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

Citation: *O. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 361

Tribunal File Number: AD-17-353

BETWEEN:

O. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Peter Hourihan

Date of Decision: July 24, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On January 30, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable, as it had found that the Applicant's "disability was not severe at the time of his MQP, and did not become severe in 2013 by the end of November." The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on April 19, 2017.

ISSUE

[2] I must decide whether the appeal has a reasonable chance of success.

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 and the Appeal Division must either grant or refuse leave to appeal.

[4] Subsection 58(1) of the DESDA identifies the following as the only grounds of appeal to the Appeal Division:

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.

[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.

SUBMISSIONS

[6] The Applicant submits that the General Division made six errors of law when it found that his disability was not severe, under subsection 42(2) of the CPP. Specifically, the Applicant submits that the General Division erred in law:

1. by failing to consider the Applicant's conditions cumulatively;
2. by requiring objective medical evidence of chronic pain;
3. by failing to consider relevant evidence of the Applicant's headache condition;
4. by failing to consider an undiagnosed condition—carpal tunnel syndrome (CTS);
5. in determining that there had been no failed work trial; and
6. by making an erroneous finding of fact in a perverse and capricious manner.

[7] The Applicant acknowledges that subsection 42(2) of the CPP requires him to establish his disability as "severe and prolonged." He further acknowledges that leave to appeal will be granted only where there is a "reasonable chance of success," that is, where there is "some arguable ground upon which the proposed appeal might succeed" (*Osaj v. Canada (Attorney Genera*l), 2016 FC 115, para. 12).

[8] The Applicant submits that for leave to appeal to be granted, the requirement is not one of a standard of review, rather, it is whether any of the grounds of appeal should succeed: *Canada (Attorney General) v. Jean*, 2015 FCA 242; and *Maunder v. Canada (Attorney General)*, 2015 FCA 274, para. 3.

[9] The Applicant submits that the General Division, in considering his conditions individually by separating shoulder pain, arm pain, neck pain, back pain and CTS, erred in law. Specifically, the Applicant referred to paragraph 85 of the General Division decision. The Applicant argues that the cumulative effect of the various conditions ought to be considered in a "real world" context to determine whether the Applicant, "in the circumstances of his or her

background and medical condition, is employable, i.e., capable regularly of pursuing and substantially gainful occupation": *Villani v. Canada (Attorney General*), 2001 FCA 248.

[10] The Applicant argues that the General Division decision lacked "any analysis as to why, considered together, these conditions did not rise to the level of severe," and that "the only conditions that were accepted to exist as of the MQP were: shoulder, arm, and neck pain." The Applicant submits that the General Division did not consider his headaches in its analysis. He argues that his background, including his age, education level and language proficiency, as well as past work and life experience, is relevant (*Villani, supra*, at para 38).

[11] The Applicant submits that all the possible impairments should be considered, not merely the dominant impairment. He cites several cases in support of such an analysis: *Canada (Attorney General) v. St-Louis*, 2011 FC 492; *Dauti v. Canada (Attorney General)*, 2013 FCA 259; *M. C. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 20; *D. G. v. Minister of Employment and Social Development*, 2015 SSTAD 462, etc.

[12] The Applicant submits that the General Division did not appropriately consider his subjective evidence of chronic pain and that it focused instead on the "objective medical evidence," referring to paragraphs 76 and 82 in respect of his back pain, and to paragraph 80 in respect of his shoulder, neck and arm pain.

[13] The Applicant submits that the General Division indicated that he had not mentioned back pain on his CPP questionnaire in August 2014; however, he indicates that he did note, in the same questionnaire, two previous back surgeries.

[14] He argues that the General Division should have considered his subjective evidence because it is important. He refers to *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, which held that some disabilities, such as chronic pain, cannot be supported by objective findings, as per paragraph 1. The Applicant cites a number of Tribunal decisions supporting this argument.

[15] The Applicant submits that the General Division erred in law by failing to consider relevant medical evidence, referring to the subjective and objective evidence of the Applicant's shoulder condition, where Dr. Gallay, orthopedic surgeon, noted in October 2011 that the

Applicant had permanent restrictions on his right arm and that he may not rehabilitate further. He also referred to Dr. Hanna's comments in May 2013 indicating that a full recovery was not expected. The Applicant further argues that the General Division dismissed the evidence of Dr. Masnyk, orthopedic surgeon, who had indicated that the Applicant's pain was not in keeping with the "relatively benign findings on imaging."

[16] The Applicant submits that the General Division failed to properly consider his back pain when it determined, at paragraph 82, that there was no medical evidence of significant back pain. He argues that there was significant subjective and objective medical evidence of a serious back problem, referencing a November 2011 Workplace Safety and Insurance Board (WSIB) report, indicating that the Applicant had "constant cervical spine pain" (his own testimony) and an additional WSIB report noting that the Applicant's pre-existing back condition was "moderate" in 2012.

[17] The Applicant argues that the General Division overlooked his headache condition and that, when important evidence is overlooked, leave to appeal should be granted, citing *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, para. 10. He highlighted references in various medical reports.

[18] The Applicant submits that the General Division failed to appropriately consider his CTS when it determined at paragraph 83 that the condition had existed only for four or five months, as articulated by Dr. Chew, neurologist, in March 2015. He argues that there were substantial references to the tingling in his arm and hand prior to the minimum qualifying period, which the General Division had overlooked. Further, he argues that it is not the diagnosis, but rather the fact that his symptoms are the result of a condition, that is important, citing a number of Tribunal decisions.

[19] The Applicant argues that the General Division erred in law when it determined that it "is not apparent from the medical evidence [. . .] that the Appellant left work because of his health condition." He submits that the General Division failed to consider the cumulative effect of his conditions, failed to consider the subjective evidence and failed to consider that the Applicant had left his maintenance job because of his health. The Applicant submits that his jobs as a security guard and hotel maintenance employee were failed attempts, that he left both

jobs because of his pain limitations and, in the case of his maintenance job, because of his inability to work the number of hours required by the employer.

[20] The Applicant submits that the General Division made a perverse finding of fact when it determined that his shoulder impingement diagnosis was interpreted to find his back pain was not serious, referencing paragraph 82 of the General Division decision. He argues that the General Division misconstrued the evidence and that, according to *Karadeolian*, *supra*, leave to appeal should ordinarily be granted.

[21] The Applicant submits that the General Division's errors, outlined above, provide a reasonable chance of success on appeal, according to subsection 58(1) of the DESDA.

ANALYSIS

[22] In determining whether leave to appeal should be granted, I am required to decide whether there is an arguable case. The Applicant does not have to prove the case at this stage; he has to prove only that there will be a reasonable chance of success, that is, "some arguable ground upon which the proposed appeal might succeed" (*Osaj*, para. 12).

[23] In *Mette v. Canada (Attorney General)*, 2016 FCA 276, the Federal Court of Appeal indicated that it is not necessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. In *Mette*, Dawson J.A. stated, in reference to subsection 58(2) of the DESDA, that "[t]he provision does not require that individual grounds of appeal be dismissed." Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." In this particular case, the grounds of appeal are inter-related.

[24] The Applicant raises six grounds for appeal. In the first four, he argues essentially that the General Division did not appropriately consider the totality of the subjective and objective evidence. These grounds are interrelated. The Applicant argues that the General Division misconstrued the evidence, favouring the objective evidence over the Applicant's subjective testimony.

[25] In respect of the Applicant's argument that the General Division decision, at paragraph 85, did not consider the cumulative nature of the 'Applicant's conditions, I find this ground does not have a reasonable chance of success. The paragraph does indicate that the conditions were considered cumulatively:

> [T]he Appellant has suffered at various times from shoulder, arm, neck and back pain, along with CTS. The medical evidence suggests that in late 2012 and into 2013 the first three of these conditions were troublesome. While, taken together, they may have constituted a serious condition, it is not apparent that they rose to the level of severe within the meaning of the CPP legislation in late 2012 and 2013.

The General Division did refer to the various conditions and merely indicated that it was shoulder, arm and neck pain that were troublesome in 2012 and into 2013, acknowledging that all the conditions were considered but that some were not severe as required by the CPP. The General Division did not merely consider the dominant impairment as submitted by the Applicant.

[26] In respect of the Applicant's argument that the General Division did not appropriately consider his subjective evidence of chronic pain in paragraphs 76, 80 and 82, I find that it is not an arguable matter that has a reasonable chance of success. The General Division noted, in paragraph 76, that the Applicant had testified to the best of his ability; however, it noted some inconsistencies between his testimony and the medical record. For example, he indicated that his back pain had become significantly worse approximately four years prior to the hearing, in 2012, and his testimony differed from the medical record concerning the amount of Oxycocet that he had been taking in 2012. The General Division then contrasted the subjective evidence with the medical record, noting this made the General Division's task more difficult and required a "greater reliance on the medical evidence." This is indicative of the General Division's consideration of all forms of evidence. Similarly, in paragraph 80, the General Division considered both the subjective and objective medical evidence in the form of a medical examination, as well as the Applicant's subjective evidence, and indicated that a shoulder impingement had been diagnosed but that "the basis for this diagnosis is unclear." In respect of paragraph 82, the General Division compared the objective medical evidence to the Applicant's subjective evidence and presumed that, because the doctor had diagnosed the right shoulder

impingement, the back pain had not been a serious issue at the time. This is a logical conclusion and does not indicate that the General Division discounted the subjective evidence, but rather that it acknowledged that it was not as serious, at that time, as the shoulder injury.

[27] In respect of the Applicant's argument that the General Division did not consider the two previous back surgeries noted on the CPP questionnaire, it is clear that the General Division considered the questionnaire in paragraph 82, noting that the Applicant did not mention "back pain," which was the focus of the particular paragraph. I find this is not an arguable matter that has a reasonable chance of success.

[28] In respect of the Applicant's submission that his subjective evidence of chronic pain was dismissed, I find this is not an arguable matter that has a reasonable chance of success. The General Division acknowledged the subjective evidence and, where it was not consistent with the objective evidence, pointed out the inconsistency. For example, in paragraph 76, the General Division notes the inconsistent evidence concerning the Applicant's use of Oxycocet, specifically that the Applicant indicated that he had taken Oxycocet almost daily in December 2012; however, his medication list indicated he did not have a prescription until September 2014. The General division stated: "[T]his makes the Tribunal's task more challenging, and in such circumstances the Tribunal is required to place greater reliance on the medical evidence." This was an acknowledgment of inconsistencies—not a dismissal of the subjective evidence**.**

[29] In respect of the Applicant's submission that the General Division failed to consider medical evidence of Drs. Gallay, orthopedic surgeon, Hanna and Masnyk, orthopedic surgeon, and that it discounted the medical evidence of the WSIB and the Applicant's subjective testimony, I find this is not an arguable matter that has a reasonable chance of success. The doctors and the WSIB noted their findings and the likely restrictions. The General Division acknowledged the objective and subjective medical evidence and found that the Applicant had not, ultimately, met the CPP requirements of "severe" (paragraph 97). The words "restrictions" and "moderate" in reference to the Applicant's condition are indicative of this.

[30] In respect of the Applicant's submission that his headaches were not considered, I find this is not an arguable matter that has a reasonable chance of success. The General Division

decision makes several references to the Applicant's headaches in the evidence section. It is not necessary that every piece of evidence be considered: "[A] tribunal need not refer in its reasons to each and every piece of evidence before it, but it is presumed to have considered all the evidence. Second, assigning weight to evidence, whether or written, is the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82).

[31] In respect of the Applicant's submission that his CTS condition was not given appropriate consideration, I find this is not an arguable matter that has a reasonable chance of success (*Simpson, supra*). The General Division referred to the CTS and considered the tingling in the arm and hand in the evidence, even though the CTS was not mentioned as a condition until later, by Dr. Chew, neurologist.

[32] In addressing the Applicant's submission that the General Division did not consider the cumulative effect of his conditions and that he had left his maintenance job for health reasons, I find this is not an arguable matter that has a reasonable chance of success. The General Division considered the evidence presented to it and provided an analysis of that evidence. Specifically, at paragraph 87, it refers to *Klabouch v. Canada (Social Development)*, 2008 FCA 33, para.14, which held that it is not the diagnosis of the disease, rather the capacity to work. The General Division looked at the Applicant's employment record. It indicated that his job as a security guard was a failed work attempt (in contrast to the Applicant's submission that the General Division found this to be a failed attempt), as per paragraph 88 of the decision. The General Division, at paragraph 88, acknowledges that the Applicant did work part-time in hotel maintenance; however, as per paragraph 89, the General Division was not convinced that this had been a failed work attempt. It went on to analyze the employment record, indicating that the Applicant earned the equivalent of $14,427 or 97% of the substantially gainful amount. It considered the potential that the employer was a benevolent one; however, it discounted this consideration in its analysis in paragraph 91, citing *Atkinson v. Canada (Attorney General)*, 2014 FCA 187. Further, at paragraph 93, the General Division references *Inclima v. Canada (Attorney General)*, 2003 FCA 117, stating that "a person must show that their effort at obtaining and maintaining employment were unsuccessful by reason of their health condition." The consideration of a failed work attempt was factored into the decision; however, on the

totality of the situation, the General Division found that the Applicant had not left his job due to health reasons.

[33] In respect of the Applicant's submission that the General Division made a perverse finding of fact when it interpreted his shoulder impingement to mean that his back pain was not serious, I find that this is not an arguable matter that has a reasonable chance of success. In its examination of the evidence, it is clear that the General Division assigned different weight to what the Applicant's back pain had been during that particular medical appointment.

[34] I find that the Applicant does not have an arguable ground on which he might succeed on appeal

CONCLUSION

[35] The application for leave to appeal is refused.

Peter Hourihan
Member, Appeal Division