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

Citation: *O. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 489

Tribunal File Number: AD-16-1315

BETWEEN:

O. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: September 26, 2017

REASONS AND DECISION

INTRODUCTION

[1] On August 18, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant.

[2] The Applicant filed a letter—which was treated as an application for leave to appeal (Application)—with the Tribunal's Appeal Division on November 18, 2016.

[3] The Applicant's reasons for appeal can be summarized as follows:

a) The General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

b) The General Division erred in:

    1. not distinguishing mechanical back pain from musculoskeletal back pain;

    2. incorrectly stating that the Applicant has "acute aortic intramural hematoma among some other illnesses" when he has "acute aortic syndrome";

    3. stating that he had been taken to the hospital on June 14, 2014;

    4. using the term "main condition" instead of "main issue," which is the wording in Dr. Coutinho's March 20, 2015, letter;

    5. misquoting other parts of Dr. Coutinho's letter;

    6. stating that he has "a personal responsibility to cooperate" in his health care; and

    7. determining that he had not attempted to return to work.

c) The General Division should not have accepted Dr. Coutinho's "expert opinion." It was sent without his knowledge or approval. The Respondent and the Tribunal did not request clarification from that doctor, nor did they request a second opinion.

ISSUE

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

THE LAW

[5] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant. Moreover, "The Appeal Division may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant."

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

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

[8] 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.

ANALYSIS

[9] The Applicant had applied for a disability pension in April 2015. The Respondent refused the application initially and upon reconsideration on the basis that, while the Applicant had certain restrictions due to his medical condition, the information did not show that those limitations prevented him from doing some type of work.

[10] The Applicant appealed that decision to the Tribunal's General Division. The General Division decided the appeal after conducting a teleconference hearing. The Applicant gave evidence at the hearing. The Respondent was not present but had filed written submissions prior to the hearing.

[11] The issue before the General Division was whether the Applicant had had a severe and prolonged disability on or before December 31, 2016, which was his minimum qualifying period (MQP).

[12] The General Division reviewed the evidence and the parties' submissions. It rendered a written decision that was understandable, sufficiently detailed and that provided a logical basis for the decision. The General Division weighed the evidence and gave reasons for its analysis of the evidence, as well as of the law. These are the General Division's proper roles.

[13] The Application submitted to the Appeal Division argues that the Applicant is disabled, and that the General Division misconstrued evidence and information in the file.

[14] For the most part, the Application repeats the Applicant's submissions before the General Division (that he is disabled and cannot work, and that the Respondent should not have relied upon Dr. Coutinho's reports).

[15] Dr. Coutinho, a cardiologist, is the physician who completed the Applicant's CPP Medical Report, dated March 31, 2015. This is also the physician who authored the reports of: February 3, 2014; March 11, 2014; April 14, 2014; May 21, 2014; June 6, 2014; March 24, 2015; and September 4, 2015, which are in the appeal record.

[16] The Applicant argues that the General Division should not have decided his case based on the medical reports of his own cardiologist. He submits that his cardiologist made "controversial and scientifically unproven statements, opinions and mistakes […] throughout the process," and that a second opinion should have been an option. These are curious arguments, given that the Applicant filed his CPP application using Dr. Coutinho's March 2014 Medical Report and that, in the application and reconsideration processes, he relied on other medical reports of the same physician.

[17] Neither the Respondent nor the Tribunal has a responsibility to seek a second opinion on a claimant's medical condition. The onus is on the claimant to demonstrate that he or she has a severe and prolonged disability as defined in the CPP. It is incumbent on the claimant (and not the Respondent) to seek a second medical opinion, if he or she was dissatisfied with the first opinion (or other opinions) that he or she had received.

[18] The Applicant's ground of appeal that the Respondent and the Tribunal neglected to request clarification from that doctor and that they failed to request a second opinion does not have a reasonable chance of success.

[19] As to the specific factual errors that the Applicant has alleged:

a) The General Division uses the term "mechanical back pain" in paragraphs 19 and 22 and "musculoskeletal" pain in paragraphs 35 and 36. Both "mechanical" and "musculoskeletal" refer to the nature of back pain that is not "inflammatory" in nature. The use of "mechanical back pain" is not an error in a finding of fact made in a perverse or capricious manner or without regard the material before the General Division.

b) The documentary evidence in the appeal record includes both the terms "acute aortic intramural hematoma" and "acute aortic syndrome" (e.g. Dr. Coutinho's April 4, 2014, report). Both terms appear in the Applicant's letters to the Respondent (e.g. the one from September 28, 2015). The General Division did make an error in a finding of fact in a perverse or capricious manner or without regard the material before it by stating in paragraph 30 of its decision that that the Applicant has "acute aortic intramural hematoma."

c) The Applicant was hospitalized on January 15, 2014. The General Division at paragraph 33 of its decision notes this hospitalization. At paragraph 39, the date "June 14, 2014," is stated; however, the report referred to in the same paragraph (at GD2-75 to 78) is dated January 14, 2014. "June" was clearly a typographical error. The General Division did not base its decision on a "June 2014" hospitalization.

d) The General Division uses the term "main issue" in paragraph 40 and "main condition" in paragraph 50. In each instance, reference is made to Dr. Coutinho's March 20, 2015, letter. There is no erroneous finding of fact in the use of "main condition" rather than "main issue."

e) At paragraph 50, the General Division finds that Applicant had "fallen short" on his personal responsibility to co-operate with his own health care. There was evidence in the record upon which the General Division could reasonably have arrived at this finding.

f) The General Division determines, at paragraph 49, that the Applicant "has not attempted to return to a work at a job that would meet the restrictions imposed by Dr. Coutinho." Dr. Coutinho's May 28, 2014, report stated "I explained to him that if he can have a desk job that would not require physical labour, he can certainly pursue this without risk of complications." There is no evidence in the record that, after May 2014, the Applicant attempted to return to work at a desk job for which physical labour would be unnecessary. Therefore, the General Division's finding is not an error in a finding of fact made in a perverse or capricious manner or without regard the material before it.

[20] Once leave to appeal has been granted, the Appeal Division's role is to determine whether the General Division has made a reviewable error set out in subsection 58(1) of the DESD Act and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene. It is not the Appeal Division's role to rehear the case *de novo*. It is in this context that the Appeal Division must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[21] I have read and carefully considered the General Division decision and the record. There is no suggestion that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact that the General Division, in coming to its decision, may have made in a perverse or capricious manner or without regard for the material before it.

[22] I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[23] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division