



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. A v. Minister of Employment and Social Development*, 2017 SSTADIS 574

Tribunal File Number: AD-17-595

BETWEEN:

A. A.

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 30, 2017

REASONS AND DECISION

INTRODUCTION

[1] On May 27, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a Canada Pension Plan disability pension was not payable. The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on August 30, 2017.

ANALYSIS

[2] The *Department of Employment and Social Development Act* (DESD Act) governs the operations of this Tribunal. According to subsections 56(1) and 58(3) of the DESD Act, 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.

[3] The only grounds of appeal available to the Appeal Division under the DESD Act 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.

[4] Subsection 58(2) of the DESD Act provides that leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[5] Therefore I must decide whether the Applicant has presented a ground of appeal under section 58 of the DESD Act that may have a reasonable chance of success on appeal.

[6] The Applicant presented a number of arguments as grounds of appeal under section 58 of the DESD Act. They are considered below.

Erroneous Findings of Fact

[7] The Applicant argues that the General Division decision was based on erroneous findings of fact made perversely, capriciously or without regard to all of the material before it. I am satisfied that the following grounds of appeal may have a reasonable chance of success as findings of fact that may have been made without regard to all of the material that was before the General Division.

[8] First, the Applicant argues that the General Division failed to analyze his diabetes in reaching its decision. The decision lists diabetes as one of the Applicant's medical conditions. There is evidence regarding its treatment in the record. The decision does not, however, consider the impact of this condition alone or in concert with the Applicant's other medical conditions. If the General Division reached its decision without considering this evidence, the decision may have been based on erroneous findings of fact contrary to section 58 of the DESD Act.

[9] Similarly, the General Division decision does not analyze the Applicant's mental acuity issues, including that he claimed he could not complete a home inspection course because of memory problems. The decision notes that the Applicant did not complete this course, but does not indicate why.

[10] Finally, in this regard, the General Division decision found that the Applicant did not make efforts to obtain or maintain alternate work. However, the Applicant submits that there was evidence of his attempts to obtain and maintain alternate work, but that he could not do so because of his limitations. This evidence should also have been considered.

Errors of Law

[11] The Applicant also argues that the General Division decision contains errors of law. I am satisfied that the following grounds of appeal may have a reasonable chance of success on this basis.

[12] The General Division decision lists and analyzes a number of medical conditions. The law is clear that all of a claimant's medical conditions must be considered individually and cumulatively to decide whether he is disabled under the *Canada Pension Plan*. In this case, the

General Division may not have considered the Applicant's diabetes or the cumulative effect of all of the Applicant's conditions on his capacity regularly to pursue any substantially gainful occupation.

[13] The legal test for disability under the *Canada Pension Plan* is whether a claimant is incapable regularly of pursuing any substantially gainful occupation. This is correctly set out in paragraph 9 of the decision. However, paragraph 52 of the decision, where the evidence was analyzed, states that the Applicant was not impeded from "working in any capacity." This may have a different meaning in law. The General Division therefore may have applied the incorrect legal test to make its decision.

[14] Lastly, in this regard, the law is clear that predictability is the essence of regularity (see *Atkinson v. Canada (Attorney General)*, 2014 FCA 187). If there was evidence that as a result of his conditions the Applicant could not attend work predictably, it would be an error of law not to consider this in reaching the decision.

Procedural Fairness

[15] Finally, the Applicant contends that the General Division did not parse out or inquire about his various symptoms, limitations and capabilities to determine their status at the end of his minimum qualifying period (the date by which an applicant must be found to be disabled in order to receive a disability pension). It is for the Applicant to present his case, not the Tribunal member. In some circumstances, however, the principles of procedural fairness might impose an obligation on the General Division member to ensure that important legal and factual issues related to his or her decision are canvassed as part of the hearing. I am prepared to hear arguments on this issue and whether this ground of appeal should succeed at the hearing of the appeal.

CONCLUSION

[16] The application for leave to appeal is granted as the Applicant has presented grounds of appeal that may have a reasonable chance of success on appeal.

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

[18] The parties are invited to make submissions on what form the appeal hearing should take with their submissions on the legal issues.

Valerie Hazlett Parker
Member, Appeal Division