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

Citation: *D. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 378

Tribunal File Number: AD-16-1230

BETWEEN:

D. 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 27, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On September 24, 2016, having found the Applicant's disability had not been severe on or before his minimum qualifying period (MQP) of December 31, 2007, 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. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on October 24, 2016.

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] According to subsection 58(1) of the DESDA, the only grounds of appeal available to the Appeal Division are:

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 to be refused if the Appeal Division is satisfied the appeal has no reasonable chance of success.

[6] In determining whether leave to appeal should be granted, I am required to determine 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 is a reasonable chance of success, that is, "some arguable ground upon which the proposed appeal might succeed" (paragraph 12): *Osaj v. Canada (Attorney General)* 2016 FC 115. The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, 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.

SUBMISSIONS

[7] The Applicant submits that the General Division erred in law when, in the absence of medical evidence from the period between March 2010 and June 2013, it failed to take into account the Applicant's testimony regarding his mental illness and its effect on his capacity to work. He argues that the General Division was satisfied that his condition had been severe in December 2007 and again in September 2013, and that the General Division then found it difficult to determine whether the Applicant's condition had been severe between these dates (paragraph 45).

[8] The Applicant submits that the General Division erred in law when it failed to consider the Applicant's testimony when he had been questioned, as indicated in paragraph 29 of the decision, about whether he thought he could return to any type of work.

[9] The Applicant submits that the General Division erred in law when it did not assign sufficient weight to the Applicant's testimony with respect to his ability to work. He argues that the diagnoses by Dr. Franklyn in December 2005 and June 2006 indicated that the condition was anticipated to continue and that it would require ongoing treatment. The Applicant argues that the General Division should have considered that his visit to the psychiatrist in 2013 was indicative of the condition being severe and prolonged.

[10] The Applicant submits that the General Division decision was based on errors of fact made in a perverse or capricious manner or without regard for the material before the General Division. Specifically, in determining whether the mental condition of the Applicant (then Appellant) remained severe on a continuous basis after the MQP date, the General Division "made no regard for the fact the appellant did not continue in treatment was purely based on his

financial situation and not that he no longer required the psychological treatment," referring to paragraph 46 of its decision. The Applicant submits that, as a result of his mental and physical condition, he could not continue working, which is supported by the medical evidence of Drs. Franklyn and Sheneva.

ANALYSIS

[11] In respect of the Applicant's submission that the General Division erred in law by not adequately considering the Applicant's testimony, I find that this is an arguable case that has a reasonable chance to succeed for the following reasons.

[12] The General Division notes at paragraph 45 that it was satisfied that the Applicant's condition had been severe in December 2007, in accordance with Dr. Franklyn's reports from 2005 and 2006, and that it was satisfied that the Applicant's condition had been severe in September 2013 as per Dr. Shenava's medical report. Continuing, the General Division states that: "[t]he troubling issue is whether the Appellant's mental condition was continuously severe between those two dates." In paragraph 46, the General Division briefly indicates that the Applicant had left psychological treatment for financial reasons and that there is no record that the Applicant sought counselling with his family physician between March 2010 and June 2013. This contradicts the General Division's comments in paragraph 41, where it states: "There are two references to anxiety in Dr. Lamont's notes after 2009: one in March 2010 and one in June 2013 which presumably leads to the referral to Dr. Shenava."

[13] The evidence at paragraph 20 indicates that, due to financial reasons, the Applicant had been unable to continue with Dr. Franklyn. There is no further context to this comment. The subjective evidence at paragraph 29 highlights that the Applicant's representative asked him whether he thought he was able to return to any type of work. The question was not fully answered, as the Applicant responded only that he had been a different person at the time of the hearing and that he had had rage, had wanted to hurt people, had been unable to be around people and had not trusted people. There is no further context to this answer**.**

[14] The evidence at paragraph 32 indicates the Applicant testified about his anxiety contributing to his inability to work, and paragraph 33 highlights a situation where his anger led

to his son pulling the Applicant off of the neighbour. Further, paragraph 34 indicates the Applicant "has two good days a month."

[15] The General Division, in its analysis, reviewed the evidence presented and, at paragraph 41, it notes that there is very little on the record, after the Applicant had stopped seeing Dr. Franklyn in 2009, until 2013 when he saw Dr. Shenava. It goes on to indicate that "[t]here is no evidence as to continuing depression and the cognitive difficulties resulting from the depression." There is no indication the General Division considered the Applicant's testimony.

[16] As a result, I find the General Division failed to consider the Applicant's subjective evidence. Consideration of the Applicant's testimony may have impacted the determination as to whether the Applicant's condition was severe. I find this has a reasonable chance of success on appeal.

[17] 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 an applicant raises. In that case, 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." Because I found that there is an arguable case, I have not considered the remaining grounds of appeal that the Applicant had submitted.

[18] I am satisfied that the reason for appeal falls within the specified grounds of appeal as set out in subsection 58(1) of the DESDA, namely, that the General Division may have committed an error of law in failing to consider the Applicant's testimony. I am also satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[19] The Application is granted.

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

Peter Hourihan
Member, Appeal Division