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

Citation: *R. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 349

Tribunal File Number: AD-16-661

BETWEEN:

R. C.

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: September 8, 2016

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 14, 2016. The GD had 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).

[2] On May 6, 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. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[3] The Applicant first applied for CPP disability benefits in January 2010. At the time, the Respondent determined that the Applicant had an MQP ending December 31, 2012 and that he was not disabled within the meaning of the CPP on or before the hearing date. The Applicant's appeal to the CPP Review Tribunal (RT) was dismissed on July 15, 2010, and his request to the Pension Appeals Board (PAB) for leave to appeal was refused on December 27, 2010.

[4] The Applicant's second application for CPP disability benefits was submitted on December 3, 2012. The Respondent again found his MQP date was December 31, 2012 and again rejected his application. In doing so, the Respondent applied the principle of *res judicata* to require the Applicant to show that he became disabled during the two-year period between December 27, 2010, when the PAB decision issued, and the December 31, 2012 MQP.

[5] At the hearing before the GD on October 22, 2015, the Applicant testified that he was employed by an automotive parts manufacturer from January 1993 to April 2009. He stopped working there when the plant closed, although he was already experiencing arthritic pain and shortness of breath. In December 2009, he made a brief attempt to work at an LCBO, but his symptoms made it impossible for him to carry on.

[6] In its decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, he did not experience the onset of a severe and prolonged disability between July 15, 2010, the date of the hearing before the RT, and December 31, 2012, the MQP date.

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.

[12] Subsection 84(1) of the CPP, now repealed, stated that "the decision of the Review Tribunal… is final and binding for all purposes" unless leave to appeal was granted by the PAB. Section 68 of the DESDA, which came into effect on April 1, 2013, contains similar language and governs decisions of the Social Security Tribunal. These restatements of the legal doctrine of *res judicata* restrict either the RT or its successor, the GD, from revisiting findings of fact that they made previously.

ISSUE

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

SUBMISSIONS

[14] In a letter accompanying his application requesting leave to appeal, the Applicant made the following submissions:

(a) He feels that he was misled by everyone involved. He was advised that he could only use information that was dated between certain dates, but after reading the decision, he realized that the GD member did in fact rely on information obtained "well before."

(b) He alleges that the GD member also asked questions about his current living status, even though he was told that he was not allowed to use any information received after December 2014.

(c) The GD member relied on information dating from prior to December 2012, as well as information submitted by Dr. Melva Bellefountaine.

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

ANALYSIS

Window of Eligibility

[15] I am satisfied that the doctrine of *res judicata* applies in this case. As such, the GD was not permitted to make a finding of disability based on evidence that was available, or could have reasonably been made available, at the time of the hearing before the RT. In practical terms, this meant that many of the documents produced by the Applicant could not be relied upon by the GD because they predated July 15, 2010. As the MQP was December 31, 2012, the Applicant was required to show that his disability became "severe and prolonged," according to the criteria set out in the CPP, during a relatively brief window lasting 2½ years.

[16] The Applicant, who had legal representation at the time of the hearing before the GD, knew, or should have known, from the Respondent's submissions and prior correspondence that *res judicata* would be an issue in the proceeding. In its letter of September 25, 2013, the Respondent advised the Applicant of its view that the GD had no jurisdiction to consider evidence of disability prior to the December 27, 2010 PAB decision. In its submissions to the GD dated March 31, 2014 and July 7, 2015, the Respondent took essentially the same position, although it pushed back (correctly, in my view) the beginning of the review window from December 27, 2010 to July 15, 2010—the date the RT heard the Applicant's first appeal. The Applicant and his then-representative had notice that they might be barred from revisiting findings of fact made by the RT as of July 15, 2010, and they should have been prepared to tailor their submissions accordingly.

[17] Having reviewed the GD's decision, I see nothing to indicate, as alleged by the Applicant, that it relied on medical evidence that predated July 15, 2010. In his leave to appeal application, the Applicant misstated the relevant MQP date and expressed puzzlement as to why the GD member asked him questions about his current condition when he was required to prove he was disabled prior to December 31, 2012. As the standard for disability under the CPP is "severe and prolonged," the GD was within its jurisdiction to consider the Applicant's status after the MQP, as it might have had relevance to the severity of his impairment during his eligibility period or its persistence thereafter.

[18] The Applicant alleged that he was misled about the dates between which he was required to show that the onset of his disability occurred. However, he did not specify who might have given him poor advice or precisely what that advice entailed, nor did he refer to a specific failure of the GD that falls into one of the three categories listed in subsection 58(1) of the DESDA. If the Applicant is alleging a lapse in procedural fairness or breach of natural justice, I see no reasonable chance of success on the grounds he has set out.

Additional Information

[19] Finally, I note that the Applicant submitted additional medical information that was prepared after the hearing before the GD. An appeal to the AD is not ordinarily an occasion on which new 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, but he or she 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 application for leave is refused.

Member, Appeal Division