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

Citation: *S. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 371

Tribunal File Number: AD-17-63

BETWEEN:

S. L.

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.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 24, 2016. The General Division had previously conducted a hearing by videoconference and had determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because his disability was not "severe" prior to his minimum qualifying period (MQP), which ended on December 31, 2011.

[2] On January 23, 2017, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division.

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. The Appeal Division must either grant or refuse leave to appeal.

[4] 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.

[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.

[6] 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]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the 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.

ISSUE

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

SUBMISSIONS AND ANALYSIS

Alleged Erroneous Findings of Fact

[9] The Applicant submits that the General Division based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it. The Applicant takes specific issue with paragraph 58 of the General Division's decision:

> The Appellant spoke extensively about his panic attacks and mental state. However, he only sought six or seven sessions of counselling with an EAP [employee assistance plan] counsellor in 2012. He stated he saw a psychiatrist for one consultation who refused to treat him. There are not medical reports provided from any psychologist, or psychiatrist. Dr. Naghlu notes in 2015 that he is awaiting a psychiatric consultation, but also notes he has had depressed mood for years. The lack of treatment indicates the condition is manageable. The Appellant and the witness both testified that the calming techniques he learned from the EAP counsellor are useful and successful in managing his condition. As well, the only medication he takes is Lorazepam, initially for his leg spasms and has increased in order to manage his anxiety. The medication

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

> has not changed in years, and there has been no treatment sought since the few sessions in 2012. The Tribunal finds there is no medical evidence to suggest the Appellant's anxiety is preventing him from working.

[10] The Applicant cites numerous instances in Dr. Naghlu's reports and clinical notes that he submits contradict the findings in the passage quoted above. First, he submits that it is "obvious" that he was being treated for his anxiety and depression by his family doctor, who assessed both his Generalized Anxiety Score and his PHQ-9 score for depression, which was noted to be between moderate to moderately severe. Second, contrary to the General Division's finding, the Applicant submits that Dr. Naghlu attempted trials of different medications to help him manage his symptoms of anxiety and depression, prescribing Cipralex (and increasing the dose), Wellbutrin and Seroquel, in addition to Lorazepam. Finally, the Applicant argues that there was no basis for the General Division to state, "The lack of treatment indicates the condition is manageable," when, in fact, the evidence shows that he had been treated by a counsellor, was still being treated by his family doctor and was twice referred to a psychiatrist.

[11] I see a reasonable chance of success on this ground. In the paragraph cited above, the General Division makes several findings of fact about the Applicant's mental health treatment:

- He received six or seven employee assistance plan sessions in 2012;
- He has not sought treatment since 2012;
- He stated that he had one psychiatric consultation;
- There were no psychiatric or psychological reports on file;
- He was on one medication—Lorazepam—for anxiety; and
- His medications have not been changed in years.

[12] My review of the underlying evidentiary record indicates that none of the above findings are, by themselves, factually inaccurate and that all of them, in fact, reflect the Applicant's testimony at the hearing. The Applicant points to his family physician's records in rebuttal, but it seems to me that none of the underlined passages directly contradict anything in paragraph 58. For example, while Dr. Naghlu's notes do indicate that he had prescribed various antidepressants and anti-anxiety medications in the past, the available evidence suggests that the Applicant was taking only Lorazepam at the time of his application for CPP disability benefits and thereafter.

[13] That said, I see an arguable case that the General Division may have missed a larger truth when, after reviewing the Applicant's medical history, it found a "lack of treatment" for his mental health issues. In drawing a negative inference from the Applicant's "lack of treatment," did the General Division disregard the many indications in the file that the Applicant was receiving extensive treatment for his depression and anxiety from his family physician? I acknowledge that a finder of fact is entitled to draw reasonable conclusions from the available evidence, but I also think it possible that the General Division unreasonably discounted Dr. Naghlu's care while drawing an unwarranted adverse inference from the relatively few interventions by mental health specialists.

Alleged Errors of Law

[14] The Applicant submits that in rendering its decision, the General Division committed various errors of law as follows:

- It failed to apply *Canada v. Dwight-St. Louis*[3] by giving only superficial justification for not accepting the Applicant's evidence that his various medical conditions left him disabled from substantially gainful work. The Applicant and his wife testified about his physical and emotional limitations, but the General Division did not discuss this evidence with a view to assessing his real-world employability.

- It failed to give adequate consideration to evidence that the Applicant was accommodated by a benevolent employer, thereby ignoring the principles set out in *Atkinson v. Canada.*[4] The Applicant submits that the workplace accommodations from which he benefitted after 2009 were so singular that it is unreasonable to expect a typical employer, in a competitive labour market, to offer comparable assistance.

---

[3] *Canada (Attorney General) v. Dwight-St. Louis*, 2011 FC 492.
[4] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

- It failed to properly apply the CPP disability test, as set out in subparagraph 42(2)(*a*)(i), by disregarding case law[5] that obliges consideration of "regularity," which has been defined as the capacity to attend work predictably or with consistent frequency. As the Applicant stated in his testimony at the hearing, he could not work to a schedule because of his leg issues and his inability to focus and concentrate. His previous jobs did not demand a regular work schedule but were for only a few hours a day.

- It disregarded *Bungay v. Canada*[6] by failing to consider all the Applicant's conditions and their collective impact on his functionality in a "real world" context. Specifically, the General Division ignored the impact of the Applicant's transverse myelitis and associated symptoms on his ability to sustain regular and substantially gainful employment.

[15] At this juncture, I will address these allegations together, as they share a common theme—the General Division's purported failure to apply the "regularity" aspect of the CPP's definition of severity. As the Applicant correctly notes, a claimant who cannot commit himself to a work schedule from one day to the next because of varying degrees of pain will be considered disabled.

[16] The Applicant alleges that the General Division ignored evidence that, in his last job, he was permitted to go without shoes and use a heater for his leg. As his condition deteriorated, he used far more than his allowable sick days, yet his employment continued. In 2010, a contract to design software for his wife's employer "fell into his lap." He was held to no fixed schedule and merely given an implementation date, allowing him to work when he felt able. The Applicant maintains that, in equating these generous terms as indicative of real-world conditions, the General Division erred in law.

[17] On this ground, I see a reasonable chance of success on appeal. As held in *Dwight- St. Louis*, it is not enough for a trier of fact to merely summarize evidence; it must also

---

[5] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; *Atkinson v. Canada (Attorney General)*, [2014] FCJ 840 (QL); *Canada (Minister of Human Resources Development) v. Gallant* CP 06612; *Eddy v. Minister of Human Resources Development* (2000) 8586 PAB; *M.T. v. Minister of Human Resources and Social Development* 28161.
[6] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

meaningfully consider medical reports and testimony in the context of an applicant's personal circumstances and, where applicable, explain why it chooses to discount a particular item of evidence.

[18] The Applicant suggests that the General Division disregarded oral and documentary evidence supporting his claim that he could no longer offer "regularity" but alleges that it did not justify its decision to do so. The Applicant points to specific instances in the hearing recording in which he grounded his inability to work on the unpredictability of his symptoms, yet the General Division did not address this aspect of his claimed non-functionality in its analysis. In paragraphs 63 and 64 of its decision, the General Division wrote:

> The Appellant has not looked for any work since 2011 when he was applying for and interviewing for jobs. The Tribunal does not accept his testimony that he is unable to work as he cannot physically get to a job. He successfully worked for himself on a contract in 2010 that was able to do at home, at his leisure. He has not attempted to find any other contract that he could do from home, though he had the company set up and available. He also managed to attend three college courses between 2010 and 2011 successfully on his own time… He also noted his limitations and accommodations as the need to work without shoes, and have his leg rested. Both of these accommodations can be done at home and would not appear to be onerous on an employer to accommodate, as is evidenced by his previous employer. Despite showing he could work with these accommodations, he has failed to show he cannot work without them.

[19] This passage suggests that, while the General Division did give some consideration to the Applicant's capacity to offer regular and consistent performance, it apparently disregarded the extent to which he benefitted from accommodation and assistance during his final two or three years in the labour market. The General Division accepted that the Applicant required unusual workplace allowances, but seized on the fact that he worked from home when he was self-employed in 2010. In paragraph 34 of its decision, the General Division noted Mrs. L.'s testimony that she was instrumental in securing, on behalf of her husband, a development contract with her employer, but this evidence, which strikes me as significant, apparently played no role its analysis. In my view, the circumstances surrounding the Applicant's last paid work could be just as easily construed as evidence of incapacity as capacity, provided that the benevolent employer doctrine is properly kept in mind.

CONCLUSION

[20] I am granting leave to appeal on all grounds the Applicant has claimed. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division