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

Citation: *S. E. v. Minister of Employment and Social Development*, 2017 SSTADIS 289

Tribunal File Number: AD-16-370

BETWEEN:

S. E.

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 21, 2017

Canada

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 December 15, 2015. The General Division had previously conducted a hearing by teleconference and had determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because his disability was not severe as of the hearing date. The General Division also determined that the Applicant's minimum qualifying period (MQP) was extended to December 31, 2017, by application of the CPP's child rearing provision (CRP).

[2] On February 26, 2016, within the specified time limitation, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. The record shows that the Tribunal requested additional information from the Applicant by way of a letter dated March 2, 2016, but it did not acknowledge his response until December 14, 2016, at which time it declared his appeal complete and on time.

THE LAW

Canada Pension Plan

[3] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[4] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

Department of Employment and Social Development Act

[5] 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, and the Appeal Division must either grant or refuse leave to appeal.

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

[7] 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.

[8] 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]

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an applicant to meet, but it is lower than the one that must be met on the

[1] *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

hearing of the appeal on the merits. At the leave to appeal stage, an applicant does not have to prove the case.

ISSUE

[10] The Appeal Division must decide whether the appeal has a reasonable chance of success.

SUBMISSIONS

[11] In his application requesting leave to appeal, the Applicant alleged that the General Division either had not received or had not properly vetted all his medical documents. He stated that his situation was life-threatening, as confirmed by multiple doctors who had been overseeing his care. He was unable to work, and he would be submitting additional medical documents in support of his claim.

[12] In a letter dated March 2, 2016, the Tribunal reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) of the DESDA and asked him to provide, within a reasonable timeframe, more detailed reasons for his request for leave to appeal. On March 9, 2016, the Applicant replied that, as the sole caregiver of his severely disabled seven-year-old son, his health had taken a considerable turn for the worse. He had been prescribed antibiotics nine times in the past 12 months and had undergone medical tests to determine the reason for his significant physical illnesses, which included throat infections and significant weight loss.

[13] His son suffers from around-the-clock seizures and requires constant supervision. He has been hospitalized for prolonged periods, and even a common cold can be life-threatening for him. The Applicant is the only person who has looked after him, and they have developed a close bond. Watching his son deteriorate has caused the Applicant significant physical hardship and extreme mental anguish. He consulted a psychiatrist, who suggested that his son be euthanized— an option he found completely unacceptable. He is currently receiving treatment from multiple doctors regarding depression and suicidal thoughts.

[14] The Applicant has been forced to look to his local government for help in taking care of his son. They have been enrolled in a shared care program under a plan that will allow the

Applicant to get better and to then take care of his son while he is alive or, should he die or become debilitated, give him a place to live out the balance of his life.

[15] The Applicant is asking the Appeal Division for relief because his situation has deteriorated significantly since December 31, 2014, the date on which, according to the General Division, he had last been eligible for disability benefits. He suffers from significant depression and physical impairments, and he needs help. His insurance company has been empathetic, but it has also stated that its next steps would be based on the Tribunal's response. It has told him that his benefits will be at risk if the General Division's decision—based on its finding that he had the capacity to look after his son—is upheld. He refuses to give up on his son and is desperate for help. His pain is real, as are his family's financial needs.

ANALYSIS

[16] This appeal raises the question of how much consideration, if any, should be given to extrinsic life pressures faced by a disability claimant beyond his or her intrinsic impairments. Reduced to their essence, the Applicant's submissions suggest that the General Division failed to give due weight to evidence that his mental and physical conditions have been compounded by the difficulties in caring for his severely disabled son.

[17] I must note here that the Applicant appears to be under the misapprehension that his MQP ended on December 31, 2014. The Respondent had originally found that this date marked the end of his eligibility period, but the General Division conducted its own investigation and determined that it should be extended to December 31, 2017, by application of the CRP to the Applicant's years as his child's primary caregiver. In any event, I do not see how the MQP had any bearing on the outcome of the General Division's decision.

[18] My review of the General Division's reasons indicate that it did not disregard the Applicant's unique situation but in fact devoted much of its analysis to his heavy responsibilities as a father and their impact on his health. Having considered the medical evidence pertaining to the Applicant's depression, fibromyalgia and chronic pain, as well as his testimony about the demands of caring for his son, the General Division ultimately concluded

that, apart from his family responsibilities, the Applicant was, on balance, not incapable regularly of pursuing any substantially gainful occupation:

> [51] The Tribunal is charged with assessing the severity of disabilities, in the context of a capacity to work. It is clear from the evidence that the Appellant is unable to pursue regularly any substantially gainful occupation *in addition to* his caregiving responsibilities. However, the Appellant's caregiving responsibilities are not typical parenting responsibilities: while important, typical parenting responsibilities generally allow enough time for a parent to pursue some form (either part-time or full-time) of substantially gainful employment. In contrast, D. E. requires intensive, around-the-clock care and such care has been provided by nurses to at least some degree throughout D. E.'s life.
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> (Italics were used for emphasis in the original.)

[19] The General Division justified its decision to consider the Applicant's functionality apart from his caregiving duties by likening the latter to economic conditions that might hinder a claimant from maintaining a job:

> [52] In general terms, the Tribunal is not concerned with situational factors that may impact a person's ability to maintain employment. It must look at a claimant's ability to work, rather than whether extrinsic factors would permit such work. For example, in *Canada (MHRD) v. Rice*, 2002 FCA 47, the Federal Court of Appeal has ruled that socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the *Canada Pension Plan*. By analogy to the Appellant's case, the Tribunal must consider whether the Appellant would be severely disabled if he did not have any exceptional caregiving responsibilities at home. A related principle is that an ability to care for D. E. is indicative of retained work capacity: such an approach is supported by the Tribunal's Appeal Division reasoning in *T.C. v. Minister of Employment and Social Development*, 2015 SSTAD 637.

[20] I see no arguable case that the General Division misapplied the law in this instance. Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. The language employed in the CPP strongly suggests that the disability must be intrinsic to the claimant and not a function of externalities, such as family pressures, natural disasters or downturns in the labour market. This is not to say that extrinsic factors cannot trigger or exacerbate potentially disabling medical conditions, but those conditions must be assessed on their own terms.

[21] The General Division cited *Canada v. Rice*[3] in seeking to draw an analogy between labour market conditions (which the Federal Court of Appeal deemed irrelevant in assessments of disability) and exceptional domestic responsibilities. I would endorse this approach, as nothing in it strikes me as inconsistent with the leading case on the CPP disability regime, *Villani v. Canada*,[4] and its requirement that a claimant's personal circumstances be taken into account in assessing capacity to work. The Federal Court of Appeal listed age, level of education, language proficiency, as well as past work and life experience, as relevant considerations, and I note that none of these factors can be easily divorced from the individual—unlike family pressures, which, difficult though they may be, are subject to adaptation, amelioration or evolution.

[22] For the most part, the remainder of the Applicant's submissions recapitulated evidence and arguments that, from what I can gather, had already been presented to the General Division. Unfortunately, the Appeal Division has no mandate to rehear disability claims on their merits. 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 correspond to the grounds of appeal set out in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[23] There is no question that the Applicant finds himself under exceptionally challenging circumstances, but the General Division was bound to follow the letter of the law, and so am I. In essence, the Applicant is imploring the Appeal Division to exercise fairness and reverse the General Division's decision, but I lack the authority to do so and can exercise only such jurisdiction as granted by the Appeal Division's enabling statute. Support for this position may be found in *Pincombe v. Canada*,[5] among other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

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[3] *Canada (Minister of Human Resources and Development) v. Rice*, 2002 FCA 47.
[4] *Villani v. Canada (Attorney General)*, [2002], 1 FCR 130, 2001 FCA 248.
[5] *Pincombe v. Canada* (A.G.) [1995] FCJ No. 1320 (FCA).

CONCLUSION

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

Member, Appeal Division