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

Citation: *S. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 150

Date: April 27, 2016

File number: AD-15-1631

APPEAL DIVISION

Between:

S. S.

Applicant

and

Minister of Employment and Social Development

Respondent

Leave to Appeal

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] The Applicant seeks leave to appeal a decision of the Tribunal's General Division issued October 4, 2015, (the Application). The General Division dismissed the Applicant's appeal of a reconsideration decision which found he did not meet the criteria for receipt of a *Canada Pension Plan*, (CPP), disability pension.

GROUNDS OF THE APPLICATION

[3] The Applicant relies on ss. 58(1) (a)(b)and (c) of the *Department of Employment and Social Development Act*, (the DESD Act). On his behalf his Counsel submitted that,

> "The General Division erred in not taking in to consideration the totality of the evidence and material before it in deciding that the appellant was not entitled to a disability pension, since the appellant was suffering from a severe and prolonged disability within the meaning of the paragraph 42(2)(a) of the plan."

[4] Counsel for the Applicant went on to state:-

> "numerous reports indicated that the appellant was unable to work due to his condition. The entire medical reports regarding this case should be considered as an evidence for the continuity of disability. The appellant has serious physical and psychological impairments."

ISSUE

[5] The issue is: Does the appeal have a reasonable chance of success?

APPLICABLE LAW

[6] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] By virtue of ss. 58(2) of the DESD Act, an applicant is, required to satisfy the Appeal Division that his appeal would have a reasonable

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1 Subsections 56(1) and 58(3) of the DESD Act govern the granting 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." 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."

chance of success. Thus leave to appeal is refused "is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success". An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success an applicant by raising an arguable case in his application for leave.[2] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[7] The DESD Act sets out the grounds of appeal at ss. 58(1). These are the only grounds of appeal. The provision reads as follows:-

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] In order to grant the Application, the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above.

ANALYSIS

[9] Counsel for the Applicant has submitted that the appeal has a reasonable chance of success because the Applicant is disabled within the meaning of the CPP and that the totality of the medical evidence supports such a finding. He charges that the General Division failed to consider the totality of the medical evidence and he submits the Applicant should be allowed the opportunity to put forward the evidence of his disability at "an impartial hearing." (AD1-23.)

[10] The Appeal Division does not find persuasive the submission that the General Division did not have regard to the totality of the medical evidence. Counsel points to and relies on the May 22, 2008 report of the Applicant's family physician, Dr. Saeed, who opined that the Applicant's disability is permanent and he is not likely to get better.[3] Counsel for the

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[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

[3] On May 22, 2008, Dr. Saeed summarised the Applicant's medical history from the time of the motor vehicle accident. Dr. Saeed's last clinical entry is dated April 4, 2008 where he notes that the Applicant was scheduled for a stress test and has back pain. He stated that the Applicant remained "totally disabled with back pain referred to legs. MRI shows disc lesion but not suitable candidate for surgery due to diabetes,

Applicant also cites and relies on the report of Dr. Bajaj whom the Applicant consulted for his back pain. Counsel for the Applicant noted that Dr. Bajaj did not find the Applicant to be a good candidate for surgery and advised him to restrict his movement. (AD1-23) Dr. Bajaj's actual statements were:-

> "I reassured the patient that he has mechanical back pain. He is not a surgical candidate. Counselling was given with regard to controlling his back pain. I can refer him for cortisone injections into the facet joints if needed. He should continue with restrictions at his work in that he should refrain from heavy lifting, or repetitive twisting/bending of his lumbar spine."(GD2-119)

[11] Thus, it would seem to the Appeal Division that Dr. Bajaj, having seen the Applicant for his back pain in March 2007, did not anticipate a cessation of all work."

[12] The General Division did not make specific reference to Dr. Saeed's May 22, 2008 report in it analysis, however, the Appeal Division finds that it cannot be said that it disregarded it entirely. The General Division noted the report and its contents at paragraph 33 of its decision. In fact, the General Division made an extensive summary of the medical evidence in the Applicant's file. It did not, however, refer to every piece of medical evidence in its analysis, which it is entitled to do.

[13] What the General Division did find was that Dr. Bajaj's report was consistent with the March 2007 Medisys Assessment of the Applicant's Functional Abilities. In a letter to the Dr. Saeed, the assessor described the assessment and what it evaluates in the following terms:-

> "An FAE (as you may or may not be aware) evaluates an individual's maximum functional abilities. Tests can include (but are not limited to) the following: flexibility testing, repetitive movements, grip strength testing, dexterity evaluation, lifting, carrying, pushing, pulling, sustained walking, climbing, aerobic testing, postural endurance tests, and other work simulation tasks. The length of the evaluation *is* typically 4 to 5 hours. (GD2-215)

[14] Furthermore, the General Division did consider and weigh Dr. Pajwani's December 2007 findings. However, the General Division preferred the evidence of Dr. Young, who

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hypertension and his age. Disability is permanent and he is not likely to get better. He has limited flexion and extension, cannot

carried out psychological testing on the Applicant, which the General Division is entitled to do. The General Division did provide clear reasons for why it preferred the evidence of Dr. Young over that of Dr. Pajwani. (para. 54).

[15] In light of the foregoing, the Appeal Division is not persuaded that the General Division did not take into consideration the totality of the medical evidence that was before it. In the view of the Appeal Division the submissions in this regard do not disclose a ground of appeal that would have a reasonable chance of success.

[16] In addition, the General Division cited and applied the correct legal tests with regards to the factors that are relevant to a determination of whether a disability is severe and prolonged. The General Division noted that per *Villani v. Canada (Attorney General),*2001 F.C.A. 248,"the severe criterion must be assessed in the real world context". This means that the General Division had to make the determination keeping in mind factors "such as age, level of education, language proficiency, and past work and life experience."

[17] According to *Giannaros v Canada (Minister of Social Development)* 2005 FCA 187 at 14-15 once it has been found that an applicant did not have a "serious medical condition" then analysis of the Villani factors is not required. This was the case here and the Appeal Division find no error on the part of the General Division that would allow it to grant leave.

[18] The General Division assessed the evidence with a view to determining the Applicant's retained work capacity as of the MQP. It looked at the fact that after he stopped work, his employer continued to make his positon available offering modified duties. The Applicant, however, never returned to work and the General Division did not find that he had satisfactorily explained why he did not. This is the crux of the General Division decision and the Appeal Division is not persuaded that the decision contains either errors of law or was based on erroneous findings of fact that the General Division made perversely or capriciously or without regard for the material before it.

[19] In sum, the Appeal Division finds that the Applicant is essentially asking it to reweigh the General Division decision and to arrive at a decision that is favourable to him. This is not

the role of the Appeal Division. *Tracey v. Canada (Attorney General)*, 2015 FC 1300. Counsel for the Applicant has put forward his view of the matter, however, the relevant date is December 31, 2009, the date the Applicant's minimum qualifying period, (MQP), ended.. The General Division did not err when it found that while the Applicant may well now be disabled by the onset of post-MQP conditions this did not affect the pre-MQP determination.

[20] Counsel for the Applicant submitted that the Applicant should be given the opportunity to have "an impartial hearing." The implication is that the General Division was not. Counsel has offered no evidence of the General Division Member acting a manner that was unfair to the Applicant. The Tribunal Record shows that the General Division hearing took place by video-conference; that both the Applicant and Counsel for the Applicant were present; and that an interpreter fluent in the Punjabi language was also present. The Appeal Division finds that in these circumstances the Applicant was afforded the opportunity to present his case fully, thus no breach of natural justice arises with respect to the conduct of the hearing.

CONCLUSION

[21] Counsel for the Applicant submitted that the General Division breached the provisions of ss. 58(1) of the DESD Act, having considered Counsel's submissions, the General Division decision as well as the material that was before the General Division, the Appeal Division find that the Applicant has not met his onus to satisfy it that the appeal would have a reasonable chance of success.

[22] The Application is refused.

Hazelyn Ross
Member, Appeal Division