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

Citation: *B. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 362

Tribunal File Number: AD-16-1109

BETWEEN:

B. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: July 25, 2017

Canada

REASONS AND DECISION

DECISION

The application requesting leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated June 29, 2016, in which the Applicant was not found disabled as of the minimum qualifying period (MQP) and in which a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on September 8, 2016.

ISSUE

[2] Does the appeal have a reasonable chance of success?

BACKGROUND

[3] By decision dated August 28, 2015, the General Division had summarily dismissed the Applicant's appeal of the Respondent's decision to deny the Applicant's request to cancel a retirement pension in favour of a disability pension under the CPP. The Applicant appealed the General Division's decision to the Appeal Division. The appeal was allowed, and the matter was returned to the General Division for reconsideration by decision dated February 24, 2016. The Appeal Division found that the Respondent had initially denied the Applicant's request on the basis that subsection 66.1(1.1) of the CPP states that a retirement pension cannot be cancelled in favour of a disability pension where an applicant for a disability pension is in receipt of a retirement pension. The Respondent had also denied the Applicant's request on the basis that the Applicant had failed to apply to cancel his retirement pension in favour of a disability pension within the 15-month time limit allowed pursuant to subsection 42(2) of the CPP, which states that a person cannot apply for a CPP benefit 15 months or more after receiving a CPP retirement pension.

[4] The Appeal Division allowed the appeal on the basis that both the General Division and the Respondent had failed to verify the Applicant's correct date of birth and that the retirement pension had potentially been paid prematurely (before the Applicant had turned 60). If the Applicant could verify his correct date of birth, then subsection 66.1(1.1) and subsection 42(2) would not bar the Applicant from applying for a disability pension, as he would not be entitled to receive a retirement pension and would not be found to have been late in filing his application to cancel his retirement pension in favour of a disability pension. However, the Applicant would still need to demonstrate that he had suffered a severe and prolonged disability on or before his MQP date.

[5] As the Applicant's correct date of birth was subsequently determined, the issue of whether he was statute-barred from cancelling his retirement pension in favour of a disability pension was resolved. The General Division's key issue for consideration was whether the Applicant could be found disabled under the CPP on or before his MQP date, which is December 31, 2011.

THE LAW

[6] 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 be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[7] 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." The Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success (*Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[8] 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[9] The Applicant submits that the General Division erred in law, as it based its June 29, 2016, decision on the first CPP application that the Applicant had filed, dated June 8, 2012, which the Respondent had refused initially. The Applicant did not seek reconsideration of this initial decision, but he filed another application for a disability pension on October 16, 2013. It is the Applicant's submission that the General Division should have based its decision on the second application filed in 2013.

[10] The Applicant further submits that the General Division breached a principle of natural justice, as the issues before the General Division appear to have been predetermined based on the completion of the General Division's June 29, 2016, decision the day following the hearing despite the Applicant having been told at the hearing that the decision would be rendered in 10 to 14 days.

[11] The Applicant submits that the General Division based its decision on an erroneous finding of fact made in perverse or capricious manner when it relied on the information and evidence contained in the "Preliminary Matters" section of the General Division's June 29, 2016, decision.

ANALYSIS

[12] The Applicant has argued that the General Division erroneously based its decision on the first of two applications for disability pension that the Applicant had filed, which would be an error of law pursuant to paragraph 58(1)(*b*) of the DESD Act. The Applicant had not requested a reconsideration of the initial refusal of that application, and the time limit for

appealing that decision, as set out in section 81 of the CPP, had since lapsed. No right of appeal exists for that application.

[13] The Applicant does not provide any details to substantiate this claim. In fact, the General Division decision, at paragraph 1, reads as follows:

> The Appellant's application for a Canada Pension Plan (CPP) disability pension was date stamped by the Respondent on October 16, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal). A previous application was filed on June 8, 2012. The application was denied at the initial level. **No reconsideration request was received for this application. Therefore, the Appellant has no right of appeal of the previous application and the decision will be based on the current application dated October 16, 2013**. [my emphasis]

[14] Prior to the rendering of a decision on this matter, a hearing before the General Division was held on June 28, 2016. The Appeal Division reviewed the recording for that hearing in its entirety. I note that the Applicant was informed that the General Division decision would be based only on the second application filed and that this was confirmed at least three times during the course of the hearing. The General Division member clearly explained that no reconsideration request had been made once the first application had been initially refused, and the time frame for doing so had lapsed. As a result, he explained, there remained no right of appeal for that application.

[15] Without any further details or evidence to support the Applicant's claim, I do not find that the Applicant has demonstrated that the General Division erroneously based its decision on the first application. Leave to appeal is not granted on this ground.

[16] The Applicant has submitted that the General Division appears to have predetermined the issues before it, as the decision was rendered the day following the date on which the hearing had been held before the General Division. The Applicant supports his claim stating that he had been previously told that a decision would be rendered in 10 to 14 days. The Applicant is arguing that the General Division decision was not communicated in a way that properly reflects that the Applicant's evidence that had been relied upon to make the decision, but that the issues were based on the General Division's predetermined speculation or

suspicions. If proven, this would be an error under paragraph 58(1)(*a*) of the DESD Act. This is a serious claim of which no evidence exists.

[17] In fact, paragraph 3(1)(*a*) and section 29 of the *Social Security Tribunal Regulations* (SSTR) require General Division members to "conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit" and to render decisions "without delay after the conclusion of the hearing." On review of the hearing recording and on review of the evidence contained in the record before the General Division, there is no evidence that the General Division failed to consider the Applicant's oral and documentary evidence, nor is there evidence that the Applicant was prevented in any way from presenting his case fully and fairly before the General Division.

[18] This is not a ground of appeal that has a reasonable chance of success, and leave to appeal is not granted on the basis that the General Division breached a principle of natural justice.

[19] The Applicant has further submitted that 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, pursuant to paragraph 58(1)(*c*), as it had relied on information set out in the "Preliminary Matters" section of its decision that, in the Applicant's words, are "stale dated."

[20] The section to which the Applicant is referring reads as follows:

> [10] The Appellant's current application was denied by the Minister at the Initial level and again upon Reconsideration. His application was denied because he applied for a Canada Pension Plan disability benefit more than 15 months after he started receiving his Canada Pension Plan retirement benefit.
>
> [11] The Appellant appealed the Minister's January 2014 decision to the Social Security Tribunal (SST)-General Division in May 2014. The General Division summarily dismissed his appeal in its decision dated August 28, 2015 for the same reason as given above.
>
> [12] On February 24, 2016, the Social Security Tribunal (SST)-Appeals Division heard the Appellant's appeal of the decision rendered by SST-General Division {Tribunal). Following the hearing, the Appeals Division referred the matter back to the GD for reconsideration, noting

> it has erred. It should also be noted that the Appeals Division did not comment on whether or not the Appellant suffered from a severe and prolonged disability which would preclude him from any suitable gainful employment at the time of his MQP of December 31, 2011.
>
> [13] The Appellant began receiving his CPP retirement pension in July 2012 (before he actually turned 60) based on a faulty factual foundation (incorrect birth date). Had the CPP retirement pension commenced in August 2012 as it should have, his current application for disability benefits is within the 15 month time frame in which he could cancel his retirement pension in favour of a disability pension in failing to verify the Appellant's birthdate.

[21] I do not find that the General Division, tasked with determining whether the Applicant had suffered a severe and prolonged disability on or before his MQP date, relied on the above paragraphs in any way. The "Preliminary Matters" section is simply meant to explain why the only issue before the General Division was whether the Applicant could be found disabled under the CPP. In paragraph 13 of that section, the General Division acknowledges that the issue of the mistaken birth date, which had led to the initial denial of the Applicant's request to cancel his retirement pension in favour of a disability pension, was in fact resolved (a certified copy of the Applicant's date of birth was filed with the General Division on March 21, 2016), and this was no longer an issue for the General Division's consideration.

[22] I note that the issue of mistaken date of birth remained in the Applicant's mind, as evidenced by his raising it several times during the hearing before the General Division on June 28, 2016. The General Division member explained why this was no longer an issue before the General Division during the hearing, and this explanation is repeated in the "Preliminary Matters" section. This in no ways substantiates the claim that the General Division relied on the information contained in that part of the decision in determining the issue of the Applicant's entitlement to a disability pension under the CPP.

[23] I do not find that this is a ground of appeal that has a reasonable chance of success on appeal. Leave to appeal is not granted on this ground.

CONCLUSION

[24] The Application is refused.

Meredith Porter
Member, Appeal Division