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

Citation: *A. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 397

Tribunal File Number: AD-16-725

BETWEEN:

A. P.

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: October 12, 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 February 25, 2016. The GD had earlier 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, 2015.

[2] On May 21, 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.

THE LAW

[3] 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.

[4] 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.

[5] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

(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.

[6] 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]

[7] 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

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

SUBMISSIONS

[9] In the application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) The GD erred in placing excessive emphasis on the report of Dr. Rosenbluth, who was hired by the insurance company to conduct an independent medical examination (IME). Dr. Rosenbluth concluded that the Applicant was not disabled following a one-time assessment in July 2013, more than two years prior to the MQP date of December 31, 2015.

(b) The GD erred in focusing on evidence from 2012 and 2013, when it should have been on the evidence more proximate to the MQP date. Since 2013, the Applicant has been under the ongoing care of another psychiatrist, Dr. Muhammad. The fact that he sees Dr. Muhammad once every three months for 10 to 15 minutes should not be taken as a reflection of the Applicant's level of disability. Given that the Applicant has seen this

[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General),* 2010 FCA 63.

doctor for several years, his visits may be focusing on maintenance rather than resolving his issues.

[10] The Applicant also included with his submissions a chronological summary of medical evidence , as well as copies of the following reports:

- Dr. Amin Muhammad, psychologist, May 12, 2016;
- Dr. Richard Chen, family physician, April 22, 2016.

ANALYSIS

Over-Reliance on Dr. Rosenbluth's Report

[11] The Applicant alleges that, in arriving at its decision, the GD placed too much emphasis on the report of Dr. Rosenbluth, whose findings, he suggests, should have been given less weight because the psychiatrist was hired by an insurer to conduct a one-time examination.

[12] I do not see an arguable case on this ground. My review of the decision, in particular its analysis, suggests that the GD engaged in a meaningful analysis of the medical evidence and relied on a variety of the available reports, not just Dr. Rosenbluth's. It is true that the GD referred to the Rosenbluth report at length in paragraph 26, but it did so for the specific purpose of assessing the credibility of the Applicant's testimony on the question of whether he was ever offered modified duties at Canada Post. I should note at this point that there appears to be a typographical error in the decision where the GD contrasted what the Applicant said at the hearing with the psychiatrist's account of what he said during examination:

> Dr. Rosenbluth wrote that the Appellant had been offered modified duties in 2012, but the Appellant adamantly testified that he had been offered modified duties or that the company was even able to offer modified duties.

[13] In the context of the point the GD was evidently attempting to make, this sentence would make sense only if "not" had been inserted between the words "had" and "been." Notwithstanding this error, which I do not believe was material, the GD was within its jurisdiction to make a finding on credibility based on the evidence before it, and I see nothing unreasonable about its logic in this instance.

[14] I suspect that the Applicant's concern arose from the fact that the GD chose to represent the Respondent's submissions, which did rely heavily on Dr. Rosenbluth's report, by directly quoting them at length, rather than condensing them into a summary, as it did for the Applicant. This asymmetrical treatment of the parties' respective submissions was admittedly odd, but I do not find it sufficient ground to permit an appeal to go forward where, as noted, the evidence was fully addressed in the analysis proper.

[15] Although the Applicant does not explicitly say so, he also seems to be suggesting that an insurer-sponsored IME report was in some way inherently less reliable and therefore worthy of less weight, than other types of medical evidence. If this is the Applicant's argument, I do not agree, any more than I would agree with a claim that treating physicians are inherently biased toward their patients. The GD was aware of the provenance of the Rosenbluth report, noting that the Applicant was assessed "on behalf of his personal insurer," and the report itself makes it clear the examination was not performed for treatment purposes.

Disregard for Evidence Proximate to MQP

[16] The Applicant submits that the GD erred in focusing its attention on medical evidence from 2013 rather than 2014 and 2015. Again, I find this ground has no reasonable chance of success. A survey of the documentary evidence before the GD indicates that most of it was dated before 2014. Those items that were prepared in 2014 and 2015 were summarized in the GD's decision and many of those were referenced in its analysis.

[17] I note that the Applicant has submitted two medical documents that were prepared after the GD's decision was issued. Both concluded that he was disabled from work, but an appeal to the AD does not occasion a hearing *de novo*, and additional evidence is not ordinarily considered. The constraints of subsection 58(1) of the DESDA do not give the AD any authority to make a decision based on the merits of the case.

CONCLUSION

[18] The application is refused.

Member, Appeal Division