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

Citation: *A. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 389

Tribunal File Number: AD-17-282

BETWEEN:

A. 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: August 1, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant is seeking leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated January 24, 2017, which determined that he was not entitled to disability pension benefits pursuant to the *Canada Pension Plan* (CPP). The General Division found that the Applicant had failed to establish that he suffered a "severe" disability on or before his minimum qualifying period (MQP) date, which, in this case, was December 31, 2010.

[2] Pursuant to section 55 of the *Department of Employment and Social Development Act* (DESD Act), "Any decision of the General Division may be appealed to the Appeal Division." The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 3, 2017.

ISSUE

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

THE LAW

[4] According to subsections 56(1) and 58(3) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal." Determining leave to appeal is a preliminary step to a hearing on the merits and is an initial hurdle for an applicant to meet, however, the hurdle is lower than the one that must be met at the hearing stage of an appeal on the merits.

[5] 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 (*Canada (Minister of Human*

Resources Development) v. Hogervorst, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[6] 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

[7] The Applicant submits that the General Division based its decision on an erroneous finding of fact pursuant to paragraph 58(1)(*c*) of the DESD Act, as it:

i. failed to consider the opinions of four physicians who had provided care to the Applicant;

ii. failed to consider the lack of sleep that the Applicant had been experiencing as a result of his health condition;

iii. misstated evidence at paragraph 17 of the decision, which stated that the Applicant had been supporting himself with odd jobs but that he had been unable to earn enough to survive;

iv. misconstrued evidence in the record with respect to the improvement that certain medications had on the Applicant's health condition over the long term;

v. misstated evidence at paragraph 27 of the decision with respect to the Applicant's attempts at physiotherapy;

vi. misconstrued the Applicant's success in obtaining his real estate licence as evidence of capacity to work;

vii. misconstrued the fact that the Applicant did not apply for a disability pension in 2006, but instead attempted to regain some independence; and

viii. failed to consider that the Applicant's disability is prolonged.

ANALYSIS

[8] The Applicant has asserted that the General Division failed to consider the opinions of four physicians who had provided medical care to the Applicant. The Applicant included reports from each of the doctors whose opinion, he argues, had been overlooked, including: a report dated December 8, 2015, from Dr. R. Nicoll; a report dated October 11, 2016, from Dr. R. Reid; a report dated May 9, 2016, from Dr. M. McNab; and, a letter dated June 21, 2016, from Dr. P. Pathak. These documents were all before the General Division for consideration. Several sentences in each of the documents have been highlighted, which, I assume, the Applicant highlighted in order to draw attention to what they say. There are also numerous notations and comments written on each of the documents at various spots, which, I am assuming, the Applicant has included, as the notations relate to the submissions he has made above.

[9] In reviewing the Applicant's application requesting leave to appeal, I recognize that the submissions contained in paragraph 7 above, specifically, items (ii) to (iiv), correlate to his initial submission at paragraph 7(i) that the General Division failed to consider the doctor's opinions contained in the documents filed with the Application. Submissions (ii) to (iiv) are specific examples of where the Applicant alleges the General Division failed to demonstrate regard for the material before it, pursuant to paragraph 58(1)(*c*) of the DESD Act. Therefore, I will consider each of the Applicant's examples he has provided within the context of his broader assertion that the General Division failed to demonstrate that it had considered the medical evidence of the four doctors and that it also failed to explain how that evidence had influenced the General Division's final decision.

[10] I will begin by noting that it is an established principle of administrative law that a tribunal need not refer to each and every item of evidence before it, but rather that it is deemed

to have considered all of it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). I also recognize that the General Division, as trier of fact, was tasked with sorting through the relevant facts, assessing the quality of the evidence and determining what evidence, if any, it chose to accept or disregard. The General Division is also afforded the authority to assign weight to certain evidence and, ultimately, come to a decision based on its interpretation and analysis of the evidence before it. However, where certain evidence is preferred, reasons for preferring that evidence must be given (*Canada (Attorney General) v. Fink*, 2006 FCA 354).

[11] The Applicant has argued that the General Division failed to demonstrate that it had considered the Applicant's sleep problems in assessing his capacity to work. In the medical documents filed with his application requesting leave to appeal, the fact that his doctors have noted several times that the Applicant has difficulty sleeping. Dr. Nicoll notes that the Applicant's sleep is poor, and that he suffers from organic sleep disorder. Dr. Reid notes that the Applicant's pain causes difficulty sleeping, which results in chronic fatigue. Dr. McNab's report also notes the Applicant's sleep problems and his chronic fatigue, and that his fatigue affects his ability to function physically and mentally. Dr. Pathak's opinion is consistent with Dr. McNab's report that the Applicant's ability to function on a day-to-day basis is compromised by his lack of sleep and his chronic fatigue.

[12] The Applicant's submissions at the time of his hearing before the General Division, as stated in paragraph 38 of the decision, included that he should be found disabled because "he does not sleep because of his condition. He cannot sleep for more than an hour at a time." The Applicant's application for CPP disability benefits did not, however, note sleeping problems as one of the limitations preventing him from working.

[13] The General Division acknowledges that medical evidence in the record dated prior to the Applicant's MQP, as well as evidence that post-dates the MQP date, reflects the fact that the Applicant has problems sleeping. Specifically, the General Division's decision reads:

> [18] In a February 19, 2009 consultation, Dr. Bond, anesthesiologist, detailed that the Appellant had twice before been treated for point sources of pain with lidocaine but that his pain had returned. The Appellant had reported burning pain and as a result had been trialed

> with Lyrica. The Appellant had an excellent response and his burning improved and so had his sleep.
>
> […]
>
> [26] In an October 11, 2016 medical opinion, Dr. Reid opined that the Appellant was currently dealing with chronic pain from his previous trauma and multiple major surgical interventions. His pain resulted in him having difficulty with sleeping leading to chronic fatigue and mobility issues secondary to his spinal cord compression.
>
> […]
>
> [30] The Appellant detailed that his spinal problem caused him muscle spasms and aches. His sleep also got worse and as a result he stopped working. At that time took the opportunity to care for his grandmother.

[14] Although the General Division, in summarizing the evidence, notes the evidence in the record with regard to the Applicant's difficulty sleeping, there is no mention of this particular health condition in the General Division's actual analysis of the "severity" of the Applicant's disability. It may be that the General Division found that the reports appended to the Applicant's application requesting leave to appeal significantly post-dated the MQP date and that they were of little probative value. In fact, at paragraph 45 of its decision, the General Division states that it gave little weight to the report from Dr. McNab because it was well beyond the MQP date and because Dr. McNab is not a specialist. The General Division notes that specialists' reports are preferred in most cases to those of a family physician where the specialists have had an opportunity to observe and provide treatment to applicants.

[15] However, with respect to the other reports appended to the Applicant's application requesting leave to appeal, there are several highlighted references to the Applicant's continued problems sleeping. As mentioned above, at paragraph 13, the Applicant's problems sleeping pre-date his MQP date and, on reading the evidence in the record, I find that they appear to have a continuing impact on his ability to function. The General Division does not appear to have thoroughly contemplated the effect that the Applicant's sleep has had on his ability to function on a day-to-day basis or what, if any, the impact of his sleep problems have had on his capacity to work. It may be that the General Division also considered the evidence in the specialists' reports to be of little probative value because several of them were dated well beyond the

Applicant's MQP date, but if this is the case then these reasons ought to be clearly articulated in the General Division's decision. The decision, as it reads, reflects the fact that the General Division preferred the opinions contained in the specialists' reports.

[16] The Applicant has argued that the General Division based its decision on an erroneous finding of fact without regard for the material before it pursuant to paragraph 58(1)(*c*) of the DESD Act. I find that the Applicant has raised a ground of appeal that may have a reasonable chance of success, and leave to appeal is granted on this ground.

[17] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, stated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an Applicant raises. In *Mette*, Dawson J.A. stated that subsection 58(1) of the DESD Act "does not require that individual grounds of appeal be dismissed […] 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." The other grounds of appeal that the Applicant has submitted are inter-related to the analysis of whether his health condition is severe and prolonged. As a result, I am not required to address the other grounds submitted in the application for leave to appeal that the Applicant filed.

CONCLUSION

[18] The Application is granted.

[19] The parties are invited to file additional submissions within the 45-day time limit allowed for doing so, and they may include submissions for consideration on whether a hearing is necessary.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Meredith Porter
Member, Appeal Division