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

Citation: *Minister of Employment and Social Development v. A. B.,* 2017 SSTADIS 446

Tribunal File Number: AD-16-1401

BETWEEN:

Minister of Employment and Social Development.

Applicant

and

A. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: September 5, 2017

REASONS AND DECISION

INTRODUCTION

[1] On September 24, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable to the Respondent.

[2] The General Division held a teleconference hearing, and it determined that:

a) the Respondent's minimum qualifying period (MQP) had ended on December 31, 2015;

b) he had testified in a careful and deliberate manner (i.e. he had been credible and the General Division member had believed his testimony);

c) there was objective medical evidence that he has a wedge fracture of his T8 vertebrae and that he suffers from irritable bowel syndrome (IBS);

d) "based largely on the Respondent's testimony at the hearing and his past work history, [the Tribunal] was satisfied that the his condition is severe and he is incapable regularly of pursuing any substantially gainful occupation as a result";

e) his disability is prolonged;

f) he had a severe and prolonged disability in September 2012; and

g) the Applicant had received the Respondent's application for CPP disability benefits in February 2014; therefore, he is deemed disabled in November 2012, and payments will start as of March 2013.

[3] Based on these conclusions, the General Division allowed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on December 23, 2016, within the 90-day time limit.

ISSUE

[5] Does the appeal have a reasonable chance of success?

THE LAW

[6] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, 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.

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

[9] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[10] The Applicant's grounds of appeal are that the General Division erred in law and that it made erroneous findings of fact in arriving at its decision. The Applicant's arguments can be summarized as follows:

a) The General Division erred in law with respect to the test for disability by failing to require objective medical evidence of the severe nature of one of the Respondent's main disabling conditions, which was found to be IBS.

b) The General Division erred in law in its application of the principles set out by the Federal Court of Appeal (FCA) in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, by failing to assess whether the Respondent had been unsuccessful at obtaining and maintaining employment due to his health condition.

c) The General Division erred in law by failing to apply other binding FCA jurisprudence.

d) The General Division made findings of fact without regard to the material before it, specifically pertaining to:

    i. its finding of prolonged disability in part on the statement that the Respondent's wedge compression fracture will not improve, a fact unsupported by any medical evidence provided on record before the General Division; and

    ii. its failure to provide a meaningful analysis of the evidence and to address inconsistencies in the evidence as it relates to the Respondent's T8 fracture, the nature, severity, prognosis and treatment of his IBS, as well as any limitations resulting from the T8 fracture and IBS.

ANALYSIS

Error of law

[11] The General Division's decision refers to one decision at paragraph 28:

> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703, the measure of whether a disability is "severe" is not whether the applicant suffers from severe impairments, but whether his disability "prevents him from earning a living". In other words, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP.

[12] The General Division did not refer to the jurisprudence cited in the Application, including but not limited to *Villani v. Canada (Attorney General)*, 2001 FCA 248; *Inclima, Gorgiev v. Canada (Minister of Human Resources Development)*, 2005 FCA 55; *Canada (Attorney General) v. Fink*, 2006 FCA 354; *Warren v. (Attorney General)* 2008 FCA 377; and *Canada (Minister of Human Resources Development)*, 2003 FCA 140.

[13] The General Division's decision is not necessarily flawed simply because it fails to cite all potentially applicable jurisprudence. However, it may be flawed if the General Division failed to apply binding jurisprudence.

[14] The Applicant submits that the General Division erred in law by failing to apply binding Federal Court of Appeal jurisprudence and by rendering a decision that was contrary to the binding case law.

[15] The General Division did not mention the *Inclima* case and does not appear to have considered whether the Respondent had residual work capacity. In a medical report that Dr. C. Arnold filled out in 2014, it is stated that the Respondent "cannot do heavy manual work". The Applicant argues that there was evidence that the Respondent has residual work capacity. The General Division decision notes that the Respondent "was able to work in the dangerous work environment of a petrochemical plant even with these deficits [i.e. consequences of his IBS]." However, the General Division did not assess the evidence related to the Respondent's work capacity. Whether the General Division erred in law in this regard warrants further review.

[16] In *Murphy v. Canada (Attorney General)*, 2016 FC 1208, the Federal Court recently found that the General Division's failure to reasonably determine a claimant's workforce attachment means that the *Villani* real-world assessment was incomplete.

[17] Here, the General Division decision does not appear to have conducted the kind of assessment suggested by the *Murphy* decision. Therefore, whether the General Division failed to reasonably determine the Respondent's workforce attachment in its discussion and analysis of the *Villani* factors and, thereby, erred in law, also warrants further review.

[18] On these two issues, the Applicant's submissions and the face of the record, I am satisfied that the appeal has a reasonable chance of success at the leave to appeal stage.

Alleged erroneous findings of fact

[19] The Applicant argues that the General Division made an erroneous finding of fact when it found that the Respondent suffered from a prolonged disability, "because this conclusion is irreconcilable with the lack of medical evidence before it."

[20] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. In response to the Respondent's arguments that the Appeal Division was required to refuse leave to appeal on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESD Act "does not require that individual grounds of appeal be dismissed […] 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." This application is one of the situations described in *Mette*.

[21] Because the alleged errors of law may be interrelated to the analysis of whether the Respondent's medical condition was severe and prolonged, I will not parse the grounds of appeal any further at this stage of the proceedings.

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.

Shu-Tai Cheng
Member, Appeal Division