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

Citation: *J. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 579

Tribunal File Number: AD-16-1371

BETWEEN:

J. A.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: October 31, 2017

REASONS AND DECISION

INTRODUCTION

[1] On November 4, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable. The General Division acknowledged that the Applicant has pain as a result of injuries sustained in a car accident in May 2010, and that he has depression. However, the General Division found that the totality of the evidence did not support that the Applicant had a disability that rendered him incapable regularly of pursuing any substantially gainful occupation as of the date of hearing and continuing (the minimum qualifying period (MQP) ends on December 31, 2016).

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on December 16, 2016.

ISSUE

[3] The Appeal Division must decide whether the appeal has a reasonable chance of success.

THE LAW

Leave to Appeal

[4] According to ss. 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 the Appeal Division grants leave to appeal. The Appeal Division must either grant or refuse leave to appeal.

[5] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

Grounds of Appeal

[6] According to s. 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[7] The Applicant submits, *inter alia*, that the General Division erred by disregarding evidence of the deterioration of the Applicant's condition up to the MQP. In particular, the Applicant argues that the General Division ignored important changes in the results of the magnetic resonance imaging (MRI) tests in 2010, 2012, 2014 and 2015, and that by 2015 the Applicant's condition had deteriorated from "mild degenerative disc disease" to "moderate to severe foraminal narrowing." The Applicant alleges that the General Division inferred erroneously that the Applicant's condition was static from 2010 up to the MQP, without having regarding for the material before it, and that this led to an erroneous finding about the Applicant's capacity to work, particularly as of 2012 and following.

ANALYSIS

[8] The initial decision-maker is presumed to have considered all of the evidence before it [see *Simpson v. Canada (Attorney General)*, 2012 FCA 82]. This presumption is overturned only when the probative value of the evidence that is not discussed is such that it should have been addressed [see *Villeneuve v. Canada (Attorney General)*, 2013 FC 498].

[9] The General Division outlined the evidence that the Applicant is relying on in stating there was deterioration of the Applicant's medical condition between 2010 and 2015. At para. 13, the General Division noted the existence of the December 2010 MRI, which showed

minimal degenerative changes of the LS-S1 disc space. At para. 14, the General Division noted that in February 2011, further "diagnostic imaging of the cervical spine, lumbar spine and pelvis were negative. No bony or soft tissue abnormality was identified; No degenerative, change or acute abnormality was seen in the lumbar spine." At para. 17, the General Division acknowledged Dr. Chapman's reference to an "MRI had shown some L5 nerve root compression." A repeat MRI was recommended in January 2012, and at para. 22 the General Division noted,

> An MRI of the lumbar spine dated February 6, 2012 showed mild degenerative facet disease through the lumbosacral spine, slightly more moderate at the L4-5 level. Mild degenerative broad based disc bulging with mild spinal stenosis; mild degenerative disc disease with broad based disc bulging at L5-S 1. Left foraminal stenosis related to loss of disc space height with mild fact overgrowth; and no discrete disc herniation (GD3-151).

[10] At para. 24, the General Division noted that in March 2012, Dr. Schneider indicated,

> An MRI scan had shown some degenerative change and bulging at the L4/5 level as well as some mild facet osteoarthritis; degenerative change and bulging at LS/S1 with some facet osteoarthritis which she attributed to mild stenosis of the foramen at the left L5/S1 level. She said he had no evidence of disk herniation or significant nerve root compression.

[11] At para. 30, the General Division noted that, in September 2013, Dr. Angel reported clinical evidence of an "L5-S1 predominant sensory radiculopathy on the left side" and recommended a repeat MRI.

[12] At para. 32, the General Division noted that, in September 2015, an "MRI of the lumbar spine showed stable appearance with moderate to severe left foraminal narrowing at L5 S1 secondary to facet osteoarthritis and disc osteophyte change GD6-3."

[13] However, in its analysis of the evidence, the General Division took note of the MRI from May 2010: "An MRI of the lumbar spine showed mild degenerative disc disease with broad based disc bulging and left foraminal stenosis related to loss of disc space height with mild facet overgrowth" (para. 38). The General Division did not expressly consider and weigh any of the evidence from the subsequent MRIs in its analysis, concluding only that the

Applicant “is reported to have had minimal improvement in his condition despite treatment” (para. 47).

[14] Arguably, repeat MRI results ordered so proximate to the MQP in 2015 had probative value. In particular, the MRI result of “moderate to severe” left foraminal narrowing from 2015 was relevant to the question as to whether the condition deteriorated in the years leading up to the MQP such that the General Division may have needed to address it specifically in determining whether the Applicant had a severe disability that would qualify him for the disability pension. Evidence of a deteriorating condition was arguably important in this case in which the General Division found that the Applicant had capacity for work as early as 2012, several years before the MQP (see para. 46). Without considering the evidence of deterioration between 2010 and 2015, the General Division’s finding of capacity to work may be an error under s. 58(1)(*c*) of the DESDA.

[15] Given that the Applicant has identified a possible ground of appeal under s. 58(1) of the DESDA, the Appeal Division does not need to consider any other grounds raised by the Applicant at this time. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276].

CONCLUSION

[16] The Application is granted. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Kate Sellar
Member, Appeal Division