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

Citation: *M. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 224

Tribunal File Number: AD-16-499

BETWEEN:

M. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Extension of Time and
Leave to Appeal Decision by: Shirley Netten

Date of Decision: May 15, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated December 7, 2015. That decision dismissed his appeal of the Respondent's decision that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] Paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA) stipulates that an application for leave to appeal must be made to the Appeal Division, in the prescribed form and manner, within 90 days after the day on which the General Division decision was communicated to the Applicant. The General Division decision was mailed to the Applicant on December 8, 2015, and was thus deemed communicated to him on December 18, 2015, by virtue of s. 19(1)(*a*) of the *Social Security Tribunal Regulations*. Ninety days after that date was March 17, 2016.

[3] The Applicant's representative initiated an appeal to the Tribunal's Appeal Division on March 28, 2016, utilizing an incorrect form. The appeal was perfected with a corrected application on April 15, 2016. The application was thus late. Through his representative, the Applicant has stated the need to find and retain legal counsel as the reason for the late appeal noting, in particular, a delay associated with communicating with proposed counsel over the Christmas holidays.

TIME EXTENSION

[4] Subsection 57(2) of the DESDA authorizes the Appeal Division to allow further time within which an application for leave may be made. As confirmed in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the following criteria must be considered in determining whether a time extension is appropriate:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[5] The weight to be given to each of these factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration, however, is that the interests of justice be served: *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[6] In this case, the Applicant states that the delay was attributable to his efforts, beginning in December 2015, to find and retain legal counsel. His representative attempted to file a notice of appeal on March 28, 2016, just 11 days after the expiry of the 90-day period, but the appeal was not perfected until April 15, 2016, due to a procedural error on the representative's part. In these circumstances, I find it more likely than not that the Applicant had a continuing intention to pursue an appeal within the 90-day period and thereafter, and I accept that there is a reasonable explanation for the late filing. Moreover, there is no prejudice to the Respondent in allowing the extension, given the relatively short period of time that had elapsed following the expiry of the statutory deadline.

[7] The final criterion, that the appeal discloses an arguable case, is also required for leave to appeal to be granted. In my view, in the circumstances of a brief, adequately-explained delay, where three of the four *Gattellaro* factors are present, it is in the interests of justice to proceed with the inquiry into whether there is an arguable case in the context of the leave application itself. Consequently, I grant the Applicant an extension of time pursuant to s. 57(2) of the DESDA.

LEAVE TO APPEAL

[8] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the DESDA:

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.

[9] Pursuant to s. 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." Accordingly, I must determine whether the Applicant's appeal has a reasonable chance of success on at least one of the permissible grounds.

[10] A leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and lower hurdle to be met, and 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). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[11] In the case at hand, I do not find that the Applicant has a reasonable chance of success on any of the grounds of appeal.

The General Division decision

[12] The Applicant's minimum qualifying period (MQP) ended on December 31, 2008; consequently, the question before the General Division was whether he had established, on a balance of probabilities, a severe and prolonged disability on or before that date. The Applicant was 50 years of age in December 2008, with a grade 10 education and an employment history including landscaping, snow removal and flower delivery; he stopped working (in his, or his spouse's, retail florist business) in July 2006. The Applicant's medical conditions within his MQP included a 1983 hiatus hernia repair resulting in ongoing dumping syndrome; surgery to remove a lipoma in November 2007; a lengthy history of chronic back pain which worsened, with left leg symptoms, in 2008 (eventually requiring surgery, post-MQP); a left shoulder injury in April 2008 after which a partial thickness rotator cuff tear was diagnosed (surgically repaired, post-MQP); and a right shoulder injury in June 2008 after which a complete rotator cuff tear was diagnosed and surgically repaired in October 2008. The major findings within the General Division decision are as follows:

a) The shoulder conditions were amenable to surgery and did not result in a prolonged disability before the end of the MQP;

b) The back pain and leg giving away did not entail significant limitations or preclude the Applicant (then Appellant) from working, nor was this condition prolonged in light of the availability of injections and surgery;

c) The Applicant's other medical conditions did not affect his capacity to work; and

d) Based upon the medical evidence, the Applicant was not unable, by December 2008, to perform a lighter job such as delivering flowers.

New evidence

[13] I note that the Applicant's representative has submitted additional documentation in support of the appeal, including a narrative prepared by the Applicant and articles on thoracolumbar scoliosis, modic changes, degenerative disc disease and spinal fusion. A review of the record confirms that none of this documentation was before the General Division. New evidence is generally not admitted at the Appeal Division, since the appeal does not constitute a hearing *de novo*: *Marcia v. Canada (Attorney General)*, 2016 FC 1367. Moreover, the existence of new evidence is not an independent ground of appeal to the Appeal Division, under the DESDA. The new evidence provided by the Applicant's representative will not be admitted, as it has no relevance to the issue to be decided, *i.e.* whether an error was made by the General Division in December 2015, on the basis of the evidence before it at that time.

[14] I turn to the possible grounds of appeal.

Breach of natural justice or jurisdictional error

[15] Although the Applicant's representative included in the reasons for appeal that the General Division "failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its discretion [sic]," she did not provide any examples of procedural or jurisdictional error. Leave ought not to be granted on a purely theoretical basis, where there is no claim or evidence underpinning a particular ground of appeal: *Canada (Attorney General) v. Hines*, 2016 FC 112. I see no reasonable chance of success on this ground.

Erroneous findings of fact, made in a perverse or capricious manner or without regard for the evidence

[16] One of the Applicant's representative's reasons for appeal appears to relate to potential errors of fact.

a) "Reliance on inaccuracies in physicians' clinical notes and records led to the incorrect determination that the Appellant did not meet the definition of disability"

[17] Dr. O'Neil's August 2009 medical report indicated that the Applicant had not worked in landscaping "for a year" and was "now" delivering flowers locally. These facts, the Applicant's representative asserts, are incorrect.

[18] The General Division decision outlined Dr. O'Neil's report, but also the file documentation and testimony which indicated that the Applicant had worked in landscaping until 1997, and delivered flowers until 2006. The member did not make a finding of fact that the Applicant had been landscaping in 2008 or delivering flowers in 2009, nor was her decision based on such a finding. As such, there is no erroneous finding of fact. To the contrary, the member referred in her analysis only to the fact that Dr. O'Neil "appeared to be of the impression that the Appellant was delivering flowers in August 2009," which is consistent with the material before her.

[19] Secondly, the representative asserts that a chart note written by Dr. Shamess in September 2008 was "inaccurate and incomplete." Dr. Shamess had noted low back soreness while raking, and left leg weakness on stairs relieved by sitting. The representative states that in fact the left leg would give out while walking, and the Applicant had constant pain in the left lower back exacerbated by certain movements such as raking. Contrary to the latter assertion, I note that Dr. Shamess' chart note for January 6, 2009 (cited in the decision) stated that the Applicant's back was "intermittently sore." In any case, the General Division member found that "before the end of his MQP, the Appellant was also having difficulties with back pain and his leg giving away on him"; this finding is neither erroneous nor made in a perverse or capricious manner or without regard for the evidence.

[20] The member's reliance upon both Dr. Shamess' and Dr. O'Neil's comments in finding that the Applicant was not precluded from working was an exercise of her function to consider and weigh the evidence before her. I see no reasonable chance of success with respect to an erroneous finding of fact.

Errors of law (or mixed law and fact) in making the decision: severe disability

[21] While not specifically articulated as errors of law, or errors of mixed law and fact, the following items appear to raise questions with respect to the General Division's legal analysis of severe disability.

a) "The Appellant's serious and deteriorating medical condition was not given appropriate consideration"

[22] The Applicant's representative outlines the hernia surgery, dumping syndrome, lipoma removal, bilateral shoulder conditions, back pain and associated difficulties. These conditions were all canvassed by the General Division, and the evidence was weighed in determining the severity of the Applicant's condition (that is, his capability or incapability regularly to pursue any substantially gainful employment). The representative does not assert that the General Division failed to consider important evidence; rather, she frames the issue in terms of "appropriate consideration" (having previously claimed that the General Division erred "by not according due weight to medical evidence…") She goes on to submit that the Applicant's medical conditions were complex, not easily diagnosed, and prevented him from working prior to the end of his MQP.

[23] In this respect, I find that the Applicant's representative is re-arguing the case and asking for a different outcome, rather than substantiating an error made by the General Division. No error of law, or error in applying the law to the facts, is identified. Leave is appropriately denied where an applicant seeks only to re-argue his or her position, or to have the evidence before the General Division re-weighed: *Johnson v. Canada (Attorney General*), 2016 FC 1254, *(Canada (Attorney General) v. Tsagbey*, 2017 FC 356.

[24] I note that the Applicant's representative did include some details in her pleadings that are not mentioned in the General Division decision, but neither are these found in the file

documentation. Specifically, she describes restricted range of motion of the collarbone, arms and shoulders associated with clavicle fusion surgery (in relation to the lipoma removal). I am unable to locate any evidence of such restrictions in the documentation before the General Division. It is not an error for the General Division to fail to consider evidence that was not before it at the time. In any case, the member recognized the Applicant's shoulder limitations in the context of his bilateral rotator cuff tears. However, she placed greater weight upon the expectation for recovery following surgery, noting that post-surgical right shoulder range of motion and function were described as "excellent" by January 2009.

[25] Accordingly, I see no reasonable chance of success with respect to the consideration given to the Applicant's medical condition.

b) "The Tribunal erred in concluding a lack of medical evidence prior to the Appellant's MQP indicated his disability was not severe and prolonged"

[26] The Applicant's representative does not identify, and I am unable to find, such a conclusion in the General Division decision. Rather, the decision relied upon the existing medical documentation and oral testimony with respect to the Applicant's condition prior to the end of the MQP.

[27] To the extent that the member relied upon the absence of a supportive medical opinion addressing work capacity and/or functional limitations, this absence is relevant to the question of whether the Applicant had discharged the burden of proving, on a balance of probabilities, that he was incapable regularly of pursuing any substantially gainful occupation. I see no reasonable chance of success on an error of law in this respect.

c) "The Tribunal erred in assuming the Appellant's lower back and left leg symptoms did not present significant difficulties"

[28] In this section, the Applicant's representative states that the "Tribunal concluded 'while the Appellant had some low back and left leg symptoms, he was not in receipt of any treatment to support significant difficulties and he did not attempt a lighter or different type of work.'" This statement, however, is not the Tribunal's conclusion. Rather, it is found in a recitation of the Respondent's submissions (paragraph 37(c)). The representative goes on to justify why the

Applicant did not have physiotherapy or other treatment within the MQP, yet the General Division member did not reach any specific conclusion, or make any negative inference, with respect to the Applicant's lack of active treatment for the back prior to the end of his MQP. Moreover, by acknowledging that the Applicant could not return to landscaping, the member implicitly accepted that there were some limitations associated with the Applicant's medical conditions.

[29] In the request for leave to appeal, the Applicant's representative then proceeds to reference principles from the jurisprudence. Citing *Bungay v. Canada (Attorney General)*, 2011 FCA 47, for the principle that employability must not be assessed in the abstract, she asserts that no lighter work was available to the worker, given his experience only in landscaping and flower delivery. Citing *Villani v. Canada (Attorney General)*, 2001 FCA 248, she asserts that in consideration of the Applicant's personal and vocational characteristics, his condition was "of a severity that would prevent him from working in any employment field in which he would be qualified." Citing *Leduc v. MNHW* (January 29, 1988), CP 1376 (PAB) and the "real world" assessment of employability, she argues that employability was inadequately considered by the General Division. She reiterates that the Applicant had to stop working due to pain and restricted movement, and was unable to work in any occupation for which he was qualified.

[30] The representative does not, however, point to any aspect of the General Division decision that would support an inadequate analysis in terms of the "real world" approach to severe disability. In paragraphs 48 and 49, the member referenced the *Villani* factors, specifically recognizing the limitations associated with the Applicant's level of education, employment background and transferable skills. The member accepted that the Applicant could not do heavy work such as landscaping, but found that the medical evidence did not support an inability to perform a lighter job, such as delivering flowers (with which he had experience). In light of this analysis, I see no reasonable chance of success with respect to an error in applying the principles, as outlined, of *Bungay*, *Villani* and *Leduc*. Again, the Applicant's representative appears to be re-arguing the case, rather than identifying reviewable errors made by the General Division.

Errors of law in making the decision: prolonged disability

[31] The Applicant's representative makes two claims with respect to the General Division's analysis in finding that the Applicant's disability was not prolonged, regarding inferences made from the availability of treatment and consideration of post-MQP medical information. However, regardless of any potential error of law regarding the prolonged nature of the Applicant's medical conditions in December 2008, there can be no reasonable chance of success on the Applicant's appeal: as I have found no arguable case with respect to the finding that the Applicant was not incapable regularly of pursuing any substantially gainful occupation by reason of his disability, the General Division's determination with respect to "severity" stands, and the Applicant's claim cannot succeed. Paragraph 42(2)(a) of the CPP states that a person is disabled, for the purposes of receiving a disability pension, only if his disability is both severe and prolonged. As such, in order for the Applicant's appeal to have a reasonable chance of success, there must be an arguable case with respect to the General Division's determinations of both "severe" and "prolonged." In other words, even if I were to agree with the Applicant that his back condition was already prolonged by December 2008 despite the prospect of surgery, I would have to dismiss his appeal on the basis of the General Division's finding that his disability was not severe by December 2008.

Result

[32] Having reviewed the matters raised in the Applicant's pleadings and having found that the Applicant does not have a reasonable chance of success on one of the statutory grounds of appeal, leave to appeal is refused.

CONCLUSION

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

Shirley Netten
Member, Appeal Division