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

Citation: *K. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 167

Date: May 6, 2016

File number: AD-16-178

APPEAL DIVISION

Between:

K. F.

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,* (the Tribunal), is refused.

INTRODUCTION

[2] The Applicant is seeking leave to appeal, (the Application), from the decision of the General Division of the Tribunal dated November 26, 2015. In its decision, the General Division found that the Respondent did not meet the definition of "severe and prolonged" as set out in the *Canada Pension Plan,* (CPP). He was, therefore, ineligible to receive a disability pension.

GROUNDS OF THE APPLICATION

[3] The Applicant relies on ss. 58(1)(c) of the *Department of Employment and Social Development Act,* (the DESD Act). In his Application, he submitted that the General Division based its decision on erroneous findings of fact that it made perversely or capriciously or without regard for the material before it. He set out the many ways, in which he felt the General Division had erred.

ISSUE

[4] The Appeal Division must decide if the appeal has a reasonable chance of success.

APPLICABLE LAW

Leave to Appeal

[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] 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 chance of success. Thus leave to appeal is refused "if the Appeal Division is satisfied that the appeal has

[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."

no reasonable chance of success". An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success 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.

[6] 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.

[7] 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. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

ANALYSIS

[8] The rationale of the General Division decision is found at paragraph 31, where the General Division states:-

> [31] The Tribunal has determined that the Appellant has not provided any evidence of significant effort or attempts at obtaining or maintaining any gainful occupation since he was fired from Home Depot in 2008.

[9] The Applicant disagrees with the decision and the conclusions that underpin it. He states he was unable to find work after his employment with Home Depot was terminated due to his poor mental health. In addition, he set out, quite extensively, what he viewed as omissions and erroneous findings of fact in the General Division decision. The Appeal Division finds it appropriate to respond to the Applicant's submissions as set out. Thus, in regard to the Applicant's submission that he,

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

> " was originally denied application because I was late in applying. I was forgiven this window as I showed at the time that even though my mental health was poor, I was still trying to find work for a year and a half after leaving home depot. This first point will reflect on your 29th, 30th and 31" decisions."

[10] Paragraphs 29, 30 and 31 of the General Division decision address the Applicant's obligation to seek alternative employment. The Appeal Division finds that the Applicant's statement does not paint a true picture of what obtained with regard to his application. His application was not denied because he was late in applying. In fact, when he applied for the disability pension in February 2013, the Respondent found that the only way the Applicant could qualify for a CPP pension was under the late application provisions as he did not have sufficient earnings and contributions to meet the contribution threshold at the time he applied. GD1A-3

[11] Using the late application provision the Applicant's minimum qualifying period was found to end at December 31, 2010. There was never any question of the Applicant showing that his application for a CPP disability pension should be considered because his mental health was poor. In the circumstances, the Appeal Division finds that this submission does not give rise to a ground of appeal that would have a reasonable chance of success.

[12] The Applicant's next submission was that:-

> 2c) You seem to have huge gaps between information and seem to be cherry picking. You have not included all of the doctors I have seen, and my primary physician reports are lacking much information. As a requirement for the addictive drugs I take, the government requires me to visit my physician once every three months before I can acquire another prescription. You have only sited a couple of my doctor's observations when they number in the hundreds. That is a total perversion of the facts.

[13] While the Applicant does not clearly state that the gaps in information are being laid at the foot of the General Division from the overall tenor of the submission, the Appeal Division infers that they are. The Appeal Division finds that the General Division could only address information that was put before it, which is the responsibility of the Applicant. With respect to the submission that the General Division "cherry picked" from his medical documentation, the Appeal Division notes that it is well settled law that the

> General Division is presumed to have considered all of the evidence that was put before it, which the General Division stated that it had done at paragraph 22 of its decision.

[22] The Tribunal has reviewed all the documents submitted including the medical reports; the Appellant's recorded information in the CPPD application and questionnaire; the Appellant's explanations of his disability and the Respondent's submissions and previous decisions on the CPPD application

[14] Without more the Appeal Division is not persuaded that the General Division ignored medical evidence. Furthermore, it is also settled law that a Tribunal need not refer to every single piece of evidence that was before it. Accordingly the Appeal Division finds that these submissions also do not give rise to a ground of appeal that would have a reasonable chance of success. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), the Supreme Court of Canada held that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391).

[15] The Applicant appears to have had a number of issues with his family physician, as well as other medical practitioners with whom he consulted. He states that his family physician did not provide him with a letter he had requested in time for him to meet the deadline for submissions and who also misdiagnosed his cancer as a skin condition. He takes issues with the General Division's questioning why he did not change physicians. In the view of the Appeal Division the General Division's statement is more in the nature of a comment and is not an issue that could give rise to a ground of appeal that would have a reasonable chance of success.

[16] Similarly, the Appeal Division finds that the fact that the Applicant saw Dr. De Angelis as a result of an emergency as opposed to having been referred to him is not an error that is so material that it would give rise to a ground of appeal that would have a reasonable chance of success. Neither does Dr. De Angelis' opinion of the Applicant's marijuana use or the fact that

he referred him back to his family physician; these are not grounds of appeal as set out in the DESD Act. Nor does the fact that the Applicant's cancer was treated in Montreal, as opposed to in Ottawa, give rise to a ground of appeal under the DESD Act.

[17] The Applicant also points to an error in paragraph 12(e) of the General Division decision, he submits and the Appeal Division accepts that the decision should read, "Anxiety has forced him not to take public transportation, visit places or go shopping. However, the Appeal Division is not persuaded that the error is of such significance that it would have affected the outcome of the decision, thereby providing a basis for appeal. The Appeal Division comes to this conclusion because it does appear that at paragraph 17 of the decision, the General Division Member noted the statement of the Applicant's family physician, Dr. Nagpal, that he suffers bouts of anxiety that keeps him housebound at least once a week. Thus, the General Division is to be presumed to have been aware of the stated effect of anxiety on the Applicant.

[18] With respect to the Applicant's attempts to find alternative employment, he seems to suggest that he was forced out of Home Depot by a supervisor who refused to comply with WSIB directives. Even if true, this is not a ground of appeal under the DESD Act, nor does it explain the paucity of his lack of employment effort. The Applicant appears to take issue with the General Division including his three periods of seasonal employment in his employment history. In the view of the Appeal Division this does not give rise to a ground of appeal that would have a reasonable chance of success.

[19] As well, the Applicant contends that the General Division erred by forgiving his "lateness due to seeking employment" and then disallowing his claim because he did not try to find alternative employment. He submitted that had he been asked to engage in a job search "years ago", he would have done so. In the Applicant's view he ought not to be asked to provide proof of a job search some six years after his employment terminated.

[20] The Appeal Division has already addressed the question of why the late application provision was applied. Therefore, relying on that discussion the Appeal Division finds this is not an issue that could give rise to a ground of appeal that would have a reasonable chance of

success. Furthermore, the General Division did not ask the Applicant to engage in a job search. This is a requirement of eligibility for a CPP disability pension. Inclima v. Canada (A.G.), 2003 FCA 117. It is not the role of the General Division to ask applicant for a CPP disability pension to seek alternative employment. Rather, applicants must demonstrate their attempts to mitigate their damages by seeking alternative employment. In the alternative applicants must show that their physical and/or mental health conditions prevented them from seeking and maintaining substantially gainful employment. *Klabouch v. Canada (Social Development)*, 2008 FCA 33. The General Division was looking at his efforts to comply with these stipulations.

[21] Finally, the Applicant argued that his condition is of long duration and that he has been undergoing treatment for more than twenty-five years. He stated that his doctor sees no hope of progress or improvement in his condition and that the drugs he takes are highly addictive. In his view these circumstances render his condition "severe, prolonged and of indefinite duration."

[22] The Appeal Division finds that this does not point to an error on the part of the General Division. An applicant cannot self-assess. In any event, the test is whether the condition prevents the applicant from pursuing regularly any substantially gainful occupation. The Applicant's contribution record shows that he had valid CPP contributions from 1977 to 2008. Therefore, he had been working during much, if not all, of those twenty five years. In other words, his condition had not prevented him from pursuing regularly any substantially gainful occupation during the period in question. Accordingly, this too is not a potential ground of appeal.

CONCLUSION

[23] The Applicant submitted that the General Division based its decision on numerous erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. On the basis of the foregoing, the Appeal Division finds that the Applicant has not raised an arguable case. In the view of the Appeal Division the Applicant is asking it to reweigh the evidence and to find in his favour, which is not the function of the Appeal Division.

[24] The Application is refused.

Hazelyn Ross
Member, Appeal Division