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

Citation: *G. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 438

Tribunal File Number: AD-16-739

BETWEEN:

G. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 29, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the General Division's decision dated May 19, 2016, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that his disability had not been "severe" on or before the end of his minimum qualifying period on July 31, 2013.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant has filed a series of submissions in support of his application, some of which were less coherent than others. In the initial application, he submitted that the General Division had failed to observe a principle of natural justice and that it had also

failed to "exercise *Constitution [Act]* of Canada." In a response to the Social Security Tribunal regarding his application, he advised that he was also appealing because the General Division had erred in law, though he did not describe how the General Division might have erred, failed to observe a principle of natural justice or failed to apply the *Canadian Charter of Human Rights and Freedoms*.

[6] The Applicant has also filed:

- ADN1D: a "Notice No Trespassing";
- ADN1H: his family physician's business card;
- ADN1J: a copy of correspondence to Respondent advising that he wished to have "her Majesty's Oath to be respected" (he also advised that he had allowed individuals onto his property but that they did not want to follow his rules "to prove status and to follow the Constitution of Canada," which resulted in serious damage to him and his family);
- AD1N1L: a letter to the Workplace Safety and Insurance Appeals Tribunal regarding his injury claims;
- ADN1M: a letter from Social Justice Tribunals Ontario advising that his file with the Human Rights Tribunal of Ontario had been closed; and
- ADN1N: a letter dated March 30, 2017, from the Canadian Human Rights Tribunal (CHRT) advising that his file had been closed. The CHRT could not accept his complaint because it did not meet the requirements under the *Canadian Human Rights Act*.

[7] None of these further submissions raised any grounds under subsection 58(1) of the DESDA and, indeed, none of them appears to have any relevance whatsoever to the appeal or to his claim for a Canada Pension Plan disability pension.

(a) Alleged breach of constitutional rights

[8] The Applicant failed to describe how his constitutional rights under the *Canadian Charter of Human Rights and Freedoms* may have been breached.

[9] Subsection 20(1) of the *Social Security Tribunal Regulations* stipulates that:

> [i]f the constitutional validity, applicability or operability of any provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act* or the regulations made under any of those acts is to be put at issue before the Tribunal,[1] the party raising the issue must
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> **(a)** file a notice with the Tribunal that
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> **(i)** sets out the provision that is at issue, and
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> **(ii)** contains any submissions in support of the issue that is raised; and
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> **(b)** at least 10 days before the date set for the hearing of the appeal or application, serve notice of that issue on the persons referred to in subsection 57(1) of the Federal Courts Act and file a copy of the notice and proof of service with the Tribunal.

[10] The Applicant has not fulfilled the basic notice requirements under the *Social Security Tribunal Regulations*. Apart from that, it is insufficient for a party to baldly allege, without providing any particulars or specifics, that his or her constitutional rights have been breached. The Appeal Division normally will not exercise its discretion and consider constitutional arguments for the first time on appeal if these arguments have not been raised or considered by the General Division and, particularly, where there is no evidentiary record or any findings of fact dealing with issues raised by an appellant: *C.F. v.Minister of Employment and Social Development* 2016 SSTADIS 86. I have reviewed the Applicant's submissions and do not see that he raised any *Canadian Charter of Human Rights and Freedoms* issues before the General Division. At this juncture, an applicant generally should not be permitted to pursue any constitutional arguments on this issue, if he did not pursue them in his appeal to the General Division.

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[1] Social Security Tribunal of Canada

(b) Alleged failure to observe principle of natural justice

[11] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his or her case, that he or she has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. However, the Applicant has failed to articulate how the General Division might have breached any principles of natural justice. Despite being invited by the Tribunal to provide evidence and submissions in support of his allegations, he has not articulated how he might have been deprived of a fair hearing or a fair and reasonable opportunity to present his case, nor has he articulated how the member might have exhibited any bias against him.

[12] I have listened to the recording of the hearing before the General Division. The member availed the Applicant with every opportunity to give evidence and make submissions. The member's tone was patient, courteous and respectful throughout the hearing, even when the Applicant raised matters that were not particularly germane to the proceedings. There was nothing to suggest that the member derogated from the standard expected of a member.

(c) Alleged error of law

[13] Despite enquiries from the Tribunal, the Applicant failed to particularize his claim that the General Division had erred in law.

[14] Although the Applicant has not identified a reviewable error under subsection 58(1) of the DESDA, I will examine the medical evidence and compare it to the General Division's decision. After all, the Federal Court has cautioned the Tribunal against mechanistically applying the language of section 58 of the DESDA when it performs its gatekeeping function. In *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at para. 10, the Federal Court wrote, "If important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave."

[15] I have reviewed the evidence that was before the General Division. There was little in the way of documentary evidence prepared contemporaneous to the end of the minimum qualifying period. The General Division accepted that the Applicant had had leg pain for several years and that he had some functional limitations with performing any manual work. Clinical records prepared in 2013 indicated that the Applicant had sustained an ankle injury at work, for which he was prescribed Naproxen. Apart from seeing the family physician in October 2013, ostensibly there were no other visits with any other health caregivers and no indication that he had any ongoing investigations or treatment for any medical conditions around the end of the minimum qualifying period. The General Division also noted that the family physician had prescribed Naproxen in May 2015 but that, otherwise, there was no evidence that he had been prescribed any stronger pain relief medication. The General Division also conducted a "real world" analysis and it considered Applicant's particular circumstances. My review of the hearing file does not indicate that the General Division either overlooked or possibly misconstrued important evidence.

[16] Unless there is a possible identifiable reviewable error under subsection 58(1) of the DESDA, decisions of the General Division are entitled to significant deference: *Hussein v. Canada (Attorney General)*, 2016 FC 1417.

CONCLUSION

[17] For the reasons that I have set out, I am not satisfied that the appeal has a reasonable chance of success. The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division