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

Citation: *D. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 381

Tribunal File Number: AD-16-1218

BETWEEN:

D. C.

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 28, 2017

REASONS AND DECISION

INTRODUCTION

[1] On July 25, 2016, having found that the Applicant had not suffered from a severe disability rendering him incapable regularly of pursuing any substantially gainful occupation at his minimum qualifying period (MQP) of December 31, 2014, 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 and continuing. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on October 19, 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 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.

[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:" *Osaj v. Canada (Attorney General)*, 2016 FC 115 (paragraph 12). 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 based its decision on an erroneous finding of fact because the Applicant had sustained a pain disorder that prevented him from pursuing his regular, gainful occupation.

[8] Further, the Applicant submits that, although he was provided with a light-duty, modified employment, he was nonetheless unable to continue the employment and that, thereafter, the employer ceased business operations, so the Applicant would not have been able to maintain gainful employment.

[9] The Applicant submits that the General Division based its decision on an erroneous finding of fact because the Applicant had testified that he has had a pain condition for a prolonged period. He testified that he had been seeking ongoing medical treatment, but that he had been unable to perform any gainful occupation due to the prolonged nature of his disability. The Applicant submits that the medical evidence and his testimony provide ample support that he suffers from a severe and prolonged disability.

ANALYSIS

[10] I find that the Applicant's submissions do not specifically state how the General Division erred, and I have given significant latitude in this respect. In essence, he is merely arguing the same reasons for appeal as those that were articulated in the original Notice of Appeal to the General Division, with the exception of the argument the Applicant testified that, because the employer who had accommodated him had ceased business operations, he would not have been able to maintain gainful employment. Unfortunately for the Applicant, an appeal is not merely an opportunity to have the same case re-argued; rather, it is an opportunity to raise matters of errors believed to have been made at the General Division level.

[11] In respect of the Applicant's submission that the General Division made its decision on erroneous findings of fact, I find that this is not an arguable ground and that it does not have a reasonable chance of success.

[12] The Applicant argues that his disability prevented him from pursuing his regular, gainful occupation. However, this is not the proper test. The General Division considered all the evidence: both objective and subjective. It focused on the requirement within paragraph 42(2)(*a*) of the CPP, which states a person has a severe disability if the person is incapable regularly of pursuing any substantially gainful occupation. As the General Division notes in its decision, the proper test in the legislation reads, "incapable regularly of pursuing any substantially gainful occupation."

[13] Further, the General Division considered *Villani v. Canada (Attorney General)*, 2001 FCA 248, in this respect, where the Federal Court of Appeal also stated that an applicant must be rendered "incapable or pursuing with consistent frequency any truly remunerative occupation."

[14] The General Division also considered a real-world application, per *Villani*, *supra*, and it looked at the Applicant's age, education, language proficiency and work experience: in both physical labour and management. It noted that the Applicant had transferable skills and indicated that if he had been able to secure employment within his limitations, the Applicant would have returned to work.

[15] The General Division, in paragraph 34, referred to *Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB), which indicated that a disease or condition does not automatically preclude someone from working; rather, it is the effect of the disease or condition on the person that must be considered, and an applicant must demonstrate that his or her condition renders him or her incapable of working. Further, the General Division referred to *Klabouch v. Canada (Social Development)*, 2008 FCA 33, where the Federal Court of Appeal indicated that it is the capacity to work—not the diagnosis—that determines whether the disability is "severe" under the CPP. The General Division found that the Applicant had not suitably shown that his condition rendered him incapable of working.

[16] In respect of the Applicant's submission that he would have been unable to pursue the modified duties on the premise that the employer ceased operations sometime after the Applicant had resigned from his job, I find that this is not an arguable ground. At paragraph 38 of its decision, the General Division indicates that the Applicant had stopped work in November 2012 because he was concerned his employer was going to fire him after he had refused to return to his original job. It added the reason was not, as required, his health problems.

[17] Although the Decision did not specifically indicate that the employer stopped operations sometime after the Applicant resigned, this is not arguable either. The General Division, in respect of addressing the Applicant's attempts to find employment at Canadian Tire and Home Depot, articulated that "socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP," as per *Canada (MHRD) v. Rice*, 2002 FCA 247.

[18] The General Division went on to indicate that there was no evidence to show that the effort to obtain and maintain employment had been unsuccessful due to the Applicant's health condition. At paragraph 36 of the decision, the General Division references Dr. Zarnett, orthopedic and arthroscopic surgeon, who conducted an independent examination of the Applicant. Dr. Zarnett indicated the Applicant was unable to resume his pre-accident job tasks. However, he did not rule out all job options. Further, the Applicant had returned to work in a position within his limitations. The General Division notes in paragraph 36:

> while the Appellant may have some difficulties that affect his ability to work in labour manual jobs, there is no evidence to support that he was incapable of modified work or alternate work and there are no reports indicating that his medical condition had worsened or deteriorated to justify his decision to stop work in November 2012.

[19] In respect of the Applicant's submission that his pain condition was prolonged and that he was seeking ongoing medical treatment even though he was unable to perform any gainful occupation, I that find this is not an arguable ground. As indicated above, the Applicant did not adequately show that his disability was the reason for his inability to work.

[20] Further, in respect of "prolonged," the General Division did not consider this, as it found the Applicant's disability had not been "severe." The requirement of paragraph 42(2)(*a*) of the CPP is both "severe" and "prolonged." It was unnecessary for the General Division to consider whether the Applicant met the requirements for "prolonged" when it found that his disability had not been "severe."

[21] In summary, I find that the Applicant does not have an arguable case and that there is no reasonable chance of success in an appeal.

CONCLUSION

[22] The Application is refused.

Peter Hourihan
Member, Appeal Division