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

Citation: *R. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 485

Tribunal File Number: AD-17-5

BETWEEN:

R. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: September 25, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated September 19, 2016, which determined that the Applicant was not eligible for a Canada Pension Plan disability pension, as it found that he did not have a severe disability as defined by the *Canada Pension Plan* by the end of his minimum qualifying period on December 31, 2008. The Applicant submits that the General Division erred in law and that it 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.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[5] The Applicant argues that the General Division erred in finding that he was able to work in 2008. He claims that the General Division "did not take into adequate consideration [his] real-life situation" and that it overlooked the fact that he has been unable to work since then, other than at "trivial, sporadic" jobs, which have left him physically and emotionally spent. He claims that the General Division should have more closely examined his situation in 2008 and that it needs to hear from him and his family. He indicates that an appeal will enable him to explain why his condition in 2008 was more devastating that it would have appeared.

[6] The General Division reviewed the Applicant's restrictions, as well as the medical evidence. Despite the fact that the evidentiary record before the General Division exceeded 1,000 pages, there was relatively limited documentary medical evidence addressing the Applicant's medical condition as it existed around the time of the end of his minimum qualifying period.

[7] The Applicant suggests that he might have been deprived of an opportunity to fully present his case and suggests that there should be a rehearing to enable him and his family to testify, but I see that the General Division provided both the Applicant and his spouse with the opportunity to testify about the Applicant's medical history and how it impacted him.

[8] The General Division indicated that, in fact, it was aware that the Applicant had not worked since 2008, but it properly noted that it was required to first examine whether the Applicant had been incapable regularly of pursuing a substantially gainful occupation by the end of his minimum qualifying period.

[9] The Applicant suggests that the General Division may have overlooked some of the medical evidence. In this regard, I note that the Applicant relied on the medical opinion of Dr. Paula Williams, a pain management specialist, including a report dated January 29, 2015, but Dr. Williams began treating the Applicant in only 2011,[1] and she did not have copies of any detailed reports relating to the Applicant's assessment and treatment from

[1] Dr. Williams had seen the Applicant several times before January 2011, as the Applicant had accompanied his wife, who was seeking treatment as well. There is no indication that Dr. Williams treated the Applicant prior to January 2011 (GD5-201).

other medical practitioners (GD1-5 to GD1-6). The General Division also came to this same determination.

[10] The General Division succinctly summarized the clinical notes from the family physician, for the entries between January 2007 and October 2010. The General Division also noted the results of diagnostic examinations and the Applicant's history of investigations and treatment. It noted that much of the medical information arose after the minimum qualifying period had passed. Although it may not have referred to all the medical evidence, a decision-maker is not required to list all the evidence before it, as there is a general presumption that it has considered it all: *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

[11] I have reviewed the medical evidence that was before the General Division. There are extensive notes from the Workplace Safety and Insurance Board (WSIB), following a workplace injury in August 2004. The notes indicate that the Applicant has had numerous investigations and undergone extensive treatment to address his pain and psychological problems, in an effort to facilitate a re-entry into the workforce, but there was relatively little, if anything, that addressed the December 31, 2008 timeframe.

[12] The Applicant participated in a functional restoration program in 2005 (GD5- 213). Upon discharge in September 2005, he demonstrated the ability to perform activities at a level that would be classified as within the "limited" physical demand level as defined by the National Occupational Classification physical demand levels. He was seen to have some permanent functional precautions for the lumbar spine. His employer reportedly was prepared to offer the Applicant a suitably modified job. Ultimately, the Applicant did not return to his former employment because he felt that the modified duties were beyond his abilities. The employer terminated him.

[13] In March 2006, the Applicant saw Dr. Kakar, a psychiatrist, shortly after he had been terminated from his employment. Dr. Kakar diagnosed the Applicant with severe major depression and a chronic pain syndrome. Dr. Kakar noted that the Applicant was receiving intensive cognitive and supportive psychotherapy regularly. The Applicant's medication regime was to be adjusted. The Applicant's response to treatment thus far had been modest

and the prognosis for recovery was guarded. Dr. Kakar was of the opinion that the Applicant was totally disabled and would be unable to do any work. The Applicant would also require ongoing cognitive and supportive psychotherapy (GD5-412 to 414).

[14] The Applicant also saw Dr. Kiraly, in June 2006, for the purposes of a non-economic loss medical assessment. Dr. Kiraly arrived at the same diagnosis as Dr. Kakar. Dr. Kiraly was of the opinion that the Applicant's prognosis for a return to work was guarded, given the chronicity and persistence of his symptoms, in spite of medical care and the passage of time. Dr. Kiraly wrote that the Applicant was a poor rehabilitation candidate due to the persistence of his severe symptoms (GD5-972 to GD5- 974).

[15] The General Division outlined the medical records leading up to the end of the minimum qualifying period. There were no additional medical opinions or records for 2007 or 2008 in the medical file that directly addressed the Applicant's medical status and what treatment he might have been receiving in that timeframe, or what the anticipated prognoses would be.

[16] The Applicant's counsel indicated in a letter dated September 12, 2008 that the Applicant had been driving a truck on a part-time basis in 2007 and in 2008, but any declared earnings were relatively nominal. The earnings history indicates that he earned $10,500 and $7,500 in each of those years (GD2-5).

[17] In December 2008, Rehabilitation Network Canada Inc., on behalf of the WSIB, undertook a transferable skills analysis of the Applicant (GD5-921). It identified possible suitable employment or business alternatives for the Applicant, although it indicated that further testing was required to determine whether the Applicant had the necessary employment aptitudes to realistically pursue these possibilities (GD5-931).

[18] In early January 2009, the WSIB assessed the Applicant. It set out a labour market re-entry plan. In 2009 and 2010, the Applicant underwent academic upgrading to grade 12. He also had computer skills training and attended college preparation courses. However, he reported that he experienced lower back and neck pain, soreness along the right lower limb, and headaches.

[19] In September 2010, Rehabilitation Network Canada Inc. identified potential challenges facing the Applicant. A psycho-vocational assessment performed in January 2009 showed that the Applicant demonstrated a severe level of anxiety and depression. The psychologists recommended that he see a psychiatrist. If the Applicant's problems were to prevent him from progressing in the two-year Architectural Technician Diploma Program, the consultants suggested that appropriate action might be taken, in consultation with the Applicant's WSIB case manager and nurse case manager (GD5-705). It is unclear from the documentary record whether the Applicant accessed any psychiatric services, but ultimately, he earned an architectural technician diploma from Centennial College in 2012.

[20] The General Division seemingly did not address the 2006 psychiatric medical opinions, other than to mention Dr. Kakar's report at paragraph 24, and Dr. Kiraly's report at paragraph 32. Both psychiatrists were of the opinion that the Applicant's prognosis was guarded. Dr. Kakar concluded that the Applicant was totally disabled and would be unable to do any work, while Dr. Kiraly concluded that the Applicant was a poor rehabilitation candidate. However, the Applicant subsequently attended a two-year architectural technician diploma program. The General Division recognized that prolonged sitting from regularly attending school exacerbated the Applicant's back pain, but found that, nevertheless, he was able to regularly attend school from three to four hours per day and attend the program for its duration.

[21] Although the General Division did not directly address the medical opinions of Drs. Kakar and Kiraly, it was clear that the General Division found it unnecessary to do so, given that it found that the Applicant had been able to regularly attend school for three to four hours per day and that ultimately he was able to earn a diploma. Having determined that the Applicant was able to complete retraining well past December 31, 2008, it found that he had the capacity to work by the end of his minimum qualifying period. Given these considerations, it cannot be said that the General Division necessarily overlooked or that it failed to address the 2006 medical opinions regarding the Applicant's capacity.

[22] Essentially, the Applicant is seeking a reassessment on the basis of his particular circumstances. However, subsection 58(1) provides for only limited grounds of appeal. It does not allow for a reassessment or rehearing of the evidence: *Tracey*, *supra*.

CONCLUSION

[23] Given the foregoing, I am not satisfied that the appeal has a reasonable chance of success. This application for leave to appeal is therefore refused.

Janet Lew
Member, Appeal Division