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

Citation: *Minister of Employment and Social Development v. U. G.,* 2017 SSTADIS 398

Tribunal File Number: AD-16-937

BETWEEN:

Minister of Employment and Social Development

Applicant

and

U. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: August 8, 2017

REASONS AND DECISION

INTRODUCTION

[1] This is a Minister's appeal of the April 13, 2016, General Division decision, which held that the Respondent was entitled to a disability pension under the *Canada Pension Plan* (CPP). In that decision, the General Division found that the Respondent had a severe and prolonged disability within the meaning of the CPP. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which received it on July 12, 2016.

ISSUE

[2] The Member 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* (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 58(1) of the DESD Act, 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.

[6] The process of assessing whether to grant leave to appeal is a preliminary one. The review requires an analysis of the information to determine whether there is an argument that would have a reasonable chance of success on appeal. This is a lower threshold to meet than the one that must be met on the hearing of the appeal on the merits. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Applicant of Human Resources Development)*, 1999 CanLII 8630 (FC). The Federal Court of Appeal, in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success.

SUBMISSIONS

[7] The Applicant has identified the grounds of appeal as follows:

a) The General Division erred in law in making its decision in the following ways:

   i. The Applicant argues that the correct test for "prolonged" was not considered.

   ii. The Applicant submits that the General Division failed to consider part-time work in its work capacity analysis for the purposes of determining whether the disability was severe.

   iii. The Applicant felt that the General Division had erred when it accepted the Respondent's testimony that he had not attempted to look for other employment as proof that the disability was severe.

a. The General Division erred in law in making its decision

i. Not considering the correct test for "prolonged"

[8] The Applicant submits that, although the General Division correctly cited the test for determining whether a disability is "prolonged" in paragraph 6 of the decision, the actual analysis of the Respondent's medical history did not properly apply that test, which was seen in paragraph 37 of the decision. The two requirements to determine whether a person is disabled are found in paragraph 42(2)(*a*) of the CPP. This paragraph reads:

> 42(2) For the purposes of this Act,
>
> (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
>
> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
>
> (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death…

[9] The Applicant submits that the General Division did not look to see whether the disability was "likely to be long continued and of indefinite duration or is likely to result in death" and, by doing so, failed to analyze the file properly. Furthermore the Applicant argues that there is no evidence that the General Division even considered whether the Respondent's condition was indefinite.

ii. Failing to consider part-time work in the work capacity analysis

[10] The Applicant argues that there was evidence in the file that indicated that the Respondent was able to do part-time work. Notably the Applicant cited paragraph 18 of the General Division decision where the Respondent's wife stated that the Respondent continued to persevere at work until September 2015. She also stated that he worked for at least a few months prior to that time, and that he would miss at least one day per week because of his condition. (General Division decision, paragraph 18)

[11] In addition, the Applicant submits that the Respondent's ability to do part-time work indicated that there was work capacity and the fact that the General Division did not consider this in its decision means that the General Division used the wrong test in the assessment of disability. The Applicant argues that the test for severity under the CPP is not whether the claimant is able to work full-time; rather, they must show that they cannot engage in "substantially gainful employment," which could include modified activities, part-time work, etc. (*Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158). The Applicant argues that,

by not analyzing the Respondent's opportunity to work in that context, the General Division erred in law.

iii. It erring in accepting testimony that the Respondent did not look for other employment

[12] The Applicant submits that the General Division finding in paragraph 35 indicates that *Inclima v. Canada (Attorney General)*, 2003 FCA 117, was not used properly in the adjudication of this file. *Inclima* explains that where there is evidence of work capacity, an individual must show how those efforts to obtain and maintain employment have been unsuccessful by reason of a health condition. Instead, the General Division explains in paragraph 35 of the decision:

> [35] […] While the Appellant has not attempted to look for other employment, the Tribunal accepts the Appellant's testimony that his symptoms have not improved to the point he would regularly be able to participate in any substantially gainful occupation.

[13] The Applicant argues that there were findings of a capacity to work. Furthermore, the submissions point out that the General Division decision accepted the Respondent's lack of attempts at finding work as proof of a severe disability. In contrast, the Applicant cites *Inclima* as the authority that, if residual capacity to work is found, attempts are required to show the inability to obtain and maintain that employment have been unsuccessful due to a health condition. It is submitted that the General Division erred in its assessment in paragraph 35 by accepting the lack of attempts as enough evidence to conclude that the Respondent would not have been able to participate in substantially gainful employment.

ANALYSIS

a) Did the General Division err in law in making its decision, whether or not the error appears on the face of the record?

i. Was the correct test for "prolonged" used?

[14] The General Division appears to have ignored the analysis required to determine whether the disability meets the test for prolonged. Although the test is properly outlined in paragraph 6 of the decision, paragraph 37 of the decision is the only paragraph that offers any

commentary on the "prolonged" criteria. The relevant portion of paragraph 6 reads: "[…] A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death."

[15] In contrast, the analysis in paragraph 37 of the General Division decision reads:

> [37] The Tribunal finds that the Appellant's disability is prolonged. He was diagnosed with fibromyalgia at a relatively young age in 2004 and was able to cope with his symptoms until a workplace accident in January 2012. Since that time the Appellant has trialed numerous narcotic and anti-depressant medications that carry with them significant negative side effects. He has attended conservative treatment management and continues to attend a pain clinic for injections and psychiatric treatment with limited success. Given the Appellant's limited progress to date despite his compliance with numerous recommended therapy strategies, the Tribunal finds little prospect that the Appellant's condition will improve to the point that he will be able to regularly resume substantially gainful employment.

[16] Paragraph 37 does not consider whether the disability is likely to be long continued and of indefinite duration or is likely to result in death. The analysis appears to fall short of the legislative requirement. There is an arguable case on this ground that may have a reasonable chance of success upon appeal. Leave to appeal on this ground is granted.

ii. Did the General Division fail to properly consider part-time work in its work capacity analysis?

[17] In paragraph 35 of the decision, *Inclima* is referenced, which suggests that a residual capacity to work was found. It is unclear from the decision whether this is part-time work or full-time work as the only analysis that was conducted was in reference to the Respondent's ability to work for his former employer. Paragraph 35 of the General Division decision reads:

> [35] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant testified that he made several attempts to return to graduated work at Primus Telecom since his workplace incident in January 2012. He reported that on each occasion he was able to persevere for several months before his body pain symptoms would increase to the point that he would have to remain off work. The Appellant's role at

> Primus was a sedentary one and his workstation was ergonomically assessed. Despite the effort to persevere in the workplace his pain became overwhelming and he had to stop working permanently as of September 30, 2015. While the Appellant has not attempted to look for other employment, the Tribunal accepts the Appellant's testimony that his symptoms have not improved to the point he would regularly be able to participate in any substantially gainful occupation. Based on the Appellant's previous attempts to return to a sedentary role on a graduated and the failure of symptom reduction despite treatment, the Tribunal finds that the Appellant health condition has precluded employment since he last worked in September 2015.

[18] The Disability Questionnaire (GD3-60 to GD3-66) shows that the Respondent worked up to July 14, 2013, following the workplace accident in January 2012. He also went back to work a few months after claiming for CPP Disability. Additionally, the Respondent's wife provided oral testimony explaining that, for at least a few months prior to September 2015, when he ceased working, that he would miss at least one day of work per week because of his condition. Given this information, paragraph 35 of the General Division decision appears to have many flaws in its analysis. Either residual capacity to work was determined, which would then lead to an analysis under *Inclima*, or there was a finding that there was no residual capacity to work. It appears from the General Division decision that there was consideration of a residual capacity to work but only in the context of the Respondent's former job. This falls short of a complete analysis of whether the Respondent could engage in "substantially gainful employment."

[19] Being unable to work is difficult standard to meet and in the Federal Court of Appeal decision of *Miceli-Riggins*, the court explained as follows:

> [15] And the "unable to work" standard is most difficult to meet. In order to meet it, the claimant must demonstrate more than just an inability to perform his or her former job. Instead, the claimant must show that he or she cannot engage in "substantially gainful employment." This includes modified activities at the claimant's usual workplace, any part-time work whether at the claimant's usual workplace or elsewhere, or sedentary jobs.

[20] Using the analysis in *Inclima* occurs only when a residual capacity to work is determined:

> [3]

> […]
>
> […]
>
> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[21] If there was a residual capacity to work, as the Applicant argues is evidenced by the potential for part-time work, then the analysis was conducted incorrectly. If the finding was that there was no residual capacity to work, then *Inclima* should not have been a part of the analysis. In either case, paragraph 35 is unclear and raises questions as to whether the Respondent had a capacity to work. Leave to appeal on this ground is accepted, as there is a reasonable chance of success on appeal.

iii. Did the General Division err in accepting the Respondent's testimony that he had not attempted to look for other employment as proof of the disability?

[22] The Respondent did admit and the General Division accepted the evidence that he had not looked for work. This issue flows directly from the preceding issue concerning capacity to work. By granting leave to appeal on the issue of determining whether there was a residual capacity to work, it is only logical then that the analytical exercise of determining whether efforts to obtain and maintain employment have been unsuccessful by reason of a health condition will also be considered. Should it be found that there was a residual capacity to work, on appeal, it would only make sense that the next step be to consider the information in the context of *Inclima*, which would instruct that attempts to find work are required. Leave to appeal is granted on this ground as there appears to be a reasonable chance of success on appeal because the issue is directly linked to the consideration of part-time work as an indication there was a residual capacity to work.

CONCLUSION

[23] Leave to appeal is granted on the following grounds:

a) The General Division may have erred in law concerning:

i. the test to be used to determine whether a disability is prolonged;

ii. determining whether there is a residual capacity to work and if so, was *Inclima* properly applied; and

iii. accepting the Respondent's evidence that by not attempting to look for work, he proved his disability.

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

Jennifer Cleversey-Moffitt
Member, Appeal Division