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

Citation: *M. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 485

Tribunal File Number: AD-16-360

BETWEEN:

M. 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: Hazelyn Ross

Date of Decision: December 12, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension in July 2013. The Respondent denied his application. It maintained the denial on reconsideration. He appealed to the General Division of the Social Security Tribunal. On December 30th 2015, the General Division determined that he did not meet the requirements contained in the CPP. Accordingly, he was not eligible for a disability pension. On February 25, 2016, the Tribunal received his application for leave to appeal the decision of the General Division (the Application).

GROUNDS OF THE APPLICATION

[2] The Applicant submits that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner without regard for the material before it.

ISSUE

[3] The Member must decide if the appeal has a reasonable chance of success.

LAW

[4] 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.

[5] 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).

[6] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave:[2] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

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

(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.

[8] *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.

ANALYSIS

[9] The Applicant's representative submitted that the General Division erred in certain aspects of its determination. He submitted that the Applicant did make attempts to return to

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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."
[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

work but that his efforts were unsuccessful because he either lacked the requisite skills or was hampered by his limitations. His specific submissions were:

a) that the Canada Revenue Agency has recognised that the Applicant is disabled having approved him for a Disability Tax Credit as of February 22, 2016. He points to the statements of Dr. Lumbar Alexon that the Applicant suffers from restricted mental functions necessary for everyday life.

b) that it is doubtful whether the Applicant has retained work capacity as, despite his health condition, he is still making efforts to obtain and maintain employment.

c) The General Division member hearing the appeal erred in law in that she failed to consider the totality of evidence, in that,

1. The Appellant continues to seek medical treatment and vocational rehabilitation for his condition that is becoming progressively worse; and

2. In fact the Appellant suffers from side effects of Medication that cause him to be drowsy.

d) The General Division failed to properly assess the "criterion of severability in real work context" (sic), as,

1. The General Division did not weigh the evidence that the Applicant has only limited ability to perform Activities of daily living and requires assistance from others; and

2. the Applicant's health condition has worsened overtime.

[10] With the exception of the evidence of the Applicant being accepted for a Disability Tax credit, all of the arguments and submissions made by the Applicant's representative were before the General Division, which both documented it and considered it in its decision, particularly at paragraphs 28 and 29 of the decision. With respect to the submission that the General Division did not consider the totality of the evidence, the facts alleged to have been disregarded were addressed in paragraph 28 do the decision. The General Division noted that the Applicant's pain and sleep difficulties were assisted by the use Cymbalta. It is well settled law that a tribunal commits no error by not referring to every piece of evidence that was before it but is presumed to have considered all the evidence: *Simpson v. Canada (Attorney General),* 2012 FCA 82 (CanLII).

[11] The submission that drowsiness is part of the side effects of his medication appears to be a recent one; however, the medical reports note at GD4-2 to 7 that without the use of his medication, the Applicant's sleep is disrupted. The Appeal Division is of the view that this can possibly encompass "drowsiness".

[12] The Applicant's representative submitted that the General Division did not assess or ascribe any weight to the evidence that the Applicant has only limited ability to perform his activities of daily living and requires assistance from others. The Appeal Division infers that in referring to the "criterion of severability in real work context" (sic), the Appellant's representative is referring to the severe criterion and the real world context. The General Division specifically addressed the Applicant's *Villani* [3] factors, stating: "[26] … In this case, in deciding that the Appellant's disability is not severe, the Tribunal considered that, although the Appellant has worked primarily in physical types of jobs, he was 52 years old as of the MQP with a high school education and basic English language skills."

[13] It also addressed his functional limitations in its assessment of his retained work capacity. That the Applicant disagrees with the General Division's conclusion is the very basis of this Application, however, the Appeal Division is not persuaded that the General Division did not assess the evidence of his functional limitations. Further, the submission that the "Appellant has had no improvement to his condition and it has only worsened over time" does not take into consideration the fact that the General Division dealt with the Applicant's health condition and his abilities its analysis.

[14] Weighing evidence is a task solely relegated to the General Division. It is not the role of the Appeal Division to reassess evidence on and application for leave to appeal: *Tracey v. Canada (A.G.).* This, in the view of the Appeal Division, is what the applicant's representative is attempting to have it do. The Appeal Division is not satisfied that the submissions put forward by the Applicant's representative give rise to grounds of appeal that would have a reasonable chance of success.

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[3] *Villani v. Canada (Attorney General) 2001 FCA 248. Before the*

[15] With respect to the submission that the Applicant has been found to be entitled to a Disability Tax Credit, the Appeal Division finds that this is new evidence that was not before the General Division. The Appeal Division is limited to considering only evidence that was before the General Division.

CONCLUSION

[16] The Application is refused.

Hazelyn Ross
Member, Appeal Division