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

Citation: *G. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 201

Tribunal File Number: AD-16-777

BETWEEN:

G. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: May 2, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On May 12, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable as the Applicant did not have a "severe disability within the meaning of the CPP" before his minimum qualifying period (MQP) date of December 31, 2013. The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on June 2, 2016.

ISSUE

[2] The Member must decide whether 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* (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESD Act provides that "[l]eave 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 DESD Act, 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] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUMISSIONS

[7] The Applicant submitted that 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. More specifically, the Applicant raised two issues (with one having two sub-issues) with respect to the General Division's decision:

a) MQP Date—in his submissions, the Applicant stated: "Do not understand MQP dated Dec. 31, 2013" and "clarification of MQP Date!"

b) Medical Information—in his submissions, the Applicant stated:

    i) "Medical Info: 2014-2016 states medical diagnosis of spinal stenosis, cronic {sic} pain syndrome, nerve root compression L4-L5."

    ii) "2012 Diagnosis hammer toe, arthritis lower back" and "all medical info up to date should be considered" and "I believe all medical info up to date should be relivent {sic} to claim." In addition, he included the contact information for Dr. Joel Giddey.

ANALYSIS

MQP Date

[8] In the General Division's decision it was noted that "[t]here was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2013." However, after listening to the recorded hearing, it is evident that the Applicant had questions about the MQP. Although he ultimately agreed to the date by verbal confirmation at the hearing, it is possible that the wrong MQP could have been used. So in an effort to determine if it was, I reviewed the Applicant's record of earnings. The calculation of the MQP is found in subsection 44(2) of the *Canada Pension Plan*:

> 44(2) For the purposes of paragraphs (1)(b) and (e),
>
> (a) a contributor is deemed to have made base contributions for not less than the minimum qualifying period only if the contributor has made base contributions during the contributor's contributory period on earnings that are not less than the contributor's basic exemption, calculated without regard to subsection 20(2),
>
> (i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period, for at least four years,
>
> (i.1) for at least 25 calendar years included either wholly or partly in the contributor's contributory period, of which at least three are in the last six calendar years included either wholly or partly in the contributor's contributory period, or
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> (ii) for each year after the month of cessation of the contributor's previous disability benefit; and
>
> (b) the contributory period of a contributor shall be the period
>
> (i) commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and
>
> (ii) ending with the month in which he is determined to have become disabled for the purpose of paragraph (1)(b), but excluding
>
> (iii) any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability, and

> (iv) in relation to any benefits payable under this Act for any month after December, 1977, any month for which the contributor was a family allowance recipient in a year for which the contributor's base unadjusted pensionable earnings are less than the basic exemption of the contributor for the year, calculated without regard to subsection 20(2).

[9] This Applicant had more than 25 years of valid contributions and his application was filed on January 2, 2013, so subparagraph 44(2)(*a*)(i.1) instructs that three of the last six years are to be used in determining the starting point for the calculation. The Applicant had valid contributions in 2011, 2010, and 2008. So given the instructions in subparagraph 44(2)(*a*)(i.1), the Applicant's MQP would be December 31, 2013. The MQP date as determined by the General Division was correct. Leave to appeal is refused on this issue.

Medical Information

[10] In the his reasons for leave to appeal and reasons for appeal, the Applicant indicated that the General Division had not considered all of the medical information up to the date of the hearing. In particular, the Applicant submitted that the 2014 to 2016 medical diagnoses of spinal stenosis, chronic pain syndrome, and nerve root compression L4-L5 were conditions not considered in the decision. The medical information on file does indicate that a magnetic resonance imaging (MRI) done in August 24, 2013, indicated a diagnosis of mild canal stenosis, which was confirmed again in the December 17, 2014, MRI. Chronic pain was mentioned throughout the medical information on file up to and including a report from the Allin Clinic on January 5, 2015, and a report from Dr. Giddey on January 7, 2015. Nerve root compression L4-L5 was also discussed in the January 7, 2015, report from Dr. Giddey following the December 17, 2015, MRI. Early on in the medical information on file, the hammer toe and arthritis in the lower back were also mentioned in the medical reports.

[11] Much of the information about spinal stenosis, chronic pain syndrome, and nerve root compression L4-L5 were in reports/ MRI's from 2014 onward. They do not specifically address the issue of disability prior to the expiry of the MQP. This is not to say that an applicant cannot rely on reports that are prepared or tests that are conducted after the MQP, but they must address the applicant's health before or on the date of the MQP. The best evidence of the Applicant's disability at the material time comes from the medical evidence obtained prior to

the expiry of the MQP. In this instance, the General Division did focus more on medical evidence that was obtained prior to the MQP. The General Division Member did reference reports and tests that were produced after the MQP, except for three specific reports—the January 5, 2015, report from the Allin Clinic, the January 7, 2015, letter from Dr. Giddey and the January 17, 2015, imaging of the Applicant's thoracic spine. In fact, the January 5, 2015, report notes, "The patient noted the onset of pain starting about 3 years ago," which would indicate that this report also speaks to the Applicant's health prior to the expiry of the MQP. The reports appear to have relevant information and were omitted in the General Division's analysis. In this instance, the General Division mentioned all the medical evidence except for three reports, where at least one of those reports contained reference to the Applicant's medical condition prior to the expiry of the MQP. In this particular case, there is a direct reference to the Applicant's condition at the material time and that report was omitted from an otherwise thorough analysis. The General Division's decision to stop the analysis of the Applicant's medical evidence as of the December 17, 2014, MRI does raise an arguable ground as to whether the General Division considered all of the medical evidence before it. I am satisfied that the appeal has a reasonable chance of success on this issue.

[12] The General Division did review Dr. Gigg's reports and medical opinions, which were provided prior to the expiry of the MQP. The General Division Member did address the issue of foot pain, noting that doctors had attempted to discover the objective reasons for the Applicant's symptoms without much success. The General Division also noted that the Applicant had arthritis in his back. These conditions were referenced in the decision. I am not satisfied that the appeal has a reasonable chance of success on this particular issue.

CONCLUSION

[13] The application for leave to appeal is granted.

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

Jennifer Cleversey-Moffitt
Member, Appeal Division