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

Citation: *K. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 288

Tribunal File Number: AD-16-1365

BETWEEN:

K. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: June 20, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 22, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because it found that his disability was not "severe" during his minimum qualifying period (MQP), which ended on December 31, 2011.

[2] On December 13, 2016, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division detailing alleged grounds for appeal.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[4] According to subsection 58(1) of the DESDA, 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.

[5] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[9] In his application requesting leave to appeal, the Applicant made the following submissions:

(a) The General Division went beyond its jurisdiction by disregarding the medical evidence. It also displayed bias and manipulated the evidence to come up with excuses to disqualify him from his disability benefits.

(b) While he might be relatively young and in possession of a high school education and years of work experience, he suffers from depression, as well as atrial fibrillation (AF). These conditions are debilitating, and the General Division should have recognized that they are severe and prolonged.

(c) He has attempted to find work, but no one will hire a person with AF. His condition makes him unreliable and unable to meet an employer's needs.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ no 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

Furthermore, the amount of work that he might be able to do would not be substantially gainful and would adversely affect his health.

(d) He stopped taking certain medications because they intensified his AF symptoms and caused side effects, such as skin rashes and gastrointestinal issues. As for the proposed ablation, the Applicant maintains that he has the right to refuse this procedure, having weighed the advantages and disadvantages of going through with it. He should not be penalized for looking out for himself.

ANALYSIS

Bias

[10] The Applicant alleges that the General Division manipulated the evidence to arrive at a predetermined outcome.

[11] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[3] has stated that test for bias is: "What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough. Not every favourable or unfavourable disposition attracts the label of impartiality. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues.

[12] Beyond expressing his disagreement with the General Division's decision, the Applicant has not offered details on any specific instance that might indicate bias on the part of the General Division. In the absence of evidence that the General Division prejudged his appeal, I see no arguable case on this ground.

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[3] *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

Failure to Recognize Severity

[13] The Applicant alleges that the General Division dismissed his appeal despite medical evidence indicating that his overall condition was "severe" according to the CPP criteria.

[14] However, outside this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the General Division analyzed in detail the Applicant's claimed medical conditions—principally AF and depression—and whether they affected his capacity to regularly pursue substantially gainful employment during his MQP. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that falls into the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it sufficient for an applicant to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[15] In the absence of a specific allegation of error, I find this claimed ground of appeal to be so broad that it amounts to a request to retry the entire claim. If the applicant is requesting that I reconsider and reassess the evidence and substitute my decision for that of the General Division in his favour, I am unable to do this. My authority as an Appeal Division member permits me to determine only whether any of the Applicant's reasons for appealing falls within the specified grounds of subsection 58(1) of the DESDA, and whether any of them has a reasonable chance of success.

[16] I see no reasonable chance of success on this ground.

Failure to Recognize Attempts to Work

[17] The Applicant suggests that the General Division ignored his attempts to find work and disregarded evidence that his medical conditions render him unemployable.

[18] I see no arguable case on this point. Case law[4] has imposed a duty on CPP disability claimants to make reasonable attempts to seek work within their limitations, provided that they have residual capacity. Accordingly, a trier of fact may be permitted to draw an adverse inference if there is evidence that the claimant has not investigated alternative employment, but there is no corresponding obligation to draw a positive inference if a claimant *has* attempted, in some way, to resume work. In the present case, the General Division noted (in paragraph 28 of its decision) the Applicant's testimony that he had looked for other jobs after leaving Weston Bakeries, but it otherwise did not refer to this issue in its analysis proper. As there is no indication that the General Division based its decision on the Applicant's attempts, or lack thereof, to return to work, I see no reasonable chance that his ground can succeed on appeal.

Failure to Consider Reasons for Refusing Treatment

[19] The Applicant submits that the General Division erred in obliging him to accept treatment without giving due consideration to what he believes were valid reasons for not wishing to take them.

[20] Again, I see no arguable case here. Numerous references to this issue in the General Division's analysis leave little doubt that the Applicant's purported refusal to follow medical advice was a significant factor in the decision to dismiss his appeal:

> [50] […] Dr. Logsetty noted the Appellant did not wish to start on any medication at all for his potential arrhythmia.
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> [51] In May 2012, Dr. Choi suggested ablation if the Appellant was refractory to medical management.
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> [52] […] The Appellant decided on his own to stop one of his prescribed medications, Metoprolol, a beta blocker.
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> [53] Dr. McIntosh in September 2015 diagnosed the Appellant as depressed due to his AF. However, Dr. Baker reported in 2013 the Appellant as reluctant to use medications, and according to the Appellant's testimony only saw the Appellant an additional twice before advising there was no need to continue psychiatric treatment […]
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> [54] The Appellant has been advised by Dr. Ha and Dr. Logsetty to undergo ablation to correct his AF. Dr. Ha noted in April 2013 that the Appellant had last been reviewed in November 2012 at which time he decided

[4] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

> not to pursue medical or invasive rhythm control… Dr. Logsetty gave the Appellant the options of about a trial of antiarrhythmic therapy and ablation. The Appellant was not interested in pursuing either option. By August of 2012 Dr. Logsetty opined that the Appellant should really consider ablation given his intolerance to beta blockers.
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> [55] In November 2014, Dr. Logsetty recommended a "pill in the pocket therapy" and in follow up in March 2015 noted the Appellant had been reluctant to take the triple "pill in the pocket" therapy and was reluctant to try any beta blockers. Dr. Logsetty noted the Appellant was clinically stable and had a structurally normal heart.
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> […]
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> [56] Dr. McIntosh reported that he had prescribed digoxin, a prescription that had not been renewed. The Appellant testified that the only medication he was taking was ASA 81mg.
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> [58] Prior to his MQP he was successfully cardioverted and he returned to work. The Tribunal acknowledges the Appellant is reluctant to undertake ablation even though recommended by two specialists. There is no apparent reason for his not trying the medical management by medication that has been suggested.
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> […]
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> [60] The Appellant was offered an ablation in November 2012, one year after his MQP. He declined that treatment due to the risk factors.

[21] However, the question here is whether the General Division's finding that the Applicant was unreasonably reluctant to follow treatment recommendations constituted an error in either fact or law.

[22] As to the former, I have reviewed the medical reports underlying the General Division's analysis and see no indication that the General Division misrepresented or otherwise distorted the words of the Applicant's treatment providers. The Applicant also suggests that the General Division ignored his reasons for eschewing certain medications, but the decision does note (at paragraph 33) that he had "stopped taking beta blockers because he says they make him worse" and had "stopped blood thinners because he does not feel comfortable with them." It was open to the Applicant to explain to the General Division why he believed he had good reason to disregard the advice of his treatment providers. It appears that the General Division considered those submissions, but decided to give them limited weight for reasons that it adequately documented in its decision. In doing so, it acted within its authority.

[23] As to the latter, there is a body of jurisprudence[5] that imposes an obligation on an applicant for CPP disability benefits to mitigate his or her impairments by pursuing all recommended treatment options. While the Applicant implies that the General Division ought to have considered the reasonableness of his non-compliance, this is distinct from assessing the reasonableness of the General Division's decision, which is not contemplated under subsection 58(1) of the DESDA, for the purposes of assessing a leave to appeal application. Here, I see that the General Division considered the Applicant's reasons for refusing to submit to an ablation, as recommended by Drs. Choi, Ha and Logsetty, and found them lacking.

[24] The Applicant argues that he had the right to refuse ablation, having weighed the advantages and disadvantages associated with undergoing this procedure. However, having applied for CPP disability benefits, the Applicant must permit others to judge his actions. In this forum, the question of whether refusal of a treatment is reasonable is for the trier of fact. Although the General Division did not explicitly cite the relevant legal principles governing the issue of medical mitigation, it is clear that its analysis was nonetheless guided by them. Whatever his motivations for doing so, the fact remains that the Applicant made a conscious decision to disregard the recommendation of three cardiologists—as documented in several of the medical reports and as confirmed by the Applicant in his testimony. In doing so, he was in effect second-guessing the professional opinions of his treatment providers, who presumably would not have recommended ablation in lieu of medication unless it was likely to produce some positive effect that outweighed potential risks.

[25] For these reasons, I see no reason to interfere with the General Division's finding that the Applicant's refusal to submit to recommended treatment was unreasonable. It was therefore within the General Division's authority to draw an adverse inference from that refusal.

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[5] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187; *Kaminski v. Canada (Social Development)*, 2008 FCA 225; and *Warren v. Canada (Attorney General)*, 2008 FCA 377.

CONCLUSION

[26] As the Applicant has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division