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

Citation: *Z. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 427

Tribunal File Number: AD-17-120

BETWEEN:

Z. B.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: August 23, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated November 28, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was ineligible for the disability benefit under the *Canada Pension Plan* (CPP) because his disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2016.

[2] On February 8, 2017, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division.

ISSUE

[3] The Appeal Division must decide whether this appeal has a reasonable chance of success.

THE LAW

[4] 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. The Appeal Division must either grant or refuse leave to appeal.

[5] According to subsection 58(1) of the DESDA, 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] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[7] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

SUBMISSIONS

[9] In his application requesting leave to appeal, the Applicant's representative alleges that the General Division's decision contained inaccuracies and misrepresentations regarding his client's disabilities. He maintained that the Applicant was disabled within the meaning of the Canada Pension Plan.

[10] In a letter dated March 23, 2017, the Applicant's representative made additional submissions:

- The General Division erred by failing to consider medical reports, prepared prior to the MQP, that supported the Applicant's claim that he was disabled by depression, anxiety and mental illness. Specifically, the General Division did not place sufficient weight on the reports of Dr. Singh Chahal, psychiatrist, or Dr. Vishal Midha, family physician. The Applicant maintains that any attempt to work would cause his ankles to deteriorate further. His psychological condition

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

also prevents him from working, as indicated by Iva Keighley's report dated February 4, 2017.

- The General Division erred in failing to give reasons for rejecting evidence that the Applicant was incapable of performing less physically demanding work. In *R. v. Sheppard*,[3] the Supreme Court of Canada considered the decision maker's duty to provide sufficient reasons for a decision. It concluded that reasons must be given for findings of fact made upon disputed and contradicted evidence, and upon which the outcome of the case is largely dependent. In *Giannaros v. Canada*,[4] the Federal Court of Appeal concluded that in omitting to explain why it rejected a body of credible evidence, the Pension Appeals Board had failed to provide adequate reasons for its decision. In this case, several medical professionals reached different conclusions about the Applicant's capacities. The outcome of Applicant's appeal was dependent, at least in part, on how this evidence was weighed. The General Division decision offered no explanation for discounting medical reports that concluded the Applicant could not work.

[11] At various times, the Applicant also forwarded to the Appeal Division various reports, including:

- Letter dated February 4, 2017 from Iva Keighley, registered social worker vocational rehabilitation consultant;
- Report dated April 20, 2017 from Michael Kliman, orthopedic surgeon;
- Letter dated March 28, 2017 from David Gutierrez, friend and neighbour;
- Report dated May 3, 2017 from Svetlana Milenkovic, psychiatrist;
- List of scheduled appointments from June 2017 to June 2018 with the Physiotherapy Wellness Institute;
- Referral statement for Dr. Vishal Midha dated June 10, 2017; and
- Various prescriptions dated May 2017.

[3] *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26.
[4] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187.

ANALYSIS

Consideration of Evidence and Sufficiency of Reasons

[12] In essence, the Applicant submits that the General Division assigned too little weight to certain items of evidence and provided insufficient reasons for doing so.

[13] I am ordinarily reluctant to challenge the General Division's authority, as trier of fact, to weigh the evidence as it sees fit, but I think its conduct in this case warrants further investigation. The Applicant submitted numerous documents—medical and otherwise—in support of his disability claim, but the General Division referred to only a handful of them in its decision. This in and of itself does not necessarily mean that the General Division's reasons were insufficient, but I see other indications that the General Division may not have fully grappled with the Applicant's evidence and arguments.

[14] First, I find it unusual that the General Division made no reference in its decision to any evidence from the Applicant's primary care physician, even though the file includes Dr. Midha's CPP medical report dated August 8, 2014, the functional abilities assessment that he completed for Bombardier on June 20, 2014, and 13 pages of his clinical notes from June 2014 to April 2015. Second, in his notice of appeal, filed with the General Division on July 3, 2015, the Applicant wrote:

> In the decision received from the Medical Adjudicator it states that "we concluded that the information does not show that your limitations prevent you from doing some type of alternative work." I have provided a number of medical reports from both medical doctors and my psychotherapist that state otherwise. Please see the letter dated Dec. 15, 2014 in which Dr. Veljkovic clearly states "At this point, I am not sure he can get back to work at all." I was terminated from my job with Bombardier as an electrical engineer six months after returning to work on modified duty, this termination occurred because I was unable to perform any job effectively. Further my doctors have stated that I cannot sit, stand or walk for more than 30 minutes at a time, what they did not explain is the length of time and amount of pain I feel when I have to transition from one of these activities to the next. This transition can take 10 or 15 minutes.

The General Division mentions Dr. Veljkovic's December 15, 2014, report (GD2-78) in paragraph 30 of its decision, but it notably does not address the orthopedic surgeon's very definite pronouncement in that same report about the Applicant's work prospects. Nor did the General Division refer to a subsequent report dated March 20, 2015 (GD2-72), in which Dr. Veljkovic concluded that the Applicant was "extremely unlikely to be able to return to any kind of work requiring a high level of physical activity or prolonged standing." Third, the General Division omitted any discussion of other documents that, on first glance, would appear to be relevant, including a psychological assessment report by Muhammad Ali and Joanna Mitsopulos dated August 20, 2013 (GD2-145) and an assessment of attendant care needs report by Ashok Jain, occupational therapist, dated January 17, 2014 (GD2-117).

[15] I also see an arguable case that the General Division unduly discounted a significant aspect of the Applicant's testimony. It is clear that the General Division dismissed the appeal because it found no indication that the Applicant was unable to do his job at Bombardier:

> [28] The Appellant stated during his testimony that he was able to return to work at his former job after a period of time recovering from his accident. He stated that he was placed on modified duties which allowed him to continue on with his work but did not allow him to do the physical element that his job required. The Appellant stated that he had an assistant who helped with the physical duties of the job. It appears to the Tribunal that the Appellant was able to complete many elements of his job except for the physical aspect that required him to climb and do various physical tasks. To the Tribunal it appears that the Appellant was able to maintain a relatively consistent work schedule and there does not appear that the Appellant missed any significant period of time due to the symptoms that he had from his accident. While the Tribunal is unable to ascertain the reason for the Appellant's dismissal it appears to the Tribunal that while the Appellant was limited in his abilities to perform the physical aspects of his job there is no indication that he was limited in all aspects of his ability to complete the requirements of the job...
>
> [33] […] The evidence shows that the Appellant did not leave his previous employment due to his symptoms but rather was terminated from his employment. There is no evidence that the Appellant was unable to perform his modified duties at his previous employer rather it appears that the Appellant was successful at performing the necessary duties of his modified job.

[16] However, the Applicant's unambiguous evidence before the General Division was that, although he was not given formal reasons for his termination, he believed that Bombardier wanted him gone for performance-related issues, which he attributed to limitations caused by his injuries. While he testified that he was able to perform modified duties, he also said that they were not sustainable and he was made to feel like he was a burden to the company. At the 18:05 mark of the audio recording of the hearing, the Applicant testified:

> Once they figured out that I cannot recover myself completely, and the outcome—the expected time of recovery—was unknown, which clearly could be seen always, all of this led them to make a final decision. They were giving me pretty much a hard time, new management at the beginning of 2014, that came, literally was not satisfied with doctors' reports and functional ability forms filled out by doctor specialists. So basically HR department started treating me like I was faking the reports, besides the already horrible situation … Once they had to accept that my situation is even worse than it could be described in their short forms, all this thing led them to a final decision and terminate my employment even though I was still on modified duties.

[17] In my view, the Applicant has made out an arguable case that the General Division failed to address his evidence on the circumstances that led to his departure from Bombardier. While the Applicant testified that he was able to perform modified duties, he also made it clear that his employer did not regard his position as tenable, which is why he was ultimately fired. None of this evidence was addressed in the General Division's decision.

[18] There is also the issue of natural justice, which demands that a decision be accompanied by an intelligible explanation. As the Applicant notes, the Supreme Court of Canada had repeatedly held that decisions at trial must be accompanied by meaningful reasons. In *R. v. R.E.M.*,[5] the Supreme Court set out the test for sufficiency of reasons in the context of criminal law, quoting with approval an earlier Ontario Court of Appeal decision:[6]

> In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what"—the verdict—and the "why"—the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at

[5] *R. v. R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51.
[6] *R. v. Morrissey*, 1995 CanLII 3498 (ON CA).

> in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[19] This logic also applies to decisions of administrative tribunals. There must be a chain of fact, law and logic that leads the reader to conclude that the outcome is defensible. In my view, this chain is absent from the General Division's reasons.

New Documents

[20] The Applicant's request for leave to appeal was accompanied by medical reports that were prepared after the General Division issued its decision.

[21] Given the constraints of subsection 58(1) of the DESDA, the Appeal Division does not ordinarily hear arguments on the merits of disability. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised, although an applicant does have the option of making an application to the General Division to rescind or amend its decision. However, in that event, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations*, which impose strict deadlines and require an applicant to demonstrate that any new facts are material and could not have been discovered at the time of the hearing without exercise of reasonable diligence.

CONCLUSION

[22] I am granting leave to appeal on all grounds claimed by the Applicant. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division