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

Citation: *D. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 282

Tribunal File Number: AD-16-397

BETWEEN:

D. P.

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: July 27, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated November 27, 2016. The GD conducted a hearing by teleconference 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, 2009.

[2] On March 8, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division (AD) an Application Requesting Leave to Appeal detailing alleged grounds for appeal.

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

OVERVIEW

[4] The Applicant was 54 years old when he applied for CPP disability benefits on July 17, 2013. In his application, he disclosed that he attended school up to Grade 12. He held a variety of jobs until a sustaining a workplace injury in 1988. He was on CPP disability benefits until 1999, when he returned to work in a modified capacity under the auspices of the Ontario Workplace Safety and Insurance Board (WSIB). He was employed as a janitor until September 2007, when his employer went out of business. In November 2007, he sustained injuries in a motor vehicle accident (MVA) that required three corrective surgeries to his right foot.

[5] At the hearing before the GD on November 5, 2015, the Applicant testified about his background and work experience. He also described how his injuries had limited his mobility.

He had not worked, or looked for work, since his injury, although he was volunteering at a military service organization as a bartender.

[6] In its decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, he did not suffer from a severe disability as of the MQP. In the GD's view, the available medical evidence suggested that the Applicant retained capacity that did not preclude substantially gainful work. His regular volunteer work and extended trips abroad were among the factors that led the GD to conclude the Applicant was not disabled according to the statutory definition.

THE LAW

[7] 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.

[8] 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.

[9] 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.

[10] 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

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

arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[11] 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

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

SUBMISSIONS

[13] In his Application Requesting Leave to Appeal, the Applicant submitted that the GD based its decision on an erroneous finding of fact in a perverse or capricious manner or without regard to the material before it. In separate submissions received March 8, 2016 and April 12, 2016, he raised the following points:

(a) He was on CPP disability benefits from 1990 to 1999 before returning to a job that was modified to accommodate his restrictions, as per the terms of his union's collective agreement.

(b) From November 2007 and for the next five or six years, he had continuous surgeries and his insurance company "wrote him off." He is unsure why the GD wrote that the second toe on his left foot had been amputated. He has longstanding hearing loss in his right ear. He has two blocked arteries and he was recently put on two additional heart medications. He is no longer able to sustain regular employment.

(c) In paragraph 19 of its decision, the GD said that he went to the gym three times a week. In fact, he merely attempted to exercise—under the direction of a cardiologist and with the guidance of his wife, who is also a professional personal trainer. He carries nitroglycerine pump spray in case it is needed.

---

[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

(d) In paragraph 27(a), it was noted that his earnings history suggested work activity in 2012, 2013 and 2014. In fact, he has not worked subsequent to December 2009.

(e) In paragraph 29, the GD alleged that he adopted the attitude that he cannot work because he is not motivated. In fact, he has not worked because of injuries sustained in his November 2007 car accident. His insurance company agreed his injuries were catastrophic.

(f) In paragraph 31, the GD alleges that his weekly volunteering as a bartender at the Army Navy and Air Force veterans' club constitutes post-MQP work activity. In fact, he does not work eight hours straight through, and there are two additional bartenders on duty and few serving customers during his shift. Patrons come to the bar to be served and he is not required to be mobile. He can sit down and take breaks as needed.

(g) In paragraph 30, the GD drew an adverse inference from his trips to Las Vegas and Panama. However, the GD did not mention that he travelled only for the sake of his wife. There were only two trips and they came two years apart. He had eight sessions with a therapist prior to his departures and was also highly medicated and accommodated during the flights.

[14] The Applicant also submitted the following documents:

- Cardiac Catheterization Cineangiogram, St. Mary's regional Cardiac Care Centre, December 15, 2004;
- Personal Medication History, Ralston Pharmacy, Stratford, 2010 to 2016;
- Photographs of wrecked vehicle;
- Extract from a WSIB decision dated August 12, 2015.

ANALYSIS

(a) Modified job after CPP disability pension

[15] The Applicant emphasized that he was on disability benefits from 1990 to 1999 before returning to a job that was modified to accommodate his restrictions, as per the terms of his union's collective agreement.

[16] I note that the GD accurately referred to this aspect of the Applicant's history in paragraph 8 of its decision. As the Applicant has not identified any specific errors of fact, I am unable to consider granting leave under the claimed grounds of appeal.

(b) Surgeries and other health issues

[17] The Applicant itemized various aspects of his impairments that he claimed demonstrated his incapacity to sustain substantially gainful employment.

[18] I find this ground to be so broad that its amounts to a request to retry the entire claim. The Applicant's submissions amount to a recapitulation of evidence and argument already presented to the GD. In essence, he is requesting that I reconsider and reassess the evidence and decide in his favour, but I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[19] The Applicant submitted four documents with his Application for Leave to Appeal. While it would appear that none of these items were before the GD, an appeal to the AD is not ordinarily an occasion on which new evidence can be submitted. The DESDA permits the AD only to determine whether the GD has committed an error according to the specified grounds. It does not empower the AD to consider evidence in a hearing *de novo*.

[20] The Applicant also suggested that the GD erred in finding (at paragraph 9) that one of his toes was surgically removed following the November 2007 MVA. I have reviewed the file that was before the GD and have also been unable to find any reference to an amputation. On this point, I suspect the GD did make a mistake—inexplicably so—although I do not think it materially affected its decision. Ultimately, it appears that the GD made a finding of residual

capacity under the misapprehension that the Applicant had suffered injuries more grievous than they were in reality.

[21] As the Applicant has not identified any specific or material errors of fact or law, I am unable to consider granting leave under this ground.

(c)) Attendance at gym

[22] The Applicant objects to the GD's finding that he had residual capacity in part because he regularly went to the gym. The Applicant suggested that the GD overlooked the fact that, while he attended a gym three times a week, he only attempted to exercise and did so under the supervision of his cardiologist and his wife, who is also a personal trainer.

[23] I see no arguable case on this ground. The evidence about gym attendance emerged from Dr. Sivakumaran's January 2012 report, which also noted that the Applicant worked out for more than one hour each session. It was open to the Applicant to qualify or contextualize his exercise regime during the hearing. As already discussed, an appeal to the AD is not an opportunity to submit new evidence or reargue one's case on the merits.

(d) Post-MQP earnings history

[24] The Applicant denies that he worked subsequent to December 2009, even though his earnings history suggested employment in 2012, 2013 and 2014.

[25] Strictly speaking, I see no factual error here. I note that the Applicant's most recent Record of Earnings, (reproduced on p. GD6-4 of the hearing file that was before the GD) indicated employment income of $3,828, $4,540 and $4,677 from 2012-14, inclusively. The GD acknowledged that these amounts, which were presumably derived from the Applicant's "volunteer" bartending at the veterans' club, did not meet the threshold of substantial earnings, but they still constituted evidence of post-MQP work.

[26] I see no reasonable chance of success on this ground. However, as discussed below, there is a question as to whether the GD fairly characterized the Applicant's 2012-14 earnings and the employment from which they were derived.

(e) Unmotivated attitude

[27] The Applicant alleges that the GD erred in finding that he had "not shown motivation to obtain employment" and "adopted the attitude he is unable to regularly engage in any substantially gainful occupation despite evidence to the contrary." In fact, says the Applicant, he cannot work because he has been injured.

[28] I see a reasonable chance of success on this ground. The GD cited the principle from *Inclima v. Canada*[3] that where a claimant for CPP disability benefits has some work capacity, he is obligated to show that he made an effort to seek out work within his restrictions. In this case, the evidence of the Applicant's nominal earnings in 2012-14 raise the possibility that he did make an effort to remain gainfully employed within his restrictions. If so, there is an argument that the GD drew a conclusion that cannot be sustained by established facts.

(f) Volunteer work at veterans' club

[29] The Applicant alleges the GD mischaracterized his weekly shift as a bartender at the Army, Navy and Air Force veterans' club. It was not, as suggested by the GD, evidence of residual capacity but undemanding sedentary volunteer work that came with many accommodations.

[30] This is an issue that is related to the Applicant's "unmotivated attitude," and I also see an arguable case on this ground. It appears the Applicant's bartending came to light in response to questions about the source of his earnings in 2012, 2013 and 2014. The GD's decision summarized the Applicant's testimony on this issue as follows:

> He has not looked for a job or applied for any positions. He indicated he was volunteering at the Army/Navy Club a couple hours a week. He was approached and offered a position as a bartender. He had not applied nor filed an application. He works an eight hour shift on Saturdays. He testified he does not believe he could work further shifts during the week. He said he is exhausted and sore when he finishes his weekly shift.
>
> Later, the GD wrote:

---

[3] *Inclima v. Canada (A.G.)*, 2003 FCA 117

> The Appellant testified he was not looking for a job and obtained his present employment when approached by a member of the Club. He had not applied for any job, and was approached due to some volunteer work at the Club. Although he indicated he did not apply for employment because he was not capable, when offered a job he has been able to maintain his one day a week job.

[31] These passages indicate that the GD took that Applicant's bartending job as evidence that he had residual capacity after the MQP and not as evidence that he made some effort to remain gainfully employed. It is clear that the GD sees significance in the fact that the Applicant did not mount an active job search after his last full-time job and that the bartending job was offered to him unsolicited. I am not sure whether the circumstances that led to the "volunteer" position at the veterans' club matter more than the fact that he was willing to work, however modestly.

[32] In paragraph 31, the GD summed up its view of the Applicant's bartending:

> The Appellant has engaged in work activity subsequent to the MQP. He has been working at the Army/Navy Club. He works an eight hour shift on Saturdays, serving as a bartender. His annual compensation does not meet the threshold of substantial earnings. The issue is not whether the Appellant has met this threshold, but whether the Appellant has the capacity regularly to pursue any substantially gainful occupation. The Appellant has shown the ability to undertake a full eight hour shift for over three years. He is able to fulfill the duties of a bartender which is not a totally sedentary occupation. The Appellant testified that he suffers increased symptoms the next day. The ability to work regularly in a job with a full 8-hour shift indicates a residual capacity to engage in any substantially gainful occupation including part-time sedentary employment on a regular basis.

[33] The GD has acknowledged that the Applicant's earnings were not "substantial" yet nevertheless suggests they were an indication of a capacity to pursue a substantially gainful occupation. It is not clear to me that being able to undertake an eight-hour shift every week can be fairly characterized as "regular"—particularly given the job accommodations described by the Applicant—and I think this issue is worthy of further consideration. There is a body of case law led by *Atkinson* v. *Canada (A.G.)*[4] that evidence of a so-called "benevolent employer" must be taken into account where a claimant carries on working despite his claimed disability. Although the GD acknowledged accommodations permitted by the veteran's club, its decision contained no discussion about the possibility that his performance might have been held to something less than a commercial standard.

---

[4] *Atkinson v. Attorney General of Canada,* 2014 FCA 187.

[34] I see a reasonable chance of success on this ground.

(g) Travel

[35] The Applicant alleges the GD drew a conclusion unsupported by fact when it inferred, from his trips abroad, that he had residual capacity. The Applicant claims the GD failed to take into account the fact that he undertook these trip reluctantly and only with the help of mediation and therapy.

[36] I see no arguable case on this ground. The decision indicates that the Applicant gave testimony on this issue and it was open to him to describe the particular circumstances and conditions under which he travelled to Las Vegas and Panama. The GD appears to have given some thought to weighing the significance of these trips, and I would not interfere with its findings.

(h) Clinical notes and records of Dr. Brook

[37] Although this matter was not pleaded by the Applicant, I see at least an arguable case that the GD may have failed to observe a principle of natural justice by ignoring a significant portion of the medical record. On May 1, 2014, the Applicant's then-representative submitted a 184-page package (originally labeled GD2) that contained the complete notes and records to date of the Applicant's family physician, Dr. P.J. Brook. Included in this package were reports that were not referred to by the GD in its decision, most notably a 57-page Multidisciplinary Assessment Report dated December 20, 2012 prepared for the Applicant's automobile insurer. This report incorporated assessments from a physiatrist, psychologist, physiotherapist, kinesiologist and vocational consultant. While the report was written nearly three years after the MQP, it nevertheless pertained to injuries the Applicant sustained in his November 2008 MVA, describing his recovery and prognosis, in particular, his prospects for returning to work.

[38] It is a well-established principle of law that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it and is presumed to have considered all the evidence, [5] but all presumptions are subject to rebuttal. In this case, one would have thought

[5] *Simpson v. Canada (AG)*, 2012 F.C.J. No. 334

that the GD's reasons contained at least a passing reference to a comprehensive report that squarely addressed the Applicant's capacity. Unfortunately, there is no way to know whether the Applicant or his representative raised the multidisciplinary report during oral submissions, as no recording of the hearing is available.

[39] I see a reasonable chance of success on this ground of appeal.

CONCLUSION

[40] I am allowing leave to appeal on the grounds that the GD may have made errors of mixed fact and/or law by: (i) suggesting he was not motivated to work and (ii) mischaracterizing his weekly "volunteer" work as a bartender. There is also an arguable case that the GD breached a principle of natural justice by disregarding important items of medical and vocational evidence, regardless of whether they were prepared after the MQP.

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

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

Member, Appeal Division