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

Citation: *J. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 132

Tribunal File Number: AD-17-108

BETWEEN:

J. 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 30, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 3, 2016, which determined that the Applicant had regained capacity to work starting from April 1, 2011. The decision effectively requires that he reimburse an overpayment of a *Canada Pension Plan* disability pension to the Respondent, for the months from April 2011 to June 2011, and confirms the Respondent's decision to terminate benefits. The Applicant had previously been found disabled as of September 2007, until shortly after he began a return to work trial. He contends, however, that he has remained continuously and permanently severely disabled since September 2007.

ISSUE

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

GROUNDS OF APPEAL

[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 argues that the General Division

failed to observe a principle of natural justice, erred in law and 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.

Bias

[5] Natural justice is concerned with ensuring that an applicant has a fair and reasonable opportunity to present his case, that he has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias.

[6] The Applicant claims that the General Division member exhibited bias against him and that she intentionally denied his appeal, to protect the Respondent's staff. The Respondent had paid the Applicant a disability pension between April 2011 and June 2011 and then subsequently determined that he was not entitled to receive that benefit.

[7] The Applicant's submissions are predicated on a belief that there was an improper relationship between the member and the Respondent's representatives or staff. He claims that the decision itself is proof of an improper relationship. He suggests that had the member not been biased against him in favour of the Respondent, she would have readily determined that he has been continuously disabled throughout, including between April 2011 and June 2011.

[8] However, the General Division is a wholly impartial and independent administrative tribunal that is separate and distinct from, and acts at arm's length from, the parties to proceedings. The members of the General Division have no formal or informal relationship with any of the parties, including the Respondent, its representatives or staff. Members have no interest in the outcome of any proceedings. If any conflicts exist, members are expected to properly recuse themselves from the proceedings.

[9] As my colleague has pointed out in *A.D. v. Canada Employment Insurance Commission*, 2017 SSTADEI 23, allegations of bias strike at the heart of the administrative law system and should not be made lightly in the absence of any proof. In quoting *Joshi v. Canadian Imperial Bank of Commerce*, 2015 FCA 92 at paragraph 10:

> Such allegations are particularly egregious when made against judges, as they attack one of the pillars of the judicial system, namely the principle that judges are impartial as between the parties who appear before them […].

[10] This applies equally to Social Security Tribunal members. It is not enough to point to an unfavourable outcome and suggest that that alone must be evidence of bias. Having failed to produce any concrete evidence or proof of an improper relationship between the member and the Respondent, its representatives or staff, I am not satisfied that the appeal has a reasonable chance of success.

Failure to consider evidence

[11] The Applicant alleges that the General Division member failed to consider relevant legal issues. In particular, he claims that the member failed to consider or mention the following:

- that he has endured over "six long arduous, years of hardship and suffering" from October 2010 to November 2016 (October 2010 coincides with the time when he returned to work), at the hands of the Respondent's staff; and
- his illness and suffering.

[12] The member recognized that the Applicant continues to experience health issues and that he continues to miss time off work as a result. However, the primary issue before the General Division was whether the Applicant remained or had ceased to be disabled as of April 2011, so she necessarily focused on what she considered was particularly germane to this issue. In this case, it is clear that the member considered not only the Applicant's health condition, but also the hours worked by him and his earning level, amongst other things. After all, if an applicant demonstrates that he is able to regularly pursue a substantially gainful occupation, this would be of greater relevance and indeed determinative of the ultimate issue of whether he is severely disabled under the *Canada Pension Plan*, over any issues of the Applicant being unwell and suffering

hardship. I am not satisfied that the appeal has a reasonable chance of success on this ground.

Law of possession

[13] The Applicant argues that the member should have applied the "law of possession," as she would have then concluded that he was entitled to retain the disability pension that the Respondent had paid to him for the period from April 2011 to June 2011. He defines the law of possession as follows: A recipient of any funds is entitled to retain those funds, and is under no obligation to return those funds under any circumstances, other than when those funds are obtained either through fraudulent or illegal means; and further, that recipient shall not be subjected to any threats or harassment for the return of those funds.

[14] The Applicant has not cited any legal authorities in support of his claim that he is entitled to the disability pension paid to him from April 2011 to June 2011 under the "law of possession," as he defines it. I could find no authorities to suggest that such a principle applies to enable an individual to retain an object, including funds, by virtue of the simple fact that he has come into possession of that object.

[15] While there is a "law of possession," it arises in the criminal context, where an individual is alleged to be in personal possession, i.e. exercises physical control over a prohibited object with full knowledge of its character, and where there is some evidence to show the individual took custody of the object willingly with intent to deal with it in some prohibited manner: *R. v. York*, 2005 BCCA 74 (CanLII). The "law of possession," as it is properly understood, has no applicability in these circumstances.

[16] I am not satisfied that the doctrine applies, or that the appeal has a reasonable chance of success on this particular ground.

Substantially gainful occupation

[17] The Applicant argues that the General Division erred in finding that, because of his earnings, he had successfully returned to work (and was therefore engaged in a substantially gainful occupation), without giving any consideration to his mental health issues.

[18] At paragraph 28, the member wrote, "based on his reported hours worked and compensation, it is difficult to argue that the [Applicant] continued to meet the criteria of disabled under the [*Canada Pension Plan*] after April 1, 2011." In the evidence section, she had noted that the records of earnings showed that the Applicant had earned the following:

- in 2010, $24,861 (he had returned to work in October of that year);
- in 2011, $90,357;
- in 2012, $90,402;
- in 2013, $87,830; and
- in 2014, in excess of $99,999.

[19] At paragraph 29, the member wrote that the evidence showed that the Applicant was capable regularly of employment with an average of 35 hours worked per week. She also wrote, "Even with time lost due to illness, his income would qualify as substantially gainful. Moreover, there is no evidence that his employment could be considered benevolent or tokenism."

[20] Clearly, the member gave some consideration not only to the Applicant's earnings or hours, but also to the nature of his duties and the extent of his engagement in the workforce. These are all relevant considerations in determining whether an applicant is engaged in a substantially gainful occupation. On this basis, I am not satisfied that the appeal has a reasonable chance of success.

[21] As a footnote, in some circumstances, earnings can be a measure of whether an applicant is engaged in a substantially gainful occupation, depending upon the amount of those earnings and when they were earned. Indeed, as of May 29, 2014, subsection 68.1 (1) of the *Canada Pension Plan Regulations*, C.R.C., c. 385, "substantially gainful" is now defined as follows:

> **68.1 (1)** For the purpose of subparagraph 42(2)(a)(i) of the Act, *substantially gainful*, in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The amount is determined by the formula.
>
> (A x B) + C
>
> where
>
> A is .25 the Maximum Pensionable Earnings Average;
>
> B is .75; and
>
> C is the flat rate benefit, calculated as provided in subsection 56(2) of the Act, x 12.

[22] Using this formula, earnings equal to or greater than $14,836 for 2014 would qualify as "substantially gainful employment," as it would show that that occupation provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. In other words, "substantially gainful" is now measured by one's earnings.

CONCLUSION

[23] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division