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

Citation: *D. V. v. Minister of Employment and Social Development*, 2017 SSTADIS 418

Tribunal File Number: AD-16-1122

BETWEEN:

D. V.

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: August 18, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On June 20, 2016, having found that the Applicant's disability was not severe, 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 September 12, 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] Subsection 58(1) of the DESDA identifies 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 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; rather, 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.

[7] 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

[8] The Applicant submits that the General Division based its decision on erroneous findings of fact that it had made in a perverse or capricious manner or without regard for the material before it. Specifically, the Applicant submits that the General Division:

a) at paragraph 40 in its decision, errs when it determines "the conclusion that [the Applicant] may be able to do heavy work is still significant." The Applicant argues that the General Division acknowledged that Dr. Kreder was in error when he had indicated that the Applicant had been doing heavy work and that he would be able to do this work for another decade and, despite the evidence to the contrary, the General Division determining that the mistaken conclusion was significant. The Applicant refers to 10 medical reports on the record that support the fact that Dr. Kreder was mistaken;

b) at paragraph 41 of its decision, errs when it determines that the Applicant was capable of working three to four hours per day when Dr. Carey actually stated that the Applicant could "likely only handle working 3 to 4 hours per day." Further, the Applicant states that the General Division did not take into account that Dr. Carey had qualified his statement by noting that he required more detailed information from the situational assessment to actually test the Applicant' specific tolerances;

c) erred when it incorrectly quoted Dr. Carey in a November 1997 medical report and that it did not rely on the conclusion of the document that Dr. Carey had cited; and

d) erred when it stated that the Applicant's residual earning capacity of zero dollars had been based only on jobs that the Applicant had expressed an interest in. He argues that this mischaracterized and misquoted the findings of the vocational assessments, which consisted of: background information; a file review of medical documentation; occupational therapy assessments; and functional capacity evaluations. Further, the Applicant submits that the Applicant underwent a series of tests, which were then subject to computerized scoring where possible occupations, although identified as suitable, were nonetheless deemed unobtainable for the Applicant due to his restrictions and limitations.

[9] The Applicant submits that the General Division erred in law by:

a) failing to apply *E.J.B. v. Canada (Attorney General)*, 2011 FCA 47, which referred to *Villani v. Canada (Attorney General)*, 2001 FCA 248, a case requiring that the severity requirement in paragraph 42(2)(*a*) of the CPP be examined in a "real world" context. Specifically, that the General Division did not consider all of the Applicant's conditions and how his restrictions and limitations affected his ability to sustain regular, substantially gainful employment. Rather, it determined that his impairments were not severe or prolonged, and it states in paragraph 45 of the decision: "he has residual effects of the accident and limitations/restrictions"; and

b) failing to follow *Nova Scotia v. Martin*, [2003] S.C.J. No. 54, which recognized that chronic pain is a compensable disability. Specifically, the Applicant that the General Division did not consider the Applicant's chronic pain condition on his ability to pursue regular substantially gainful employment.

ANALYSIS

[10] In respect of the Applicant's two submissions above in points 8(c) and (d), I will address both concurrently as they are closely inter-related. Specifically, the Applicant argues that the General Division erred when:

i) it incorrectly quoted Dr. Carey in a November 1997 medical report and that it did not rely on the conclusion of the document that Dr. Carey had cited; and,

ii) when it stated that the Applicant's residual earning capacity of zero dollars had been based only on jobs that the Applicant had expressed an interest in.

I find these do have a reasonable chance of success on appeal for the following reasons.

[11] The Applicant cites the situational assessment from November 1997, which reads as follows:

> The claimant was fully co-operative and participated willingly in the evaluation process with visible signs of maximum effort during most activities. Performance was consistent, as indicated by reproducible abilities and limitations throughout testing procedures. It is our view that the assessment results are a valid measure of the claimant's current abilities. (p. GD4-430).

And further,

> Based on the data outlined above, the claimant does not match with the physical and psychological skills required to perform the above-noted jobs.
>
> The claimant's residual earning capacity is, therefore, determined to be $0.00.
>
> The decision-making process outlined above is based on data obtained from all assessment components and discussions among all team members. (p.GD4-434).

[12] The General Division refers to the assessment from 1997 in paragraph 22 under the sub-heading of evidence. It referenced the "Summary of Findings" (p. GD4-430) and noted the report indicated that the Applicant had demonstrated the ability to perform light-level work on a part-time basis and that, further, that he would be unable to perform more than four hours of work per day. The General Division then referenced the "Situational Assessment Conclusions" (p. GD4-431) indicating six particular occupations the Applicant would be capable of performing, for a maximum of four hours per day. It then referenced the report titled "Summary – Decision Making Process," which concluded that the Applicant did not have the

psychological skills required to perform the six noted jobs and that his residual earnings capacity was zero dollars.

[13] Though the General Division did not state that the November 1997 report indicated that "physically" the Applicant was capable to perform light-level work on a part-time basis, it acknowledged that the Applicant did not have the psychological skills to perform the jobs listed.

[14] The General Division also refers to the evidence of a February 2001 assessment (paragraphs 23 to 27 of the decision), highlighting the Applicant's restrictions and further indicating the assessment concluded that the Applicant was not suitable for the occupations listed, as well as the fact that his residual earnings capacity was zero dollars.

[15] The General Division specifically refers to the residual earnings capacity of zero dollars in its analysis (paragraph 43 of the General Division decision), noting that the vocational report from November 1997 indicated the Applicant's interests did not line up with his transferable skills and that the Applicant is not entitled to limit his pursuit of an occupation to his areas of interest. It found that the residual earnings capacity conclusion had been reached after a consideration of a finite number of listed occupations. The General Division noted that the proper test is whether the Applicant "is incapable regularly of pursuing 'any' substantially gainful occupation."

[16] The November 1997 assessment does not indicate that the six occupations were based on the Applicant's interests. The report at page GD4-422, states:

> [the Applicant] participated in Medical and Physiotherapy Examinations on November 17, 1997, as well as a Psychovocational Assessment with Cambridge Employment Options and Dr. Robert Carey on November 18, 19, 1997. Following these assessments, occupational options were developed based on the claimant's medical limitations, measured aptitudes, and transferable skills.

[17] Further, the February 2001 assessment uses this same language in its rationale for the jobs chosen for evaluation at that time. I note that, in 2001, it considered eight occupations that were different from those that had been considered in 1997.

[18] In its analysis, the General Division refers to the Link With work assessment conducted in February 2001 (paragraph 42 of the General Division decision), which, it indicates, concluded that the Applicant was "capable of light to medium closer to light level work above waist level [*sic*]." It did not, however, indicate that the report then went on to state that the Applicant had been considered for eight specific jobs, all of which he had been considered physically incapable of performing. Again, this report indicated that the occupational options were considered based on the totality of the Applicant's limitations, aptitudes and transferable skills. The report then concluded that the Applicant's earning capacity was zero dollars.

[19] The General Division determined that the Applicant had not attempted to find alternative work and that he had not shown a motivation to do so. When it determined that the assessments in 1997 and in 2001 had evaluated only those jobs based on the Applicant's interests and not on an overall determination of capability, it may have failed to consider the full extent of the Applicant's determination to find alternative work. Further, it may have based its decision on an erroneous finding of fact that the occupations had been determined based on his interest.

[20] In *Mette v. Canada (Attorney General*), 2016 FCA 276, the Federal Court of Appeal indicated 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. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." Because I have found that there is an arguable case, I have not considered the remaining grounds of appeal that the Applicant has submitted.

[21] I am satisfied that the Applicant has demonstrated there is a reasonable chance of success, namely, that the General Division may have based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

CONCLUSION

[22] The Application is granted.

[23] 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