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

Citation: *H. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 220

Tribunal File Number: AD-16-956

BETWEEN:

H. 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: May 11, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 5, 2016, which 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, 2012.

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 granting leave to appeal, 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. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] In his application requesting leave to appeal, the Applicant submitted that the General Division based its decision on an erroneous finding of fact that it made in a perverse and capricious manner or without regard for the material before it. In a subsequent letter

dated August 8, 2016, the Applicant described his condition, along with the treatment that he undergoes. He attached pictures of the massage machine that he uses. He confirmed that his appeal was based on the ground that the General Division had made erroneous findings of fact and, finally, he requested a rehearing. The Applicant also provided medical reports from one of his physiatrists, covering the period from May 24, 2012 to March 17, 2016. The General Division did not have copies of the reports dated May 14, 2013, July 2, 2015, November 12, 2015, and March 7, 2016.

[6] The Applicant submits that the General Division based its decision on the following erroneous findings of fact without regard for the material before it:

- at paragraph 34, in finding that his condition is necessarily improving because he no longer takes any pain relief medication, when he had testified that his condition is deteriorating and that he had stopped taking any medication because he found that it made his condition worse;

- at paragraph 35, in finding that he is "unable to partake in part-time, sedentary work suitable to his limitations," without identifying any occupations suitable for his current physical condition;

- at paragraph 35, in finding that "not a single physician stated that the [Applicant] was unable to work at all because of his medical condition," but he claims that there is at least one medical report, from his family physician, that states that he is unable to work at all. Further, he claims that Dr. Chu, another physiatrist, also verbally advised him that he should apply for a disability pension; and

- in relying on the medical opinion of Dr. Weiss, a physiatrist, instead of the opinion of the physiatrist Dr. Bohorquez, when he has seen Dr. Bohorquez regularly since May 2012. He also alleges that the report of Dr. Weiss should be given little, if any, weight because Dr. Weiss had failed to conduct any medical

investigations or make his own medical findings. The Applicant further claims that Dr. Weiss failed to accurately record the medical history provided to him.

[7] The Applicant argues that the General Division erred in failing to recognize that the requirements for a Canada Pension Plan disability pension are identical to the requirements of his private disability insurer. He argues that, as he has qualified for a disability pension through his private disability insurer, the General Division should have found that he also qualified for a Canada Pension Plan disability pension.

[8] I am prepared to grant leave to appeal on the first issue raised by the Applicant—that the General Division erred in finding that his condition necessarily improved to the point that, by January 2015, he has been able to discontinue taking pain relief medication, when he indicates that his oral evidence stated otherwise. The Applicant will need to provide the timestamps and refer me to the portions of the audio recording of the hearing before the General Division to verify his allegations. At the same time, he should be prepared to provide corroborating documentary evidence to support his allegations. I note, for instance, that the medical report dated November 14, 2013, of Dr. Bohorquez indicates that there had been some improvement in symptoms with trigger point injections and that the Applicant also found that Cyclobenzaprine 10 mg per day helped to dull some of his pain. The physiatrist's report of January 8, 2015 also indicates that the Applicant's pain was better controlled at that time (AD1B-18). These reports in fact seem to support the General Division's findings.

[9] Although I have granted leave to appeal, I will briefly address some of the other issues raised by the Applicant. Had they been the only basis for the Applicant's request for leave to appeal, I would not have been satisfied that the appeal has a reasonable chance of success.

i. Identifying alternative occupations—the Applicant argued that the General Division was obligated to identify alternative occupations suitable for his physical limitations. However, there is no duty on the General Division to do so.

ii. Medical opinions regarding his capacity to work—the Applicant argues that the General Division erred in finding that no one found that he was unable to work at all, when he claims that his family physician, Dr. C.J. Boshoff, is of the opinion that he is unable to work because of his medical condition. She prepared medical reports dated December 6, 2011 and April 25, 2012, but neither refers to his work capacity (GT1-82 to 83 and GT1-86 to 89).

The Applicant also relies on the verbal opinion of Dr. Chu that he cannot work at all. When the Applicant saw Dr. Chu in August 2010, approximately 1.5 years after his work-related injury, the Applicant was continuing to work on a full-time basis at his usual duties. Dr. Chu did not recommend that he stop working at that time. Similarly, when seen in February 2011, Dr. Chu did not make any recommendations or offer any opinion that the Applicant was unable to work (GT1-94). Dr. Chu may have verbally recommended that the Applicant apply for a disability pension, but such a recommendation is not determinative of the Applicant's capacity or his eligibility for a Canada Pension Plan disability pension. Even if the Applicant had testified at the General Division hearing that Dr. Chu had verbally recommended that he apply for a disability pension, I cannot envision that the General Division would have assigned any weight to this evidence, as it finds no support in the documentary record.

iii. Weight of evidence—the Applicant argues that the General Division should have placed little to no weight on the medical opinion of Dr. Weiss, because he inaccurately recorded the medical history and failed to conduct any medical investigations or make his own medical findings. A review of Dr. Weiss's report indicates that he in fact conducted a neuromusculoskeletal examination and he clearly formed his own medical opinions (GT1-70). The Applicant has not identified any inaccuracies in the reported history, but even if there had been, the Applicant could have either obtained the clinical notes (if any) or obtained a second report from Dr. Weiss, asking him to address those

inaccuracies. In any event, the issue of the matter lies within the "province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

iv. Private disability insurer—the Applicant argues that the General Division should necessarily have found him disabled for the purposes of the *Canada Pension Plan*, because his private disability insurer has found him disabled under its own policy. It is well established that any decisions made by a provincial board or private disability insurer with regard to an applicant's entitlement to disability benefits under a provincial statute or private plan of coverage are irrelevant, because the test to apply is usually different from the test under the *Canada Pension Plan*: *Callihoo v. Canada (Attorney General)*, [2000] FCJ No. 612 at paras. 18 and 20; *Harvey v. Canada (Attorney General)*, 2010 FC 74 at paras. 49 to 52. I note also that the Applicant failed to provide a copy of his disability insurer's test.

[10] Finally, the Applicant has filed additional medical records. However, new evidence generally does not constitute a ground of appeal. As the Federal Court held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367:

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[11] New evidence can be considered on an appeal to the Appeal Division only under very limited circumstances, where they address any of the grounds of appeal. Those circumstances, however, are not present here.

[12] To some extent, the Applicant is seeking a reassessment. However, 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. As the Federal Court held in *Tracey*, it is not the Appeal

Division's role to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied.

CONCLUSION

[13] The application for 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