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

Citation: *J. G. By his Guardian and Trustee v. Minister of Employment and Social Development*, 2016 SSTADIS 483

Tribunal File Number: AD-16-321

BETWEEN:

J. G.
By his Guardian and Trustee

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: Hazelyn Ross

Date of Decision: December 12, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] In a decision dated November 18, 2015 a Member of the General Division of the Social Security Tribunal of Canada, (the Tribunal), determined that the Applicant was not entitled to a disability pension under the Canada Pension Plan, (the CPP). The Applicant has filed an application for leave to appeal, (the Application), with the Appeal Division of the Tribunal.

ISSUE

[2] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[3] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development,* (DESD), Act govern the grant of leave to appeal. Subsection 56(1) provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Thus, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[4] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1] In *Canada (Attorney General) v. O'Keefe* 2016 FC 503, the Federal Court examined the jurisdiction of the Appeal Division to grant leave to appeal, stating that:-

> [36] Leave to appeal a decision of the SST-GD may be granted only where a claimant satisfies the SST-AD that their appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. No other grounds of appeal may be considered (*Belo-Alves,* above, at paras 71-73).

[5] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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[1] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

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] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal.

GROUNDS OF THE APPLICATION

[7] On the behalf of the Applicant his Statutory Guardian and Trustee, (statutory guardian), submitted that the General Division erred by placing undue weight on the fact that the Applicant did not appear in person at the hearing, despite the evidence that he had provided concerning the Applicant's mental state and level of functioning. The Applicant's Statutory Guardian also submitted that the General Division ignored medical evidence that the Applicant was unable to work, which evidence had been sufficient to procure disability benefits from the Applicant's insurer.

ANALYSIS

Did the General Division place undue weight on the Applicant's non-attendance?

[8] The Applicant did not attend the hearing before the General Division. In his stead, his statutory guardian attended. The Pension Appeals Board, (the PAB), dealt with this circumstance in several decisions. Generally, the PAB has held that "it is important for an applicant to attend at the hearing so that a proper assessment of his or her claim can be made." *De Caro v. MHRD* , (April 24, 1997) CP 4068. In *Montilla v. MHRD*, (November 28, 2000) CP 06657, the PAB spelled out the importance of an applicant giving oral testimony before the Review Tribunal, (now General Division), stating that:-

> [13] However, for whatever reason, the Appellant elected not to give evidence before this Board, we have heard nothing of his daily routine since August 26, 1993. We do not know what work other than bricklaying that the Appellant has looked for if indeed there is other work that he can do. We know from the records before us that he is able to drive a car. However, we do not know how far he can drive or for how long. There is

> no evidence before us of whether the Appellant was, or was not, employed after his accident (except for the short time he was employed by his former employer in 1994) or whether the Appellant is now gainfully employed.
>
> [14] The issue before this Board is has to the Appellant adduced such evidence as will cause us to conclude, from that evidence, on a balance of probabilities, that he does in fact suffer from a disability which is both severe and prolonged within the meaning of the Act — a disability which readers him incapable of regularly pursuing any substantially gainful occupation, and, is such as to be long continued and of an indefinite duration or is likely to result in death.

[9] The following principle has been distilled from the PAB's statements:-

> "Oral testimony may usefully address issues such as the applicant's daily routine, the extent to which he or she can drive, what alternative employment has been sought, whether the applicant has been employed since the accident or whether the applicant is not gainfully employed."

[10] The Appeal Division recognises that the PAB decision is not binding upon it, however, it finds it to be of persuasive value in this appeal given that it touches on the very issue at hand, namely an applicant's failure to give oral testimony at the General Division hearing.

[11] Similarly, the Federal Court of Appeal, (the FCA), has also addressed this issue. In *Mehan v. Canada (Attorney General),* 2009 FCA 281, the FCA refused an application for judicial review of a decision of an Umpire where the Applicant had failed to attend the hearing and the Umpire reached a decision based on the documents that were before him.

[12] Thus, while not the norm, non-attendance at a hearing does not by itself give rise to a ground of appeal. The issue in the present case is whether the General Division unduly relied on the Applicant's non-attendance at the hearing to reach its decision that the Applicant was not eligible for CPP disability benefits.

[13] The Appeal Division is not persuaded of this argument. The General Division addressed the Applicant's non-attendance as a preliminary matter and it also referred to it during its analysis of the evidence. The General Division initially discussed this while determining if the Applicant had received the Tribunal's Notice of Hearing. Ultimately, the General Division was satisfied that the Applicant had likely received the Notice of Hearing. Notwithstanding this

conclusion, the General Division invoked subsection 3(1) of the *Social Security Tribunal Regulations* to allow the Applicant's statutory guardian to be a witness in the proceeding and to give evidence of what he had personally observed or heard.

[14] Later, the General Division observed that the Applicant's non-attendance was not helpful in that his absence prevented it from having the benefit of his evidence. The General Division observed that it would have to rely on the documentary evidence. (See paragraph 49)

[15] The General Division's decision turned on several factors, namely, that at the time of the hearing there was not and there had never been a statutory guardian for the Applicant's personal care; that the Applicant appeared to not have followed treatment recommendations; and that by obtaining part-time work, it demonstrated that the Applicant had some retained work capacity. In the circumstances, the Appeal Division finds that the General Division did not place undue reliance on the Applicant's non-attendance at the hearing.

Did the General Division disregard medical evidence?

[16] The Applicant's statutory guardian submitted that the General Division ignored medical evidence that he was unable to work.

[17] The Tribunal record indicates that the Medical evidence consisted of :-
The CPP Medical report dated April 5, 2012 and signed by Dr. Prabhu. (GD4-106) Dr. Prabhu made the following diagnosis:- Depressive disorder and for which he was prescribed 10 mg Cipralex, daily and 75 mg. Trazodone nightly.

Occupational Health Assessment report dated April 12, 2012 signed by Dr. Prabhu. Dr. Khan's letter dated March 28, 2011, indicating that he saw the Applicant between February 12, 2007 and July 31st 2007. (GD4-121)

Dr. Prabhu's psychiatric assessment dated March 29, 2012 (GD4-119) that diagnosed depression in remission and alcohol dependency in partial remission.

> Dr. Prabhu's Report dated September 25, 2012, (GD4-131), stating that he saw the Applicant because of his "history of depression and declining mental and physical health".

[18] Reference was also made in the Respondent's assessments to a medical report from a family medicine doctor.

[19] The Appeal Division is not persuaded by the submission that the General Division ignored medical evidence that indicated that the Applicant was disabled within the meaning of the CPP. In its decision the General Division made an extensive summary of the medical evidence recapping all of the medical reports that was before it. The General Division did not stop there. It discussed the relevance of the medical evidence, noting that it was contradictory. In particular that Dr. Prabhu's conclusions in his report of March 29, 2012 contradicted his statements in the Declaration of Incapacity.

[20] The General Division is charged with weighing evidence. That is not the role of the Appeal Division: *Tracey v. Canada (Attorney General).* Absent error, which the Appeal Division does not find, it cannot reweigh the evidence in order to arrive at a conclusion that favours an Applicant.

[21] The Applicant's statutory guardian argues that, on the same facts, the Applicant was able to obtain disability payments from his insurer. While it may seem that it is a foregone conclusion that having secured disability payments from the insurer, the Applicant would automatically be entitled to CPP disability benefits. This, however, is not the case. The CPP has established its own criteria for payment of disability benefits and it is these criteria that must be met: *Halvorsen v. Canada (Minister of Human Resources Development,* 2004 FCA 377, dealing with payments made by a Workplace Injury and Safety Board.

[22] In light of the above analysis, the Appeal Division is not satisfied that the reasons for the application for leave to appeal disclose grounds of appeal that would have a reasonable chance of success.

CONCLUSION

[23] The Application is refused.

Hazelyn Ross
Member, Appeal Division