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

Citation: *G. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 483

Tribunal File Number: AD-16-1350

BETWEEN:

G. W.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: September 25, 2017

REASONS AND DECISION

[1] On September 6, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable because the cumulative effects of the Applicant's shortness of breath, swelling in his legs and feet, as well as his diabetes, high blood pressure and sleep apnea, had not amounted to a severe disability on or before the minimum qualifying period (MQP) of December 31, 2014.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on December 6, 2016.

ISSUE

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

THE LAW

Leave to Appeal

[4] 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 be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[5] 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.

Grounds of Appeal

[6] According to subsection 58(1) of the DESDA, the only grounds of appeal are:

> (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.

BACKGROUND

[7] The General Division decision summarized the medical evidence in some detail under the heading "Written Evidence," including medical documents from both Dr. Ball (family physician) and Dr. Van Dorsser (cardiologist).

[8] The decision provides a description of a May 2014 report from Dr. Van Dorsser, including the prognosis that the Applicant was unable to complete his previous heavy workload (para. 40). The General Division's description of Dr. Van Dorsser's subsequent June 2014 opinion omits his conclusion, namely, that the Applicant was disabled from pursuing gainful employment (para. 41). The decision describes Dr. Ball's evidence of August 6, 2014, which concluded that a job with more sedentary activity (light work) would be entirely reasonable, given the Applicant's functional status, left ventricular function and status post-coronary revascularization (para. 42).

[9] In the analysis component of the decision, the General Division places, "great weight on the evidence of Dr. Ball, Cardiologist, because the Appellant was under his care from 2012 until 2014 and his evidence was objective" (para. 51). The analysis section was silent as to the weight the General Division had assigned to Dr. Van Dorsser's evidence of June 2014.

SUBMISSIONS

[10] The Applicant submits that the General Division made "an important error regarding the facts contained in the appeal file," and that the General Division "erred in law in that he failed to consider the totality of the medical evidence."

ANALYSIS

[11] The Applicant must show a reasonable chance of success on one of the grounds of appeal in the DESDA in order for the Appeal Division to grant leave to appeal.

[12] There may be an error under subsection 58(1) of the DESDA: the General Division may have failed to consider relevant evidence in assessing the Applicant's disability. In its summary of the evidence, the General Division's decision provides a description of three medical reports: two from Dr. Van Dorsser and one from Dr. Ball. Dr. Van Dorsser's reports are dated May and June of 2014 respectively, and Dr. Ball's report is dated in August of that same year. The MQP is December 31, 2014, so the timing of all three reports reveals they are relevant to determining whether the Applicant had a severe disability on or before the MQP.

[13] Dr. Ball's August 2014 conclusion that a sedentary job was reasonable seems to conflict with Dr. Van Dorsser's June 2014 opinion that the Applicant was disabled from pursuing gainful employment. Dr. Van Dorsser's conclusion was omitted from the facts in the General Division's decision, but Dr. Ball's conclusion was expressly included. There is no express statement about the weight assigned to Dr. Van Dorsser's June 2014 opinion, but the General Division gave Dr. Ball's evidence "great weight" because he had treated the Applicant from 2012 to 2014 and because his evidence was objective. The General Division gave reasons why Dr. Ball's evidence had been given great weight but not why it had been preferred over that of Dr. Van Dorsser. If the General Division considered the period of time during which Dr. Van Dorsser had treated the Applicant relative to Dr. Ball, or the objectivity of Dr. Van Dorsser's evidence relative to that of Dr. Ball (and how "objectivity" was assessed, as physicians were not cross-examined), there does not seem to be a clear indication of that in the decision.

[14] The failure to provide reasons for preferring Dr. Ball's evidence over Dr. Van Dorsser's may well be an error under subsection 58(1) of the DESDA. By not referring to Dr. Van Dorsser's finding in its analysis, the General Division may have erred by neglecting to weigh the conflicting medical evidence and by failing to provide reasons for relying on Dr. Ball's report over that of Dr. Van Dorsser's.

[15] The General Division must analyze relevant conflicting evidence and provide an explanation as to what evidence is rejected or given less weight and why (see *Atri v. Canada (Attorney General)*, 2007 FCA 178, and *Canada (Attorney General) v. Ryall*, 2008 FCA 164, and *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92).

[16] The Federal Court has found that overlooking crucial evidence that goes to the heart of the Applicant's claim (medical evidence that supported a severe disability) is an error of fact made in a perverse and capricious manner and without regard to the materials before the General Division (see *Joseph v. Canada (Attorney General)*, 2017 FC 391, paras. 48 and 72).

[17] The Appeal Division has characterized a failure to weigh and provide reasons for preferring one medical report over another as a potential error of mixed law and fact (see *B. M. v Minister of Employment and Social Development*, 2017 CanLII 60467 [SST], para. 22, and *B.M. v Minister of Employment and Social Development*, 2015 SSTAD 111, para. 12), or as a potential error of law (see *S. N. v Minister of Employment and Social Development*, 2015 SSTAD 991, para. 8).

[18] The adequacy of reasons is not a stand-alone basis for quashing a decision. Reasons must be read together with the outcome (see *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26, at para. 18, and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62, para. 14). Reasons need to facilitate an understanding of why the Tribunal made its decision.

[19] The Applicant has an arguable case—the General Division's decision does not explain how it resolved the conflicting medical evidence on the key issue before it. The Appeal Division grants leave to appeal, as the General Division may have 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 pursuant to the DESDA, subsection 58(1)(*c*).

The Applicant's Grounds of Appeal

[20] The Appeal Division does not need to consider any other submissions or grounds that the Applicant has raised at this time. Subsection 58(2) does not require that individual grounds of appeal be considered and accepted or rejected (see *Mette v. Canada (Attorney General)*, 2016 FCA 276).

CONCLUSION

[21] The Application for leave to appeal is granted.

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

Kate Sellar
Member, Appeal Division