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

Citation: *J. V. v. Minister of Employment and Social Development*, 2017 SSTADIS 417

Tribunal File Number: AD-16-899

BETWEEN:

J. V.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: August 17, 2017

REASONS AND DECISION

[1] On May 30, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal of the Respondent's determination that a disability pension under the *Canada Pension Plan* (CPP) was not payable to him. The General Division found that the Applicant had not met the eligibility criteria for disability benefits by December 31, 2002, being the end of his Minimum Qualifying Period (MQP).

[2] The Applicant has now requested leave to appeal the General Division decision to the Appeal Division of the Tribunal.

[3] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the *Department of Employment and Social Development Act* (DESDA):

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.

[4] Pursuant to s. 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] A leave to appeal proceeding is a preliminary step to an appeal on the merits; the Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal may succeed: *Osaj v. Canada (Attorney*

General), 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[6] In the application for leave to appeal, the Applicant's representative asserted that the General Division had erred in law because "the MQP is in error", the Applicant "had income from 2007 to 2013 or 2015", and the details would be clarified by his accountant. As this appeared to anticipate the reliance upon new evidence, I asked the Applicant's representative to clarify the error claimed to have been made by the General Division, with reference to the relevant documentation before the General Division. An extension of time for this purpose was requested and granted. The Applicant's representative subsequently asked that the appeal process be further delayed as "CRA is taking longer than I had anticipated to respond." She advised that "[t]here has been a mistake in his taxes which is being corrected at the CRA" and she would submit the information once received. In response, I issued the following interlocutory decision, contained in an endorsement of June 27, 2017:

> New evidence is generally not admitted at the Appeal Division, because the appeal does not constitute a hearing *de novo* (see, for example, *Marcia v. Canada (Attorney General)*, 2016 FC 1367). This is why I had initially asked the representative to refer me to the relevant documentation that was before the General Division. I find no basis to grant the representative's request for a further extension of time, since this request relates to the introduction of new evidence, presumably in the form of tax reassessments. Documents that were not before the General Division in May 2016 can have no bearing on a claim that an error was made by the General Division at that time. Moreover, the existence of new evidence is not an independent ground of appeal to the Appeal Division, under the DESDA.
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> I note that the General Division only addressed the question of whether the Applicant had a severe and prolonged disability on or before the MQP of December 31, 2002. In the event that the Applicant successfully establishes a later MQP through additional years of pensionable earnings, the appropriate course of action would be to file a new application for disability benefits with Service Canada. Since the General Division has determined that the Applicant did not meet the relevant criteria by December 31, 2002 (subject to the result of the current appeal to the Appeal Division), a new application would be limited to the question of whether the Applicant met the criteria for disability benefits between January 1, 2003 and the new MQP date.
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> With respect to the matter presently with the Appeal Division, the Applicant's representative is asked to advise, by July 17, 2017, whether she is instructed

> to proceed with the application for leave to appeal the General Division decision and, if so, on what statutory grounds.

[7] The Applicant's representative has not communicated further with the Tribunal, despite another letter from the Tribunal (July 26, 2017) indicating that the deadline had passed and a decision on the application for leave to appeal would be made on the basis of the materials received to date. I turn now to that decision.

[8] The Applicant is apparently seeking tax reassessments from the Canada Revenue Agency with respect to claimed income during several years subsequent to December 31, 2002, potentially affecting the calculation of his MQP. However, there has been no suggestion that the General Division had evidence before it to support an MQP ending later than December 31, 2002, at that time; rather, the Applicant's representative proposes to establish a later MQP with new evidence, in the future. The determination of the MQP is a question of fact, yet the Applicant does not claim that the General Division made its finding of the MQP in a perverse or capricious manner or without regard for the material before it. A review of the file confirms that the MQP of December 31, 2002 is consistent with the Record of Contributions before the General Division, outlining the Applicant's pensionable earnings. Furthermore, as stated previously, the existence of new evidence is not an independent ground of appeal to the Appeal Division.

[9] Although the Applicant's representative initially framed the issue as an error of law, there has been no suggestion that the relevant law, specifically s. 44(2)(*a*) of the CPP (which defines the MQP), was incorrectly interpreted by the General Division. As set out above, the Applicant relies solely upon forthcoming evidence of additional years of income to dispute the calculation of his MQP. Moreover, the Applicant's representative has not identified any other grounds of appeal, despite having been given the opportunity to do so.

[10] In the result, therefore, I find that the Applicant has not presented an arguable ground, within s. 58(1) of the DESDA, upon which the appeal may succeed. Accordingly, I conclude that the appeal has no reasonable chance of success, and leave to appeal must be refused.

[11] As indicated previously, in the event that the Applicant successfully establishes a later MQP through additional years of pensionable earnings, he may wish to file a new application for disability benefits (with an eligibility window between January 1, 2003 and the new MQP date).

CONCLUSION

[12] The application for leave to appeal is refused.

Shirley Netten
Member, Appeal Division