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

Citation: *M. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 548

Tribunal File Number: AD-16-927

BETWEEN:

M. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: October 24, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On April 25, 2016, the General Division of the Social Security Tribunal of Canada determined that a disability pension under the *Canada Pension Plan* was not payable. The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on July 7, 2016. This Application was incomplete, as the Applicant had not filed the required declaration.

[2] On July 18, 2016, the Tribunal wrote to the Applicant's counsel, advised that the document was missing and requested that it be filed. On July 17, 2017, the Tribunal again wrote to the Applicant and stated that, as it had been one year since the incomplete Application had been filed and the missing information had not been provided, the file would be closed.

[3] On August 4, 2017, counsel for the Applicant wrote to the Tribunal, enclosing a declaration signed by the Applicant on July 27, 2017, and requesting an extension of time to file the Application. He also stated that, until he received the July 2017 letter, he was not aware that the Application was incomplete.

[4] I must first decide whether the Applicant should be granted an extension of time to file the appeal or whether the requirement to file the declaration on time should be dispensed with. If an extension of time is granted or the filing requirement is dispensed with, I must then decide whether leave to appeal should be granted.

ANALYSIS

Extension of Time and Dispensing with Filing Requirements

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the operation of the Tribunal. Paragraph 57(1)(*b*) provides that an application for leave to appeal a decision of the General Division, Income Security Section, must be made within 90 days of when the decision was communicated to the claimant. Subsection 57(2) provides that the Appeal Division may grant an extension of time, but in no case may an application be made more than one year after the date on which the decision was communicated to the claimant.

Subsection 40(1) of the *Social Security Tribunal Regulations* lists what must be filed with the Tribunal for an appeal to be complete, including a copy of the General Division decision, the grounds of appeal, an identifying number, contact information for the party seeking leave to appeal and a declaration that the information is true to the best of the appellant's belief. In this case, all of the required documents were filed within 90 days, except a declaration signed by the Applicant.

[6] Unfortunately, the declaration was not filed with the Tribunal until approximately 14 months after the date of the General Division decision, which is after the one-year limit to extend time permitted by the DESD Act. Accordingly, no extension of time can be granted to the Applicant.

[7] I find that there are special circumstances in this case. The Applicant filed the documents required for the Application within the time permitted to do so, except for the declaration. I accept that his counsel did not know that a declaration was missing until July 2017, and that it was filed immediately after that. All of the documents required to complete the appeal have now been filed. There is no indication that the Respondent would be prejudiced if this matter were to proceed. In addition, for the reasons set out below, I am satisfied that the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal. I am therefore prepared to dispense with the requirement that the Applicant file the declaration within 90 days of the date on which the General Division decision was communicated to him.

Leave to Appeal

[8] In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252. The Federal Court of Appeal has also found that an arguable case at law is akin to whether legally an applicant has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[9] Section 58 of the DESD Act sets out the only grounds of appeal that can be considered to grant leave to appeal a decision of the General Division (the section is set out in the Appendix to this decision).

[10] Counsel for the Applicant presented a number of grounds of appeal. In summary, he contended that the General Division decision contained errors of law and errors of fact made in a capricious manner without regard to the material that was before the General Division. I will consider below only those grounds of appeal that may have a reasonable chance of success on appeal.

[11] To begin, the Applicant submits that the General Division erred in its consideration of the Applicant's work activities. The decision notes a medical report that stated that the Applicant was working long hours. However, the Applicant testified that he was able to work only for about two hours each week just to get out of the house. The decision did not reconcile this seemingly contradictory evidence. In *R. v. Sheppard*, , 2002 SCC 26, the Supreme Court of Canada determined that reasons for a decision may be insufficient if there are significant inconsistencies in the evidence that are not addressed in the decision, the evidence relates to a key issue and the record does not otherwise explain the decision in a satisfactory manner. As the decision in this case was based on the evidence surrounding the Applicant's work activities and this was an important issue in the appeal, not dealing with the apparent contradictions in this evidence is a ground of appeal that may have a reasonable chance of success on appeal.

[12] In addition, the General Division decision concluded that the Applicant had failed to discharge his obligation to establish that he could not obtain or maintain work because of his disability. It is unclear, however, what evidence this conclusion was based on, and there is no real analysis of this issue. The decision was based, at least in part, on this finding of fact. The reasons for the decision may also be insufficient in this regard.

[13] The Applicant also asserts that the General Division erred in its interpretation of various medical reports that were filed with the Tribunal. For example, he contends that, although the decision states (paragraph 40) that Dr. LeRoux was of the opinion that the Applicant was capable of light duties in January 2011, but that none were available, Dr. Leroux's report did not say this. The General Division relied on this error in making its decision. If this is the case, the decision may have been based on an error of fact made capriciously or without regard to the material before the General Division.

[14] Further, the decision concluded that the Applicant had capacity to work at the relevant time, but did not consider whether that capacity was "regularly to pursue any substantially gainful occupation." In fact, the Applicant argues that it appears that this conclusion was based on a doctor's letter that set out physical restrictions for a period of time after a hernia repair, and the Tribunal member assumed that such restrictions would not be articulated if the Applicant was unable to work. This may be an error of fact made capriciously or without regard to the material that was before the General Division, as there does not appear to have been any evidentiary basis for the assumption made. In addition, the decision does not consider whether any such work would be substantially gainful as this term is defined in case law. This may be an error of law.

[15] Finally, counsel argues that the Applicant was not reliable, and that reliability must be assessed, as it is a cornerstone element when determining whether a claimant is incapable regularly of pursuing any substantially gainful occupation. The decision contains no analysis of the Applicant's reliability. This may also be an error of law.

CONCLUSION

[16] For the reasons set out above, the Applicant is dispensed with compliance with the requirements to file all documents necessary for the Application to be complete within 90 days of the date that the General Division decision was communicated to him. The Application is to be considered filed on time.

[17] The Application is granted, as the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal.

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

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(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.

58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.