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

Citation: *C. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 125

Tribunal File Number: AD-16-1205

BETWEEN:

C. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 29, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated July 21, 2016. The General Division had earlier conducted a hearing by teleconference and 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" prior to the minimum qualifying period (MQP), which will end on December 31, 2018.

[2] On October 18, 2016, within the specified time limitation, the Applicant's representative submitted to the Appeal Division an application requesting leave to appeal detailing alleged grounds for appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[3] 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.

[4] 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.

[5] 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.

[6] 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]

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

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

SUBMISSIONS

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

(a) New medical evidence, which was not available earlier due to the timing of the hearing, is being obtained, including the enclosed report dated October 17, 2016, by Ted Cebrat, psychotherapist, of the Michael G. DeGroote Pain Clinic. This report indicates that the Applicant, despite receiving treatment, has a severe and prolonged disability.

(b) The General Division failed to review and give adequate weight to the medical evidence as a whole, basing its decision on the medical evidence that was originally filed, and not on the Applicant's ongoing medical treatment and updated reports. Reports from Dr. Ali Ghouse and Ross Rehabilitation refuted earlier the evidence and clearly stated

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

that the Applicant's condition prevented him from engaging in any employment. In denying the Applicant benefits, the General Division disregarded these reports.

ANALYSIS

New Document

[10] The Applicant's request for leave to appeal relies, in part, on a psychotherapy report that was unavailable at the time of hearing; indeed, it was not prepared until after the General Division had already issued its decision. I note that it took nearly three years after the Applicant applied for CPP disability benefits for the hearing to come before the General Division—a length of time that one would ordinarily expect was sufficient to gather evidence of disability.

[11] In any event, an appeal to the Appeal Division is not ordinarily an occasion on which additional evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the Appeal Division any authority to make a decision based on the merits of the case. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations*. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

Alleged Failure to Consider Medical Reports

[12] For the most part, the Applicant's submissions on these grounds amount to a recapitulation of evidence and arguments that, from what I was able to determine, were already presented to the General Division. In essence, the Applicant argues that the General Division gave inadequate consideration to evidence that he felt proved he was suffering from a severe and prolonged disability as of the hearing date.

[13] An administrative tribunal is presumed to have considered all the evidence before it, and in this case, the General Division made its decision after conducting what appears to be a thorough survey of the evidentiary record. Both of the medical reports mentioned in the Applicant's submissions were addressed in the General Division's reasons—Dr. Ghouse's May 27, 2016, physiatry report and Maria Ross and Katrina Kotsopoulos' February 17, 2016, situational assessment report were both duly summarized, as were results from another independent medical examination (IME). The General Division referred to findings from all three of the IMEs in its analysis proper and offered defensible reasons for giving them lesser weight:

> [52] In his submissions, the [Applicant's] representative suggested that the Tribunal should give strong weight to the conclusions of Dr. Ghouse, Dr. Macaulay and Maria Ross. The Tribunal has no doubt that they are all experts in their fields as the representative suggests. However, the Tribunal concurs with the Minister that more emphasis should be placed on the reports of the treating physicians.

While the Applicant may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might choose to accept or disregard, and decide on its weight.

[14] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all of the evidence. In *Simpson v. Canada*,[3] the appellant's counsel identified a number of medical reports, which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

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

[15] The thrust of the Applicant's submissions is that I reconsider and reassess selected documentary evidence and decide in his favour. I am unable to do this, as my authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the enumerated grounds of subsection 58(1), and whether any of them have a reasonable chance of success. In the absence of any specific allegation of error, I do not think there is an arguable case that the General Division gave insufficient consideration to the medical reports listed by the Applicant.

CONCLUSION

[16] The Applicant has not identified grounds under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division