that the General Division breached the provisions of subsection 58(1) of the DESD Act. In particular, Counsel submitted that the General Division failed to give appropriate weight to aspects of the Applicant's testimony and the medical documentation. For the reasons set out above the Tribunal is not satisfied that Counsel's submissions disclose a ground of appeal that would have a reasonable chance of success.

Accordingly, the Application is refused.

Hazelyn Ross
Member, Appeal Division