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

Citation: *V. S. v. Minister of Employment and Social Development,* 2017 SSTADIS 627

Tribunal File Number: AD-17-58

BETWEEN:

V. S.

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: November 9, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 28, 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 because the Applicant failed to prove on a balance of probabilities that his condition had been severe on or before minimum qualifying period of December 31, 2016.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division on January 20, 2017.

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 applicant may bring an appeal to the Appeal Division 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 following are the only grounds of appeal:

(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 generally that the General Division committed errors under ss. 58(1)(*b*) and 58(1)(*c*) of the DESDA, and also that he had new evidence for the Appeal Division to consider.

Alleged Errors

a) Finding of Non-Compliance Is an Error of Fact

[8] The Applicant argues, *inter alia*, that the General Division erred in fact in finding that he had not "optimized his treatment options" (para. 30) by failing to implement a medication change. The Applicant argues that the General Division ignored evidence from his wife at the hearing about his ability to make even the most basic decisions (like selecting what clothing to wear each day) as a result of his disability. The Applicant further argued the General Division had erred in fact in assuming that he had the responsibility to implement medication changes that Dr. De Jesus had recommended in his report to Dr. Kirstine. The Applicant argues the finding that he was non-compliant with treatment was in error.

b) New Evidence

[9] The Applicant seeks to introduce medical evidence before the Appeal Division that was not before the General Division. The Applicant attached a series of medical documents to the Application dated from 1995, the year he had been injured in an explosion. The Applicant's representative then sought out and filed with the Appeal Division a lot of new evidence subsequent to filing the Application that was not before the General Division. The Applicant's

representative argues that this evidence indicates that he may have "had all along undiagnosed and untreated PTSD [post-traumatic stress disorder]." The Applicant's representative argues that, at the General Division, the Applicant was unrepresented, that he was not aware that he needed to submit medical evidence and that, at the hearing, the General Division failed to probe the Applicant about whether he might have undiagnosed PTSD.

[10] The Applicant argues that the General Division erred in failing to consider the impact of the explosion on the Applicant, and that it failed to consider whether the Applicant has a psychological condition that goes back to 1995 that may have gone undiagnosed.

ANALYSIS

a) Finding of Non-Compliance May Be an Error of Fact

[11] The General Division found that the Applicant was non-compliant with treatment and did not have a reasonable explanation for that non-compliance [see *Bulger v. Minister of Human Resources Development* (May 18, 2000), CP 9164 (PAB)]. This finding may be an error of fact under s. 58(1)(*c*) of the DESDA, made in a perverse or capricious manner by the General Division without regard for the evidence before it.

[12] The General Division decision indicates that Dr. De Jesus from the Centre for Addiction and Mental Health (CAMH) had recommended medication adjustment for the Applicant on October 16, 2015, and that the "Appellant testified that he is still considering these changes, but has not yet implemented them." (para. 30) The General Division concluded that the Applicant was non-compliant with Dr. De Jesus' recommendation, that he had failed to establish the reasonableness of his non-compliance and, therefore, that he had not made reasonable efforts to improve his health (para. 30).

[13] Dr. Kristine follows the Applicant in supportive psychotherapy and review of pharmacotherapy (para. 19). The stated purpose of Dr. De Jesus' consultation and report was to assess the Applicant and "[…] make treatment recommendations in the context of symptoms of anxiety and depression." (GD 3-1) The Application asks why, in the General Division's analysis, it seems that the burden is placed on the Applicant (rather than on his treating physician who received the recommendation from CAMH) to change his medications. Given:

(i) Dr. Kristine's recognized role in the Applicant's medication management; (ii) the fact that Dr. Kristine referred the Applicant for the consultation with Dr. De Jesus; and (iii) the fact that the Applicant now states he does not know why the General Division is placing the burden for the decision about medication on him, it is at least arguable that the General Division erred in finding the Applicant was non-compliant. In this context, the fact that the medication change was under consideration and unimplemented up until then does not answer the question about non-compliance absent information about what role the Applicant's treating physician (Dr. Kristine) played in the Applicant's consideration. The decision is silent on Dr. Kristine's role in implementing the recommendations from CAMH. The Applicant argues he was not non-compliant and the General Division made an error. That is an arguable position.

[14] The Applicant also argues that the evidence about his limitations was ignored in the context of the analysis about his treatment non-compliance, which led to the error of fact under s. 58(1)(*c*) of the DESDA. The General Division acknowledges elsewhere in the decision that his wife testified that he could not dress for weather or shower independently or be left unattended (para. 16). This evidence was not expressly considered in determining whether the fact that the Applicant had not yet changed his medications constituted non-compliance.

[15] The General Division is presumed to have considered all the evidence before it, but that presumption will be set aside when the probative value of the evidence that is not expressly discussed is such that it should have been [see *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498; *Kellar v. Canada (Minister of Human Resources Development)*, 2002 FCA 204; and *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366]. It is arguable that the General Division needed to expressly consider the evidence about the Applicant's severe lack of independent decision making (like being unable to determine what clothes to wear in the morning without assistance), when determining whether the fact that the Applicant had not yet changed medications constituted treatment non-compliance.

b) The Appeal Division Will Not Hear or Consider New Evidence

[16] The Appeal Division does not provide a new (*de novo*) hearing, and it normally does not grant leave to appeal on the basis of new evidence [see *Mette v. Canada (Attorney General)*,

2016 FCA 276]. Therefore, it will not consider new evidence or arguments based on that new evidence here.

[17] Given that there is a possible error here under s. 58(1) of the DESDA, at this time, the Appeal Division does not need to consider any other grounds that the Applicant has raised. Subsection 58(2) of the DESDA does not require that individual grounds of appeal be considered and accepted or rejected [see *Mette*, *supra*.]. However, in considering the Applicant's argument about undiagnosed PTSD, the Appeal Division will not review the new evidence the Applicant filed (that was not before the General Division).

[18] On appeal, the Appeal Division would benefit from submissions about the General Division's findings regarding the independent evaluation completed by Dr. Elmpak, as well as whether the treatment of that report also constituted any error under s. 58(1) of the DESDA. The General Division described the test results as "mostly invalid and exaggerated." However, the report recommends that in future the Applicant "[…] be supervised and guided during all measures of testing in order to obtain valid results. It is possible that invalidity in test results were due to his inability to adequately attend and process test items." (GD8-13). The neuropsychological assessment that the General Division referenced (para. 14) may have arisen as a result of Dr. Elmpak's comments about possible reasons for the invalid results (GD8-13).

CONCLUSION

[19] 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