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

Citation: *R. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 194

Tribunal File Number: AD-16-214

BETWEEN:

R. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Neil Nawaz

DATE OF DECISION: May 31, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated October 23, 2015. The GD conducted an in-person hearing on September 23, 2015 and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), as it found his disability was not "severe and prolonged" as of the minimum qualifying period (MQP) of December 31, 2009.

[2] On January 28, 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, specifically:

(a) It made a determination that his self-employment income for 2010 was $15,115 without accounting for many legitimate expenses associated with carrying on a business.

(b) It stated that he was first referred to a specialist in December 2010, when in fact he had previously seen Dr. Markland, a rheumatologist, in May 2009.

[9] The Applicant also submitted various documents with his Application for Leave to Appeal, including:

- Receipts for drugs prescribed by Dr. Markland in 2009;
- An extract from the Applicant's 2010 income tax return, including a profit and loss statement with background information;
- Letters from Dr. Kenneth Bayly dated February 11, 2014, July 7, 2014 and June 4, 2015;
- Letters from Dr. Janet Markland dated May 13, 2009 and February 1, 2011.

[10] I note that all of the listed documents were before the GD at the time of the hearing, with the exception of the prescription receipts and Dr. Markland's letter of May 2009.

ANALYSIS

[11] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[12] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

Characterization of 2010 Income

[13] The Applicant alleges that the GD based its decision on an erroneous finding of fact made without regard for the material before it by mischaracterizing the Applicant's earning from self-employment in 2010. Specifically, the Applicant claims that in determining that he effectively earned $15,115, the GD disregarded valid business expenses, including cost of goods sold in the amount of $800 (which represented opening inventory at the beginning of the year) that should have been deducted from gross revenues.

[14] It is clear from its reasons that the GD rested much of its decision to deny this claim on the finding that the Applicant had substantially gainful earnings after 2009: "The issue before the Tribunal is not whether the Appellant is able to work; the issue is whether he was gainfully employed at the time of his MQP." The GD stated that it was guided by section 68.1 of the *Canada Pension Plan Regulations*, S.R.C., c. 385, which came into force on May 29, 2014. It reads in part:

> For the purpose of subparagraph 42(2)(a)(i) of the Act, "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension ...

[15] The GD noted that earnings equal to or greater than $14,836 for 2014 would qualify as "substantially gainful" and concluded that the Applicant's $15,115 in earnings for 2010 qualified as such.

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC)
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

[16] On this issue, I see a reasonable chance of success on appeal for five reasons.

[17] First, although this is best described as an error in law rather than fact, the GD did not appear to appreciate that section 68.1 was not applicable and of no force and effect for applications received prior to May 29, 2014. In this case, the Applicant applied for CPP disability benefits in April 2013. While the GD said it was "guided" by the regulation, its analysis of the Applicant's 2010 income was limited to comparing it to the section 68.1 benchmark with no reference to the jurisprudence that previously governed the meaning of "substantially gainful."

[18] Second, even if section 68.1 were in force at the relevant time, it refers only to "salary and wages," and may not apply to the Applicant's income from business.

[19] Third, in attempting to determine the Applicant's "true" business income, the GD does not explain why it failed to account for the differential between opening and closing inventories in calculating the cost of goods sold for the Applicant's parts resale business. A review of the Applicant's profit and loss statement and his income tax return for 2010 (both of which were before the GD), suggest that the principles of accrual accounting were properly observed, and the Applicant makes an arguable case that his income should have been found at least $800 lower.

[20] Fourth, the GD does not appear to have taken into account many of the Applicant's business expenses in calculating his 2010 earnings from self-employment. In paragraph 26, the GD stated:

> The Tribunal also noted that the Appellant had gross income in 2010 of $22,792.49 as the Respondent pointed out. Of the gross income $12,811.83 was labour and $9,845.66 was part revenue. The Tribunal also noted that the cost of the parts was $7,542.02 so therefore the revenue from parts was only $2,303.64. Totaling the two amounts gives a better look at the Appellant's earnings for 2010 and this would translate into $15,115.47 for earnings.

A cursory glance at the Waldheim Appliance Profit and Loss Statement and the Applicant's income tax return for 2010 indicates many other expenses, including vehicle, office supplies, telephone, etc., that yielded a net income of $8,124. It is not clear why the GD member chose to disregard these presumably legitimate business expenses; if he did not believe they represented valid costs of doing business, he did not say so in his decision.

[21] Finally, although this ground was not argued by the Applicant, there may be an arguable case that the GD erred in failing to deduct depreciation and amortization (or Capital Cost Allowance, as it is known for the purpose of calculating income tax) in determining the Applicant's self-employment income for 2010. Although CCA does not represent an outlay of cash, it is nonetheless generally regarded as a deductible expense because it represents a valid cost of doing business.

First Specialist Referral

[22] The Applicant alleges the GD erred in finding he was first referred to a specialist in December 2010, when in fact he had previously seen Dr. Markland, a rheumatologist, in May 2009—prior to the end of the MQP.

[23] In paragraph 28 of its reasons, the GD analyzed the medical evidence, remarking "Only in December 2010 was the Appellant referred to a specialist." The Applicant's representative submits that the GD replicated an error originally made by the Respondent in its Submissions by the Minister and which she attempted to correct in her letter to the GD dated March 9, 2015 (p. GD5-10).

[24] A review of the hearing file reveals indications that the Applicant did receive a referral to Dr. Markland on April 27, 2009 (as seen in Dr. Bayly's clinical notes on p. GD4-94, among other documents). This issue is material because the GD based its finding, in part, on a supposed lack of treatment prior to the end of the MQP.

[25] In my view, this ground has a reasonable chance of success on appeal.

New Documents

[26] Based on my review of the file, the prescription receipts and Dr. Markland's May 2009 letter were not before the GD at the time of hearing. If the Applicant is asking me to consider those additional documents, reassess the evidence and decide in his favour, I am unable to do so at this stage given the constraints of subsection 58(1) of the DESDA. Neither a Leave Application, nor an appeal, provides an opportunity to hear the merits of a case anew. In short,

there are no grounds on which I can consider the documents noted above for the purposes of an application for leave to appeal.

[27] If there are any new facts or records which the Applicant intends to file in an effort to rescind or amend the decision of the GD, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations* and file an application to rescind or amend with the GD. Subsection 66(2) of the DESDA requires that an application to rescind or amend be made within one year after the day on which the decision in question is communicated to the parties. Under paragraph 66(1)(b) of the DESDA, an applicant must show that the new fact is important and would not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[28] As indicated, the Application for Leave to Appeal is granted on the grounds that the GD may have made the following factual and legal errors:

(a) Applying the standard contained in section 68.1 of the *Canada Pension Plan Regulations* for "substantially gainful earnings" to an application that was submitted before it came into effect;

(b) Making an assessment of the Applicant's 2010 earnings from self-employment without regard to certain valid costs of carrying on business;

(c) Finding there was no specialist referral until December 2010, when in fact the Applicant saw a rheumatologist in May 2009—prior to the MQP.

[29] I invite the parties to make submissions in respect of the form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers).

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

Member, Appeal Division