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

Citation: *A. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 160

Tribunal File Number: AD-16-494

BETWEEN:

A. S.

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: May 4, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 8, 2016. The General Division 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" by the end of his minimum qualifying period on December 31, 2012.

[2] The Applicant's representative applied for leave to appeal on April 1, 2016. Several grounds of appeal were raised. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[3] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[4] The Applicant submits that he has a severe condition and that he does not have any residual work capacity. He advises that he made a reasonable effort to continue to work by returning to work at "highly accommodated light work" with his employer. He submits that he failed an attempt to return to work due to significant functional limitations. Although he was optimistic about working, he did not have coping strategies to deal with his condition. He struggles with daily activities, which, he claims, demonstrates that he does not have any residual capacity to work.

[5] The Applicant is of the position that his condition has not improved since 2009. He claims that there is support for this view from his family physician. Dr. David Pinkerton prepared a medical report dated March 8, 2016, which states that the Applicant has severe chronic back pain despite treatment. The report also indicates that the Applicant's chronic back pain has caused marked reduction in mobility throughout the day and every day. Although the report was prepared after the end of the minimum qualifying period Applicant

submits that the family physician commented on the Applicant's condition as it has existed since 2009.

[6] The Applicant submits that the General Division erred in law in failing to consider the totality of the evidence before it. He argues that the General Division ought to have considered the fact that he continues to seek medical treatment and rehabilitation for his condition, but that it continues to deteriorate. The Applicant further alleges that the General Division improperly assessed the severe criterion in a "real work context".

[7] The Applicant also argues that the General Division based its decision on an erroneous finding of fact that it made in a perverse and capricious manner or without regard to the material before it, when it indicated at paragraph 37 that there was no documentation from the Workplace Safety and Insurance Board (WSIB). The Applicant suggests that this is an obvious error, as a decision dated September 17, 2013 from the WSIB was before the General Division.

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

ANALYSIS

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out that the only grounds of appeal are 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.

[10] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within at least one of the grounds of appeal and that the appeal has a reasonable chance of success, The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Work capacity and medical report of family physician

[11] The Applicant's representative submits that the evidence establishes that he does not have any residual work capacity.

[12] The Applicant relies in part on his family physician's medical opinion to support these allegations. However, the General Division obviously did not have the report of March 8, 2016 before it, as it was prepared after the hearing of the appeal. The Applicant is requesting that I consider any additional facts, re-weigh the evidence and re-assess the claim in his favour. The grounds of appeal under subsection 58(1) of the DESDA are very narrow. They do not permit me to acquiesce to the Applicant's request. In *Belo- Alves v. Canada (Attorney General),* 2014 FC 1100, at para. 108, and cited in *Tracey*, the Federal Court held that "the introduction of new evidence is no longer an independent ground of appeal".

[13] These submissions essentially call for a reassessment of the evidence. As the Federal Court held in *Tracey*, it is not within the Appeal Division's jurisdiction 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, provide opportunities to re-litigate or re-prosecute the claim. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

(b) Totality of evidence

[14] The Applicant's representative contends that the General Division failed to consider the totality of the evidence, in that it did not appreciate that his condition continues to deteriorate and that he continues to undergo medical treatment and rehabilitation.

[15] The General Division indicated that the Applicant was required to establish that he had a severe and prolonged disability on or before the end of the minimum qualifying period, which in this case, was December 31, 2012. It is immaterial whether the Applicant's condition has continued to deteriorate since that date or that he is still undergoing medical treatment and rehabilitation, in the absence of any evidence to establish that his disability has been severe and prolonged disability since the end of his minimum qualifying period. It has not been shown that the General Division failed to consider the totality of the evidence. I am therefore not satisfied that the appeal has a reasonable chance of success on that particular ground.

(c) Assessment of severe criterion

[16] The Applicant's representative alleges that the General Division improperly assessed the severe criterion in a "real work context". However, he did not elaborate or provide any support for these particular submissions. If he is suggesting that the General Division should have assessed severity in a "real world" context, by considering the Applicant's personal characteristics such as his education, employment experience and daily activities, it appears that the General Division did in fact do so, at paragraph 52. The General Division referred to *Villani v. Canada (Attorney General),* 2001 FCA 248 and also considered factors such as the Applicant's level of education and past work and life experience. The Federal Court of Appeal stated at paragraph 49 of the *Villani* decision that:

> . . . as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing an y substantial gainful occupation. The Ass essment of the applicant 's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[17] If the General Division considers an applicant's personal circumstances, the Appeal Division generally ought not to interfere with that assessment. In this particular case, the General Division undertook the *Villani* analysis required of it, when it considered the Applicant's education and prior work experience. As the trier of fact, the General Division

was in the best position to "judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation". I am not satisfied that the appeal has a reasonable chance of success on this ground.

(d) WSIB decision

[18] The Applicant's representative also argues that the General Division based its decision on an erroneous finding of fact that it made in a perverse and capricious manner or without regard to the material before it, when it indicated at paragraph 37 that there was no documentation from the WSIB. The Applicant says that this is an obvious error, as a decision dated September 17, 2013 from the WSIB was before the General Division. The Applicant's representative does not explain however why the WSIB September 2013 decision is critical to the overall claim.

[19] I have reviewed the hearing file that was before the General Division and do not see that a copy of the September 17, 2013 WSIB decision was in evidence. On that basis, I do not find that the General Division made an erroneous finding of fact when it stated that there was no documentation from the WSIB. In any event, the General Division did not base its decision on the absence of this report. It also did not draw any adverse inferences. I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[20] The Application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division