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

Citation: *B. C. v. Minister of Employment and Social Development,* 2016 SSTADIS 166

Tribunal File Number: AD-16-124

BETWEEN:

B. C.

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 6, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 10, 2015. 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, 2009.

[2] The Applicant applied for leave to appeal on January 7, 2016. He filed additional submissions on February 24, 2016, in response to a request for information from the Social Security Tribunal. He submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond and refused to exercise its jurisdiction, and that it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner without regard for the material before it. He indicates that there are discrepancies in the decision. He can only succeed on this application if I am satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[4] 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.

[5] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA 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.

[6] The Applicant submits that he did not receive a fair hearing before the General Division, as he was unable to present his case due to crippling pain.

[7] The Applicant argues that there are discrepancies in the evidence, although he did not specifically identify them. He contends that the primary reason for his appeal is because the General Division based its decision on incomplete medical information. Indeed, he notes that his current family physician continues to await compensation from the General Division to enable him to complete "any documentation". As well, some of the notes of his former family physician were incomplete.

[8] The Applicant maintains that his condition is severe and that his "sciatic agony intensifies" with any activity. He submits that he has a longstanding, degenerating permanent condition which renders him unemployable on either a full- or part-time basis. He mentions that he attempted part-time employment several times after 2008, but failed because of his crippling pain.

[9] The Applicant provided a detailed summary of his medical history and treatment, as well as his employment history. He filed copies of various diagnostic examinations. These did not form part of the evidence before the General Division.

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

ANALYSIS

(a) Natural justice

[11] The Applicant contends that he did not receive a fair hearing before the General Division as he was unable to properly present his case due to crippling pain. This appears to be the first time that this complaint has arisen. There is no indication that the Applicant brought this to the attention of the General Division, or that it was aware that the Applicant was hampered by his pain. Indeed, the Applicant even asked someone who had accompanied him to the hearing to leave, as apparently he found her presence to be disruptive, but made no suggestion that he might have been unable to continue due to his pain levels.

[12] If an applicant is unable to continue, for reasons of health or other, there is an onus on him to bring this to the immediate attention of the trier of fact. Had the Applicant in this particular case encountered any difficulties and had he found that his pain impaired the quality of his evidence, it was his responsibility to notify the General Division at the earliest opportunity. Had he done so and the General Division chosen to proceed, this might have then resulted in a breach of the principles of natural justice. However, it is too late for him to wait until the appeal proceedings to raise this matter.

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

(b) Discrepancies in the evidence

[14] The Applicant argues that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. The erroneous findings of fact apparently can be traced to gaps in the medical evidence, which led to discrepancies.

[15] Apart from the fact that the Applicant failed to identify any specific discrepancies, any gaps or missing medical evidence cannot be attributed to the General Division. It is incumbent upon an applicant to produce any medical information upon which that applicant intends to rely, as the General Division should be able to rely on a full medical record.

[16] If an applicant is to establish that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, that applicant must show that the General Division not only based its decision on that finding of fact, but that there was evidence or material before it which it failed to consider. The General Division cannot be faulted for failing to consider evidence that was not before it.

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

(c) Medical and employment history

[18] The Applicant reviewed his medical and employment history. Essentially the Applicant is seeking a reassessment. As the Federal Court held in *Tracey*, the Appeal Division's mandate does not consist of reassessing the evidence or reweighing the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

(d) Diagnostic examinations

[19] The Applicant filed several diagnostic examinations in support of his leave application. He has not identified the grounds upon which he filed these diagnostic examinations, other than to establish that he has an objective basis to account for his pain.

[20] In essence, the Applicant is requesting that I consider 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".

[21] I am not satisfied that the appeal has a reasonable chance of success on the basis of any new records that do not address any of the enumerated grounds of appeal under subsection 58(1) of the DESDA.

CONCLUSION

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

Janet Lew

Member, Appeal Division