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

Citation: *A. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 181

Tribunal File Number: AD-15-1350

BETWEEN:

A. 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: April 25, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division's decision dated September 23, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that the Applicant's disability had not been "severe" by the end of his minimum qualifying period on December 31, 2010.

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 I can grant leave to appeal, I need to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal, and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant submits that the General Division erred on each of these grounds.

(a) Breach of Natural Justice

[5] The Applicant submits that his rights to due process were not observed in the hearings below and, as a result, his right to fully represent himself and have all the evidence before the previous decision-makers was violated. He claims that the General Division's decision was therefore based on an incomplete set of facts.

[6] He argues that, as a self-represented litigant, he was unaware of the test he was required to meet and that he mistakenly assumed that a supportive medical opinion would suffice to establish entitlement to a Canada Pension Plan disability pension. He claims that, had he been aware of the requirements under the *Canada Pension Plan*, he would have instructed his family physician and his cardiologist to address the issue of whether he was incapable regularly of pursuing any substantially gainful occupation by the end of his minimum qualifying period.

[7] In *McCann v. Canada (Attorney General)*, 2016 FC 878, the applicant, Mr. McCann, represented himself. The Federal Court acknowledged that this may have affected the way Mr. McCann's arguments were articulated throughout the process. Nevertheless, the Court held that "the law is the same for all and does not vary depending on whether a litigant chooses to be represented or to represent himself or herself […] [Mr. McCann] had a test to meet and, unfortunately for him, he failed on the most important factor, that of the merit of his claim," which, in that case, was against the Appeal Division's decision.

[8] The fact that the Applicant had represented himself until these proceedings before me has no bearing on the issue of whether the General Division failed to observe a principle of natural justice and whether the Applicant was thereby deprived of the right to a fair hearing or the right to fairly present his case. There is no indication that the General Division or, for that matter, the Social Security Tribunal, denied the Applicant any opportunity to seek representation in those proceedings. As was the case in *McCann*, irrespective of whether the Applicant was represented, he was still required to meet the requirements under the *Canada Pension Plan* to qualify for a disability pension.

[9] The Applicant suggests that the Respondent had a duty to inform him of the requirements under the *Canada Pension Plan* and that it failed to ask or direct him to seek appropriate medical opinions. I do not know of any positive duty on the Respondent to inform any applicant of the burden he or she is required to meet to establish entitlement. That said, I notice that the initial and reconsideration decisions from the Respondent to the Applicant indicated that he was required to establish that he had had a disability that was both severe and prolonged. The Respondent's initial decision also indicated that it was attaching an information sheet that provided the definition of disability under the *Canada Pension Plan* (GT1-13).

[10] I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

(b) Errors of Law

[11] The Applicant submits that, by finding that there was insufficient evidence to establish that he was severely disabled, the General Division effectively applied a "criminal standard-beyond the reasonable doubt standard" rather than the lower standard of proof on a balance of probabilities. However, at paragraphs 44, 55 and 57, the General Division set out the standard of proof as one of being on a balance of probabilities. There is no indication in the decision that the member deviated from this standard of proof.

[12] The Applicant further submits that the General Division erred by failing to assess his subjective complaints of pain or disability. However, the General Division was mindful of his complaints in this regard. For instance, at paragraph 47, the member noted that the Applicant had found his aches and pains "extremely debilitating. He was tired and weak". The member accepted that the Applicant had experienced aches and pain in 2010 and that he was subsequently diagnosed with fibromyalgia, but it is clear that the member was unsatisfied that his aches and pains were of such sufficient severity to meet the criterion under the *Canada Pension Plan.* Indeed, the member found the complaints vague, because of the passage of time.

(c) Errors of Fact

[13] The Applicant submits that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the evidence before it. In particular, the member stated that the family physician, Dr. Swanney, had failed to mention any aches or pains. However, the Applicant argues that the family physician had in fact mentioned his aches and pains. The family physician did so by "adopt[ing] the description of symptoms and treatment set out in Dr. Abdulla's December 10, 2010 report that specifically describes in detail the [Applicant's] difficulties with myalgia and statin myopathy."

[14] The Applicant argues that the member erred in suggesting that there had been no documented complaints within the family physician's records of pain or aches in 2010 and that, as such, his pain could not have been that severe. Apart from the alleged references in Dr. Swanney's medical report, the Applicant claims that his complaints were also well-documented in Dr. Min's early 2010 reports. In addition, the Applicant claims that other doctors diagnosed and described other ongoing pain and weakness (such as lumbar stenosis) that affected his lower limbs and lower back.

[15] The family physician's report is dated December 9, 2010. Under diagnosis, he listed ischemic heart disease and hereditary hypercholesteromia, but he also wrote "detailed history attached" and, under "relevant/significant medical history relating to the main medical condition," he also wrote "detailed attached" (GT1-47). It is not clear what the family physician attached, but correspondence dated January 17, 2011 from Canada Revenue Agency regarding the disability tax credit and a consultation report dated December 10, 2010 from the cardiologist Dr. Abdulla immediately follow the family physician's medical report.

[16] In his report of December 10, 2010, Dr. Abdulla, the cardiologist (GT1-52 to 54) wrote that the Applicant has had:

> considerable significant myalgia and muscle weakness aside from just muscle pain associated with all statin therapy […] The pattern of myalgia is absolutely classical for statin myopathy.

> [. . .]
>
> the patient is getting considerable weakness, aching and pains related to the Lescol.
>
> [. . .]
>
> He is putting up with considerable myalgia and muscle weakness related to the Lescol statin therapy and the CK level is elevated [. . .]
>
> Because of this, muscle weakness, myalgia and aches and pains, he is unable to do his normal job of fabricating and welding, which requires a fair amount of muscular activity. He would have to be considered disable [*sic*] from that point of view.

[17] The cardiologist clearly indicated that the Applicant suffered from aches and pains. On this basis, I am satisfied that the General Division may have 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, in finding that the Applicant could not have had aches and pains because his family physician had not specifically mentioned them in his report of December 9, 2010.

[18] I recognize that the Applicant alleges that the member made other erroneous findings of fact, without regard to the documentary and oral evidence. The Applicant may address these alleged erroneous findings of fact at the hearing of the appeal in this matter. If the Applicant intends to rely on any of the oral evidence, he should refer me to the time stamps from the recording of the hearing before the General Division.

CONCLUSION

[19] 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