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

Citation: *D. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 477

Tribunal File Number: AD-16-1136

BETWEEN:

D. F.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jennifer Cleversey-Moffitt

Date of Decision: September 13, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant's application for a Canada Pension Plan (CPP) disability pension was date stamped by the Respondent on March 25, 2014. The Respondent denied the application initially and upon reconsideration. The reconsideration decision was appealed to the Social Security Tribunal of Canada (Tribunal). On July 26, 2016, the Tribunal's General Division determined that a disability pension under the CPP was payable. The General Division found that the Applicant had a severe and prolonged disability in December 2015. The Applicant, through his representative, filed an application for leave to appeal (Application) with the Tribunal's Appeal Division, which was received on September 16, 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* (DESDA), "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 DESDA 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 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] 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 (Minister 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's representative submits that the General Division member erred when she determined that the Applicant had a severe and prolonged disability in December 2015. Specifically, the Applicant's representative cites paragraph 53 of the General Division decision as being problematic. Here, the General Division member explained that she relied on Dr. John's December 30, 2015, report where he stated that the Applicant's conditions made it "extremely difficult for him to perform even a sedentary type of employment on a regular basis." (GD7-3)

[8] The Applicant's representative submits that it was not Dr. John's intention to convince the Tribunal that December 2015 was the date of onset. In an effort to address this, the Applicant's representative obtained additional information from Dr. John dated September 6, 2016. The representative has submitted this new report for consideration at the Appeal Division level.

ANALYSIS

[9] The Appeal Division must first determine whether Dr. John's new September 6, 2016, letter should be considered. Secondly, the Appeal Division must determine whether 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 in its interpretation of the medical evidence on file.

[10] The Applicant's representative submits that the date of onset was determined in error and to support that, he obtained a new letter from Dr. John dated September 6, 2016, in an attempt to explain how the December 30, 2015, date was erroneous (the "clarification letter"). Obviously this "clarification letter" was not available to the General Division at the time of the hearing or prior to the decision being rendered.

[11] New evidence cannot be considered by the Appeal Division because the Appeal Division does not conduct *de novo* hearings. It is the General Division's role to review the evidence and make findings of fact. The General Division member was tasked with weighing the evidence, determining the facts and concluding the matter based on an unbiased analysis of the file as well as the oral evidence provided at the hearing. In *Parchment v. Canada (Attorney General)*, 2017 FC 354 (CanLII), the Federal Court again explained the Appeal Division's role in paragraph 23 of the decision:

> In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing of Mr. Parchment's case. They also do not consider new evidence. The Appeal Division's jurisdiction is restricted to determining if the General Division committed an error (ss. 58(1) (a) through (c) of the DESDA) and the Appeal Division is satisfied that an appeal has a reasonable chance of success (58(2) of the DESDA). Only if the criteria of ss. 58(1) and (2) are met does the Appeal Division then grant leave to appeal.

[12] Additionally, Roussel J. wrote in *Tracey v. Canada (Attorney General)*, 2015 FC 1300 (CanLII), that "[u]nder the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (Belo-Alves, at para 108)."

[13] This was further enunciated in *Marcia v. Canada (Attorney General)*, 2016 FC 1367 (CanLII) where it was determined that new evidence does not constitute a ground of appeal. As the Federal Court stated at paragraph 34,

> New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing de novo. As Ms. Marcia's new evidence pertaining to the

> General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 (CanLII) at para 73).

[14] In a more recent case, *Glover v. Canada (Attorney General)*, 2017 FC 363 (CanLII), the Federal Court referenced *Canada (Attorney General) v. O'keefe*, 2016 FC 503 and concluded that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. Dr. John's report dated September 6, 2016, is new evidence and I cannot accept it in the context of this application for leave to appeal and as such have not considered it.

[15] Now we must turn to the issue of whether the General Division based its decision on an erroneous finding of fact by determining the date of onset as December 30, 2015. The General Division member reviewed both the medical evidence on file and listened to the Applicant's testimony at the hearing. In determining the date of onset, the General Division member wrote in paragraphs 52 and 53 of the decision:

> [52] The Tribunal found the testimony of the Appellant to be credible and forthright. The Tribunal finds that the Appellant has chronic pain in his back, hips and knees that he has experienced regularly since his workplace accident in October 2010. The Tribunal finds that the Appellant has undertaken all recommended treatment including an attempt at weight loss. Despite the Appellant's compliance with the treatment plan including physiotherapy and medication, the Tribunal finds that the Appellant continues to experience pain that interferes with his ability to sit, stand or walk for long periods of time.
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> [53] The Tribunal finds that the Appellant's testimony is corroborated by the medical evidence including that of Drs. Wang, Fung, Leung, and John. In particular, the Tribunal relies on the medical opinion of Dr. John as of December 30, 2015 that the Appellant was incapable of performing even a sedentary job in light of his pain. The diagnosis in the medical documentation is that the Appellant has chronic knee problems with degenerative arthritis as well as pesanserine tendinitis, chronic back pain and a combination of spinal stenosis, knee and hip problems. Further medical evidence confirms that the Appellant has osteoarthritis in his hips and knee.

[16] Additionally, the date of onset is also discussed in the conclusion of the decision at paragraphs 64, 65 and 66:

> [64] The Tribunal finds that despite the treatment and medication the Appellant is not expected to improve and Dr. Wang indicated in 2013 that the Appellant had reached maximum recovery in respect of his surgery to his left femur. Moreover, the Tribunal relies on Dr. Wang's conclusion that the Appellant had a serious injury that many patients never fully recover from. The Tribunal relies on Dr. Leung's conclusion that he was unsure when the Appellant could be expected to recover such that his sitting, standing and walking were not limited. Finally, Dr. John concluded that the Appellant's medical conditions prevented him from working from the end of 2015 onwards.
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> [65] Given the medical evidence filed with the Tribunal as well as the evidence of the Appellant, the Tribunal finds that the Appellant's condition is long continued and of indefinite duration as of his MQP. Therefore, the Tribunal finds that the Appellant has a prolonged disability as of his MQP.
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> **…**
> [66] The Tribunal finds that the Appellant had a severe and prolonged disability in December 2015, when Dr. John concluded the Appellant was incapable of sedentary work. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of April 2016.

[17] The December 30, 2015, report from Dr. John is found at GD-7 and the relevant paragraph reads:

> [The Applicant] has chronic knee problems with degenerative arthritis. He also has pesanserine tendinitis. He also has chronic back pain. Combination of spinal stenosis, knee and hip problems makes it extremely difficult for him to perform even a sedentary type of employment on a regular basis.

[18] In a review of previous medical reports, there is a lack of commentary on the Applicant's complete inability to maintain employment until Dr. John's report of December 30, 2015. Other instances reference attempts at work and offer commentary on the Applicant's conditions, but Dr. John's December 30, 2015, report is the first report where a doctor opines that the Applicant is incapable of even sedentary work.

[19] The Applicant's representative argues that although the report is dated December 30, 2015, Dr. John really meant to indicate that the date of onset was April of 2013. At the time of

the hearing, there were two other relevant letters from a doctor that comment on the Applicant's ability to work. They are as follows:

a) Dr. Wang's letter to Marquardt Paralegal Service dated June 21, 2013, explains that the Applicant cannot return to physical labour work. This report does not comment on his return to other types of employment. It reads:

> Although his femur fracture has healed, the nature of the injury, the difficult road to recovery, and his persistent hip and knee symptoms will prevent him from returning to physical labour. Based on my interactions with Mr. D. F., he has made it very clear to me that he cannot return to physical labour and I fully support him and recommend he not return to physical labour duties. (GD2-76)

b) Dr. Wang's letter of July 6, 2013, to Marquardt Paralegal Service explains that the Applicant cannot return to his previous work. Again, this report does not comment on his ability to work in other types of employment. In fact, this report explains that Dr. Wang had spoken to the Applicant about a career change. The relevant passages read:

> With his persistent hip and knee symptoms, patient made it clear he was in no condition to return to previous work duties which I can completely understand. I believe he should avoid further provocative activities that could place more stress to his hip and knee.
>
> His October 19, 2010 injury did play a role in the need for career change. This was a significant injury requiring surgical treatment. Despite recovering, he continues to be symptomatic and cannot return to his previous work given its strenuous physical demand. (GD2-102)

[20] Neither of these letters indicates that April 2013 was an appropriate date of the onset of disability. In fact, in the July 6, 2013, letter, Dr. Wang does reference the possibility of a career change, indicating that this doctor opined that there was still capacity to work.

[21] The General Division's role is to act as the primary trier of fact. The Appeal Division's role is not to re-adjudicate the file.

[22] Dr. John's letter dated September 6, 2016, is new evidence and is not something the Appeal Division has the jurisdiction to accept.

[23] With respect to the allegation that the General Division erred by determining the date of onset as December 30, 2015–after a review of the file it is evident that the member conducted a proper hearing, weighed the evidence that was before her, made reasonable findings of fact and established the correct law.

CONCLUSION

[24] The Applicant presented no grounds of appeal that would have a reasonable chance of success on appeal. The Application is refused.

Jennifer Cleversey-Moffitt
Member, Appeal Division