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

Citation: *J. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 255

Tribunal File Number: AD-16-729

BETWEEN:

J. S.

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 December 11, 2014. The General Division of the Social Security Tribunal (Tribunal) 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, 2010. The Applicant filed an application requesting leave to appeal on May 26, 2016, invoking several grounds of appeal.[1]

ISSUES

[2] The primary issues before me are as follows:

i. Did the Applicant file an application requesting leave to appeal within the time permitted under the applicable legislation? If not, does the Appeal Division have any authority or discretion to extend the time for filing?

ii. Does the appeal have a reasonable chance of success?

ANALYSIS

Issue 1: Did the Applicant file his application with the Appeal Division on time?

[3] Subsection 57(1) of the *Department of Employment and Social Development Act* (DESDA) requires an application for leave to appeal to be made to the Appeal Division within 90 days after the day on which the reconsideration decision was communicated to an appellant.

[4] The Tribunal mailed a copy of the General Division's decision to the Applicant in December 2014. If the decision had been communicated to the Applicant in December 2014, under subsection 57(1) of the DESDA, he would be required to file a

[1] Correspondence dated April 15, 2016 from the Applicant's representative indicates that the Applicant had obtained new medical records and wished to submit them "in an effort to reopen his case." The Applicant signaled that he intended to file an application to rescind or amend the General Division decision, but the time for doing so has now passed.

leave application by no later than March 2015. In this case, the Applicant filed his leave application more than a year later, in May 2016. However, a review of the hearing file indicates that he did not receive the General Division's decision in December 2014, owing apparently to mail delivery issues. The Tribunal re-sent the decision to the Applicant's updated address in February 2015.

[5] In April 2016, the Tribunal was notified that the Applicant had yet to receive the decision. By then, the Applicant had a new mailing address. The Tribunal re-sent the decision to the Applicant. It is unclear precisely when the decision was communicated to him, but he brought an application requesting leave to appeal shortly thereafter, in May 2016, clearly within 90 days after the Tribunal re-sent the decision to him. I find that the Applicant filed the application for leave to appeal on time.

Issue 2: Does the appeal have a reasonable chance of success?

[6] Subsection 58(1) of the 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.

[7] 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, before leave can be granted. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant submits that the General Division erred under each of these grounds. For ease of reference, I will employ the Applicant's

subheadings, although some of the allegations might be more appropriately placed under another subheading.

(a) Breach of natural justice

[8] The Applicant argues that "an abuse of discretion occurred when the [General Division member] selectively looked at the dates of incidents, the treatments described, and [his] doctor's opinions … thus slanting their conclusions and arriving at a negative decision…" He further claims that the member failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise his jurisdiction, in that he focused on "spurious events" recorded in the hearing file, such as the fact that he (1) held a real estate licence, and (2) earned a class 1 driver's licence. (A B.C. class 1 driver's licence is generally associated with driving semi-trailer trucks, but it also permits drivers to operate other vehicles, including buses and taxis.)

[9] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his or her case, that he or she has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. The Applicant's allegations that the member breached principles of natural justice fail to show that he was deprived of a fair hearing, that he did not have a fair and reasonable opportunity to present his case, or that the member was biased against him.

[10] The Applicant suggests that the member ought not to have given any consideration to the fact that he held a real estate licence or that he had earned a class 1 driver's licence. However, in *Villani v. Canada (Attorney General)*, 2001 FCA 248, the Federal Court of Appeal held that the statutory test for severity requires an "air of reality" in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. The Court also held that the hypothetical occupations that a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience. Indeed, *Villani* requires a decision-maker to consider an applicant's personal characteristics. Therefore, the fact that the Applicant obtained a real estate licence and a class 1 driver's licence were relevant considerations in determining whether he had a severe disability on or before the

end of his minimum qualifying period. That said, the General Division merely noted the fact that the Applicant holds a real estate licence; this factor did not form any part of the member's analysis as to whether the Applicant was severely disabled, whereas, the member determined that the class 1 licence was a relevant factor in assessing the severity of the Applicant's disability.

[11] Despite acquiring the class 1 licence in 2009, the Applicant denies that he has ever been able to use it, because he is unable to load or unload a vehicle. However, this is contrary to the documentary evidence. While the Applicant has not driven a semi-trailer truck, he has been driving taxis. The medical report dated November 12, 2010 from his cardiologist indicates that he was driving a taxi a few days a week and that he was doing heavy lifting, albeit he reported that he still felt dizzy from doing this (GT1-71 to 72). Before November 2010, the Respondent's notes and correspondence with the Applicant (including a letter dated September 22, 2010) suggest that the Applicant was not working because he had been unable to find any work (GT1-14 to 15).

[12] The Applicant argues that the member acted inappropriately in being selective about the evidence. In other words, he claims that the member improperly weighed the evidence. However, the issue of the weight to be ascribed to evidence does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Federal Court of Appeal has declined to interfere with a decision-maker's assignment of weight to the evidence, holding that such an exercise is a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82 (CanLII). Similarly, I would defer to the General Division's assessment of the evidence. As the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I am therefore not satisfied that the appeal has a reasonable chance of success on this ground. I cannot conclude that the General Division should have placed more weight on, or given greater consideration to, any of the evidence that favoured the Applicant.

[13] The Applicant urges me to reconsider the medical assessment, particularly the medical opinions of Dr. Ramorasata, but, as the Federal Court held in *Tracey*, there is no place under the DESDA for the Appeal Division to conduct a reassessment when determining whether leave should be granted or refused. The grounds of appeal are very specific and are limited to those under subsection 58(1) of the DESDA.

(b) Errors of law

[14] The Applicant submits that the General Division made several errors of law. He submits that the General Division failed to provide a "written post-Decision" for several months, thereby plunging him into deeper depression. He claims that he was denied the opportunity to present new medical information at the hearing.

[15] The Notice of Hearing indicates that the hearing was scheduled for November 25, 2014. The member rendered his decision on December 11, 2014. As indicated above, the Applicant did not receive a copy of the General Division's decision until after the Tribunal re-sent the decision in April 2016. While it is regrettable that the delay exacerbated the Applicant's depression, the Tribunal had been unaware that the Applicant had failed to receive a copy of the decision in February 2015. Upon learning that the Applicant had yet to receive the General Division's decision, the Tribunal promptly sent a copy to him. Neither the General Division nor the Tribunal can be faulted for any delay, given the circumstances. In any event, this matter has no relevance to the issue of whether the General Division erred in law in making its decision.

[16] The Applicant asserts that he was denied the opportunity to present new medical evidence at the hearing. The member indicates, however, that the Applicant, as well as his former representative, did not attend the hearing on November 25, 2014. I therefore deduce that the Applicant must be referring to the hearing that had been scheduled before the Canada Pension Plan Review Tribunal on June 6, 2012. The Review Tribunal hearing of June 2012 was apparently adjourned as the Applicant had recently received 36 pages of medical records and anticipated that he would be receiving a medical report from an orthopaedic surgeon, following a consultation with him in July 2012. The Review Tribunal did not render a decision at that time.

[17] On April 1, 2013, the appeal was transferred to the Tribunal, as are any appeals that were filed before April 1, 2013, under subsection 82(1) of the *Canada Pension Plan*.

[18] The Tribunal subsequently rescheduled the hearing. The Tribunal's Notice of Hearing dated July 16, 2014 indicates that the parties had until August 25, 2014 to file additional documents or submissions and until September 23, 2014 to file any responses. Despite being provided with the opportunity to file additional documents or submissions, neither party filed anything further. Given this history, neither the General Division member nor the Tribunal failed to provide the Applicant with an opportunity to file any additional documents or submissions.

[19] Notably, the Tribunal wrote to the Applicant in June 2016, advising that he could consider applying to the General Division for a rescission or amendment of its December 2014 decision. The Tribunal stressed that the application could be made only once and had to be submitted within one year of the General Division decision.

[20] The Tribunal wrote to the Applicant again on July 7, 2016, seeking clarification from him, given that he had filed new medical records on May 26, 2016. The Tribunal sought to clarify whether the Applicant intended to proceed with an application to rescind or amend the General Division decision, or whether he intended to appeal the General Division's decision. Communications with the Applicant's representative suggested that the Applicant had yet to receive the July 2016 letter from the Tribunal, so it was re-sent.

[21] In its letter dated September 15, 2016, the Tribunal advised the Applicant that if he intended to pursue an application to rescind or amend, he should file an application "without delay, as there are strict time limits under section 66 of the DESDA." The Tribunal wrote again to the Applicant, on April 27, 2017, advising that as he had not already filed an application to rescind or amend, it would now be proceeding to assess his application requesting leave to appeal.

[22] Even if the Applicant had filed an application to rescind or amend with the General Division under section 66 of the DESDA, he would have had to establish that any new facts were material and "could not have been discovered at the time of the hearing [before the

General Division] with the exercise of reasonable diligence." It is not altogether apparent that the Applicant would have been able to meet the discoverability aspect of this test, given that he had had these records in his possession for some time.

[23] If the Applicant intends to rely on the new medical records as the basis of an appeal before the General Division, it has now become well-settled law that new evidence generally does not constitute a ground of appeal before the Appeal Division. As the Federal Court held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367, "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*." An appeal does not enable an applicant to introduce new evidence or submissions to bolster his case. There is no basis whereby I can consider any new evidence, unless it falls within any of the exceptions, such as when it specifically addresses any grounds of appeal.

[24] Finally, the Applicant argues that the General Division erred by "challenging [Dr. Ramorasata's] examinations and findings without explanation." However, the General Division member clearly explained why he preferred the medical opinion of another medical practitioner over that of Dr. Ramorasata at paragraph 28 of his decision.

(c) Erroneous findings of fact

[25] The Applicant submits that the General Division made an erroneous finding of fact that he does not have a severe disability, when his family physician was of the opinion that, "[his] conditions are severe, chronic, progressive, and lifelong."

[26] However, the General Division found that there was conflicting medical evidence and ultimately found that Dr. Ramorasata had not addressed the issue of the Applicant's capacity. The member preferred the medical opinion of another medical practitioner. In the face of conflicting evidence, the member was entitled to prefer the medical opinion of one practitioner over another, provided that he explained his decision in this regard.

CONCLUSION

[27] For the reasons set out above, I am not satisfied that the appeal has a reasonable chance of success and, accordingly, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division