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

Citation: *A. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 154

Tribunal File Number: AD-16-632

BETWEEN:

A. P.

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: April 10, 2017

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division dated January 29, 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" by the end of his minimum qualifying period on December 31, 2013. For the Applicant to succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

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 alleges that the General Division erred in law and that it based its decision on an erroneous finding of fact relating to the

severity of his disability and his ability to retrain and find lighter work, in connection to his ability to sit for prolonged periods.

Physical limitations

[5] The Applicant submits that the General Division erred in finding that he could take English language courses to overcome his language barrier, and that he is suited for sedentary work, maintaining that the severity of his pain precludes him from prolonged sitting and affects his concentration. The Applicant argues that, properly, the member should have concluded that he is unable to take any language course or engage in any sedentary employment because of the severity of his pain.

[6] The General Division wrote that it recognized that the Applicant's language barrier was an obstacle to finding alternative or lighter work, but, citing also his age, the conservative treatments he was undergoing and his functional limitations, the member indicated that language was only one factor to consider. The member also found that it was reasonable to expect that the Applicant "could, for example, undertake some language courses to reduce his language barrier and allow him to seek new opportunities of retraining or employment."

[7] The General Division accepted that the Applicant is faced with several physical limitations and that he may not be able to return to his previous employment as a carpenter, or, for that matter, any physically demanding work. The member indicated that he was unconvinced that the Applicant demonstrated that he was incapable of pursuing alternative and lighter work within his limitations. The member, however, does not appear to have indicated what those limitations were, and whether the Applicant was capable of sitting for prolonged periods and whether sedentary work or retraining that involved sitting for prolonged periods was appropriate. I am satisfied that this raises an arguable case, though this is not to suggest that I have accepted that there was corroborating medical evidence to support the Applicant's allegations that he had limitations with prolonged sitting and was unable to take English language training courses or engage in sedentary employment, at any time on or before the end of his minimum qualifying period.

[8] The member referred to the family physician's medical report dated May 2012, which suggests that the Applicant has difficulty sitting for any considerable length of time. I note that there was other medical evidence regarding the Applicant's alleged limitations. For instance, a consultation report dated February 11, 2013 indicates that the Applicant complained of increased pain with prolonged sitting (GD2-37), but most of the medical documentation did not expressly refer to any limitations with sitting.

[9] Medical reports throughout 2013 indicate that the Applicant's lower back pain was getting progressively worse, although they did not indicate any restrictions with sitting (GD4-3 to 6). Similarly, a medical report dated June 13, 2013 made no reference to any restrictions with sitting, although this same report referred to other limitations (GD5-48). One of the more recent reports, dated February 6, 2014, indicated that the Applicant's pain improved with a nerve root block and that he now rated his pain at 4/10 instead of 10/10 (GD5-82). An updated medical report dated September 29, 2015 from his family physician indicates that the Applicant continues to experience chronic back pain. Although there is no question that the Applicant has chronic back pain, the medical file does not specifically address the issue of the Applicant's limitations with sitting after the report of February 6, 2014. Nonetheless, I am satisfied that the appeal has a reasonable chance of success.

Medical report dated February 17, 2017

[10] The Applicant has since produced a medical report dated February 17, 2017.

[11] It has become well-settled law that new evidence generally does not constitute a ground of appeal. As the Federal Court held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367:

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[12] New evidence can be considered on an appeal to the Appeal Division under only very limited circumstances, where it addresses any of the grounds of appeal. Those circumstances, however, are not present here to enable me to consider the medical opinion dated February 17, 2017.

CONCLUSION

[13] 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