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

Citation: *K. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 100

Tribunal File Number: AD-16-587

BETWEEN:

K. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: March 14, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 28, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" by the end of his minimum qualifying period on December 31, 2013. He raises 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 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 granting leave, 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 endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant has raised several grounds.

Disability status with provincial and federal governments

[5] The Applicant argues that the General Division should have determined that he was disabled for the purposes of the *Canada Pension Plan*¸ as he has already been declared disabled and has disability status with both the provincial and federal governments. However, the Social Security Tribunal (Tribunal) is not bound by any determinations of disability made under any provincial schemes or any federal departments (such as the Canada Revenue Agency, from which the Applicant has been receiving a federal tax credit), as the definition of disability under the *Canada Pension Plan* differs from those under other insurance or provincial disability schemes. The *Canada Pension Plan* strictly defines disability and the Applicant must prove that he is disabled as defined by the *Canada Pension Plan.* It is irrelevant whether the Applicant has been found disabled under any provincial or other federal scheme.

Medical examination

[6] I note that there was relatively little in the way of medical documentation before the General Division, particularly any opinions that could have addressed the Applicant's capacity and functionality. It might have been of some assistance in assessing the severity of the Applicant's disability had there been additional medical opinions. Indeed, the Applicant suggests that he should have been subjected to a medical examination.

[7] The Applicant advises that he is prepared to submit to a medical examination at the request of the Respondent and/or the Tribunal. He suggests that the General Division failed to provide him with this "necessary step" in making a final decision.

[8] Ultimately, the burden of proof lies with the Applicant to prove his case, rather than with the Respondent or the Tribunal to prove that the Applicant is disabled or otherwise. There is no onus or any duty on the Respondent or the Tribunal to arrange for a medical examination of the Applicant, and, in the case of the Tribunal, it would be inappropriate to oversee any of the evidence, as it must, at all times, be at arms' length and remain wholly impartial and independent from the parties to the proceedings.

Physiotherapy

[9] The Applicant submits that the General Division based its decision on an erroneous finding of fact, made without full consideration of the evidence before it, when it determined that he must be fully resolved from injuries sustained in a motor vehicle accident, as he is no longer attending physiotherapy. The Applicant states that he decided against continuing with physiotherapy treatments, as he had plateaued and was no longer seeing any benefit, and because he did not have the funds to continue attending.

[10] The General Division however did not base its decision on the fact that the Applicant had discontinued physiotherapy. Indeed, it did not mention or consider the Applicant's trial of physiotherapy. Accordingly, I am not satisfied that the appeal has a reasonable chance of success on this ground.

Discrimination

[11] The Applicant submits that the General Division member unduly discriminated against him, because she found that he is not disabled and has the capacity to work. Without any underlying facts to support this allegation, there is no basis upon which to conclude that the member discriminated against him.

Past work history

[12] The Applicant argues that the General Division failed to consider that his efforts at obtaining and maintaining employment were unsuccessful because of his health condition. He suggests that a review of his past work history shows that, despite his efforts, he was unable to maintain employment and that he was therefore terminated each time. The Applicant's last employment was with Canadian Tire. He was forced to leave this employment as it was too physically demanding and as lighter duties were not available.

[13] The General Division determined that there was no evidence that the Applicant had undertaken any efforts at obtaining and maintaining suitable employment that considered his physical limitations, since his employment with Canadian Tire. Indeed, the General Division determined that it was family considerations, rather than the Applicant's health, that

precluded him from undertaking any efforts at obtaining and maintaining employment. The General Division found that he had some capacity and therefore required that he undertake efforts to obtain and maintain employment suitable for his limitations. Given this, I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

Physical condition

[14] The Applicant argues that he does not have the physical ability to obtain part- or full-time physical employment, particularly as his condition has deteriorated since he left his employment with Canadian Tire in early 2013. He notes that sometimes he requires the assistance of a cane to walk. He also denies that he has any ability to perform an office job, as he has restrictions against sitting for prolonged periods, and because he has only a Grade 11 education. The Applicant also notes the diagnoses that he received and the treatment he has undergone.

[15] The General Division considered these, focusing on the Applicant's disability at the end of his minimum qualifying period (other than that there is no reference to the Applicant's use of a cane at this time), and accepted that employment of a physical nature is inappropriate, given the Applicant's condition. The General Division recognized that the Applicant has a Grade 11 education but found that the evidence indicated that he could be retrained for a position within his physical restrictions.

[16] Essentially, the Applicant is requesting that the Appeal Division reweigh and reassess the evidence in order to reach a different conclusion regarding his eligibility for a disability pension. However, as the Federal Court held in *Tracey*, it is not the role of the Appeal Division to conduct a reassessment when determining whether leave should be granted or denied, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[17] Additionally, I am mindful of the words of the Federal Court in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

CONCLUSION

[18] Given these considerations, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division