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

Citation: *F. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 254

Tribunal File Number: AD-16-1027

BETWEEN:

F. D.

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 31, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division decision dated June 27, 2016. The General Division determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it had found that his disability was neither "severe" by the end of his minimum qualifying period on December 31, 2001, nor that it had become "severe" within the prorated period from January 1 to April 30, 2002.

ISSUE

[2] Does the appeal have a reasonable chance of success?

GROUNDS OF APPEAL

[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 the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant submitted that the General Division had failed to observe a principle of natural justice and that it had erred in law. In particular, he submitted that the General

Division had failed to provide him with a hearing and that it had also failed to consider whether his employment with NB Power from May to November 2003 represented a failed return-to-work effort. He argued that the General Division's failure to consider this last issue was significant, as the General Division had largely based its decision on the premise that he was not severely disabled in his employment after the minimum qualifying period had passed.

[6] At paragraph 21 of its decision, the General Division found that the Applicant had worked for six months in 2003 and that he had been dismissed from this position due to a shortage of work. The General Division also found that, despite the very physical nature of the work, there was no evidence that the Applicant had required any special accommodations or assistance. The General Division noted that the Applicant had valid earnings in 2003; the earnings history disclosed that the Applicant had unadjusted pensionable earnings of $10,417 for 2003 (GD2-42).

[7] The employer completed a questionnaire in September 2013 (GD2-109 to GD2-111). The questionnaire indicates that the Applicant was a casual labourer who worked 40 hours weekly. He performed general labour, which consisted of lifting, carrying, bending, and climbing. The employer was unable to provide any information regarding the Applicant's attendance, the quality of his work, whether he required any special arrangements or assistance from co-workers, or whether his medical condition affected his ability to handle the job's demands. The employer also noted that there were no significant work records available.

[8] The General Division proceeded "on the record" on the basis of the documentary evidence before it. The member explained that this method of proceeding was appropriate, and that a further hearing was unnecessary because the issues under appeal were not complex, there were no gaps in the information on file, there was no need for clarification, credibility was not a prevailing issue and, finally, the method of proceeding respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[9] However, by proceeding "on the record," the General Division may have deprived the Applicant of an opportunity to respond to the employer's questionnaire, to any suggestion that he was necessarily engaged in a substantially gainful occupation, or that his employment reflected the requisite capacity under the *Canada Pension Plan*. The Applicant might have also been able to provide information regarding his employment, which the employer had been unable to address. For this reason, I am satisfied that the appeal has a reasonable chance of success. This is not to suggest, however, that the Applicant would have necessarily adduced sufficient evidence to convince the General Division that the employment in 2003 represented a failed work attempt, given his level of earnings for 2003 and given the fact that he had been released from the position for reasons unrelated to his medical condition.

CONCLUSION

[10] 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