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

Citation: *S. N. v. Minister of Employment and Social Development,* 2017 SSTADIS 384

Tribunal File Number: AD-16-1356

BETWEEN:

S. N.

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 31, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated October 31, 2016. The General Division had previously conducted a hearing by teleconference and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because his disability was not severe during his minimum qualifying period (MQP), which ended on December 31, 2011, or alternatively, during his prorated period from January 1, 2014 to August 31, 2014.

[2] On December 8, 2016, within the specified time limitation, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. On June 22, 2017, the Appeal Division requested further information and the Applicant's authorized representative replied by way of a letter dated July 15, 2017.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Canada Pension Plan

[4] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

Department of Employment and Social Development Act

[5] 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.

[6] 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.

[7] 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.

[8] 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]

[9] 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.

---

[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 his application requesting leave to appeal dated December 8, 2016, the Applicant alleged that the General Division gave insufficient weight to the fact that both his hands are disabled, leaving him unable to carry out activities of daily living or employment-related functions.

[12] In a letter dated June 22, 2017, the Appeal Division reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) of the DESDA and asked him to provide, within a reasonable timeframe, more detailed reasons for his request for leave to appeal. In submissions dated July 15, 2017, the Applicant's newly-hired representative noted that, because the hearing before the General Division was conducted via teleconference, his client had difficulty comfortably participating in the proceedings. The Applicant suggested that he had difficulty understanding the variant of Tamil spoken by the interpreter provided by the Tribunal.

[13] The Applicant also said that his then family physician, Dr. Loganathan, was at first unable to diagnose his hand issues. As his pain intensified, the Applicant became increasingly incapable of performing his work duties. Eventually, his new family physician, Dr. Jeyashankar, ordered a bone scan, which identified the medical issue. The Applicant then underwent surgery, but he was left with an additional left hand impairment.

[14] Finally, the Applicant submits that he did not share with the General Division the fact that he suffered from left arm and chest pain on or before August 31, 2014.

ANALYSIS

Interpreter

[15] Although he does not characterize it as such, the Applicant suggests that the General Division failed observe a principle of natural justice by presiding over a hearing that was marred by inadequate language interpretation.

[16] The courts have consistently held that the failure to raise an objection to a procedural irregularity at the earliest opportunity amounts to an implied waiver of any perceived breach of fairness or natural justice that may have occurred. In *Nsengiyumva v. Canada*,[3] the Federal Court of Canada addressed a comparable situation in which the language interpretation was alleged to be faulty:

> In instances where the applicant is aware that there is a difficulty with the interpreter, it is reasonable to expect the applicant to object immediately. In *Mohammadian*, at trial, 2000 CanLII 17118 (FC), [2000] 3 F.C. 371, Pelletier J. (as he then was) held at paragraph 28:
>
>> It will be a question of fact in each case whether it is reasonable to expect a complaint to be made. If the interpreter is having difficulty speaking the applicant's own language and being understood by him, this is clearly a matter which should be raised at the first opportunity. On the other hand, if the errors are in the language of the hearing, which the applicant does not understand, then prior complaint may not be a reasonable expectation.

[17] At this point, I have only the Applicant's word that the interpreter made available to him did not speak his dialect of Tamil. An audio recording of the hearing would shed some light on this matter but, unfortunately, it appears that the General Division member presiding over the hearing neglected to record the proceedings. Of course, even if such a recording existed, I would not be in a position to assess the competence or suitability of the interpreter. I cannot speak or understand Tamil and have no way to assess with any precision the quality of the interpreter's work. Similarly, I am in no position to determine whether the respective dialects of the Applicant and the interpreter rendered them mutually unintelligible. However, it would have become quickly apparent even to a non-speaker of Tamil had there been an issue with translation, and I suspect that the General Division would have likely documented any objections or concerns raised by the Applicant at the hearing.

[18] That said, if the Applicant can satisfy me that

- there was a significant problem with the quality of the interpreter's work;
- he attempted to raise concerns with the General Division about that work during the hearing; and

[3] *Nsengiyumva v. Canada (Minister of Citizenship and Immigration),* 2005 FC 190 (CanLII).

- the General Division ignored or overrode those concerns without regard for the Applicant's ability to effectively present his case;

then his appeal may have a reasonable chance of success on this ground. In the absence of a recording, I will be particularly interested to hear evidence from the Applicant himself, by way of either testimony or written affidavit, that details specific instances in which he believes his or the General Division's words were mistranslated and what material effect those mistranslations might have had on the outcome.

Hand Impairment

[19] The Applicant maintains that his hands are impaired, but this amounts to a recapitulation of submissions that he has already made to the General Division. The Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that correspond to the grounds of appeal set out in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[20] I see no reasonable chance of success on this proposed ground of appeal.

Undisclosed Pain

[21] The Applicant submits that he did not "share" information about his hand and chest pain with the General Division, although it is not clear whether this was a function of the alleged interpretation problems addressed above or whether he withheld details at the time of the hearing. In any case, a request for leave to appeal to the Appeal Division is not an occasion on which to make new submissions on the merits of the evidence. The Applicant had ample opportunity to present his evidence in the period leading up to the hearing, and I see no indication that the General Division disregarded any significant component of the material before it. My review of the General Division's decision indicates that it fully considered the evidence surrounding the Applicant's hand impairments but concluded that they did not prevent him from performing substantially gainful work. In addition, the General Division addressed the

evidence of the Applicant's chest pain, making a specific finding that there was no evidence of it prior to 2015 (paragraph 32).

[22] I do not see an arguable case on this point.

CONCLUSION

[23] I am granting leave to appeal on the sole ground that the General Division may have failed to observe a principle of natural justice by disregarding the Applicant's objections to faulty interpretation during the hearing of October 11, 2016. 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.

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

Member, Appeal Division