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

Citation: *R. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 205

Tribunal File Number: AD-16-1257

BETWEEN:

R. F.

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: May 3, 2017

Canada

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 September 6, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible for the disability benefit under the *Canada Pension Plan* (CPP), because his disability was not "severe" prior to the minimum qualifying period (MQP) ending on December 31, 2009.

[2] On November 3, 2016, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division on the grounds that the General Division erred in rendering its decision. 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. 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 might 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 a first hurdle for the 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 requesting leave to appeal, the Applicant alleged that the General Division based its decision on an erroneous finding of fact. Contrary to the General Division's suggestion, he was never told to find a sedentary job while on workers' compensation benefits. At the time, he believed that he would return to work. He was receiving physiotherapy and medical treatment and doing his best to get better. Unfortunately, this never happened, and his condition has become progressively worse over the years. The Applicant submits that the General Division failed to understand that he has been severely disabled since 2008.

ANALYSIS

[10] It is clear that a major factor in the General Division's decision was its finding that the Applicant had made insufficient effort to obtain work that was lighter, or more sedentary, than

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

the physically demanding jobs that he had held prior to his back injury. As the General Division noted, *Inclima v. Canada*[3] imposes an obligation on applicants for CPP disability benefits to have investigated alternative employment within their limitations. The Applicant alleges that "he was never told" to find a sedentary job, and the General Division erred in failing to recognize this fact.

[11] I see no reasonable chance of success on this ground. There is nothing in *Inclima* and the jurisprudence surrounding mitigation that relieves an applicant of his obligation to pursue alternative work, even if no one was urging him to do so. Whether or not the Workers' Compensation Board told the Applicant to try a lighter job had no bearing on his duty to make a reasonable effort to pursue one.

[12] That said, my review of the decision and the underlying evidentiary record indicates that there was a basis on which the General Division could find that, while the Applicant may not have been ordered to find sedentary work, he certainly was not barred from it either. As the General Division noted in paragraph 37 of its decision, Dr. Gallant wrote in January 2016 that the Applicant had been "healthy enough to successfully undertake and complete retraining in another profession but has been limited by pain, depression, amotivation and deconditioning." In paragraph 42, the General Division summarized Dr. Daigle's February 2009 report, which confirmed that, following his injury, the Applicant carried on modified duties—essentially a desk job—for as long as they were available. In paragraph 67, the General Division drew what I see as a defensible conclusion:

> The Appellant did lighter work immediately following his 2008 injury but he was eventually sent home in December 2008 because no further work was available. The Tribunal finds that this is evidence of work capacity at a light level. The evidence is that the Appellant was sent home more because the employer did not have light to sedentary work available and less so because the Appellant was unable to do that type of work.

[13] The remainder of the Applicant's submissions suggest that the General Division dismissed his appeal despite medical evidence indicating that his impairments were in accordance with the criteria governing CPP disability.

---

[3] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[14] While the General Division's analysis did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the decision is defensible on the facts and the law. The General Division's decision contains a detailed overview of the available medical reports, as well as testimony given by the Applicant and his wife. The decision closes with an analysis that suggests the General Division meaningfully assessed the evidence and had defensible reasons supporting its conclusion that there was insufficient evidence of incapacity.

[15] An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me only to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to merely express their conviction that they were incapacitated or disabled.

CONCLUSION

[16] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division