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

Citation: *R. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 169

Tribunal File Number: AD-16-1206

BETWEEN:

R. M.

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 19, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated August 22, 2016. The General Division had earlier conducted a hearing by videoconference 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, which ended on December 31, 2011.

[2] On November 8, 2016, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division. 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 appeal 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 his application for leave to appeal, the Applicant made the following submissions:

(a) The General Division erred in failing to rule on the "prolonged" criterion.

(b) At the hearing, the Applicant read into evidence a medical report dated July 28, 2016, in which Dr. Yves Raymond advised Great-West Life Insurance that his patient was unlikely to return to work. In paragraph 28 of its decision, the General Division declined to place significant weight on this report, leading the Applicant to believe that this material medical information was ignored or rejected as evidence.

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

ANALYSIS

Failure to Rule on "Prolonged"

[10] Having found that the Applicant's disability was not "severe" according to the statutory definition, the General Division concluded in paragraph 33 of its decision that it was unnecessary to consider the "prolonged" criterion.

[11] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is "severe *and* prolonged" [my emphasis]. To qualify for CPP disability benefits, it is not enough to have an impairment that is either severe or prolonged; it must be both. Logic demands that if the General Division found that the Applicant's disability fell short of severity, then his claim must fail, regardless of how long-lived or indefinite his condition might be.

[12] I do not see an arguable case on this ground

Reading into Evidence of Dr. Raymond's July 2016 Report

[13] It appears that the Applicant obtained a report from his family physician at a late date and found himself with insufficient time to submit it to the Tribunal in advance of the hearing. During the teleconference of August 4, 2016, the General Division permitted the Applicant to "read in" the report, which was dated one week earlier.

[14] In paragraph 23, the General Division wrote:

> The Appellant indicated he recently received a copy of his Family Doctor's recent report to the long-term disability insurer. He testified the Doctor wrote he has cognitive restrictions, analytical – moderate; decision making – mild; learning/memory – mild; social interaction – severe. The Appellant further testified the Doctor wrote that safety rules would be difficult to learn, and his patient has low concentration and anxiety symptoms, and the Doctor indicated under Prognosis: not good, unlikely to return to work at this time, unlikely to change in foreseeable future.

[15] In its analysis, the General Division addressed Dr. Raymond's report as follows:

> [28] […] The last reports on file indicated the Appellant should be able to increase his hours. The Tribunal does not place significant weight on the report the Appellant read at the hearing. The Tribunal does not know the context or purpose of the report nor on what if any objective basis the Doctor formed his opinions.

[16] I am aware that the General Division's notice of hearing, dated May 8, 2016, advised the parties that additional documents were to be filed by June 10, 2016, after which date they would be admitted only at the General Division's discretion. I also recognize the General Division's authority, as trier of fact, to weigh evidence as it deems appropriate. That said, I think the Applicant has an arguable case that the General Division failed to observe a principle of natural justice by effectively dismissing the late report. If the General Division did not "know the context or purpose of the report" or whether there was any objective basis on which Dr. Raymond formed his opinion, it was open to the General Division to make inquiries of the Applicant to that effect at the hearing or to defer judgment to give the Applicant a reasonable amount of time in which to submit a hard copy of the report. The question that arises is whether the General Division fairly exercised its discretion to consider late documents and, if not, whether its failure to do so had any material impact on the outcome of the appeal.

CONCLUSION

[17] For the reasons set out above, I am granting leave to appeal on the ground that the General Division may have breached a principle of natural justice by, in effect, dismissing a medical document tendered late by the Applicant.

[18] I invite the parties to provide further submissions, which may include their views on whether a further hearing is required and, if so, what type of hearing is appropriate.

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

Member, Appeal Division