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

Citation: *T. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 257

Tribunal File Number: AD-16-427

BETWEEN:

T. M.

Applicant

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 – Leave to Appeal

DECISION BY: Janet Lew

DATE OF DECISION: July 7, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 16, 2016. The General Division found that the Applicant had a severe and prolonged disability which commenced in May 2013, when he stopped working due to illness. The Applicant's work stoppage appears to have been the sole factor upon which the General Division determined that he did not become disabled until May 2013. The Applicant filed an application requesting leave to appeal on March 15, 2016, on the ground that the General Division erred in law and also 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. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[3] The Applicant alleges that his disability became severe and prolonged in July 2008, when he stopped working. He claims that since July 2008, he has been incapable of pursuing or maintaining any substantially gainful occupation, or earning a living. He argues that the evidence shows that his attempt to work after 2008 was unsuccessful. The Applicant argues that his severe medical and psychological conditions prevented him from applying for a Canada Pension Plan disability pension before September 13, 2013, when he finally applied.

[4] In submissions filed on April 26, 2016, the Applicant claims that although he ceased employment with U.S. Steel in July 2008, his disability in fact commenced in 2006 or 2007. He relies on some of the medical documentation, which indicates that he had hospital admissions and attended both psychiatric services and a core program for treatment of addictions.

[5] The Social Security Tribunal provided a copy of the leave materials to the Respondent. However no written submissions were received from the Respondent.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* 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.

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

[8] Although he does not use the word "incapacity", it appears that the Applicant is suggesting that he has been continuously incapacitated since July 2008, to the point that he was unable to apply for a disability pension. If the Applicant can establish that he was incapacitated, his application could be deemed to have been made earlier than September 13, 2013. However, that would require him to establish that he was incapable of forming or expressing an intention to make an application for benefits. The evidence before the General Division precludes a finding to that effect. After all, the Applicant was employed after 2008, as evidenced by the earnings history (GD3-23 to GD3-24).

[9] Despite the fact that the Applicant may have become disabled as early as July 2008, paragraph 42(2)(b) of the *Canada Pension Plan* sets out when a person is deemed to have become disabled, for the purposes of payment of a disability pension. The paragraph reads,

in part, that "in no case shall a person . . . be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made". Notwithstanding the fact that the Applicant claims that he was disabled as early as July 2008, the earliest that he can be deemed disabled under the *Canada Pension Plan* is June 2012. This is 15 months retroactive from September 2013, when he applied for a disability pension.

[10] In any event, the earnings history after 2008, particularly for 2011, when the Applicant had earnings of $29,940 (GD3-5), suggest that he may have been engaged in a substantially gainful occupation.

[11] The Applicant's questionnaire accompanying his application for a disability pension provides no guidance or indication from the Applicant as to when he felt he could no longer work (GD3-34).

[12] At paragraph 7 of its decision, the General Division indicated that there was little documentation regarding the Applicant's employment history. The General Division noted that the Applicant worked as an industrial mechanic from April 2, 2013 until May 8, 2013, when he stopped working due to illness. Other than a brief reference to the fact that the Applicant had worked at the Steel Company of Canada for 28 years, there was no other work history on file before the General Division.

[13] There was no evidence before the General Division regarding the Applicant's employment in 2012, including when he worked, the nature of his employment, whether he was able to fulfill his duties and responsibilities or required any accommodations. Similarly, apart from mentioning that the Applicant worked from April 2, 2013 to May 8, 2013, there is no further information regarding his employment.

[14] Although the Applicant worked for little more than a month in 2013, it does not appear that the General Division conducted any meaningful analysis regarding the nature of his employment then and as to whether it could constitute a substantially gainful occupation. The General Division appears to have accepted that the Applicant's brief employment was substantially gainful but it is unclear on what basis it might have come to this determination.

As such, I am satisfied that the appeal has a reasonable chance of success. I question also whether it was sufficient for the General Division to have solely based the onset of the Applicant's disability on his employment history, without correlating it with the medical evidence.

CONCLUSION

[15] The application for leave to appeal is granted.

[16] I invite the parties to make submissions as to whether a hearing is required or whether the appeal can be done on the record. If they advocate for a hearing, the parties should make submissions in respect of the form that the hearing should take (i.e. whether it should be conducted by teleconference, videoconference or other means of telecommunication, whether it should be held in-person or conducted by exchange of written questions and answers). If a party requests a hearing other than by exchange of written questions and answers, I invite that party to provide an estimate of the time required to prepare oral submissions.

[17] This decision granting leave to appeal does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division