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

Citation: *S. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 240

Tribunal File Number: AD-16-555

BETWEEN:

S. M.

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 25, 2017

REASONS AND DECISION

INTRODUCTION

[1] On January 18, 2016, 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. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 26, 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 for which leave to appeal may be granted 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 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 had failed to consider that the Applicant has intermittent explosive disorder and cannot deal with the public.

[7] The Applicant further submitted that the General Division had erred in finding that the Applicant could not complete his Workplace Safety & Insurance Board (WSIB) worker transition program due to issues related to the program and the school he had attended. However, the Applicant's failure to complete the program was due to his inability to walk to class and manage stairs, as well as to sit or stand for an extended period of time.

ANALYSIS

The Diagnosis: Intermittent Explosive Disorder

[8] Before granting leave to appeal, I must be satisfied that the Applicant has identified how the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction, made an error in law, or that the Applicant has identified an erroneous finding of fact that the General Division made in a perverse or capricious manner or without regard for the material before it in coming to its decision. An applicant is not required to prove the grounds of appeal for the purposes of a leave to appeal application (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC)); however, it is insufficient to make a general statement that the General Division ought to have decided the matter differently. The Applicant's disagreement with the General Division's findings 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 to appeal pursuant to the DESD Act. It would be an improper exercise of the delegated authority conferred to the Appeal Division to grant leave to appeal on grounds not included in subsection 58 of the DESD Act (see *Canada (Attorney General) v. O'keefe*, 2016 FC 503).

[9] I am restricted to considering only those grounds of appeal that fall within subsection 58(1) of the DESD Act. The subsection does not permit me to reassess or reweigh the evidence, and I am precluded from considering evidence that was not before the General Division for consideration, as the submission of new evidence is not one of the grounds for appeal

enumerated in the DESD Act. The Applicant filed documents with the Appeal Division following the General Division's decision. These documents included a psychiatric consultation report from Dr. Okoronkwo at the East Algoma Mental Health Clinic, as well as a letter from Dr. John Clarke to the WSIB.

[10] The Applicant made assertions that evidence before the General Division had been misconstrued and that it had not been properly considered. Specifically, in his application requesting leave to appeal, the Applicant states:

> In paragraph 48 states "[the Applicant] did not follow up with the WSIB worker transition Specialist when asked if another program or another school might be more suitable.["] The problem wasn't with the school or the program the problem was the claimant's inability to be able to walk to the classes, manage the stairs, sit for a period of time, stand for a period with pain being a barrier. The pain was so extreme that the claimant was ready to cause physical violence to another classmate. Confirming that [the Applicant] has intermittent explosive disorder and is unable to deal with the public. A condition that [the Applicant] spoke of during testimony and that his doctor confirms. Psychiatrist Elendu Okorokwro confirms the diagnosis of major depressive disorder and intermediate explosive disorder.

[11] I find that the Applicant's argument carries little weight. On the issue of the General Division's alleged failure to consider the Applicant's mental health issues, particularly the fact that he has intermittent explosive disorder, I note that there was no medical evidence in the record before the General Division of his diagnosis with the disorder. This is noted at paragraph 42 of the decision. The right to consider and weigh evidence is vested in the General Division. Where certain evidence is preferred, reasons for preferring that evidence must be given (*Canada (Attorney General) v. Fink*, 2006 FCA 354). However, the General Division cannot make findings in the absence of medical evidence. Objective medical evidence is required in determining disability under the CPP (*Warren v. Canada (Attorney General)*, 2008 FCA 377).

Applicant's Efforts to Further Education

[12] With regard to the Applicant's assertion that the General Division misconstrued the evidence regarding the Applicant's attempts to complete retraining at Fanshawe College, I note that, at paragraph 41 of the decision, the General Division accepted that the Applicant's medical

condition does not allow him to pursue a physically demanding job. At paragraph 42, the General Division accepted that the Applicant had participated in both pain management and anger management sessions. At paragraph 44, the General Division found that the Applicant could not return to his former occupation, and that attempts at modified work had been unsuccessful. The General Division, at paragraph 46 of the decision, also accepted that the Applicant had followed the medical advice given to him, but that he continues to experience ongoing pain and limited mobility. There is a departure, however, on the issue of the Applicant's efforts to retrain or find alternate employment; the General Division found that the Applicant's efforts to complete retraining opportunities had fallen short when he had failed to pursue opportunities with disability services at the college for the purposes of finding ways to accommodate his health condition while attending college courses. Specifically, at paragraph 47 of the decision, the General Division found that he "did not make a concerted effort to follow up with the services which may have assisted him in continuing his retraining."

[13] The General Division found that there was no evidence that the Applicant, after leaving his employment in 2010, had attempted to find employment within his limitations.

[14] Applicants seeking a disability pension under the CPP must demonstrate, where capacity to work has been found, that they have made efforts to obtain other employment or to retrain for employment within their limitations (*Inclima v. Canada (Attorney General)*, 2003 FCA 117). The Applicant was found to have residual capacity to work through his past work experience, his relatively young age, his level of education and language proficiency, as well as a completed psychoeducational assessment. The General Division found, however, that the Applicant had failed to demonstrate sufficient efforts to complete his retraining opportunity and that he had failed to make reasonable efforts to seek alternate employment within his limitations (*Inclima*). I cannot see how this amounts to an error on the part of the General Division.

[15] The Applicant has not raised a ground of appeal that has a reasonable chance of success.

CONCLUSION

[16] The Application is refused.

Meredith Porter
Member, Appeal Division