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

Citation: *W. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 437

Tribunal File Number: AD-16-811

BETWEEN:

W. S.

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: November 10, 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 May 3, 2016, 2016. The GD had earlier 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, 2007.

[2] On June 4, 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:

- The GD erred in considering video surveillance transcript evidence from the Workplace Safety and Insurance Board (WSIB), which portrayed the Applicant as uncooperative with the treatment recommendations of an Independent Medical Evaluation (IME).

- The Workplace Safety and Insurance Appeals Tribunal (WSIAT) subsequently had an opportunity to review the IME and question the Applicant about the

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

video. It disagreed with the WSIB's finding of noncompliance and found that it had not approved appropriate psychological treatment.

- Given the ruling of the WSIAT, the Applicant cannot be faulted for failing to fulfill his duty to mitigate his impairments.

[10] The Applicant also included with his submissions copies of the following documents:

- Applicant's written submission to the WSIAT dated November 25, 2015;
- WSIAT decision dated March 18, 2016;
- Non-Economic Loss decision dated April 22, 2016;
- WSIB implementation letter dated May 9, 2016.

ANALYSIS

[11] The Applicant's request for leave to appeal relies on documents related to his workers' compensation claim that were not before the GD at the time of hearing. 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. Once a hearing is 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.

[12] In any case, even if these documents were admissible, they would be irrelevant to the present case. The WSIB is governed by a distinct legislative regime that is unrelated to the CPP. In overturning the WSIB's prior assessment, the WSIAT may or may not have had access to the same evidence that was before the GD, and it applied a set of statutory criteria that had little to

do with those of the CPP. The Applicant and his representative should be aware that, at the end of the day, the document generated by the WSIAT is a quasi-judicial decision from another administrative tribunal and cannot be characterized as evidence.

[13] I note that the GD explicitly declined (in paragraph 40) to place any weight on the WSIB's video surveillance. In considering the issue of mitigation, it was open to the GD to assess, and assign weight to, the various items of evidence, including the IME in question and other medical reports, whether commissioned by the WSIB or not. The thrust of the Applicant's submissions is that I revisit the evidence in light of a post-hearing document that is (i) inadmissible and (ii) irrelevant. I am unable to do this, as my authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the grounds of appeal enumerated in subsection 58(1) and whether any of them have a reasonable chance of success.

[14] I see no arguable case on the claimed grounds of appeal.

CONCLUSION

[15] The application is refused.

Member, Appeal Division