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

Citation: *I. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 76

Tribunal File Number: AD-16-1160

BETWEEN:

I. M.

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: February 28, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension on August 17, 2009. On May 6, 2010, the Respondent approved the application, specifying a first payment date of September 2008, which it held was the maximum retroactivity period permitted under the legislation.

[2] The Appellant appealed to the the General Division of the Social Security Tribunal, claiming that he had been incapacitated from applying for the CPP disability pension earlier. On April 27, 2016, the General Division conducted an in-person hearing and determined, in reasons issued on June 22, 2016, that the Applicant had a severe and prolonged disability as of August 2007, when he could no longer work due to his mental health. The General Division also found that the Applicant was not incapable, according to the definition set out in subsection 60(8) of the CPP, of forming or expressing an intention to make an application earlier than August 17, 2009. Accordingly, it upheld the first payment date of September 2008.

[3] On September 27, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division an application requesting leave to appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

CPP

[4] Subsections 60(8) to 60(10) of the CPP set out the requirements for a finding of incapacity:

> (8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an

application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

(b) the person had ceased to be so incapable before that day, and

(c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[5] According to paragraph 42(2)(b) of the CPP, a person cannot be deemed disabled, for payment purposes, more than fifteen months before the Respondent received the application for a disability pension. According to section 69 of the CPP, payments start four months after the date of disability.

DESDA

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

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

[8] 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 made in a perverse or capricious manner or without regard for the material before it.

[9] 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]

[10] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an 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

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

SUBMISSIONS

[12] In his application requesting leave to appeal, the Applicant made the following submissions:

(a) Although he enjoyed a successful career in the banking industry for nearly 25 years, he has also suffered from anxiety, depression and related cognitive

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

dysfunction going back to the 1990s. The General Division erred in finding that he was not incapacitated from applying for the CPP disability pension from August 17, 2007 to August 17, 2009. As well, in the third line of paragraph 70 of its decision, the General Division referred to his claimed period of incapacity as "August 17, 2009 through to August 17, 2009."

(b) The General Division failed to observe a principle of natural justice by not considering all of his medical conditions in their totality. The decision contained very little analysis of the evidence and it did not indicate how the General Division reached its conclusion.

(c) The General Division based its decision on an erroneous finding of fact by disregarding his suicidal episodes in 2007, which rendered him incapable of consenting to treatment and culminated in his January 2008 involuntary committal under section 15(1.1) of the *Mental Health Act.*

(d) The General Division based its decision on an erroneous finding of fact by placing excessive weight on Dr. Birdi's report dated November 6, 2007. First, Dr. Birdi linked the Applicant's symptoms to an organic pathology of the brain, a finding that he was not in a position to make, as he had no access to the neurological reports. Second, he gave no consideration to the Applicant's overwhelming auditory hallucinations, which were treated for six months with Paxil. Third, Dr. Birdi concluded that the Applicant's symptoms were not enough in number to be caused by any psychiatric illness, such as schizophrenia. The Applicant disputes this statement; he has been diagnosed with anxiety, and it is indeed a psychiatric illness.

ANALYSIS

[13] The Applicant suggests that the General Division dismissed his appeal despite medical evidence indicating that he was incapable, according to the definition set out in subsection 60(8) of the CPP, of forming or expressing an intention to make an application earlier than August 17, 2009.

[14] However, in making this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division 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 General Division analyzed the evidence underlying the Applicant's claim of incapability and came to a defensible conclusion that was supported by the facts and law.

[15] 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 General Division, nor is it enough to express their continued conviction that they were incapable during the relevant period.

[16] The Applicant pointed to various aspects of his submissions before the General Division that he believes were 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 General Division's decision and see no indication that it ignored, or gave inadequate consideration to, any significant component of the Applicant's evidence.

[17] My review of the General Division's decision indicates that it referred to the significant items of documentary evidence made available to it and comprehensively summarized the Applicant's testimony. It addressed the Applicant's various medical conditions—primarily symptoms associated with anxiety, depression and post-traumatic stress disorder—in order to determine, not only whether his impairments were "severe and prolonged" under paragraph 42(2)(a) of the CPP, but also whether they pointed to a finding of incapability under subsection 60(8). I see no indication that it misapplied the law. Contrary to the Applicant's allegations, it took into account his crisis of 2007 and his eventual involuntary committal in January 2008, referring at length to these events in paragraphs 15-19, 39 and 64-65. The Applicant also suggested that the General Division placed excessive reliance on Dr. Birdi's report, but it is open to the trier of fact to assign weight to evidence as it sees fit, provided its determinations are founded in reason. In this case, the Applicant offered a number of reasons why the Birdi

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

report should not have been given credit, but he had ample opportunity to make such arguments at the hearing and, if he did, I see no indication that the General Division disregarded them. A request for leave to appeal to the Division is not an occasion on which to make new submissions on the merits of the evidence.

[18] The decision closes with an analysis that suggests General Division meaningfully assessed the evidence and had defensible reasons supporting its conclusion that the Applicant was capable of forming or expressing an intention to apply between August 2007 and August 2009. (I am satisfied that the error in paragraph 70 was no more than typographical and had no bearing on the decision outcome.) While the General Division 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 Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different result. 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 Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave is refused.

Member, Appeal Division