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

Citation: *J. A. v. Minister of Employment and Social Development,* 2016 SSTADIS 247

Tribunal File Number: AD-16-489

BETWEEN:

J. A.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division- Leave to Appeal Decision

DECISION BY: Neil Nawaz

DATE OF DECISION: June 30, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated December 30, 2015. The GD conducted a hearing by teleconference on December 8, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that his disability was not "severe" prior to the minimum qualifying period (MQP) of December 31, 2014.

[2] On March 31, 2016, the Applicant submitted to the Appeal Division (AD) an Application Requesting Leave to Appeal accompanied by a letter prepared by his authorized representative detailing alleged grounds for appeal.

[3] To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

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

[6] 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.

[7] 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]

[8] 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

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

SUBMISSIONS

[10] The Applicant's representative 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:

(a) At paragraph 19 of its decision, the GD referenced Dr. Doerksen's report, which counsel alleges was "filled with obvious errors" because the Applicant communicated with the physician via a translator who did not speak Dinka, his native language, but Arabic, his second language. The GD acknowledged the Applicant's submissions that translation difficulties explained Dr. Doerksen's "problematic" report and in paragraph 53 stated that it was "troubled" by that report because it was inconsistent with the Applicant's testimony—the GD found it unlikely that the Applicant never discussed with Dr. Doerksen matters such as whether he had returned to work. The GD then stated that the "report of Dr. Doerksen is somewhat anomalous and is largely disregarded in the analysis

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

below"—a statement that contradicted his previous remarks about the Doerksen report. One cannot be troubled by something that one also claims to have largely disregarded.

(b) In paragraphs 16 and 17 of its decision, the GD noted the Applicant's extremely limited ability to communicate effectively, but subsequently discounted his testimony due to a lack of clarity and compelling credibility (paragraphs 66 and 67). These findings by the GD cannot be reconciled and can be fairly characterized as an unreasonable disregard for the material before it.

(c) The GD refused to take judicial notice of two well-known facts:

(i) The Applicant's work as a mushroom picker required a high level of physical exertion;

(ii) The state of the economy in Windsor-Essex economy was poor and would limit the job opportunities of an unskilled worker lacking English-language skills.

ANALYSIS

[11] Communication among individuals, even those who share a language, is always imperfect, but hearings that are mediated by interpreters are particularly fraught with difficulty. Something is inevitably lost in translation in both directions, and the potential for misunderstanding and interpretation necessarily runs high. In this case, the Applicant's request for leave to appeal is grounded in what he claims was his difficulty in making himself understood, not just in his testimony before the GD but also to his treatment providers, whose reports, he submits, inaccurately conveyed his history.

(a) Dr. Doerksen's Report

[12] It is clear that when the GD described the Doerksen report as "problematic" and "troubling," it was referring less to the essential reliability of the report but to its inconsistency with the Applicant's testimony. Dr. Doerksen, after examining and interviewing the Applicant, essentially reported that the latter had recovered from his heart attack and had no lingering symptoms—a story that stood in contrast with the Applicant's claim of nearly complete

disability. The GD conceded that doctors' reports sometimes contain inaccuracies and specifically acknowledged that Dr. Doerksen was incorrect to note the Applicant was still working as of October 2013, but one mistake does not mean the report was "filled with obvious errors," as alleged by the Applicant's representative, nor does it mean the report was wholly unreliable. The Applicant's representative has not refuted the remainder of the content of Dr. Doerksen's report other than to allege that what his client meant to say was distorted by his being forced to communicate with his physician via an interpreter in his second language (Arabic).

[13] Among the GD's prerogatives is its right to assess the credibility of witnesses, and there is no reason to believe that it did so unreasonably in this case. The GD questioned the Applicant about Dr. Doerksen's report but found it difficult to believe that the physician had so completely misinterpreted—even allowing for the difficulties inherent in translation—how Mr. Agong was feeling during examination or, alternatively, that he had never actually discussed his physical capacity with Dr. Doerksen in the first place.

[14] It is unclear from its decision why the GD chose to "largely disregard" Dr. Doerksen's report, but it cannot be said that doing so prejudiced the Applicant's case. I note that the GD's decision to de-emphasize the report may have actually benefitted the Applicant's case since, his error aside, Dr. Doerksen also described fairly unremarkable physical examination results. In its analysis of the Applicant's condition and functionality, the GD referred to many reports but it did not appear to significantly base its decision on anything in the Doerksen report. The one area where the GD did give weight to it was on the issue of the Applicant's reliability as a witness. The contrast between the Applicant's testimony and what he apparently told (or failed to tell) Dr. Doerksen was of a piece with other inconsistencies in the Applicant's evidence.

[15] I do not agree with the Applicant's representative that the GD contradicted itself by choosing to give the Doerksen report lesser weight. The GD found the report "problematic" because it contained a factual error and found it "troubling" because it flagged problems with the Applicant's reliability as a witness. The GD was within its jurisdiction to conclude that while the report was flawed, it was not worthless, and it made its reasons in assigning it due weight plain and clear in the decision.

[16] I am not persuaded that this ground will have a reasonable chance of success on appeal.

(b) Dismissal of Applicant's Testimony

[17] One of the roles of the GD is to weigh and assess evidence, including oral testimony. The GD's decision notes on several occasions that it had difficulty understanding the Applicant, but it did not attribute this to any lack of skill on the part of the professional interpreter of Dinka who was present but to the Applicant's lack of clarity in his own language: "The Tribunal attributed these issues less to the Applicant's evasiveness and more to his degree of nervousness and communication abilities…" The GD noted difficulties eliciting information from the Applicant on relatively simple matters, such as the ages of his children or the frequency of his nosebleeds.

[18] The GD appears to have made a real effort to separate problems inherent to translation from the Applicant's own difficulty in expressing himself. In the absence of any evidence of deficiency in interpretation, the GD was within its jurisdiction to find that the Applicant's confusing testimony was the result of his own inability to articulate his thoughts. If the GD member could not make sense of the Applicant's testimony, then he was justified in discounting it. I do not see any contradiction in the GD's approach to this issue, nor do I see any erroneous finding fact without regard to the evidence.

(c) Judicial Notice

[19] The Applicant criticizes the GD for not having taken judicial notice of the "fact" that the Applicant's former job was physically demanding. In effect, he alleges that the GD made an erroneous finding of fact when it stated the Applicant's evidence did not indicate that mushroom picking required a high level of physical exertion.

[20] Whether or not the Applicant was still capable of physical work was one of the key issues of the hearing before the GD. Having heard and weighed the evidence, the GD determined that the Applicant's disability did not preclude all forms of work, and I see no error that would justify overturning this finding. It is evident from its decision that the GD devoted some thought to understanding the nature of the Applicant's job as a mushroom picker:

> The Appellant described the mushroom farm where he worked as a factory. The mushrooms were grown indoors and the Appellant worked from a standing position. It seems that that there were levels of mushroom beds and that the Appellant sometimes required a safety harness when working at the higher beds. The Appellant described the work as irregular, saying that the farm operated year-round, but that shifts varied in length depending on the number of mushrooms ready to be harvested. When there were a lot of mushrooms, he said that he could be asked to work up to 14 hours per day, 7 days per week. He described putting the harvested mushrooms into cups, with the cups being on trays (12 cups per tray) and the trays went onto a trolley.

[21] The description above suggests that while picking mushrooms is a manual activity that demands "some" effort, it is not immediately obvious that it requires a "high" level of physical exertion. In any case, it is not the role of the AD to revisit findings of fact by the GD unless they are "capricious, perverse or without regard to the material before it," and in my judgment the GD's characterization of the Applicant's previous job was none of those things.

[22] The Applicant also alleged that the GD erred in failing to take judicial notice of the economic conditions in the Applicant's home county of Windsor-Essex. This issue was addressed—correctly—in the GD's decision, when it invoked the Federal Court of Appeal's decision in *Canada v. Rice*[3] to exclude external socio-economic factors in considering the Applicant's work prospects.

[23] In my view, there is no arguable case for either of these claimed grounds.

CONCLUSION

[24] While the GD's analysis of the evidence did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the outcome is defensible on the facts and the law. In short, the Applicant has put forward no grounds that carry a reasonable chance of success on appeal.

[25] The application for leave to appeal is refused.

Member, Appeal Division

[3] *Canada (MHRD) v. Rice*, 2002 FCA 47