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

Citation: *A. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 524

Tribunal File Number: AD-17-408

BETWEEN:

A. H.

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: October 6, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal). The General Division had conducted a hearing on the basis of the existing 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" during the minimum qualifying period (MQP), which ended on December 31, 2000.

[2] On May 22, 2017, within the specified time limitation, the Applicant submitted to the Tribunal's Appeal Division an application requesting leave to appeal detailing alleged grounds for appeal.

BACKGROUND

[3] The Applicant was born in Pakistan in 1969. He migrated to Canada in 1995 and worked in a restaurant until 1999, when he was deported. As a result of his employment, he made qualifying contributions to the CPP for the years 1995, 1996, 1997 and 1998.

[4] The Applicant first applied for CPP disability benefits on September 14, 2001. As with his subsequent applications, it was made from outside Canada. The Respondent denied the application initially and upon reconsideration. The Applicant then appealed to the now-defunct Review Tribunal. The Review Tribunal dismissed the appeal on December 4, 2003. The Applicant then appealed to the Pension Appeals Board (PAB). The PAB dismissed the Applicant's appeal on July 30, 2007. It does not appear that the Applicant applied for judicial review of the PAB's decision.

[5] The Applicant applied for CPP disability benefits a second time on December 18, 2009. The Respondent denied this application on the basis of *res judicata*. The Applicant did not

request a reconsideration of that decision, nor did it proceed to the Review Tribunal or to the PAB.

[6] On March 30, 2015, the Applicant applied a third time for CPP disability benefits. The Respondent again denied his application, initially and on reconsideration, on the basis of *res judicata*. The Applicant then appealed these denials to the General Division. In a decision dated May 9, 2017, the General Division dismissed the appeal, finding that the principle of *res judicata* was applicable. In doing so, the General Division analyzed the factors set out in *Danyluk v. Ainsworth Technologies*[1] and concluded that there was no reason to exercise its residual discretion to waive *res judicata* and consider the Applicant's disability claim on its merits.

THE LAW

[7] 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.

[8] 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.

[9] 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;

(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 made in a perverse or capricious manner or without regard for the material before it.

[1] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44.

[10] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[2] 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.*[3]

[11] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[13] In his application requesting leave to appeal, the Applicant made the following submissions:

- The General Division made an *ex parte* decision that failed to consider his June 2007 appeal, which made it clear that his eyesight became defective during his stay in Canada.
- The General Division ignored medical evidence that he has continued to receive treatment for his vision in Pakistan. His doctors have declared that he is disabled.
- Like the other tribunals that have heard his claim, the General Division turned down his appeal because it did not want an Asian to receive the disability pension to which he is entitled.
- Contrary to the General Division's assertion, he did not go to Norway to work, but rather to seek treatment. While there, he engaged in part-time, rather than full-time, employment, to defray his expenses. He returned to Pakistan in 2013.

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

- It was the Tribunal's responsibility to ask the Canadian High Commission in Islamabad to issue the Applicant a visa so that he could attend an oral hearing. It was also open to the Tribunal to arrange for a consular doctor to examine the Applicant in Pakistan. No such efforts were ever made.

- The Appeal Division should decide this case on the merits and not on the basis of the General Division's comments, which misrepresent the true story.

ANALYSIS

[14] The Applicant suggests that the General Division dismissed his appeal despite medical evidence indicating that his condition was "severe and prolonged" according to the criteria governing CPP disability.

[15] However, outside of this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, erred in law or based its decision on an erroneous finding of fact. The decision indicates that the General Division reviewed the Applicant's submissions and determined that the doctrine of *res judicata* prevented consideration of his application for CPP disability benefits. The General Division concluded—properly, in my view—that the issue of whether the Applicant was disabled as of his MQP date of December 31, 2000, had already been adjudicated by the PAB in a hearing held on May 31, 2007, and therefore could not be revisited.

[16] I see no error of law in the General Division's analysis of *res judicata* and its applicability to the Applicant's fact situation, nor do I see anything potentially problematic in its use of the *Danyluk* criteria. As the General Division correctly noted, the Supreme Court of Canada held that there were sound public policy reasons underpinning the doctrine of *res judicata*:

> [a]n issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[17] While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must set out some rational basis for their submissions that fall within the enumerated

grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the General Division decision, nor is it sufficient for an applicant to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[18] I will now briefly address the Applicant's specific allegations.

Failure to Consider Prior Appeal

[19] As the General Division correctly determined, the doctrine of *res judicata* prohibited it from assessing evidence that had already been adjudicated pursuant to the Applicant's previous applications. This included evidence that was considered by the PAB in its July 2007[4] decision. To the extent that the General Division did address that decision, it did so only to confirm that (i) it dealt with the same issues as the current appeal, (b) the prior decision was final and (iii) the parties to the two proceedings were the same.

Disregard for Medical Evidence

[20] Having found that *res judicata* barred it from considering the Applicant's disability as of December 31, 2000, the General Division correctly saw no need to conduct a review of the medical record. Any documentary evidence, whether it was generated before or after the July 2007 PAB decision, would be out of bounds if it pertained to the medical conditions that were the basis of the Applicant's 2001 application for CPP disability benefits.

Bias Against Asians

[21] The Applicant suggests that a bias against Asians—or at least applicants residing in Asia—motivated the General Division's denial of his appeal, but he offers no evidence to support this allegation beyond bald assertion. The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[5] has stated that the test for bias is the following: "What would an informed person, viewing the matter realistically and practically and having thought the matter through

[4] The Applicant refers, apparently in error, to the decision date as June 2007.
[5] *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 2 (SCC), 1978 1 SCR.

conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough. An unfavourable disposition, in itself, is insufficient to attract the label of impartiality.

Employment in Norway

[22] The Applicant alleges that the General Division erred in fact by mischaracterizing his employment in Norway, which he says was part-time and undertaken only to offset the cost of medical treatment that he received there.

[23] I see no arguable case that the General Division erred in this instance. In his third application for CPP disability benefits, the Applicant disclosed that, from 2011 to 2013, he worked as a kitchen assistant for up to 54 hours per week—by any reasonable standard a "full-time" job. In any case, the General Division's decision did not turn on the substance of the Applicant's post-MQP work. The General Division discussed the Applicant's Norwegian employment only in the context of determining whether *res judicata* should be waived—specifically, whether the seventh *Danyluk* factor (the potential for injustice) was applicable. Since, as discussed, the General Division found that the matter had already been conclusively adjudicated, it quite appropriately saw no need to consider the evidence on its merits, and that precluded any investigation into whether the Applicant's employment in Norway was "substantially gainful."

The Tribunal's Responsibilities

[24] The Applicant suggests that the General Division had an obligation to call testimony and then take active steps to ease his entry into Canada for the purpose of attending a hearing.

[25] In my view, this submission misunderstands the Tribunal's function and misconstrues its authority. Parliament enacted legislation that gave the General Division the discretion to determine how hearings are to be conducted, whether by personal appearance, videoconference, teleconference or exchange of written documents. I do not lightly interfere with this discretion, particularly where, as in this case, the decision to hold an on-the-record hearing was not made on a whim, but for defensible reasons explained in writing. Those reasons, listed in paragraph 2, indicate that the Applicant's inability to enter Canada played no part in the General Division's decision to proceed in the absence of oral evidence. It simply decided that the Applicant's

testimony was not needed, and I see nothing unreasonable in this, given the background issues and facts in this appeal.

[26] Ultimately, the burden of proof lies with the Applicant to prove his case on a balance of probabilities, rather than with the Respondent or the Tribunal to prove that the Applicant is disabled or otherwise.[6] There is no duty on the Tribunal to solicit evidence, as indicated by subsection 68(1) of the *Canada Pension Plan Regulations*, which states that an applicant for benefits "*shall* supply the Minister" [my emphasis] with documents relating to his or her disability. The Applicant resides in Pakistan but, over the years, his remove from Canada has not prevented him from prosecuting multiple applications and submitting hundreds of pages of medical evidence.

Demand for Assessment of Disability on Merits

[27] Just as the General Division was barred from reassessing the substance of the Applicant's disability claim by virtue of *res judicata*, so too am I. Moreover, the Appeal Division has no mandate to consider evidence of disability on its merits; my authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the precise and narrow grounds of subsection 58(1) and whether any of them put forward an arguable case.

CONCLUSION

[28] The Applicant has not identified any grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division

[6] *Dhillon v. Minister of Human Resources Development* (November 16, 1998), CP 5834 (PAB).