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

Citation: *T. L. v. Minister of Employment and Social Development,* 2017 SSTADIS 141

Tribunal File Number: AD-16-823

BETWEEN:

T. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: April 3, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) issued on March 15, 2016. The General Division refused his application for disability benefits under the *Canada Pension Plan*, as it had found that his disability was not "severe" at the time of his minimum qualifying period (MQP) of December 31, 2013.

[2] The Applicant takes the position that the General Division erred in assessing whether his disability was severe. The Applicant's counsel argues that the General Division based its decision on errors of law and that it made serious errors in its finding of facts. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

[3] The Applicant filed the Application with the Appeal Division of the Tribunal on April 12, 2016, within the 90-day time limit.

SUBMISSIONS

[4] The Applicant seeks leave on the following grounds:

a) The General Division erred in law by failing to consider all of the Applicant's disabling conditions, including chronic pain, depression, mild brain injury, learning disability and functional illiteracy;

b) The General Division erred in law by failing to apply the principles set out in applicable jurisprudence such as: *Nova Scotia v. Martin*, [2003] 2 SCR 504, and *Villani v. Canada (Attorney General)*, 2001 FCA 248; and

c) The General Division made erroneous findings of fact without regard to the material before it by:

1. Referring to the Applicant's schooling as "practical learning" when it was education designed for those with learning handicaps;

2. Finding that the Applicant obtained “some transferable skills” when his only work experience was physical farm labour (which his disability prevented him from doing) and he is functionally illiterate;

3. Failing to give proper deference or even any deference to the views and opinion of the Applicant’s treating family physician and preferring the opinion of others.

THE LAW

[5] Although a leave to appeal application is an initial and lower hurdle to meet than the one that must be met on the hearing of the appeal on the merits, for leave to be granted, some arguable ground upon which the proposed appeal might succeed is required: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether, legally, an applicant has a reasonable chance of success.

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

ANALYSIS

[7] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[8] The grounds and reasons relied upon by the Applicant fall into four categories: (1) the General Division failed to consider all of the Applicant's disabling conditions; (2) the General Division improperly applied the jurisprudence to the facts; (3) the General Division preferred some medical evidence over other medical evidence; and (4) the General Division based its decision on an erroneous finding of fact without regard to the material before it.

[9] In respect of category (1), the General Division referred to the Applicant's medical problems related to a farming accident in March 2011 (neck, right shoulder, and leg), learning disability, depression and pain. In the Analysis portion of its decision, the General Division discussed the impact on the Applicant of the workplace accident, carpel tunnel syndrome, anxiety and depression.

[10] The General Division decision referred to excerpts of the medical evidence in the file that it had considered the most pertinent. In paragraph 44, the General Division stated:

> [44] The Tribunal acknowledges the medical reports of Dr. Finn, Family Physician and his opinion the Appellant is not employable and his conditions are severe and prolonged. The opinion of the Family Doctor is not corroborated or supported by the medical reports authored by specialists or professional assessors. Much of the conclusions reached by Dr. Finn are based upon subjective information provided by either the Appellant or a parent. The objective diagnostic imaging indicates a successful neck operation and no significant tear or tendinosis in the rotator cuff and no significant AC degenerative changes (January 2012). Dr. Murty, FRCS that the Appellant hopefully will respond to routine training as he is quite young and in excellent physical health. The carpal tunnel syndrome endured by the Appellant was described as mild and did not appear be getting worse. Objective testing by Cascade indicated mild anxiety and depression measured on the Beck Inventory, and he would be a suitable candidate for training on a job within a suitable field. A FAE (September 2012) indicated work ability should be able to be sustained on a day to day basis. In April 2013 Hamilton Health Sciences indicated the Appellant was neurologically stable and he was undergoing training to seek a job that would be suitable to his condition. A consultation report authored by Dr. Felolu in October 2015, the right shoulder x-ray was normal, mild degenerative changes of the cervical spine without spinal foraminal compromise, range

> of motion of cervical spine was decreased but not significant, and upper extremity bilaterally was normal, strength testing was normal. The objective medical evidence on file does not substantiate the opinion of the Family Physician. Dr. Finn noted in July 2013 the Appellant does not feel capable to do physical labour, and in February 2014 concluded the Appellant was not a suitable candidate for retraining based on discussions with him and his parents. The Tribunal prefers the objective evidence of specialists and finds the opinion of Dr. Finn is often based on subjective factors.

[11] In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal concluded that, when determining whether a claimant is disabled under the *Canada Pension Plan*, all of the claimant's conditions must be considered: not just the main one. As there is no mention of pain or chronic pain in the Analysis portion of the decision appealed from, it is not clear to me that the General Division considered the cumulative effect of the Applicant's physical and psychological conditions in this case.

[12] The arguments in category (2) relate to application of jurisprudence. The General Division cited the *Villani* decision and identified the "Villani factors", and it concluded that the Appellant had "adequate English verbal skills" and "had obtained some transferable skills within his medical restrictions". The General Division's decision does not refer to the *Martin* case or other jurisprudence relating to chronic pain and its assessment.

[13] The arguments in category (3) and (4) relate to the General Division's treatment of the evidence before it, particularly in its findings of fact related to the Applicant's education and skills and its weighing of the evidence before it.

[14] Specifically, the Applicant argues that the General Division failed to give the proper deference or even any deference to the views and opinion of the Applicant's treating family physician and relied, instead, on reports of non-physicians who had administered testing to measure organic injury but not inorganic conditions (e.g. chronic pain, defective cognitive ability, memory, concentration etc.). The testing had been commissioned in the context of workers' compensation, and it had been limited to conditions and injuries related to the workplace accident; a factor the General Division failed to appreciate. He also asserts that the General Division's findings related to "practical learning" and "transferable skills" were made without regard to the evidence before it.

[15] Possible errors of law or mixed fact and law in the General Division decision include:

a) Its analysis of how the Applicant's personal characteristics or circumstances affected his capacity of regularly pursuing any substantially gainful occupation (application of *Villani*);

b) The conclusion that the Applicant had "obtained some transferable skills within his medical restrictions"; and

c) The omission of pain or chronic pain in its consideration of the cumulative effect of the Applicant's conditions (application of *Bungay* and *Martin*).

[16] I find that the grounds and reasons for appeal in categories (1), (2) and (4) have a reasonable chance of success.

[17] With respect to category (3), 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 raised by an applicant. In response to the Respondent's arguments that the Appeal Division was 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*.

[18] Because the errors asserted may be inter-related to the analysis of whether the Applicant's medical condition was severe and prolonged, I will not parse the grounds of appeal any further at this stage of the proceedings.

CONCLUSION

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

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

[21] 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