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

Citation: *R. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 116

Tribunal File Number: AD-16-458

BETWEEN:

R. A.

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 23, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 22, 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."

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 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 submits that the General Division erred in law and that it also based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

Chronic Pain and Subjective Levels of Pain

[5] The Applicant submits that the General Division failed to recognize and consider that he suffers from chronic pain. He notes that the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 and the Pension Appeals Board in *Hunter v. Minister of Social Development* (February 6, 2007), CP23431 (PAB) recognized that chronic pain is a compensable disability and that there may be few, if any, objective findings at the site of injury.

[6] The Applicant argues that had the member recognized chronic pain, he would have then proceeded to assess his subjective pain levels. He further argues that the member ignored his oral testimony.

[7] The medical records indicate that the Applicant has chronic musculoskeletal pain, including in his right shoulder (GD5-93) and neck, back and legs (GD9-41). He apparently had been diagnosed "previously as suffering from chronic pain syndrome" (GD9-26 and 27). The records indicate that he has undergone bilateral carpal tunnel release. His family physician's medical chart (GD9-2) lists the Applicant's complaints as being largely related to anxiety, Crohn's disease, hyperlipidemia, sleep disorder, fibromyalgia and osteoarthritis. The records also indicate that in January 2015, the Applicant's primary complaints consisted of fibromyalgia, osteoarthritis and Crohn's disease. The Applicant's submissions focused on his fibromyalgia, as that was considered the most debilitating and disabling of his multiple medical concerns.

[8] The General Division member did not provide an extensive analysis of the medical evidence, but it is clear that he was aware of and considered the Applicant's chronic pain, though he may not have used the expression "chronic pain." The member acknowledged that the Applicant has experienced pain in his back, shoulder, elbow, wrist, right ankle and feet since 2013. The member also acknowledged that the Applicant has fibromyalgia, although he noted that there was little in the way of documentary evidence regarding treatment or its impact on any activities of daily living.

[9] The Applicant asserts that the General Division ignored his oral testimony, particularly regarding his pain complaints. Yet, it is clear that the General Division considered the Applicant's testimony in this regard. The member simply found that there was little, if any, documentary medical evidence to corroborate the Applicant's oral testimony regarding the impact of his fibromyalgia on his functionality or his ability to manage within his physical restrictions. In other words, the member was unprepared to accept the Applicant's testimony without corroborating documentary evidence, such as a functional abilities examination.

[10] However, the Applicant also asserts that the General Division should have unreservedly accepted his oral testimony regarding his subjective pain levels and how it impairs his ability to work, in the absence of any documentary evidence. In this case, the medical report dated June 16, 2014 from a rheumatologist, established that the Applicant has fibromyalgia, although it did not address the issue of the Applicant's functionality or capacity (GD9-16). I know of no authority that requires a decision-maker to unreservedly accept an appellant's oral testimony regarding the severity of his disability, when there is either no supporting documentary evidence, or the evidence is deficient in addressing the scope of that appellant's limitations and the impact on him. In my view, it is best left to the trier of fact to determine, based on the evidence before him, whether an appellant's oral evidence is sufficient to prove his case, or whether corroborating evidence is required.

Orchard Business

[11] The Applicant contends that the General Division erred in finding that he was actively involved in his family's orchard business. He maintains that his injuries have forced him to effectively retire from the business. The Applicant argues that the unequivocal evidence before the General Division was that the orchard business has become an investment and not a business in which he actively participates. He claims that his involvement is limited to giving advice to his wife and daughter for an hour each day. The Applicant argues that the General Division failed to address this evidence altogether and thereby erred in determining that he was involved in a substantially gainful occupation and in concluding that he was earning employment income.

[12] The member specifically noted at paragraph 10 in the evidence section that the Applicant estimated that his advisory role for the orchard business takes approximately one hour per day. In his analysis, the member referred to this as a "contribution to the farm," for which he receives a share of the profits of the operation, paid to him as employment income, according to the earnings history (GD8-15). It may be that when considering whether the Applicant was severely disabled, the member considered whether the Applicant had work capacity, such as being able to continue to contribute to the management of the farm in any manner, rather than whether he was incapable regularly of pursuing any substantially gainful occupation. For instance, at paragraph 28, the member wrote that he was satisfied that the Applicant's medical problems did not cumulatively prevent him from continuing to manage the farm. Similarly, at paragraph 32, the member indicated that the extent of the Applicant's severe medical issues did not either individually or collectively combine to be of such a severe nature as to prevent his contribution to the farm.

[13] Considering that he allegedly had limited involvement in the orchard business, the Applicant suggests that there should have been some analysis or discussion into whether his meagre contribution to the farm could constitute capacity regularly of pursuing a substantially gainful occupation.

[14] I make no judgment on whether the Applicant's involvement in the orchard business is meagre and whether it constitutes being engaged in a substantially gainful occupation, but I agree that there is an arguable case to be made that the member may have considered the Applicant's contribution to the farm as the equivalent of being engaged in a substantially gainful occupation, possibly without examining the extent of his involvement in the operations (though this is not to suggest that if an applicant performs only minimal activities, he does not necessarily have the capacity to do more or he does not have the capacity to regularly pursue any substantially gainful occupation). This leads to the broader consideration of whether the General Division determined whether the Applicant has the capacity to regularly pursue any substantially gainful occupation.

[15] The member also noted that the Applicant has transferable skills that continue to prove vital to the operation of the farm, but it is not readily apparent from the decision whether the member accepts that the Applicant is limited to working an hour each day or whether he is capable of working more hours.

[16] For these reasons, I am satisfied that the appeal has a reasonable chance of success.

Family Physician's Medical Opinion

[17] The Applicant claims that the General Division based its decision on an erroneous finding of fact at paragraph 28, in misquoting the family physician as having written, "not all of which are disabling." The Applicant submits that the physician did not comment on the cumulative effect of his medical problems.

[18] The family physician prepared a Canada Pension Plan medical report dated November 16, 2012, in which he wrote, "I've been asked to list all of the patient's diagnoses NOT all of which are disabling" (GD5-56).

[19] At paragraph 28 of his decision, the General Division member wrote:

> The Tribunal is satisfied that the "constellation" of medical problems do not cumulatively prevent the [Applicant] from continuing to manage the farm in collaboration with his wife and daughter. The Tribunal agrees with Dr. Chilvers regarding the complaints of his patient that: "not all of which are disabling." This doctor did not indicate which, if any, condition was disabling.

[20] The member's quote of the family physician's medical opinion is accurate. It is also true that the physician did not indicate which of the conditions were disabling.

[21] What is less clear from the decision is whether the member's determination that the Applicant's problems did not cumulatively prevent him from continuing to manage the farm flowed from the family physician's opinion that not all of his conditions are disabling. While the two issues could be seen as being separate and distinct from each other, they are discussed in the same paragraph. Yet, at the same time, it is not the only instance where the member discussed two seemingly separate and disparate issues within the same paragraph.

For instance, in the preceding paragraph, the member discussed the findings of one medical practitioner regarding the Applicant's carpal tunnel syndrome, and then proceeded to discuss the opinion of another medical practitioner regarding the Applicant's response to medication for his Crohn's disease, although there is no apparent connection between the two reports or the two medical conditions.

[22] What is more apparent is that the General Division member came to his conclusion that the Applicant's problems did not cumulatively prevent him from continuing to manage the farm, on the basis of his analysis of the medical evidence, at paragraphs 26 and 27. Accordingly, I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

The Evidence

[23] The Applicant addressed the medical and employment evidence that was before the General Division. He also addressed some of the jurisprudence on the issue of severity under the *Canada Pension Plan*. He described his functional limitations and restrictions. He argues that the evidence supports a severe disability that prevents him from continuing his management contribution to the farm work.

[24] 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. This is so, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[25] 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

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

Janet Lew
Member, Appeal Division