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

Citation: *G. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 259

Tribunal File Number: AD-16-824

BETWEEN:

G. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: June 1, 2017

REASONS AND DECISION

INTRODUCTION

[1] On March 18, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable.

[2] The General Division Member determined that the Applicant did not prove on a balance of probabilities that he suffered from a severe and prolonged disability that rendered him incapable regularly of pursuing any substantially gainful occupation at the time of his minimum qualifying period (MQP) and continuously since. It should be noted that the Applicant's MQP date was December 31, 2001, and that this date was agreed upon by all the parties.

[3] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which was received on June 16, 2016.

ISSUE

[3] The Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] 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."

[5] 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."

[6] According to subsection 58(1) of the DESD Act, the only grounds of appeal 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 made in a perverse or capricious manner or without regard for the material before it.

[7] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[8] It was submitted that the General Division had based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it. Specifically, the Applicant submitted that the General Division had not properly assessed the Applicant's mental/psychological disability by failing to consider two 2014 reports by Dr. Mpitas, who described the Applicant not only as someone suffering from not severe Idiopathic Hypertrophic Subaortic Stenosis disorder physically, but also as someone who has a "[...] schizoaffective disorder presenting hypomanic and depressive episodes as well as psychotic episodes (ideas of persecution) in between the episodes."

[9] The submissions went on to further explain that the Applicant's psychological and mental conditions were proof that the Applicant was, and is still, incapable of making decisions for himself, including not believing he was disabled and returning to the workforce after the expiry of the MQP. Additionally, it was submitted that self-delusion was the reason that the Applicant had returned to the workforce, but that he should have never returned due to his disability.

[10] The submissions also challenged the General Division Member's comments that the Applicant "had no problems communicating during the hearing." The Applicant's brother submitted that even if the Applicant had sounded lucid, that did not mean he understood everything around him.

[11] It was also submitted that the Applicant's work history after the expiry of the MQP should have been immaterial, as an employer had provided new evidence that his disability rendered him incapable of contributing as a full-fledged member of the team. This report had not been included in the General Division file.

[12] Along with these arguments, the Applicant also provided his own written submissions explaining that his life had been extremely difficult. His letter to the Appeal Division outlined his difficulties getting to work, his medication management, his mental stability and his other health issues. He also mentioned his discharge from the Greek military, which, he argued, was evidence of a severe disability.

ANALYSIS

Dr. Mpitas' Reports

[13] The Applicant submitted that Dr. Mpitas' reports were not referenced in the decision and therefore that the General Division did not properly adjudicate the file. The Federal Court of Appeal in *Simpson v. Canada (Attorney General)*, 2012 FCA 82, noted that an administrative tribunal charged with finding fact is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions. With that guidance in mind, I have reviewed the General Division's decision and have found no indication that it ignored, or gave inadequate consideration to, any significant aspect of the Applicant's disability claim. Dr. Mpitas' reports did not provide contradictory evidence and were produced in 2014— many years after the expiry of the MQP. Although medical reports that are produced after the MQP has expired can be helpful, this doctor was monitoring the Applicant from only about 2012 to 2014—a period well beyond the expiry of the MQP. Nowhere in the report was there any information that would assist in the understanding of the Applicant's disabilities prior to the MQP.

[14] With respect to the General Division's consideration of the Applicant's mental/psychological disabilities, the decision explicitly referenced a number of reports including some that were completed post-MQP. In paragraph 9 of the General Division decision, the Member acknowledged the panic attacks that the Applicant had experienced from 2007– -2009. In paragraph 13 of the decision, the Member cited a report from Dr. Bentley-Taylor from May 2001, which noted that the Applicant had developed a significant psychological problem with acute anxiety. In the same paragraph, the Member cited Dr. Eriksson's findings that the Applicant exhibited intense neurotic behaviour due to the severity of this disease, which contributed to a slow recovery. In paragraph 15, Dr. Sagman's January 2002 report was cited noting that the Applicant had symptoms of generalized anxiety and panic disorder with agoraphobia. Paragraph 17 referenced the family doctor's notes from September 2002 about the Applicant's post-surgery health indicating that, because of anxiety and panic attacks, the Applicant was seeing a psychiatrist. Paragraph 18 also noted Dr. Deliakis' report from October 2002, which noted the Applicant was still having difficulty with sleep interruption, fatigue, mood swings, panic attacks, anxiety, agoraphobia, depression, diarrhea and gastric reflux. The Expert Medical Opinion from the Social Insurance Institute of Greece, completed in February 2005, was referenced in paragraph 19. It opined that the Applicant had a "depressive disorder of reactive incidence." Again in paragraph 20, the Member noted that many medical reports produced after the expiry of the MQP referenced his mental disabilities.

[15] The General Division's analysis detailed the various medical conditions and associated symptoms, even consulting and referencing those reports that provided information after the expiry of the MQP. The General Division is to assign weight to evidence as it sees fit. While specific reference to Dr. Mpitas' reports was not noted, other reports that contained similar information were cited. Additionally, the General Division also considered evidence that had been produced post-MQP. I cannot find an arguable case that the General Division erred in its consideration of the evidence. This issue has no reasonable chance of success on appeal.

Communication During the Hearing

[16] The Applicant's brother submitted that the General Division's note about the Applicant's ability to communicate at the hearing might have been misconstrued. The allegation

against the General Division was that although the Applicant may have sounded lucid, he may not have understood everything around him. In reading the General Division decision, the actual comment was contained in paragraph 31 and was in reference to the Applicant's linguistic skills. The comment in its entirety reads: "He is fluent in English and had no problem communicating well in English at the oral hearing."

[17] The comment was not made in the context of assessing the Applicant's health, but rather in reference to the Applicant's linguistic capabilities, which is relevant to the *Villani* (*Villani v. Canada (Attorney General)*, 2001 FCA 248) "real world" approach of assessing how personal characteristics impact an applicant's capacity to regularly pursue any substantially gainful work. This issue has no reasonable chance of success on appeal, as the General Division's comment was unrelated to the Applicant's health.

New Evidence

[18] In considering the Application, the Appeal Division has a limited mandate. There is no consideration for new evidence. As explained by the Federal Court in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at paragraph 23:

> […] They have no authority to conduct a rehearing of Mr. Parchment's case. They also do not consider new evidence. The Appeal Division's jurisdiction is restricted to determining if the General Division committed an error (ss. 58(1) (a) through (c) of the DESDA) and the Appeal Division is satisfied that an appeal has a reasonable chance of success (58(2) of the DESDA). Only if the criteria of ss. 58(1) and (2) are met does the Appeal Division then grant leave to appeal.

In this Application, the Applicant submitted new information with respect to his work from 2007-–2008 in Greece. The Appeal Division cannot consider new evidence, given the constraints of subsection 58(1) of the DESD Act. Once a hearing before the General Division has concluded, there is a very limited basis upon which any new or additional information can be raised. Leave to appeal is refused with respect to the consideration of new evidence.

Work History After MQP

[19] The Applicant's brother also argued that the fact that he had worked after the expiry of his MQP should be immaterial. Unfortunately for the Applicant, this fact is extremely relevant. As was explained in the General Division decision, the case of *Miller v. Canada (Attorney General)*, 2007 FCA 237, has succinctly explained that, "the capacity of an applicant for a disability benefit to regularly engage in remunerative employment is the very antithesis of a severe and prolonged disability." The General Division reviewed the post-MQP employment evidence and in paragraph 27 noted:

> […] The Appellant testified that he worked for the Greek government as a computer technician from about July 2007 to October 2009. He also indicated he worked in Canada repairing television remote digital boxes around the period up to moving to Greece again in April 2010. He obtained this position through an employment agency. He indicated he worked up to 5 days a week, although some weeks it was 1 – 3 days. The evidence is clear the Appellant engaged in substantially gainful employment after the Minimum Qualifying Period. […]

[20] Additionally, the General Division's analysis looked at the issue of whether the medical conditions/symptoms rendered the Applicant incapable regularly of pursuing any substantially gainful occupation. At paragraph 29, the General Division found:

> […] The Appellant had some difficulty in attending work due to anxiety and other symptoms. However, the Appellant was able to engage in full time work for a significant length of time especially in Greece after the MQP. Although the Appellant had some difficulties it was not to the extent that he was incapable of substantially gainful employment. The Tribunal finds that when assessing the effects of the medical conditions on the Appellant it does not indicate a severe and prolonged disability at the time of the MQP and continuously since. The Appellant may very well suffer from a severe disability at the time of the hearing however the evidence does not indicate a severe disability at the time of the MQP and for the years after that he engaged in full time work.

[21] Additionally, the General Division noted correctly that there is no discretion to allow for equitable relief based on financial need. Leave to appeal on this issue is refused as there is no reasonable chance of success on appeal.

Discharge From Greek Military

[22] Finally, the Applicant argued that the letter discharging him from military service was proof of disability. This document was reviewed by the General Division Member and referenced in paragraph 19. Completed in February 2005, the General Division noted that the finding was that he had been granted a disability percentage of 80 per cent and that he was unfit for military service in Greece. This had occurred in 2005, approximately three years after the MQP. In paragraph 26 of its decision, the General Division Member noted:

> […] The Tribunal finds his effort at obtaining and maintaining employment was successful after 2001. The Tribunal finds there was evidence of work capacity and evidence of ability to obtain and maintain employment and was not thwarted by his medical condition.

The discharge notice from 2005 does not speak to the Applicant's health prior to or on the MQP date. Again, the General Division is charged with assigning weight to evidence. In keeping with *Simpson*, the General Division acted appropriately by assessing the facts, reviewing the relevance of the evidence, determining what, if any, evidence was accepted or disregarded before weighing that evidence, then ultimately coming to a decision based on its interpretation and analysis of the material before it. Hence, I do not see how this ground has a reasonable chance of success.

CONCLUSION

[23] The Appeal Division's job, as per subsection 58(1) of the DESD Act, is to determine whether the reasons for appeal fall within any of the specified grounds and whether they have a reasonable chance of success, without delving directly into an adjudication of the merits of the file. The Applicant is essentially requesting a *de novo* hearing and is hoping for a different decision based on the same set of facts and the same applicable law. These reasons do not fall within any of the specified grounds; in other words, there is no arguable case.

[24] The Appeal Division does not have jurisdiction to conduct a *de novo* hearing. An applicant's disagreement with the General Division decision does not constitute a breach of natural justice or an error in law or fact.

[25] The law is quite clear that, when disability occurs after the MQP has expired, there is no eligibility.

[26] The Applicant has presented no grounds of appeal that would have a reasonable chance of success on appeal. Leave to appeal is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division