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

Citation: *Minister of Employment and Social Development v. J. M.,* 2017 SSTADIS 106

Tribunal File Number: AD-16-1215

BETWEEN:

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Applicant

and

J. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: March 20, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 20, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal of a decision of the Minister of Employment and Social Development (Applicant). The Respondent had been denied benefits on a claim for a disability pension, because the Applicant had determined that the Respondent did not have a severe disability on or before December 31, 2013. The Applicant appealed to the General Division of the Tribunal.

[2] The General Division held the appeal by videoconference, and it determined that:

a) The end of the Respondent's minimum qualifying period (MQP) is December 31, 2013, with a pro-rated MQP of February 28, 2014;

b) she had a severe disability as defined in the *Canada Pension Plan* (CPP) as of December 22, 2010;

c) there may be circumstances where a temporary condition is prolonged under the CPP;

d) the Respondent's disability meets to test of "long continued" and, at the MQP, there was little likelihood of her condition improving;

e) *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309 and *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366 are distinguishable;

f) at the MQP, the Respondent's disability was long, continued and of indefinite duration, and, therefore, prolonged from December 2010 to November 2014; and

g) the Respondent is deemed disabled in June 2012; payments start four months after the deemed date of disability as of October 2012; and the disability pension ceases with the payment of November 2014.

[3] Based on these conclusions, the General Division allowed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on October 18, 2016, within the 90-day time limit.

ISSUE

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

LAW AND ANALYSIS

[6] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[8] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[9] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

[10] The Applicant's grounds of appeal are that the General Division erred in law in arriving at its decision in that it allowed a closed period of disability, contrary to established jurisprudence. The Applicant's arguments can be summarized as follows:

a) The *Henderson* and *Litke* cases foreclose the possibility of pensions in cases of temporary disability.

b) The General Division granted a disability pension for a temporary period of disability, which is a period with a definite duration.

c) The General Division cited *Henderson* and *Litke* but did not apply them correctly and also distinguished them incorrectly.

d) The General Division did not refer to cases decided by the Appeal Division which follow

   Henderson and *Litke* and offer clarification on temporary periods of disability.

e) Closed periods are not allowed under the CPP, and the Respondent does not meet the prolonged branch of the test for disability.

f) The General Division also made an erroneous finding of fact in a perverse or capricious manner when it found that the Respondent's medical conditions were severe and prolonged, because the medical evidence did not support this finding.

Error of Law

[11] The General Division distinguished the *Henderson* and *Litke* cases at paragraph 69. It also concluded that these cases "clearly state that there may be circumstances where a temporary condition is prolonged under the CPP." It did not consider these cases to foreclose the possibility of disability pensions in cases of temporary disability, which is the argument of the Applicant.

[12] The General Division did not refer to the *Zagordo* decision (*Minister of Human Resources Development v. D.Z.*, 2015 SSTAD 1194) or any other decisions of the Appeal Division related to this issue.

[13] In the circumstances, whether the General Division erred in law in making its decision warrants further review.

[14] On the ground that there may be an error of law, I am satisfied that the appeal has a reasonable chance of success.

Erroneous Finding of Fact

[15] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated that it is unnecessary for the Appeal Division to address all of the grounds of appeal that an applicant raises. In response to the Respondent's arguments that the Appeal Division had been required to deny leave on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESD Act "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." This Application is one of the situations described in *Mette*.

[16] The Applicant raises several grounds of appeal. Its grounds of appeal include errors of law and erroneous findings of fact.

[17] Because the errors of law asserted are inter-related to the analysis of whether the Respondent's medical condition was severe and prolonged and at what period of time, I will not parse the grounds of appeal at this stage of the proceedings.

CONCLUSION

[18] The Application is granted pursuant to paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[19] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[20] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, on the form of the hearing and on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division