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

Citation: *H. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 190

Tribunal File Number: AD-16-821

BETWEEN:

H. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision: Janet Lew

Date of Decision: April 28, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 19, 2016. The General Division 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, 1993.

ISSUE

[2] Does the appeal have a reasonable chance of success?

BACKGROUND FACTS

[3] By way of background, the Applicant filed two applications for a Canada Pension Plan disability pension, in March 2011 and in December 2012. This matter relates to the first application filed in March 2011.

ANALYSIS

[4] 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;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[5] I need to be satisfied that the reasons for appeal fall within any of the above grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant filed an application requesting leave to appeal, alleging that the General Division made several errors.

a. Incapacity

[6] The Applicant alleges that he has been incapacitated since August 1987. If he had been able to establish that this was the case, and if he had been able to prove that he was disabled, the Applicant may have been eligible for a longer period of retroactive payment of any Canada Pension Plan benefits. However, he has not suggested that the General Division erred in its assessment of his incapacity. I see no error on the face of the record either. The General Division cited and applied the correct test for incapacity. The General Division examined the Applicant's relevant activities and found that he worked during the applicable timeframe, lived independently, was financially responsible and applied for regular Employment Insurance benefits.

[7] If the Applicant is seeking a reassessment on the issue of his alleged incapacity, there is no place under the DESDA for the Appeal Division to conduct a reassessment when determining whether leave should be granted or refused: *Tracey*. The grounds of appeal are very specific and are limited to those under subsection 58(1) of the DESDA.

b. Regularity

[8] The Applicant further alleges that he has suffered from a severe and prolonged disability since August 1987, which has rendered him incapable regularly of pursuing any substantially gainful occupation.

[9] Although the Applicant acknowledges that he holds a class 3 driver's licence, he claims that he was unable to pursue a "sustainable living from 1987 to 2012 or in any other year." He argues that the nature of his mental illness is such that his condition was "never stabilized to the point of regularity" and he was therefore unable to work on a "continuous,

persistent or uninterrupted" basis. He argues that the General Division failed to consider these facts when it assessed the severity of his disability.

[10] The Applicant submits that the General Division failed to properly assess the severity of his disability, as it did not consider whether he was incapable regularly of pursuing any substantially gainful occupation, in the sense that he was unable to work on a continuous, persistent or uninterrupted basis.

[11] The General Division addressed the Applicant's evidence and submissions at paragraphs 51, 53 and 55, where it wrote:

> [51] [T]he Appellant had been employed from January 20, 2010 to December 13, 2010 as a part-time truck driver working approximately 75 hours per month as this was all the work that was available. His attendance was described as good and had no absences other than to take care of his daughter or for the occasional doctor's appointments.
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> [53] [T]he Appellant was employed from April 3, 2012 to May 15, 2012 for seasonal work from April to May, as a truck driver. The Appellant was employed 8 hours per day. It was noted this was part-time work as this was all the work that was available. His attendance was described as good and he had no noted absences.
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> [55] The Appellant has submitted that his employment since 1987 was not sustainable and that he was unable to work regularly. However the courts have determined (*Canada (MHRD) v. Scott*, 2003, FCA 34) that the word "regularly" is meant to describe the incapacity rather than the employment. Further, the Tribunal looked to *Chandler v. MHRD* (November 25, 1996), CP 4040 (PAB) for guidance which stated that "regularly" means the Appellant must be capable of coming to work as often as is necessary. Predictability is the essence. The evidence of the Appellant's employers in 2010 and 2012 show that the Appellant's attendance was good and he was able to attend to work when required and was able to meet the demands of the job. (my emphasis)

[12] The General Division found that the Applicant was able to work on a regular basis and was able to attend work when required. Hence, it cannot be said that the General Division failed to consider whether he was incapable regularly of pursuing any substantially gainful occupation. Indeed, based on the evidence before it, the General Division found that the Applicant was able to reliably work on a consistent basis. It found that his work attendance was good, that he was able to attend work when required and that he was able to meet work demands. I am not satisfied that the appeal has a reasonable chance of success on the basis of this argument.

c. Benevolent Employer

[13] The Applicant submits that the General Division also failed to consider that he worked for a benevolent employer after the end of his minimum qualifying period and that his employment therefore should not be constituted a "substantially gainful occupation." He further argues that the General Division erred in determining that his 2010 income exceeded any threshold for being "substantially gainful" (GD4-2).

[14] The General Division focused on the Applicant's 2010 and 2012 employment, in determining whether he was capable of a substantially gainful occupation. The General Division summarized the evidence regarding the Applicant's 2010 employment at paragraph 34, noting that the Applicant was employed as a part-time driver from January 20, 2010 to December 13, 2010. The General Division referred to an employer questionnaire, noting that the employer described the Applicant's attendance as good and that he did not have any absences other than to care for his daughter. The Applicant worked approximately 75 hours per month, as this was all the work that was available. The General Division also wrote:

> His work quality was described as good and he required no special arrangements or help from his coworkers. The employer further noted that the Appellant had the ability to hand [*sic*] the demands of the job and that he quit his employment […]. [T]he Appellant testified that he stopped working on December 13, 2010, because he needed to take care of and help his daughter and this employer would not give him a leave of absence.

[15] The General Division summarized the evidence regarding the Applicant's 2012 employment at paragraphs 36 and 37, noting that the Applicant was a seasonal employee, driving trucks from April 3, 2012 to May 15, 2012. He worked eight hours per day. It was noted that this was part-time employment, as this was all the work that was available. The employer described the Applicant's work as good and he had no noted absences. The General Division also wrote that the Applicant, "had the ability to do the job, his work was satisfactory and he needed no help form his co-workers or special arrangements" (GT 5-21 – GT 5-23).

[16] The Applicant was also employed from June 26, 2012 to August 31, 2012, as a truck driver. An employer's questionnaire for this timeframe indicates that he worked seven to ten hours per day and 35 to 50 hours per week. The General Division noted that the Applicant's "attendance was described as good, he had no absences and he had the ability to do the job."

[17] The General Division accepted the evidence regarding the Applicant's employment in 2010 and 2012, as set out in paragraphs 51 and 53. Although the General Division did not specifically use the expression "benevolent employer" in its analysis, it is clear that the General Division turned its mind to this issue, when it considered the nature of the Applicant's employment, the demands placed upon him, and whether he was able to fulfill his duties and responsibilities without the need for any special accommodations or arrangements.

[18] I am not satisfied that the appeal has a reasonable chance of success on the basis of the argument that the General Division failed to consider that the Applicant had benevolent employers.

d. 2010 Income

[19] The Applicant argues that the General Division erred in determining that his 2010 income exceeded any threshold for being "substantially gainful."

[20] The General Division noted that the Applicant had T4 earnings of $14,271 (paragraph 34). This amount largely reflects his earnings from his employment at KRW Enterprises Inc. The Applicant had nominal earnings from his employment at GBW Auto Services Inc. (GD18-4 and GD18-5).

[21] The General Division, however, did not undertake any analysis to suggest that there was any correlation between employment earnings and being engaged in a substantially gainful occupation. Rather, it conducted its analysis on the issue of whether the Applicant's employment constituted a substantially gainful occupation by examining the nature of his employment, the hours and dates he worked and whether more work was available to him, the duties that he performed and whether he was able to fulfil his responsibilities without any special accommodations or arrangements. I am therefore not satisfied that the appeal has a reasonable chance of success on the basis of the argument that the General Division inappropriately used his earnings to determine whether his employment constituted a substantially gainful occupation.

e. Gaps in the Medical Records

[22] The Applicant acknowledges that there are gaps in the medical records, particularly for the years in or around the end of his minimum qualifying period, but he submits that this should not be held against him, as his physicians failed to properly keep his medical records intact. Nonetheless, the Applicant maintains that the documentation before the General Division is sufficient to prove that he was severely disabled by the end of his minimum qualifying period and that he has been continuously disabled since then.

[23] The fact that there are gaps in the medical records does not constitute a ground of appeal under subsection 58(1) of the DESDA. The General Division has to rely on the documentary evidence before it.

[24] The Applicant maintains that the documentary record before the General Division is sufficient to prove that he was severely disabled and has been incapacitated since 1987. Essentially, this calls for a reassessment. However, as I have noted above, a review or reassessment of the evidence also does not fall within any of the grounds of appeal under

subsection 58(1) of the DESDA. There is no role for the Appeal Division to conduct a reassessment when determining whether leave should be granted or refused. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

CONCLUSION

[25] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division