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

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 414

Tribunal File Number: AD-16-1018

BETWEEN:

J. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: August 17, 2017

REASONS AND DECISION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated May 4, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Appeal Division are that:

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.

[3] An appeal to the Appeal Division may only be brought if leave to appeal is granted: DESDA, s. 56(1). The requirement to obtain leave to appeal to the Appeal Division serves the objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34. In this context, having a reasonable chance of success means "having some arguable ground upon which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

[4] The leave to appeal process is a preliminary step to being granted the right to argue an appeal on the merits. At the leave stage, an applicant is required to demonstrate that the proposed appeal has a reasonable chance of success on at least one of the grounds set out in s. 58(1) of the DESDA. On the appeal on the merits, an applicant will be required to establish on a balance of probabilities that an error was committed by the General Division within the scope of s. 58(1). Thus, an applicant is presented with a different and appreciably lower hurdle at the leave to appeal stage than at the appeal stage.

SUBMISSIONS

[5] In the application for leave to appeal, Applicant's counsel submits that the General Division:

> (i) erred in law by misinterpreting the definition of severe disability under the CPP;
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> (ii) erred in law by misapprehending the test for reasonable refusal of treatment;
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> (iii) misapprehended the facts by preferring some findings of physicians over other findings of the same physician, as well as over the findings of other equally qualified physicians; and
>
> (iv) ignored objective findings of fact regarding the Applicant's health.

[6] Although Applicant's counsel pleads that grounds (iii) and (iv) constitute errors of law, in fact they raise the argument that the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it, an argument falling within the scope of s. 58(1)(*c*) of the DESDA.

[7] The Respondent made no submissions on the application.

NEW DOCUMENTATION AND INFORMATION

[8] In his submissions dated August 10, 2016, Applicant's counsel has included the following documents that were not before the General Division: (i) as Tab 2 to the submissions: reports dated December 1, 2013, from the Centre for Addiction and Mental Health (CAMH) and (ii) as Tab 3 to the submissions: reports dated December 4, 2013, from CAMH. These documents are referred to in paras. 33 and 34 of the submissions.

[9] The Appeal Division has only limited powers under the DESDA. Its role is to review the overall legality of what the General Division has done to determine whether it committed an error falling within one or more of the three grounds set out in s. 58(1) of the DESDA. An appeal to the Appeal Division does not constitute a hearing *de novo* (*Marcia v. Canada (Attorney General)*, 2016 FC 1367. Accordingly, as a general rule and as recently confirmed in *Parchment v. Canada (Attorney General)*, 2017 FC 354, the evidentiary record before the

Appeal Division consists of the evidentiary record that was before the General Division. The new documentation submitted by the Applicant's counsel and the references to these documents in paras. 33 and 34 of the submissions are not admissible as they do not have any relevance to the issue before me, which is whether—on the basis of the evidence that was before it—the General Division committed an error falling within the scope of s. 58(1) of the DESDA.

DISCUSSION

[10] With respect to the second ground of appeal, Applicant's counsel submits that the Applicant:

> […] acted subjectively reasonably given his own life experiences (his father suffered a seizure as a result of taking medication) and his overall health condition. […] In the alternative, if it is held that the SSTGD [General Division] was reasonable in determining that [the Applicant's] incomplete medical compliance was unreasonable, the SSTGD erred in law by failing to what impact [*sic*] that refusal might have on the claimant's disability status as required by *Lalonde v. Canada (MHRO)* [*sic*], 2002 FCA 211.

[11] In *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 2011, the Federal Court of Appeal stated:

> In *Villani* [*v. Canada (Attorney General)*, 2001 FCA 248], this Court concluded at paragraph 38 of its decision, that its analysis of subparagraph 42(2)(*a*)(i) of the Act [CPP]:
>
> ... strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.
>
> […]

> The "real world" context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable. [underlining in original]

[12] Although the Court in *Lalonde* was conducting a judicial review of a decision of the Pension Appeals Board, predecessor to the Appeal Division, the *dicta* apply equally to the General Division when it approaches the issue of whether a claimant has reasonably refused medical treatment.

[13] Before the General Division, the Applicant bore the onus to establish that he had reasonably refused treatment and, if his refusal to undergo treatment was properly deemed unreasonable, he also bore the onus to establish that such refusal did not have any impact on his disability status.

[14] In the present case, the General Division carried out a comprehensive analysis of the voluminous evidence before it. The member discussed the issue of the Applicant's refusal of a number of different treatments recommended by his medical practitioners at para. 59 of the reasons. The member found "that the Appellant [the Applicant on this application] has failed to establish the reasonableness of his noncompliance with treatment recommendations and, therefore, has not made reasonable efforts to improve his health".

[15] Ultimately, she concluded:

> [61] Having considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions, the Tribunal is not satisfied on the balance of probabilities that the Appellant suffered from a severe disability as of the MQP.

[16] Although the member canvassed the several treatments that had been recommended by the Applicant's physicians that had been refused by the Applicant, she may have failed to consider appropriately the impact that refusal might have had on the Applicant's disability status which would constitute an error of law falling within the scope of s. 58(1)(*b*) of the DESDA. I find this constitutes an arguable ground upon which the proposed appeal might succeed.

[17] For the purposes of this application, I need not make a decision on whether all the grounds of appeal put forward in the application for leave to appeal raise an arguable case, as I have found that the Applicant has raised at least one ground that does so: see *Mette v. Canada (Attorney General*), 2016 FCA 276.

DISPOSITION

[18] The application for leave to appeal is granted. Success at the leave to appeal stage is not, of course, determinative of whether the appeal itself will succeed.

[19] In accordance with s. 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file: SST Regulations, s. 42. The parties may wish to make submissions regarding the form the hearing of the appeal should take (i.e. in writing, by teleconference, videoconference or in person) together with their submissions on the merits of the appeal.

Nancy Brooks
Member, Appeal Division