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

Citation: *B. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 225

Tribunal File Number: AD-16-417

BETWEEN:

B. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: May 15, 2017

REASONS AND DECISION

INTRODUCTION

[1] On December 10, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on March 11, 2016.

ISSUE

[2] The member must decide whether the Applicant has raised a ground of appeal that 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 GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) The GD 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.

SUBMISSIONS

[6] The Applicant submitted that the General Division failed to consider the significance of the Applicant's health condition in assessing the severity of the disability he is claiming.

[7] The Applicant also argued that the General Division failed to assess his serious health condition as "prolonged."

ANALYSIS

[8] The Applicant has submitted that the General Division based its decision on an erroneous finding of fact, in determining that he was not entitled to disability pension payments, and that the General Division failed to properly consider the seriousness of his medical diagnosis based on the evidence in the record before it.

[9] Disability is not assessed in accordance with the Applicant's medical diagnosis or health condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in paragraph 50 of its decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248:

> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[10] The Federal Court of Appeal further articulated the *Villani* principles in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, stating that applicants seeking to demonstrate that they suffer from a severe disability under the CPP must adduce evidence of a serious health problem and, where there is evidence of work capacity, must also show that efforts to obtain and maintain employment have failed because of that health problem. It is not the applicant's inability to do his particular job that matters, but his inability to do any "substantially gainful occupation" (*Klabouch*).

[11] The General Division canvassed the Applicant's oral evidence at his in-person hearing held on November 4, 2015, in paragraphs 8 to 33 of its decision. Paragraphs 34 to 76 summarize the medical evidence in the documentary record before the General Division. Following a summary of the information contained in the medical evidence package at the time of the MQP date, the General Division failed to find evidence supporting the Applicant's claim that he was incapable regularly of pursuing any substantially gainful occupation. In fact, the only limitations noted in the documentary evidence were that the Applicant was advised not to engage in any repetitive bending or lifting. It was the General Division's finding that the Applicant had some capacity to work. Though, the General Division did acknowledge that the Applicant may not be able to return to his previously chosen occupation.

[12] In determining that the medical evidence did not support a finding that the Applicant lacked any capacity to work, the General Division considered the Applicant's health condition in a real world context. He was 50 years old at the time of his MQP date. The General Division acknowledged that the Applicant did not have office work experience or computer or typing skills. He had a grade 8 education and his work experience was limited to being a window and door installer. He did, however, have good language proficiency.

[13] Subsequently, because of the Applicant's relatively young age, language proficiency and consistent work history, the General Division found that the Applicant had some capacity to either retrain or engage in some occupation within the Applicant's limitations. There was no evidence that the Applicant had attempted any retraining or had sought employment opportunities within his health condition limitations. As a result, the General Division dismissed the Applicant's appeal (*Inclima*).

[14] The Applicant may not agree with the General Division's determination. However, the Applicant's disagreement with the General Division's finding is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. The Appeal Division does not have broad discretion in deciding leave pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave on grounds not included in subsection 58(1) of the DESD Act (*Canada (Attorney General) v. O'keefe*, 2016 FC 503).

[15] The Appeal Division is also not in a position to reweigh the evidence already considered by the General Division. As set out above in paragraph [5], the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence already considered by the General Division. The General Division has discretion to consider evidence before it and where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence. In this case, the General Division has provided reasons for relying on medical evidence in the record.

[16] This is not a ground of appeal that has a reasonable chance of success, and leave is not being granted on this ground.

[17] The Applicant has submitted that the General Division failed to find that his medical condition was prolonged. However, paragraph 42(2)(*a*) of the CPP requires that a disability be both severe and prolonged in order for an applicant to be entitled to a disability pension under the CPP. If the General Division has not found the disability to be severe, it is unnecessary for the General Division to contemplate the prolonged nature of the Applicant's disability. If the disability is not found to be "severe," the application for a disability pension under the CPP would fail regardless of the General Division's findings concerning the "prolonged" criterion.

[18] This not a ground of appeal that has a reasonable chance of success.

CONCLUSION

[19] The Application is refused.

Meredith Porter
Member, Appeal Division