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

Citation: *Y. Y. v. Minister of Employment and Social Development*, 2017 SSTADIS 454

Tribunal File Number: AD-17-239

BETWEEN:

Y. Y.

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: September 15, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated December 21, 2016. The General Division had conducted a hearing on the basis of the documentary record and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because his disability was not "severe" prior to the minimum qualifying period (MQP), which ended on December 31, 2006.

[2] On March 20, 2017, within the specified time limitation, the Applicant's authorized representative submitted to the Appeal Division an application requesting leave to appeal detailing alleged grounds for appeal.

THE LAW

Canada Pension Plan

[3] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[4] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[5] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Department of Employment and Social Development Act

[6] According to subsections 56(1) and 58(3) of the DESDA, 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.

[7] 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.

[8] 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;
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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 made in a perverse or capricious manner or without regard for the material before it.

[9] 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]

[10] 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

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

the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[12] In a brief accompanying the application requesting leave to appeal, the Applicant's legal representative submits that the General Division committed the following errors:

(a) It failed to provide the Applicant with an opportunity to respond to the Respondent's submissions. The Applicant claims to have never received these submissions, yet the General Division's decision indicates that it placed heavy reliance on them.

(b) It failed to consider a significant portion of the evidence before it, specifically a package of medical reports that were submitted with the Applicant's October 2015 notice of appeal to the General Division.

(c) It failed to properly consider post-MQP reports, discounting them merely because they were prepared after December 31, 2006 and ignoring their relevance to conditions that originated prior to that date. The Applicant's chronic pain, degenerative disc disease and peripheral neuropathy did not arise overnight.

(d) It declined to hold an oral hearing and decided the appeal on the record, citing the absence of a "gap" in the information before it. However, its decision indicates that, while there was a "gap," the General Division makes no attempt to fill it: In paragraph 33, the General Division writes: "There is no evidence that the appellant attempted to return to work or look for alternative employment." However, the General Division did not make any effort to ask the Applicant about this matter—not even by way of written questions and answers, which is an option under subsection 21(a) of the *Social Security Tribunal Regulations*.

(e) It misapplied the "real world" test set out in *Villani v. Canada*,[3] which requires a decision-maker to specifically consider an applicant's background, including factors such as age, education, language proficiency and work and life experience, in assessing disability. In this case, the General Division briefly addresses *Villani* in paragraph 31, with a boilerplate acknowledgement of the relevant factors, but then did not meaningfully analyze how an individual in their late forties, with only a limited education and deficient English language skills, would be able to sustain substantially gainful employment, given the Applicant's many medical conditions.

ANALYSIS

[13] At this juncture, I will address only the arguments that, in my view, offer the Applicant his best chance of success on appeal.

Alleged Disregard of Medical Documents

[14] It is a well-established principle of law that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it and is presumed to have considered all the evidence.[4] However, all presumptions are subject to rebuttal and, in this case, I see at least an arguable case that the General Division, by ignoring a significant portion of the medical record, may have failed to observe a principle of natural justice.

[15] The Respondent based its denials on medical documents that the Applicant submitted pursuant to his application for benefits. Those medical documents were contained in the Respondent's file (labelled GD2 in the record), which was transferred to the General Division when the Applicant appealed to the Tribunal. Included with the Applicant's notice of appeal (GD1) was an 83-page package of additional medical reports, all of which dated from 2006–07. As far as I can tell, there was little overlap[5] between this material and the documents that had already been submitted: nearly all of it was "new."

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[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[4] *Simpson v. Canada (Attorney General)*, [2012] F.C.J. No. 334 (QL).
[5] *GD1 and GD2 have four documents in common: Dr. Iacobellis' reports dated April 12, 2007, and August 29, 2007; an MRI of the lumbar spine dated May 28, 2007; and Dr. Gyomorey's report dated September 27, 2007.*

[16] On the face of it, the General Division seems to have ignored the package that was submitted with the notice of appeal. I note that its decision referred to every significant document in GD2—14 of them, by my count—but not to a single report in GD1 that was not already disclosed in GD2, even though GD1 alone contained material that predated December 31, 2006, the most relevant period for the purpose of assessing the Applicant's disability.

[17] At this point, I am not concerned with whether the substance of the documents in GD1 significantly differed from those of GD2. What matters now is the real possibility that, in coming to its decision, the General Division overlooked a large volume of potentially relevant medical records *holus bolus*.

Alleged Denial of Hearing Rights

[18] On this ground, I also see an arguable case that the General Division may have denied the Applicant's right to be heard. It is true that a CPP disability claimant bears the burden of proving, on a balance of probabilities, that his or her disability is severe and prolonged according to the criteria set out in paragraph 42(2)(*a*). However, in this case, the General Division relied on the absence of information about the Applicant's efforts to remain in the workforce after ceasing self-employment as an auto mechanic:

> [33] 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). There is no evidence that the appellant attempted to return to work or look for alternative employment when he stopped working in January 2007. Therefore, The Tribunal cannot determine from the evidence before it that the appellant was unsuccessful in obtaining or maintaining employment by reason of his health condition if he never attempted to look for alternative employment. *Inclima* states there is an obligation to pursue alternative employment when the Appellant retains the residual capacity to do so. In this case, the Tribunal is satisfied that the Appellant had the capacity to seek alternative employment but failed to meet his obligation as set out in *Inclima*.

[19] Here, the General Division in effect penalized the Applicant for not attempting to look for work, but there was nothing in the documentary record about this subject one way or another. I note that the CPP disability application materials do not ask claimants for information about any post-injury retraining or work trials. One might argue that, if the General Division intended to rely on the absence of particular evidence that the Respondent

had not demanded, then it was only fair to offer the Applicant an opportunity to supply that evidence—by means of either an oral hearing or written questions and answers. I am ordinarily reluctant to interfere with the General Division's discretionary authority to decide on an appropriate form of hearing, but there may be cause to make an exception in this case.

CONCLUSION

[20] I am granting leave to appeal on all grounds that the Applicant has claimed. 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.

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

Member, Appeal Division