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

Citation: *A. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 370

Tribunal File Number: AD-17-39

BETWEEN:

A. S.

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: July 26, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted and the appeal is allowed.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated December 8, 2016. After conducting a hearing by videoconference on November 2, 2016, the General Division determined that the Applicant was eligible for a disability pension under the *Canada Pension Plan* (CPP) because his disability was "severe and prolonged" during the minimum qualifying period (MQP), which will end on December 31, 2017.

[2] The General Division also found that the date of onset of his disability was November 2016, the month in which the hearing was conducted. Citing section 69 of the CPP, the General Division set a first payment date of March 2017, four months after the date of onset.

[3] On January 16, 2017, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Canada Pension Plan

[4] Section 69 of the CPP provides that where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled.

Department of Employment and Social Development Act

[5] According to subsection 56(1) 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.

[6] 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.

[7] 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.

[8] Some arguable ground upon which the proposed appeal might succeed is needed for leave 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] 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 hearing of the appeal on the merits. At the leave to appeal stage, the applicant does not have to prove the case.

[9] Subsection 59(1) of the DESDA sets out the powers of the Appeal Division. The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the General Division's decision in whole or in part.

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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.

ISSUE

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

SUBMISSIONS

[11] In the application requesting leave to appeal, the Applicant's representative made the following submissions:

- He does not wish to challenge the General Division's finding that his client had a severe and prolonged disability. Rather, he is seeking leave to appeal the General Division's determination that the Applicant's deemed[3] date of disability was November 2016—the very month in which the hearing was conducted.
- The Applicant was injured in a motor vehicle accident (MVA) on January 3, 2015. He was in his garage getting out of his car when it rolled back and pinned him between a pillar and the open door of the vehicle. Emergency department records indicate that he sustained a displaced fracture at the posterosuperior margin of the left public bone, and a February 18, 2015, MRI confirmed that he sustained a full thickness tear in his right shoulder. The Applicant underwent arthroscopic repair of his right shoulder in May 2015, followed by extensive rehabilitation.
- There were no facts or evidence before the General Division to support its conclusion that the date of disability onset was November 2016, rather than January 3, 2015—the date on which the Applicant suffered grievous, serious and permanent injuries in the MVA. The General Division determined the date of disability onset in an arbitrary manner, without regard to the evidence before it. The General Division failed to articulate any reasons whatsoever as to how it arrived at November 2016, and there was no evidence on the record, either documentary or testimonial, to support this finding.
- In fact, all the available evidence supported January 3, 2015 as the date of disability onset. The General Division's failure to tie the commencement of the

[3] In fact, the General Division made a finding on the actual—not deemed—date of disability onset.

> Applicant's disability pension to this date represents an error of law and a breach of the principles of natural justice.

ANALYSIS

[12] Having reviewed the Applicant's submissions against the record, I am compelled to agree that he has an arguable case on the grounds raised. I will go further and say that I am also convinced of his case on its merits. I am satisfied that the General Division based its decision on an erroneous finding of fact, made without regard to the material before it, when it determined that the Applicant's date of disability onset was November 2016.

[13] The record indicates that the Applicant's application for CPP disability benefits was founded entirely on injuries and related symptoms arising from his January 3, 2015, MVA. Indeed, the General Division appeared to acknowledge as much at several points in its decision:

> [52] The Tribunal considered the medical evidence on file and the oral testimony given at the hearing and determined that the Appellant does have a severe and prolonged disability, as defined by CPP. The Appellant sustained injuries to his shoulder and pelvic region which have not healed despite medication and treatment….
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> [55] The Tribunal determined that the Appellant does not have the capacity for work. He sustained physical injuries in his automobile accident when he was pinned in his garage. The Appellant has attended the prescribed physiotherapy and undergone an unsuccessful shoulder repair surgery. Further, the Appellant has developed depression and although treated by his family doctor with medication and counselling, the Appellant's condition has not improved to the point where he has regained his capacity for work.
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> [59] … The Appellant's functional restrictions, which are a result of his injuries sustained in his motor vehicle accident, continue to impede his daily functioning. Further, the Appellant has developed symptoms of depression. […]

[14] The Appeal Division usually defers to the General Division on questions of fact, but it defies logic to find that the Applicant's disability did not cross the severity threshold until the hearing before the General Division. Furthermore, as noted by the Applicant, there was nothing in the evidence to support a date of disability onset of November 2016.

[15] This also raises an issue of natural justice, which demands that a decision be accompanied by an intelligible explanation. In *R. v. R.E.M.*,[4] the Supreme Court of Canada set out the test for sufficiency of reasons in the context of criminal law, quoting with approval an earlier Ontario Court of Appeal decision[5]:

> In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what"—the verdict—and the "why"—the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[16] This logic also applies to decisions of administrative tribunals. There must be a chain of fact, law and logic that leads the reader to conclude that the outcome is defensible. On the question of date of disability onset, that chain is absent from the General Division's reasons.

CONCLUSION

[17] Leave to appeal is granted and the appeal itself is allowed.

[18] Although I am convinced that the General Division based its decision on an erroneous finding of fact and rendered its decision, in part, contrary to a principle of procedural fairness, the Applicant's date of disability onset remains an open question. Section 59 of the DESDA empowers the Appeal Division to "give the decision that the General Division should have given," but in this case I think it more appropriate to refer this matter back to the General Division, whose mandate includes fact finding, for reconsideration—but only on the questions of the date of disability onset and the first payment date. To avoid a possibility of bias, I direct this matter to be assigned to a different General Division member. I also direct Tribunal staff not to remove any document or file from the existing record.

Member, Appeal Division

[4] *R. v. R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51 (CanLII).
[5] *R. v. Morrissey*, 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.).