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

Citation: *H. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 350

Tribunal File Number: AD-16-143

BETWEEN:

H. R.

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: Hazelyn Ross

Date of Decision: September 8, 2016

Canada

REASONS AND DECISION

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] On September 24, 2013 the Respondent issued a reconsideration decision in relation to the Applicant's application for a disability pension under the *Canada Pension Plan*, (CPP). The reconsideration decision upheld the Respondent's earlier decision denying him a disability pension. The Applicant appealed to the General Division of the Tribunal from the reconsideration decision, which issued its decision on October 22, 2015. On the basis that his disability did not meet the criteria set out by the CPP, the General Division found the Applicant ineligible for a CPP disability pension.

[3] The Applicant applies for leave to appeal, (the Application), the decision of the General Division. The Tribunal received the initial Application on January 8, 2016. Following correspondence with the Tribunal, the Applicant's representative filed a complete application on February 8, 2016. As this date complies with the Tribunal's directive for filing, the Appeal Division finds that the Application was filed on time.

REASONS FOR THE APPLICATION

[4] On the Applicant's behalf his representative has submitted that the General Division committed several errors in arriving at its decision. From her submissions, the Appeal Division deduces that she is suggesting that the General Division erred in law by failing to take into account the cumulative effect of his medical conditions.

[5] The Appeal Division also deduces that the Applicant's representative is submitting that the General Division based its decision on erroneous findings of fact that it made in respect of the evidence pertaining to the Applicant's ability to seek and continue treatment as well as to continue working.

ISSUE

[6] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[7] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[8] To obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[9] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, which are:-

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.

[10] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal.

ANALYSIS

Did the General Division disregard the cumulative effect of the Applicant's medical conditions?

[11] The Applicant's representative submitted that the General Division did not take into account "the full impact of the Applicant's disabilities together for their cumulative impact" in its determination of whether they met the CPP definition of severe and prolonged disability. She submitted that the Applicant's family physician and specialist supported his attempts to obtain disability benefits. The Applicant's representative also argued that the General Division ought to have come to a finding similar to that of the Pension Appeals Board, (PAB), in *Bulger v MHRD (May 18, 2000)CP 09164 (PAB)* as the Applicant, like Ms. Bulger, suffers from fibromyalgia.

[12] The Applicant's representative points to the following statement in the *Bulger* decision to support his position:-

> "While the Board agrees with the Minister's contention that Appellant has not always been fully compliant with the various recommended treatment programs, the Board nonetheless finds that Appellant's failure to fully engage or pursue these programs was not always unreasonable. Compliance must be viewed in the context of Appellant's circumstances. Persons afflicted with fibromyalgia and experiencing the constant diffuse pain lack of proper sleep, loss of energy, feelings of despair and associated depression cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or a trauma injury. Another factor that cannot be overlooked is quite often the lack of publicly funded secondary health care facilities including pharmacotherapy."

[13] The Applicant's representative contends that the above statements apply equally to the Applicant; and that the General Division erred in law by failing to apply them to him.

[14] The first issue with this submission is that decisions of the Pension Appeals Board do not bind the Tribunal. They are of persuasive value only. Thus, the General Division did not have to follow the decision of the PAB and will not be in error for not doing so. In the case of the Applicant, the General Division distinguished *Bulger* because it found that the appellant in that case had made attempts to follow recommended treatment and had a reasonable

explanation for her failure to do so. Furthermore, the General Division found the medical evidence with regard to the severity of the Applicant's fibromyalgia to be mixed. Nonetheless, it was satisfied that the Applicant had a "serious medical condition at the time of the MQP". In fact, the General Division found that the Applicant's severe sleep apnea, major depressive disorder and fibromyalgia together constituted a serious medical condition. However, after weighing the evidence, as it is entitled to do, the General Division did not find that the level of severity rose to that of the CPP definition.

[15] The evidence showed that the Applicant's family physician listed Chronic Fibromyalgia and sleep apnea as the main diagnoses when he completed the CPP medical report. (GD4-35). He also cited chronic depression as one of the Applicant**'s** medical conditions. (GD4-38) The General Division was alive to these diagnoses and was also alive to the treatments recommended for these conditions. The General Division was also alive to the Applicant's testimony regarding his medical conditions and their effect on his life. (paras. 11 through 29)

[16] As stated earlier, the General Division did assess the cumulative effect of the Applicant's medical conditions. Notwithstanding, its conclusions that the Applicant's medical conditions were serious as of the MQP, the General Division found that the Applicant failed to follow treatment recommendations. Specifically, that he obtain assistance for his psychological issues as these were a complicating factor in relation to his fibromyalgia and sleep apnea. Therefore, it cannot be said that the General Division committed an error in this respect.

[17] In the view of the Appeal Division, the Applicant's representative is really expressing disagreement with the General Division's conclusion. In doing so, the Appeal Division is being invited to reweigh the evidence. According to the Federal Court in *Tracey,* on an application for leave to appeal it is not the task of the Appeal Division to reweigh evidence. Leave to appeal is not granted in respect of this submission.

Did the General Division misapprehend evidence?

[18] The Applicant's representative submitted that the General Division misapprehended the evidence concerning his ability to seek and continue treatment. The General Division undertook an extensive examination of the medical evidence. It found that four medical practitioners had

advised the Applicant to seek help for his psychological issues as they were complicating his treatment for fibromyalgia and sleep apnea. The General Division also found that the Applicant has not complied with the recommendations of the physiatrist, psychiatrist, his family doctor, or the sleep disorder specialist. The General Division also found that the Applicant had failed to attend scheduled consultations with mental health specialists (para. 20/35). In addition, he had also failed to participate in a recommended exercise programme on the ground that it would not cure his condition. (para. 39)

[19] The Applicant's representative has attempted to put forward explanations for the Applicant's conduct. These explanations include the representative's observation that as the Applicant had been self-represented at the hearing, and, despite the assistance of a Punjabi interpreter, he may have been unable to explain his reasoning in detail.

[20] With respect, the Appeal Division finds this to be no more than speculation on the part of the Applicant's representative. There has been no issue raised with regard to the nature of the hearing before the General Division. Therefore, the Appeal Division concludes that the Applicant had ample opportunity to put forward his case. The General Division cannot be faulted if his representative now comes to the view that the Applicant could have presented his case differently. Thus, the submission that the General Division misapprehended evidence relating to the Applicant's ability to seek and maintain treatment does not disclose a ground of appeal that would have a reasonable chance of success.

[21] The Applicant's representative also submitted that the General Division misapprehended the evidence concerning the applicant's attempts to obtain and maintain alternate employment. In this submission reliance is placed on the decision in *Lalonde v Canada (MHRD),* 2002 FCA 211. In *Lalonde,* the Federal Court of Appeal found that the PAB had not determined whether the appellant's physical disability was severe and prolonged, as it was required to do. While the FCA returned the matter to the PAB, it did so emphasising that the appellant had "the burden of proving her physical disability to the Board, in accordance with the requirements of subsection 42(2) of the Act, and the efforts she has made to find employment for herself in the circumstances. *Adele Lutzer v. Minister of Human Resources Development*, 2002 FCA 190, paragraphs 7 *et seq*.)."

[22] While *Lalonde* may speak to the requirement that an appellant's conditions be assessed in order to determine whether they were "severe and prolonged" the Appeal Division is not persuaded that the General Division failed to make this assessment. In fact, the General Division based its determination on the Applicant's failure to follow recommended treatment. The Appeal Division is not persuaded that this is an error. The General Division may reach its determination by any of several ways, including, for example, a finding that an appellant retained work capacity. Therefore, the Appeal Division is also not satisfied that this submission discloses a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[23] The Applicant's representative submitted that the General Division erred in law and misapprehended the Applicant's evidence. On the basis of the foregoing analysis, the Appeal Division is not satisfied that her submissions disclose grounds that have a reasonable chance of success on appeal.

[24] The Application is refused.

Hazelyn Ross
Member, Appeal Division