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

Citation: *Minister of Employment and Social Development v. T. H.,* 2016 SSTADIS 182

Tribunal File Number: AD-16-168

BETWEEN:

Minister of Employment and Social Development

Applicant

and

T. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Neil Nawaz

DATE OF DECISION: May 24, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated October 21, 2015. The GD conducted a hearing by way of teleconference on September 1, 2015 and determined that the Respondent had not, as alleged by the Applicant, sufficiently recovered from his disability to justify cutting off his benefits under the *Canada Pension Plan* (CPP).

[2] On January19, 2016, within the prescribed time limit, the Applicant's representative filed an application with the Appeal Division (AD) requesting leave to appeal.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), "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."

[4] Subsection 58(2) of the DESDA provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

[6] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[8] The Applicant submits that the GD based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it.

[9] Specifically, the Applicant alleges the GD erred by failing to appreciate and explicitly analyze the significant revenue generated, and the activities undertaken to earn those revenues, in the years 2007-11. Rather, it submits that his gross income and his business activities indicate that he was no longer disabled within the meaning of subparagraph 42(2)(a)(i) of the CPP as they demonstrated that he was capable of regularly engaging in a substantially gainful occupation.

[10] The Applicant notes that the GD took into account the Respondent's testimony that driving a truck gave him purpose, and his self-employment never generated enough profit to take a salary; however, the GD did not explicitly address the evidence before it that showed the Respondent's business activities produced significant self-employment business revenue. While the GD referred to revenue, expenses and net profit, the Pension Appeals Board (PAB) has repeatedly held that the profitability of the business venture is not relevant to determining whether a claimant has the ability to work. Although the decisions of the PAB are not binding on the AD, it is submitted that their decisions nevertheless have persuasive value.

[11] The Applicant argues that the very fact the Respondent was generating significant revenues from his trucking business was sufficient to justify a determination of work capacity without further inquiry into his medical condition or functional capacities. In *Gill v. Canada (AG)*, 2011 FCA 195, the Federal Court of Appeal dismissed an application for judicial review in light of income tax returns showing self-employment income earned for babysitting,

upholding the PAB's decision that her disability was not severe, as she was not incapable regularly of pursuing any substantially gainful occupation. The Court also found that, in reaching that conclusion, it was unnecessary to conduct a detailed review of the medical evidence.

ANALYSIS

[12] The Federal Court of Appeal has held that whether an appeal has a reasonable chance of success is akin to determining if there is an arguable case at law: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[13] The Applicant alleges that the GD based its decision on an erroneous finding of fact without regard for the material before it by focusing on evidence of the Respondent's net losses, rather than the significant gross revenues from his trucking business.

[14] Having reviewed the GD decision and the application for leave, I find that the Applicant's claimed grounds for appeal are better characterized as an error of mixed fact and law. The Applicant alleges the GD essentially ignored (or "failed to appreciate") the magnitude of the Respondent's revenues, which in several years approached six figures, but it also relies on case law that deems the profitability of a business venture is irrelevant to determining whether a claimant has the ability to work. The Applicant correctly notes that the precedents cited are PAB decisions and therefore not binding on this tribunal, but the legal issue brought forward must inform any inquiry into whether the GD was right to disregard the Respondent's gross income.

[15] It is true that the GD's decision did not contain a detailed analysis of the many activities that the Respondent must have carried on in order to generate his reported gross revenues during the period from 2007-11. It was far more occupied with assessing the Respondent's recent medical history and explaining why one cannot consider revenues without also taking into account the expenses incurred to produce them. Whether or not the GD was justified in concluding the Respondent's business was unprofitable or his activities unremunerative, I am persuaded there is at least an arguable case it made an erroneous finding of fact without regard to the evidence before it.

CONCLUSION

[16] I am allowing leave to appeal on the grounds that the GD may have made erroneous findings of fact by failing to appreciate the magnitude of the Respondent's revenues and the extent of his business activities.

[17] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

[18] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division