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

Citation: *P. O. v. Minister of Employment and Social Development,* 2017 SSTADIS 498

Tribunal File Number: AD-17-162

BETWEEN:

P. O.

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 27, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On November 24, 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 an application for leave to appeal (Application) with the Tribunal's Appeal Division on February 17, 2017.

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

a) The General Division erred in law and 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.

b) The General Division erred in:

   1. failing to take into account his age; and

   2. failing to see that his age and his disability clearly prevent him from performing any work.

c) Medications have side effects, which was not taken into account.

d) There was no suitable employment given his age at the time of his minimum qualifying period (MQP).

e) Dr. Drosdowech's report in June 2006 stated that the Applicant was unable to work at his own or at another occupation.

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 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 2010 and again in 2013. His MQP date in those applications was December 31, 2009. His main disabling condition was a right shoulder condition.

[10] This appeal relates to the Applicant's third application for a disability pension, made in October 2015. His MQP date is the same: December 31, 2009. His main disabling condition is the same: a right shoulder condition.

[11] 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.

[12] 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.

[13] The issue before the General Division was whether the Applicant had had a severe and prolonged disability on or before December 31, 2009, which was the end of his MQP.

[14] The General Division reviewed the evidence and the parties' submissions. It rendered a written decision that was understandable, that was 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.

[15] 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.

[16] For the most part, the Application repeats the Applicant's submissions before the General Division (that he is disabled and cannot work and that one medical report in 2006 states this).

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

a) The General Division did note the Applicant's age at the time of his MQP (54).

b) The Applicant did not present evidence on the side effects of medication on him.

c) The Applicant did not attempt to obtain or maintain any type of employment after 2006. Therefore, the statement "there was no suitable employment" is not supported by any evidence.

[18] The appeal has no reasonable chance of success based on these grounds.

[19] As for Dr. Drosdowech's report in May 2006 (not June), it appears to be an insurance questionnaire. The question asked was "At the present time do you feel your patient is ready to return to the workforce in his/her own or another occupation? Would you support involvement from a Vocational Rehabiliation Consultant to assist in identifying appropriate vocation options?" The doctor's answer was "No." Therefore, in May 2006, Dr. Drosdowech was of the view that the Applicant was not ready to return to the workforce. That opinion is consistent with the Applicant having had shoulder surgery in February 2006.

[20] However, the Applicant's MQP date is December 31, 2009, and Dr. Drosdowech and others provided reports between June 2006 and the MQP date. The General Division noted reports in 2008 and 2009. It concluded that "[t]here is no medical report suggesting the Appellant was precluded from sedentary or light duty work subject to restrictions as to the use of his right upper extremity contemporaneous to his MQP and since." This finding of fact was not made in a perverse or capricious manner or without regard for the material before it.

[21] In June 2008, an occupational therapist determined, among other things, based on assessment results, that the Applicant's workday tolerance was six and a half hours. There is evidence of the Applicant's work capacity in June 2008.

[22] 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 (Attorney General)*, 2003 FCA 117). The Applicant has not looked for work within his functional limitations since ceasing work in February 2006.

[23] It is not an error for the General Division to not specifically refer to the May 2006 document relied upon by the Applicant.

[24] For the above-noted reasons, the Applicant's ground of appeal based on Dr. Drosdowech's May 2006 report does not have a reasonable chance of success.

[25] 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.

[26] 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.

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

CONCLUSION

[28] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division