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

Citation: *M. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 685

Tribunal File Number: AD-17-247

BETWEEN:

M. C.

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 28, 2017

REASONS AND DECISION

INTRODUCTION

[1] On January 16, 2017, 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 found that the Applicant had failed to establish a severe disability on or before his minimum qualifying period (MQP) of December 31, 2013. Further, the General Division found that the Applicant's disability was not prolonged as defined in the CPP because, although he experienced symptoms since an accident in 2006, he made significant improvement with treatment.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on March 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 that the General Division erred in law in making its decision under s. 58(1)(*b*) of the DESDA, and that the General Division based its decision on erroneous findings of fact that it had made without regard for the evidence before it under s. 58(1)(*c*) of the DESDA.

[8] First, the Applicant argues that the General Division wrongly focussed on the Applicant's earnings as evidence that his disability was not severe, even though those earnings had been greatly reduced in 2012 and had ceased completely in 2013 (the MQP ended December 31, 2013). The General Division stated that the Applicant's counsel "argued, very strongly" that the Applicant was "disabled as of 2007, with no possibility that he could have become disabled at a later date." (para. 38) The Applicant continues to argue that the source of the income since 2007 was not from work, and that, in any event, the General Division misstated his position as he did make an alternative argument that his disability became severe in 2011.

[9] Second, the Applicant argues that the General Division's finding that he had capacity to work was an error. The Applicant argues that, in reaching that conclusion, the General Division stated that there were no medical opinions indicating he was unable to work at any occupation (para. 43). The Applicant argues that the General Division ignored Dr. McGovern's report of May 16, 2014, which was shortly after the end of the MQP (GD3-328 to 329). That report

stated: “I think his emotional distress has likely overshadowed a lot of his assessments in recent years, but I do not believe he is employable.”

[10] Finally, the Applicant argues that the General Division erred in its application of the Federal Court of Appeal’s decision in *Inclima v. Canada (Attorney General)*, 2003 FCA 117. *Inclima* states that, where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person’s health condition. The Applicant argues that, if the Tribunal erred in fact in concluding that the Applicant had capacity to work, then it is at least arguable that there was no work capacity and that, therefore, *Inclima* should not have been applied at all. Second, the Applicant argues that the General Division “uses *Inclima* in reference to the Appellant’s earnings but fails to mention at all the lack of earnings in 2012 and 2013.”

ANALYSIS

[11] The General Division expressly stated (at para. 43) that none of the medical reports indicated that the Applicant was unable to work at any occupation. At para. 44, the General Division finds that the Applicant did earn income in 2008 to 2011, “presumably working in the construction field” and that he “produced no evidence that he was unable to maintain this work because of his condition.” The Applicant maintains his position that the income in those years was claimed for tax purposes as income, but it was actually the use of credit. As such, he neglected to provide any evidence that he could not maintain the work in construction in 2008 to 2011 because he does not concede that he worked during that period.

[12] However, the Applicant did provide a report from Dr. McGovern dated May 2014 (several months after the expiry of the MQP) that concluded expressly “I do not think that he is employable.” That report is not mentioned in the General Division’s decision. It is arguable that the General Division ignored that report in deciding the Applicant had capacity for work. The report was several months after the end of the MQP, but it provides opinion or context about previous assessments and then provides a clear opinion that the Applicant was not employable. There may be an error here under s. 58(1)(*c*) of the DESDA. The threshold is low, and the Applicant has a reasonable chance of success on this question.

[13] 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]. Here, Dr. McGovern's evidence from May 2014 was not discussed, and the statement that there was no evidence indicating that the Applicant was unable to work at any occupation is arguably in error.

[14] Given that the Applicant has identified a possible error under s. 58(1) of the DESDA, the Appeal Division does not need to consider any other grounds that the Applicant has raised at this time. The DESDA s. 58(2) does not require that individual grounds of appeal be considered and accepted, or rejected [see *Mette v. Canada (Attorney General)*, 2016 FCA 276]. The Applicant is not restricted in his ability to pursue any of the grounds raised in his Application.

CONCLUSION

[15] 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