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

Citation: *G. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 156

Tribunal File Number: AD-16-1251

BETWEEN:

G. W.

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: April 11, 2017

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 (Tribunal) dated August 2, 2016. The General Division had earlier conducted a hearing on the record and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because his disability was not severe during his minimum qualifying period (MQP), which ended on December 31, 2014.

[2] On November 2, 2016, within the specified time limitation, the Applicant's authorized representative submitted to the Appeal Division an application requesting leave to 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 may 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 an initial hurdle for an 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 a schedule accompanying the application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) In paragraph 32 of its decision, the General Division noted that the Applicant was admitted to Ottawa General Hospital on April 14, 2016 due to his medical condition. The General Division erred in failing to adjourn the hearing to give the Applicant's representative the opportunity to obtain additional relevant medical documentation on the hospitalization. It is the General Division's duty and responsibility to fairly review credible and supportive evidence and not make decisions on speculation if that evidence is unavailable.

[1] *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(b) In considering only the evidence contained in the appeal file, the General Division failed to properly assess critical matters such as the Applicant's prognosis or diagnosis after July 12, 2012. This is critical. The General Division incorrectly determined the Applicant's condition to be "stable" as of the MQP date of December 31, 2014.

(c) The General Division erred in law by failing to consider the medical evidence in its totality. Based on the new arguably relevant documents, the Applicant has significant functional limitations that would prevent him from performing even "highly accommodated light work." The Applicant's condition was severe as of the MQP.

(d) The General Division failed to consider the report dated November 6, 2013, which stated that the Applicant's hand-eye coordination was poor and that his short-term memory was deteriorating. He was no longer able to drive, and he was neglecting personal hygiene. He was unable to manage all the household management and employed a caregiver. The report concluded that no improvement or recovery was expected. According to the report dated May 22, 2013, the Applicant's condition was getting worse.

[10] Enclosed with the notice requesting leave were the following documents:

- a Great-West Life questionnaire dated November 6, 2013 and completed by Dr. Felix Klajner, family physician, on November 28, 2013;
- a hospital chart dated November 5, 2012;
- a Great-West Life questionnaire dated April 24, 2013 and completed by Dr. Klajner on May 22, 2013;
- a Great-West Life questionnaire dated October 5, 2012 and completed by Dr. Klajner on October 23, 2013;
- progress reports of Dr. Anne Kensole, endocrinologist, dated April 10, 2011, December 5, 2011 and March 24, 2012;

- a Great-West Life Attending Physician's Statement completed by Dr. Klajner pursuant to the Applicant's short term disability claim on April 18, 2012;
- office notes of Dr. Klajner from June 11, 2010 to April 18, 2012; and
- diabetic eye examination reports by Dr. Gloria Nebiolo, optometrist, dated July 27, 2011, February 2, 2012 and November 14, 2012.

ANALYSIS

Background

[11] I will begin by summarizing a few background details that are relevant to this application. The Applicant filed his CPP disability application with the Respondent on April 25, 2012 and, following refusal at the initial and reconsideration stages, he appealed to the General Division on November 15, 2015. The record shows that the Tribunal scheduled a videoconference hearing for May 4, 2016, but its notice of hearing to the Applicant was returned and marked "moved." After a second notice of hearing was returned, the Applicant's representative submitted a letter, dated March 8, 2016, to the Tribunal asking that the hearing be cancelled because he was unable to locate his client. He also requested that the Tribunal consider "making a decision with the information currently on file." On March 30, 2016, the General Division notified the Applicant's representative that it would make a decision based on the documents and submissions filed. The General Division provided the parties with a revised filing period (ending May 3, 2016) and response period (ending June 3, 2016).

[12] In a letter dated April 14, 2016, the Applicant's representative advised the General Division that the Applicant had been admitted to Ottawa General Hospital due to his medical condition. No further information was provided.

New Documents

[13] Although he does not characterize it as such, the Applicant's representative is, in essence, alleging that the General Division failed to observe a principle of natural justice by denying the Applicant an additional opportunity to submit further medical evidence. He

submitted, with the notice requesting leave, a number of reports and records, most of which had not been previously made available to the General Division.

[14] I see no reasonable chance of success on this ground. 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, as well as 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.

Hospitalization

[15] The Applicant's representative submits that it was unfair of the General Division to go ahead with adjudicating the appeal after it was informed that the Applicant had been admitted to hospital.

[16] In my view, this ground has no reasonable chance of success on appeal. First, the Applicant and his authorized representative had more than four years to submit medical evidence in support of their claim. That period included 18 months that could have been spent gathering information documenting the Applicant's condition during the crucial weeks before December 31, 2014—the last day on which he was eligible for CPP disability benefits. The General Division had initially scheduled an oral hearing, but it was cancelled at the request of the Applicant's authorized representative, who clearly consented, as an alternative, to a hearing based on the documentary record. The representative's letter of April 14, 2016 tersely disclosed that his client was in hospital but offered neither supporting documents nor salient details such as when and why he had been admitted. Notably, the letter acknowledged that the decision was to be made on record but did not request a change in the form of hearing, an adjournment or a

filing extension. If the Applicant's representative was in the process of obtaining more medical evidence, he did not say so. Given these circumstances, the General Division's decision to proceed was reasonable and did not represent a breach of natural justice or procedural fairness.

[17] The Applicant's representative also suggests that the General Division erred in law by failing to consider the medical evidence in its totality—but by "totality," it is clear that he includes documents that had never been submitted to the General Division in the first place. The General Division cannot be faulted for failing to consider evidence that was not made available to it, nor can it be reasonably expected to allow an appeal to carry on indefinitely while it awaits further evidence that may or may not exist.

[18] Otherwise, an administrative review 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. While the Applicant may disagree with the General Division's conclusions, it is not my role, as a member of the Appeal Division, to revisit the evidence to assess its merits.

CONCLUSION

[19] For the reasons set out above, I see no arguable case for any of the grounds of appeal advanced by the Applicant. The application for leave to appeal is therefore refused.

Member, Appeal Division