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

Citation: *T. W. v. Minister of Employment and Social Development*, 2016 SSTADIS 428

Tribunal File Number: AD-16-1044

BETWEEN:

T. 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: Janet Lew

Date of Decision: November 2, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated June 7, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" by the end of his minimum qualifying period on September 30, 2013, the month before he began receiving a Canada Pension Plan retirement pension. The Applicant filed an application requesting leave to appeal on August 23, 2016, with supplementary submissions on September 14 and October 17, 2016.

ISSUES

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal

has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[5] In the application filed on August 23, 2016, the Applicant indicated that he has "no medical evidence of [his] injuries" as doctors refuse to treat him. He advised that he was endeavouring to obtain a medical report "for [his] next hearing". In his submissions filed on September 14, 2016, the Applicant listed several grounds of appeal.

i. Natural justice

[6] The Applicant argues that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise her jurisdiction. He cited one example of this, where "an account [*sic*] submitted a medical report in the document was not included in the appeal file", but otherwise did not identify other alleged failures. However, the Applicant then wrote that he does not have a medical report as his doctors "have always refuse[d] to examine [him]". He indicates that he is currently negotiating with the College of Physicians and Surgeons to finally be examined by a specialist.

[7] In his letters dated March 19, 2014 (GD2-13- to GD2-15) and March 20, 2014 (GD2-10), the Applicant confirmed that he has not been seen by a specialist and therefore does not have a specialist's opinion. It is implicit from his correspondence that he believes that a specialist's opinion would have advanced his claim to a disability pension. His former family physicians had not referred him to any specialists and the Applicant was precluded from arranging a medical consultation due to financial constraints.

[8] There is no indication that the Applicant sought or had been arbitrarily refused an adjournment of the hearing of the appeal before the General Division, to enable him to arrange for a specialist consultation and opinion. Indeed, the Applicant did not articulate how the General Division may have failed to observe a principle of natural justice.

[9] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his case, that he has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. The fact that the Applicant has been unsuccessful in obtaining a medical opinion thus far, or that he

is continuing his efforts to obtain a report, is not relevant to the ground that the General Division failed to observe a principle of natural justice. There is no indication or any evidence that the General Division deprived the Applicant of a reasonable and fair opportunity to present his case, or that it exhibited any bias. Accordingly, I am not satisfied that the appeal has a reasonable chance of success on this ground.

ii. Error of law

[10] The Applicant submits that the General Division erred in law, as the decision was made without medical evidence. He insists that his physicians will not examine him unless he needs to undergo surgery, and surgery has been refused in his case "because it is very often a failure". He advises that he has been told he will have to "live this way".

[11] In fact, there were two medical opinions – dated December 30, 2002 and February 12, 2014 - before the General Division and the member considered these in coming to its determination. The Applicant suggests that the General Division should have ensured that there was a specialist's opinion before it. However, it is incumbent upon an appellant to adduce the evidence on which he intends to rely, as the General Division can only base its decision on the evidence before it. I am not satisfied that the appeal has a reasonable chance of success on this ground.

iii. Erroneous finding of fact

[12] The Applicant submits that the General Division based its findings on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. This ground is based on the same submission above, that the General Division did not have the benefit of a specialist's opinion. However, the Applicant has not referred to any particular finding of fact which might have been made without regard for the material before it. The language of paragraph 58(1)(c) of the DESDA is quite specific, that the error must have been made without regard for the material before the General Division. The subsection does not contemplate any material or evidence which has not been produced and was not before the General Division. It is immaterial to this ground that the Applicant

has never been seen by a specialist or that he does not have a specialist's opinion. I am not satisfied that the appeal has a reasonable chance of success on this ground.

iv. Medical examination and specialist's opinion

[13] The Applicant advises that he is endeavouring to obtain a medical examination and opinion by a specialist before a new hearing takes place. However, there is no entitlement to a new hearing or to a reassessment either at the leave stage or on appeal. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503 at para. 28, the Federal Court held that, "an appeal to the [Social Security Tribunal Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58 [of the DESDA]". In other words, even if the Applicant had obtained and filed a new medical report with his leave application, there would have been no basis for me to consider it, unless it related to any of the grounds of appeal. The Applicant has not suggested that any forthcoming specialist's opinion will address any of the grounds of appeal, as he anticipates that any opinion will serve to establish the severity of his disability.

[14] Finally, the Applicant hints at receiving financial assistance from the Social Security Tribunal to secure a medical examination and obtain a medical report. However, there is no authority to provide assistance of this nature.

CONCLUSION

[15] Given these considerations, the application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division