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

Citation: *K. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 323

Tribunal File Number: AD-16-627

BETWEEN:

K. S.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: August 21, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated April 4, 2016. The GD had conducted a hearing by videoconference 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, 2010.

[2] On April 29, 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 45 years old when he applied for CPP disability benefits on May 25, 2012. In his application, he disclosed that he had the equivalent of a Grade 5 education from India, his country of origin. He immigrated to Canada in 1988 and was most recently employed as machine operator in a food processing plant, a job he held from July 1996 to June 2007, when he sustained a workplace injury to his back. After two years, he resumed modified work that included visual inspection of packages. He continued in that role until May 2010, when he was laid off.

[5] At the hearing before the GD on November 18, 2015, the Applicant testified about his background and work experience. He also described his low back pain and how it limited his

ability to function at home and at work. He said that the WSIB sent him to school for 1½ years, where he attended classes four to six hours a day Monday through Friday. He also took ESL courses at that time, although he still does not know the full English alphabet. He testified that he stopped going to school in 2011 and had since developed depression. He was on medication and other therapies, but they were not helpful.

[6] In its decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, he retained work capacity and did not suffer from a severe disability as of the MQP. The GD found that, while the Applicant's English language skills were poor, he was still capable of light work, as suggested by the fact that he was able to perform modified work for his former employer. The GD also found the Applicant had not made sufficient effort to find alternate work suitable to his limitations.

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 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 made the following submissions:

(a) The medical evidence indicates that his overall condition is "severe," in compliance with the CPP definition of disability. He suffers from chronic low back pain, major depressive disorder and type 2 diabetes, all of which cause him constant pain and adversely affects his ability to function.

(b) He has an extremely limited education and is unable to read or write in English or his mother lounge of Punjabi.

(c) While he attempted to return to modified duties in December 2009, his employer did not adhere to the prescribed restrictions, and his pain increased. Even if his employer had offered to keep him on after May 2010, the Applicant would not have been able to continue with the job.

(d) The GD noted in paragraph 13 of its decision that the Applicant resumed regular duties two weeks after he was assigned modified duties in December 2009. This is not accurate. In fact, he did not return to regular duties at any time and instead

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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

continued to perform modified duties, although he felt they exceeded his prescribed restrictions.

(e) The GD also erroneously concluded that the Applicant did not attempt any retraining program. In fact, he did attempt modified duties with his former employer, and once this option was no longer available, he attempted a WSIB-sponsored retraining program, which involved upgrading his English skills, although ultimately he remained incapable of pursuing any form of employment due to his disability and lack of language skills.

(f) The GD disregarded the principle that "predictability is the essence of regularity," as set out in cases such as *MHRD v. Bennett*.[3] To be "regularly capable of pursuing any substantially gainful occupation" is predicated upon that person being capable of coming to work whenever and as often as necessary. It is not a reasonably attainable requirement in today's workplace that a supportive employer with a flexible working schedule or productivity requirement be needed. It follows that if that is what is required for one to return to work, the Applicant was "incapable regularly pursuing any substantially gainful occupation."

[14] The Applicant also filed with the AD an Ontario Workplace Safety and Insurance Appeals Tribunal (WSIAT) decision dated February 9, 2016 to support the above propositions and demonstrate that the GD based its decision on erroneous findings of fact. He submitted that the WSIAT deemed him unemployable in any capacity given his permanent organic and psychological restrictions, as well as his age, lack of transferable skills, minimal education and significant language barrier.

ANALYSIS

[15] As the Applicant's submissions do not always specify which grounds of appeal are being claimed under subsection 58(1) of the DESDA, I will address his allegations against the GD under the following headings:

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[3] *Minister of Human Resources Development v. Bennett* (Pension Appeals Board, July 9, 1997)

Severe Condition, Limited Education, Inability to Read or Write in English

[16] The Applicant alleges that the GD dismissed his appeal despite medical evidence indicating that his overall condition was "severe," according to the CPP criteria, and without taking into account his limited education and inability to read or write in English.

[17] Outside of these broad allegations, the Applicant has not identified how, in coming to its decision, the GD failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the GD analyzed in considerable detail the Applicant's claimed medical conditions—principally chronic lower back pain and major depression—and whether they affected his capacity to regularly pursue substantially gainful employment. In doing so, it adequately took into account the Applicant's background—including his Grade 5 education and his lack of facility in English—but found that they were not significant impediments to his ability to perform light work as of the December 31, 2010 MQP.

[18] While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. The AD ought not to have to speculate as to the true basis of the application. It is not sufficient for an applicant to state their disagreement with the decision of the GD, nor is it sufficient for an applicant to express his continued conviction that his health conditions renders him disabled within the meaning of the CPP.

[19] In the absence of a specific allegation of error, I must find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. If he is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, 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.

[20] I see no reasonable chance of success on these grounds.

Modified Duties

[21] The Applicant alleges that the GD erred when it found in paragraph 13 of its decision that he resumed regular duties two weeks after he was assigned modified duties in December 2009. He argues that in fact he never returned to regular duties at any time, and he continued to perform modified duties, even though they exceeded prescribed restrictions and aggravated his back pain. The Applicant also suggests the GD disregarded his evidence that he would not have been able to continue with modified duties, even if his employer had not laid him off in May 2010.

[22] Having reviewed the GD's decision against the relevant supporting evidence, I am not satisfied that the Applicant has presented an arguable case on this ground. In paragraphs 12 to 14 of its decision, the GD summarized the Applicant's testimony about his return to work as follows:

> [12] The Appellant resumed modified work in December 2009 and did lighter, modified work that included visual inspection of packages.
>
> [13] The Appellant testified that on modified duties he worked four to six hours. He testified that after two weeks he resumed regular hours. The Appellant testified that he continued in that role until May 2010 when his employer told him they could no longer offer him the modified job and was laid off.
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> [14] The Appellant testified that while on modified duties he took three or more breaks during the day and that two were for 20 minutes each and one was 30 minutes. He testified that he was sometimes was allowed to go for washroom breaks of 15 to 20 minutes and if he felt worse he would be able to leave early or get extra breaks. The Appellant testified that if his job would have been able to continue accommodating him he would have continued working.

[23] Close inspection of the decision text indicates that the GD never said, as alleged, that the Applicant returned to regular duties—only that he returned to regular hours, during which he continued to perform modified duties. In addition, the GD relayed the Applicant's testimony that he would have worked at modified duties, as they were prescribed, had they continued to be available to him past May 2010.

[24] In short, the Applicant has not identified anything in the evidence to contradict the GD's findings on these matters.

Attempt to Retrain

[25] The Applicant alleges that the GD erroneously found that he did not attempt to retrain, when in fact he did enroll in a WSIB-sponsored program, which involved upgrading his English skills.

[26] I find no arguable case on this ground. The Applicant has not identified a specific passage in the GD's decision that denied his effort to retrain. In fact, the GD explicitly acknowledged it
in paragraph 15:

> The Appellant testified that WSIB sent him to school for one and a half years, where he attended classes four to six hours a day Monday through Friday. He testified provided students flexibility and accommodation of their disabilities. The Appellant testified that that although he took ESL courses at that time he still does not know the full English alphabet.

[27] In paragraph 42, the GD found that, although the Applicant had completed a workplace restoration program, there was no further evidence that he attempted to obtain or maintain suitable employment. Short of making a material, factual error, the GD was within its jurisdiction as trier of fact, to review the available evidence and assign it appropriate weight in determining that the Applicant retained capacity to perform some forms of work.

Indifference to Regularity Principle

[28] The Applicant alleges that the GD ignored the "regularity" component of the CPP's definition of disability when it found he could work based on his capacity to perform "modified" duties between December 2009 and May 2010.

[29] Although it is true that the GD correctly stated the CPP test for disability in paragraph 5 of the decision, the issue is whether, in substance, it applied the correct test and made a genuine attempt to grapple with the Applicant's capacity to "regularly" pursue employment. Having reviewed the decision, I find no arguable case that the GD failed in this obligation.

[30] In paragraphs 41 to 43, the GD inferred from the Applicant's post-injury activities that he was still able to perform light work on a regular basis. In particular, it noted that he resumed modified work in December 2009 and completed the WSIB retraining program in August 2011.

It also relied on Dr. Hussain's mention of work the Applicant was doing as an electrical assembler as of August 2012.

[31] I see no error of law or fact that would warrant interfering with the GD's findings on this issue.

WSIAT Decision

[32] An application to or hearing before the AD is ordinarily not ordinarily an occasion in which fresh evidence can be submitted. The WSIAT decision, dated February 9, 2016, was obviously not before the GD at the time of hearing, and it appears the Applicant submitted it in a bid to revisit findings of fact that had already been made. In any case, whatever its conclusions, the WSIAT applies a different set of statutory criteria that have no relevance to a determination of disability under the CPP.

CONCLUSION

[33] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the Application is refused.

Member, Appeal Division