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

Citation: *K. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 467

Tribunal File Number: AD-16-939

BETWEEN:

K. C.

Applicant

and

Minister of Employment and Social Development
(formerly 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 30, 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 May 2, 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) ending December 31, 2001.

[2] On July 13, 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 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.

[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 did not properly assess the medical evidence on file. Given the nature and duration of his medical issues, the Applicant feels that he suffers from a severe and prolonged disability that prevents him from pursuing gainful employment.

(b) The GD erred in law in making its decision by basing its decision on assumptions about the Applicant's ability to return to work. The GD found that the Applicant did not put forth sufficient effort in his 2010 attempt, but he felt that he could sustain serious injury to himself or others if he continued to work.

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

[10] The Applicant's representative also submitted an addendum containing extracts from selected medical reports, all of which were before the GD at the time of hearing.

ANALYSIS

[11] The Applicant submits that the GD dismissed his appeal despite medical evidence indicating that his condition was "severe and prolonged" according to the criteria governing CPP disability.

[12] Outside of this broad allegation, the Applicant has not identified how, in coming to its decision, the GD failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the GD analyzed in detail the Applicant's claimed medical conditions—principally bipolar disorder and fibromyalgia—and how they affected his capacity to regularly pursue substantially gainful employment as of the December 31, 2001 MQP. In doing so, the GD took into account the Applicant's background and his attempts to seek alternative employment that would accommodate his impairments.

[13] While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the decision of the GD, nor is it enough to express their continued conviction that their health conditions renders them disabled within the meaning of the CPP.

[14] In his submissions, the Applicant detailed findings and conclusions from the medical reports that he suggested the GD overlooked, but it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions.[3] That said, I have reviewed the GD's decision and found no indication that it ignored, or gave inadequate consideration to, any significant component of the Applicant's evidence or submissions.

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[3] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[15] The GD's decision contains a detailed overview of the medical evidence, including what appear to be comprehensive summaries of a number of the reports listed in the Applicant's submissions, including most, if not all, of Dr. Ahmed's many progress notes. The decision closes with an analysis that suggests the GD meaningfully assessed the evidence and had defensible reasons supporting its conclusion that there was insufficient evidence of a disabling condition as of the December 31, 2001 MQP. In refusing the Applicant's claim, the GD cited Dr. Ahmed's observation that his bipolarity went into remission from 2009-12 and his 2011 opinion that physical restrictions were not preventing a return to work.

[16] The Applicant suggests that the GD based its decision on assumptions about his ability to return to work and in effect ignored his submission that his 2010 driving job demonstrated, not capability, but incapability. However, I see no indication the GD took a leap of logic unsupported by evidence. Paragraph 32 shows the GD was cognizant of the Applicant's testimony about why he stopped working:

> After winding springs, he could not move or go to work on the Wednesday. He returned to work on the Thursday however his mind was not on the job. He fell off a four foot ladder onto the cement causing bruising and soreness. He was glad not to go back. His father's friend told him he did not think he was working out and that he would have to let him go.

[17] Contrary to the suggestion of the Applicant, the GD did not draw an adverse inference from any lack of effort on his part to return to work. Instead, the GD found that the Applicant's driving job indicated post-MQP residual capacity:

> [56] Although the Appellant testified he worked for three days in 2010 as a driver, did some lifting of light objects, wound some springs (which caused him to go off work for one day) and stopped working after he fell from a ladder, the Tribunal is not satisfied that this short-lived work attempt establishes the Appellant was incapable regularly of pursuing any substantially gainful occupation. The Appellant did not indicate he was not capable of completing the driving component of the job or that he was incapable of getting along with other individuals on the job. The Tribunal is not satisfied, therefore, that this brief work effort supports a finding the Appellant was severely disabled from pursuing any substantially gainful occupation.

[18] I see nothing unreasonable in this passage. While the GD's analysis did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the decision is defensible on the facts and the law. An appeal to the AD is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My

authority permits me only to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[19] I see no arguable case for the grounds claimed by the Applicant.

CONCLUSION

[20] The application is refused.

Member, Appeal Division