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

Citation: *G. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 713

Tribunal File Number: AD-17-397

BETWEEN:

G. F.

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: December 7, 2017

REASONS AND DECISION

INTRODUCTION

[1] On February 1, 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 because the Applicant did not have a severe disability on or before his minimum qualifying period (MQP), which ended on December 31, 2014.

PRELIMINARY ISSUE

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on May 16, 2017. The Applicant's representative indicated that the Applicant received the General Division's decision on February 16, 2017. On May 17, 2017, the Tribunal wrote to the Applicant confirming receipt of the complete Application on the day it was received, which was May 16, 2017. The letter indicated that the Application appeared to have been filed more than 90 days after the date that the decision was communicated to the Applicant.

[3] The *Social Security Tribunal Regulations* [at s. 19] set out when General Division decisions are deemed communicated. Based on s. 19(1)(*a*), the General Division decision was deemed communicated on February 11, 2017. This presumption can be rebutted. The Applicant is represented and indicated without explanation that he received the General Division decision on February 16, 2017. The Appeal Division accepts this submission and therefore finds that the General Division decision was communicated on February 16, 2017. The *Department of Employment and Social Development Act* (DESDA) states [at s. 57(1)(*b*)] that an applicant must make an application for leave to appeal to the Appeal Division within 90 days of the Tribunal communicating the decision to the applicant (the 90-day limit). The Application was received within the 90-day limit. The Application was filed in time and no extension of time is required in order to proceed.

ISSUE

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

THE LAW

Leave to Appeal

[5] 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 Divis ion only if the Appeal Division grants leave to appeal. The Appeal Division must either grant or refuse leave to appeal.

[6] 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

[7] 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

[8] The Applicant submits that the General Division misapplied the test for a severe disability because it approached the Applicant's medical conditions individually rather than assessing them in their totality to determine their cumulative impact as is required [see *Bungay v. Canada (Attorney General)*, 2011 FCA 47]. Specifically, the Applicant argues that the General Division failed to consider how the Applicant's diabetic neuropathy; entrapment of the left ulnar nerve at the cubital tunnel and left median nerve at the carpal tunnel; and the tear in his rotator cuff all impose physical limitations that may combine to significantly limit the physical tasks the Applicant was able to perform on or before the end of the MQP. The Applicant argues that the General Division failed to consider the Applicant's impairments cumulatively when considering whether he had capacity for sedentary work, and whether he was a candidate for retraining.

[9] The Applicant submits that the General Division made an erroneous finding of fact without regard to the record in determining that the Applicant did not act reasonably in pursuing treatment recommendations. The Applicant argues that the General Division did not ascribe appropriate weight to the physiotherapy the Applicant testified that he had attempted, and to the barriers he faced in getting to physiotherapy. The Applicant also argues that the General Division did not consider the impact that surgery to correct the entrapment of the left median nerve at the carpal tunnel might have had in light of the Applicant's diabetic neuropathy.

ANALYSIS

[10] The Applicant argues that the General Division did not consider the impact that surgery to correct the entrapment of the left median nerve at the carpal tunnel might have in light of the Applicant's diabetic neuropathy. There is no description in the General Division decision about any possible impact of that surgery in light of the Applicant's diabetic neuropathy. If evidence about such an impact was before the General Division, it might have been relevant to the question as to whether the Applicant's non-compliance with treatment was reasonable.

[11] 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].

[12] Evidence of some kind of contraindication or impact of that surgery (to correct the entrapment of the left median nerve at the carpal tunnel) with respect to his diabetic neuropathy was relevant to the question of whether the Applicant's failure to pursue the surgery was reasonable. The General Division decision states (para. 68) that the Applicant

> did not specifically testify why he refused surgery for the ulnar nerve entrapment/carpal tunnel. Absent a medical report setting out the risks attendant on surgery and confirming that the Appelant's unwilingness to pursue surgery was reasonable, the Tribunal is unable to conclude on the available medical evidence that the Appelant's unwilingness to pursue surgery for this condition was reasonable.

[13] An "arguable" case is a low threshold. It is arguable that the General Division ignored that evidence contrary to s. 58(1)(*c*) of the DESDA. However, on appeal the Applicant will need to provide a more detailed submission as to where this evidence about the diabetic neuropathy and the surgery to correct the nerve entrapment is located in the record for the Appeal Division. If the Applicant takes the position that the evidence was in the form of testimony and he requires the recording of the hearing in order to pinpoint that evidence in the record, he may request a copy of the hearing from the Tribunal so that the Tribunal can provide it to the parties.

[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 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].

[15] The Applicant is not restricted in his ability to pursue the grounds raised in his Application. However, if he continues to rely on the argument that the General Division erred in failing to take into account the cumulative impact of three of his conditions, the Applicant

should be prepared to argue whether that cumulative analysis as required by *Bungay* was necessary in law in light of the General Division's finding that for two of the three conditions, the Applicant's failure to comply with treatment was not reasonable (see paras. 68 and 74).

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