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

Citation: *S. J. v. Minister of Employment and Social Development,* 2017 SSTADIS 82

Tribunal File Number: AD-16-373

BETWEEN:

S. J.

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: March 1, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division, dated January 18, 2016, which 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" by the end of his minimum qualifying period on December 31, 2013. The Applicant filed an application requesting leave to appeal on February 29, 2016, invoking several grounds of appeal.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (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 leave can be granted, 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 of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

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

Totality of the evidence

[6] The Applicant submits that the General Division failed to apply *Bungay v. Canada (Attorney General),* 2011 FCA 47, in failing to consider the totality of the evidence before it. The Applicant notes that, at paragraph 17, Stratas J.A. held that the Pension Appeals Board must take into account the entire condition of the applicant and not just the main disabling condition, which in that case, was severe osteoporosis. The Applicant argues that, in his case, the General Division failed to consider the impact of his severe chronic pain, fibromyalgia, depression, back pain, bilateral frozen shoulder, a meniscus tear in his left knee, in addition to the side effects of his medication (severe stomach pain and constipation), on his ability to regularly pursue any substantially gainful occupation. The Applicant asserts that this constitutes an error of law.

[7] In its analysis, the General Division noted that the Applicant relied on a rotator cuff impairment and shoulder surgery for his claim to a disability pension. The General Division also noted that the family physician had diagnosed the Applicant with upper back and lower back pain with sciatica. A review of the family physician's CPP medical report indicates that he had also diagnosed the Applicant with new left shoulder tendonitis, chronic back pain and anxiety (GD3-75 to 78).

[8] At paragraphs 9 and 32 in the evidence section, the General Division noted that the evidence indicated that the Applicant had been diagnosed with anxiety. Yet, it is unclear whether the General Division considered and dismissed this evidence regarding the Applicant's anxiety, as there is no discussion and no reference to the Applicant's anxiety in its analysis. It may be that the member determined that the anxiety did not arise or did not become severe until sometime after the end of the minimum qualifying period had passed, but this is unclear from its analysis. Similarly, the General Division also referred to the Applicant's chronic pain and depression at paragraph 32 in the evidence section, yet made no further mention of either in its analysis. In the case of the Applicant's chronic pain, it is

also unclear whether the General Division might have determined that it arose sometime after the end of the minimum qualifying period, as there is no further analysis or discussion on it. As for the Applicant's depression, however, the General Division noted that the Applicant testified that he began to develop depression following the Applicant's surgery, which took place in early March 2012, well before the end of the minimum qualifying period.

[9] The General Division noted that the Applicant's submissions indicated that he continued to suffer from severe right and left shoulder pain, lower back pain, knee pain and depression, and that he was disabled by "virtue of the combination of his physical and psychological symptoms since June 2011". While there was mention of the Applicant's shoulder and back pain, there was no mention of the Applicant's knee pain or depression in the analysis and discussion, and possibly no consideration of the combination of the Applicant's physical and psychological symptoms since June 2011, and their impact on the Applicant.

[10] Despite the evidence and the Applicant's submissions before it, it appears that the General Division may not have considered some of the Applicant's complaints and their impact on his capacity regularly of pursuing any substantially gainful occupation. On this basis alone, I am satisfied that the appeal has a reasonable chance of success.

Other alleged errors of law

[11] As I have indicated above, the Applicant has raised several grounds of appeal, but as the Federal Court of Appeal in *Mette v. Canada (Attorney General),* 2016 FCA 276 (CanLII) recently pronounced, it is unnecessary for the Appeal Division to address all of the grounds of appeal raised by an applicant. In response to the Respondent's arguments that the Appeal Division was required to deny leave on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESDA "does not require that individual grounds of appeal be dismissed … individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave".

[12] The Applicant alleges that the General Division committed other errors of law but, given that there may a degree to which they are inter-related, I need not address each of them.

Attempts to return to work

[13] Finally, the Applicant alleges that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. In particular, the Applicant points to paragraph 67, where the member wrote:

> […] In Dr. Mendonca's note dated July 25, 2014, it was noted that the Appellant's employer offered him light duty but the Appellant did not attempt to return to work. He testified that he has not returned to any form of employment and he has not done any retraining. The Appellant has not demonstrated an effort to obtain or maintain employment has been unsuccessful by reason of his health condition.

[14] The Applicant submits that this is an erroneous finding that he had been offered light duties and that he did not attempt to return to work. He claims that the employer was unable to offer him anything suitable for his restrictions. The Applicant has not referred me to his testimony or the documentary evidence to support this submission.

[15] The Applicant submits that the General Division erred in finding that he had not returned to any form of employment, had not attempted to obtain or maintain employment and that it was unsuccessful by reason of his health condition, as he had given testimony regarding his job search efforts. He points to his testimony at 44.26 and 46.45 of the recording of the hearing of the appeal, regarding his attempts at returning to work and his job search efforts. Given the Applicant's testimony in this regard, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[16] The application for leave to appeal is granted. This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division