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

Citation: *S. W. v. Minister of Employment and Social Development*, 2016 SSTADIS 335

Tribunal File Number: AD-16-580

BETWEEN:

S. W.

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: Neil Nawaz

Date of Decision: August 29, 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 March 28, 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, 2009.

[2] On April 18, 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 32 years old when he applied for CPP disability benefits on April 2, 2012. In his application, he disclosed that he was a high school graduate and was most recently employed as a machine operator, a job that ended in October 2005 because of lack of work. He claimed to be disabled because of epilepsy, a right shoulder dislocation and spinal cord compression fracture.

[5] At the hearing before the GD on January 12, 2016, the Applicant testified that his driver's license was cancelled after he was diagnosed with epilepsy. He said that he holds a forklift license and has thought about going back to work, but he is not allowed operate machinery anymore. He avoids using computers because the flickering of the screen could trigger a seizure. His orthopedic specialist advised that he was not a suitable candidate for

surgery to reconstruct his injured right shoulder, as that the repair might be undone if he had a seizure. He testified that he experienced adverse effects from interactions between some of his prescribed medications. He was self-medicating his shoulder and spine pain with medical marijuana, and he reported that he had been seizure-free since November 2011.

[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. The GD found that only two items of documentary medical evidence originated before the Applicant's MQP. While the Applicant had been diagnosed epilepsy, the GD found that the condition was not in itself severely disabling if it was controlled. Noting that the Applicant had only four seizures in his lifetime, all them in his sleep, the GD was not persuaded that his condition rendered him incapable regularly of pursuing any substantially gainful occupation, given his age, education and work experience.

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) He had more information to add to the case, including hospital records and doctors' notes and letters. Among other information, they would document his last seizure, when his dosage of clonazepam was increased. They would also explain why his right shoulder injury cannot be repaired.

(b) He suffers from atypical cholinesterase deficiency, compression factors at T4-T6 and a right shoulder tear. Due to the extent of his injuries, which he sustained during an epileptic seizure, he was unable to find gainful work. He had lost his driver's license and was unable to lift any weight due to his back and shoulder injuries. He would be a hazard in a workplace.

[14] In a letter dated July 25, 2016, the AD reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) and asked him to provide more detailed reasons for his request for leave. As of the specified submission deadline, the AD had not received any response.

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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

ANALYSIS

Severe and Prolonged Condition

[15] The Applicant suggests that the GD dismissed his appeal despite medical evidence indicating that his condition was "severe and prolonged" according to the criteria governing CPP disability.

[16] 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 detail the Applicant's claimed medical conditions—principally epilepsy and injuries to his spine and right shoulder—and how they affected his capacity to regularly pursue substantially gainful employment as of the December 31, 2009 MQP. In doing so, the GD took into account the Applicant's background and his attempts—or lack thereof—to seek alternative employment that would accommodate his impairments.

[17] 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 merely state their disagreement with the decision of the GD, nor is it sufficient for an applicant to express their continued conviction that their health conditions renders them disabled within the meaning of the CPP.

[18] 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 his 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.

Additional Information

[19] Finally, I note that the Applicant claimed to have "more information to add to the case," although no other documents were submitted with the application. In any event, an appeal to the AD is not ordinarily an occasion on which additional evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the AD any authority to make a decision based on the merits of the case.

[20] Once a hearing before the GD has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the GD to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[21] 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