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

Citation: *M. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 721

Tribunal File Number: AD-17-513

BETWEEN:

M. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: December 8, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant fell off the roof of a building and struck his head in March 2014. He applied for a disability pension under the *Canada Pension Plan* (CPP) in February 2015, but he did continue some work until January 2017. His application for a disability pension was denied by the Respondent, the Minister of Employment and Social Development (Minister), as was his request for reconsideration. He then appealed to the General Division of the Social Security Tribunal of Canada (Tribunal), where a hearing was held in April 2017, but the appeal was later dismissed.

[2] In July 2017, the Applicant filed this application for leave to appeal with the Tribunal's Appeal Division. For the reasons described below, I have decided that leave to appeal should be granted.

THE LEGAL FRAMEWORK

[3] The Tribunal is created and governed by the *Department of Employment and Social Development Act* (DESD Act). The DESD Act establishes a number of important differences between the Tribunal's General Division and its Appeal Division.

[4] First, the Appeal Division is generally focused on particular errors that the General Division might have made. More specifically, the Appeal Division can interfere with a General Division decision only if one of the following errors set out in subsection 58(1) of the DESD Act is established:

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.

[5] A second important difference established by the DESD Act is that most appeals before the Appeal Division must follow a two-step process:

a) The first step is known as the application for leave to appeal stage. This is a preliminary step that is intended to filter out those cases that have no reasonable chance of success.[1] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground upon which the proposed appeal might succeed?[2]

b) If leave to appeal is granted, the file moves on to the second step, which is known as the merits stage. It is at the merits stage that appellants must show that it is more likely than not that the General Division committed at least one of the three possible errors described in subsection 58(1) of the DESD Act. The expression "more likely than not" means that appellants have a higher legal test to meet at the second stage as compared to the first.

[6] This appeal is now at the leave to appeal stage, meaning that the question I must ask myself is whether there is any arguable ground on which the proposed appeal might succeed. It is the Applicant who has the responsibility of showing that this legal test has been met.[3]

ANALYSIS

[7] In his application requesting leave to appeal, the Applicant submits that the General Division made errors of law and fact. In general, the Applicant alleges that the General Division (AD1-21 and 40 to 52):

a) applied the wrong legal test when assessing whether he had a severe disability;

b) misinterpreted paragraph 42(2)(*a*) of the CPP by adopting a piecemeal approach to the evidence, failing to consider the Applicant's "real world" factors, and failing to consider the Applicant's uncontradicted testimony that he had been working for a "benevolent employer"; and

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[1] DESD Act, at subsection 58(2).
[2] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at paragraph 16.
[3] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paragraph 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20.

c) made errors of fact in finding that the Applicant could work for someone other than a "benevolent employer", by concluding that the absence of certain medical visits was indicative of a lack of severity, and in interpreting Dr. Kennedy's report of December 30, 2017 (GD8-3).

[8] The Minister has not filed any submissions on the question of whether leave to appeal should be granted.

Errors of Law

[9] The legal test for a severe disability is set out in subparagraph 42(2)(*a*)(i) of the CPP as follows: "a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation."

[10] Nevertheless, the Applicant highlights the following passages from the General Division's decision, which suggest that a different test might have been used (underlining added):

a) Paragraph 38: "Although it may be difficult for the Appellant to find another job given his education and limited work experience, he has demonstrated that it is <u>not impossible</u>, with or without a benevolent employer."

b) Paragraph 40: "However, the Tribunal must determine whether these conditions prevent him from working <u>in any capacity</u>. While he may not be able to perform his regular occupation, his ability to earn a consistent amount, his ability to continuously obtain and maintain employment until January 2017, and the December 2016 comments from Dr. Kennedy demonstrate that he is capable of working regularly <u>in some capacity</u>."

[11] In keeping with the Applicant's theory, I also note paragraph 37 of the decision, where the General Division wrote this (underlining added): "The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on <u>his or her inability to perform any work</u> (*Klabouch v. Canada (Social Development)*, 2008 FCA 33)."

[12] In light of these passages from the General Division's decision, I am satisfied that the Applicant has raised an arguable ground under paragraph 58(1)(*b*) of the DESD Act and on which the appeal might succeed. As a result, leave to appeal is granted.

[13] Since I have granted leave on one ground, it is not necessary for me to consider any of the other issues that were raised by the Applicant, though all may be considered at the second step of the proceeding (i.e. the merits stage).[4]

[14] It is worth stressing at this point that nothing in this decision prejudges the result of the appeal on its merits. It is at the merits stage that the Applicant will have to show that it is more likely than not that the General Division committed at least one of the errors set out in subsection 58(1) of the DESD Act.

CONCLUSION

[15] The application for leave to appeal is granted.

Jude Samson
Member, Appeal Division

[4] *Mette v. Canada (Attorney General)*, 2016 FCA 276, at paragraph 15.