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

Citation: *D. J. v. Minister of Employment and Social Development*, 2017 SSTADIS 650

Tribunal File Number: AD-17-529

BETWEEN:

D. J.

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: November 16, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

OVERVIEW

[1] The Applicant, D. J., who is 45 years old, worked for many years as an industrial driller. He has a history of back pain for which he underwent decompression surgery in 2006. He sustained an on-the-job back injury in November 2011 and, following an attempt to return to work, left employment in March 2013.

[2] In April 2016, the Respondent, the Department of Employment and Social Development, refused the Applicant's application for a disability pension under the *Canada Pension Plan* (CPP), finding no evidence of a severe pathology that prevented him from performing suitable work within his functional limitations.

[3] The Applicant appealed the Respondent's refusal to the General Division of the Social Security Tribunal (Tribunal). It found that the Applicant had failed to demonstrate a severe disability during the minimum qualify period (MQP) ending December 31, 2015 and, even if such a disability existed, the Applicant failed in his obligation to mitigate his condition by declining recommended treatment.

[4] The Applicant has now requested leave to appeal from the Appeal Division, alleging that the General Division failed to take into account the following evidence: (i) his former employer was unable to accommodate his limitation; (ii) he pursued all appropriate treatment options; and (iii) he has only a Grade 9 education, as indicated in his oral testimony.

[5] I have reviewed the decision against the underlying record and concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[6] I must answer the following questions: Does the Applicant have an arguable case that the General Division based its decision on the erroneous findings of fact by disregarding evidence that:

(a) He wanted to continue working for his former employer, but it was unable to accommodate limitations associated with his severe lower back pain;

(b) He pursued all appropriate treatment recommendations;

(c) He attended school up to Grade 9—not Grade 12—as indicted in the questionnaire that accompanied his application—a point that he attempted to correct in his oral testimony;

(d) He is unable to perform any alternate employment as result of his medical condition and his lack of transferable skills.

ANALYSIS

[7] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[1] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[8] The Applicant suggests that, in dismissing his appeal, the General Division disregarded certain aspects of the evidence, but I see no arguable case on any of the points raised.

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[1] DESDA at subsections 56(1) and 58(3).
[2] Ibid. at subsection 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(a) Availability of Accommodations from Former Employer

[9] The Applicant suggests that the General Division failed to consider his evidence that he wanted to continue working for his former employer, but it was unable to offer him accommodation because of his condition.

[10] In making this allegation, the Applicant cites paragraph 39(b) of the decision, but this passage is part of a list summarizing his own submissions and does not represent the General Division's actual findings, which are found under the heading "Analysis."

[11] In any case, it is clear that the decision does not turn on whether TBT Enterprises had alternative work to offer, but whether the Applicant was willing to seek sedentary or modified employment elsewhere. Having considered the available evidence, the General Division concluded that he was not and drew an adverse inference from his failure to investigate alternative employment options.

[12] In my view, this submission would have no reasonable chance of success on appeal.

(b) Pursuit of Treatment Options

[13] The Applicant suggests that the General Division found, contrary to the evidence, that he had failed to follow all his physicians' treatment recommendations.

[14] I see no reasonable chance of success on this ground. It is open to the General Division, as trier of fact, to sift through the evidence and weigh it as it sees fit, provided that it does so within the parameters established by subsection 58(1) of the DESDA. In this case, I see no indication that the General Division ignored the Applicant's stated reasons for eschewing pain medication; in fact, it addresses them directly in paragraphs 53 and 54 of its decision, finding that the Applicant, given his reaction to Advil, had not provided a rational explanation for refusing to investigate alternative pain medication regimes. As well, the General Division finds in subsequent paragraphs that the Applicant had unreasonably failed to follow through on advice to take Lyrica, try steroid injections or attend physiotherapy and pain management counselling. The Applicant has not specified how these findings are incorrect, and I do not see how they are inconsistent with underlying evidentiary record.

(c) Highest Level of Education Attained

[15] The Applicant suggests that the General Division disregarded his attempt to correct the record during the oral portion of the hearing, when he testified that he had attended school up to Grade 9, not Grade 12, as indicted in his questionnaire.

[16] I see no arguable case on this point. While the Applicant may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the relevant evidence, assess its quality, and determine what if any, it chooses to accept or disregard.[4]

[17] In fact, paragraphs 7, 9, 42 and 47 directly address the Applicant's contradictory evidence on this question, and the decision indicates that the General Division did not ignore his evidence that he dropped out of school in Grade 9, but rather considered it and found it wanting.

(d) Lack of Transferable Skills

[18] I see no arguable case that the General Division overlooked evidence that the Applicant's medical condition and lack of transferable skills rendered him unable to perform alternate employment.

[19] In my view, this allegation is so broad that it amounts to a bid to reargue the chief issue under appeal. However, the Appeal Division does not ordinarily consider disability cases on their merits; the law permits it to intervene only if the General Division has committed an error that falls within the relatively narrow categories set out in the DESDA. In this case, the General Division undertook a detailed and meaningful analysis of the evidence underlying the Applicant's medical conditions and the extent to which they affected his capacity to regularly pursue substantially gainful employment as of the MQP.

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[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

CONCLUSION

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

Member, Appeal Division