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

Citation: *R. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 744

Tribunal File Number: AD-17-531

BETWEEN:

R. M.

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: December 18, 2017

DECISION AND REASONS

DECISION

Leave to appeal is granted.

OVERVIEW

[1] The Applicant, R. M., who is now 59 years old, has a history of drug and alcohol abuse and has been diagnosed with bipolar disorder. He is a high school graduate and has a certificate in hospitality management. He has held a variety of jobs over the years, mainly in the retail industry. His most recent full-time employment was as a store manager for a sporting goods outlet, a job that ended in 2008 when he was laid off. He continued to apply, unsuccessfully, for managerial jobs, and has more recently taken a part-time job at a sign installation company.

[2] In December 2015, the Respondent, the Minister of Employment and Social Development (Minister), refused Mr. R. M.'s application for a disability pension under the *Canada Pension Plan* (CPP), citing his ongoing part-time job and what it deemed insufficient medical evidence that his condition prevented him from performing substantially gainful work.

[3] Mr. R. M. appealed the Minister's refusal to the General Division of the Social Security Tribunal of Canada (Tribunal). In its decision of April 25, 2017, it acknowledged that Mr. R. M. had followed a "tumultuous path," but found that his addictions and bipolarity did not amount to a "severe and prolonged" disability as of the minimum qualifying period (MQP), which ended on December 31, 2011.

[4] On July 26, 2017, Mr. R. M.'s legal representative filed an application requesting leave to appeal with the Tribunal's Appeal Division, alleging that the General Division had committed the following errors:

(a) It failed to observe a principle of natural justice by failing to record the oral portion of Mr. R. M.'s hearing;

(b) It erroneously found that

(i) Mr. R. M. had not been diagnosed as bipolar as early as 2002–03;

(ii) Mr. R. M. had refused opportunities to work more hours in 2015.

(c) It failed to apply *Canada (Attorney General) v. St.-Louis*[1] in giving insufficient consideration to evidence that Mr. R. M.'s disability was severe in the context of his personal circumstances;

(d) It improperly applied the CPP disability test by disregarding case law[2] that obliges consideration of "regularity";

(e) It failed to apply *Bungay v. Canada*[3] by failing to consider all Mr. R. M.'s conditions and their collective impact on his functionality in a "real world" context; and

(f) It failed to apply *Inclima v. Canada*[4] when it found that Mr. R. M. had some capacity to return to work as of the MQP.

[5] I have reviewed the General Division's decision against the underlying record and concluded that Mr. R. M. has a reasonable chance of success on appeal for at least one of the above grounds.

ISSUES

[6] 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,[5] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of

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[1] *Canada* (*Attorney General) v. St.-Louis*, 2011 FC 492.

[2] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; *Atkinson v. Canada (Attorney General)*, [2014] FCJ 840 (QL); *Canada (Minister of Human Resources Development) v. Gallant* CP 06612; *Eddy v. Minister of Human Resources Development* (2000) 8586 PAB; *M.T. v. Minister of Human Resources and Social Development* 28161.

[3] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

[4] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[5] DESDA at subsections 56(1) and 58(3).

success.[6] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[7]

[7] I must determine whether Mr. R. M. has an arguable case for any of the grounds he has raised in his application requesting leave to appeal.

ANALYSIS

[8] Having reviewed Mr. R. M.'s submissions against the record, I am satisfied that he has an arguable case.

[9] Several of Mr. R. M.'s grounds of appeal are linked. He argues that the General Division failed to apply the complete definition of "severe," as set out in subparagraph 42(2)(*a*)(i) of the CPP, which obliges the trier of fact to consider an applicant's capacity to offer regular performance—i.e., attend work predictably or with consistent frequency. This raises the question of whether the General Division erred in finding that Mr. R. M. had residual capacity, which in turn demands examination of how it characterized the series of part-time jobs that occupied the last few years of his working life.

[10] In paragraph 18 of its decision, the General Division noted Mr. R. M.'s testimony about his last job at Sign Art as follows:

> He stated he was working enough hours in the summer, and he probably could get more hours and work full time. He did not look for any other work while working part time in the summer at Sign Art.

[11] The General Division clearly relied on this purported statement in its analysis, writing in paragraphs 80 and 81:

> The Appellant states he has not looked for any work since then though he worked at Sign Art in 2015. The Tribunal accepts that this was not substantially gainful. He stated he was not called in to work much at Sign Art as he was not skilled at using the tools involved in the job. He also stated it is likely he could have worked more or even full time. He chose not to pursue more work.

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[6] DESDA at subsection 58(1).
[7] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

> The Tribunal finds there is evidence of work capacity at the time of the MQP and beyond and that the Appellant has failed to prove an effort at obtaining and maintaining employment was unsuccessful by reason of his health condition.

[12] The General Division accepted that Mr. R. M.'s seasonal sign installation job during the summer of 2015 was "not substantially gainful" and, indeed, his most recent Record of Employment[8] on file indicates that he has registered no earnings above the year's basic exemption since 2008. Nevertheless, the General Division found that Mr. R. M. had residual capacity because he said he could have worked more but "chose" not to.

[13] I have conducted a preliminary review of the entire audio recording of the April 15, 2017 videoconference. It is true that the presiding General Division member seems to have positioned her voice recorder too close to her keyboard, which she used to take notes throughout the proceedings. That said, the resulting clacking sound, while distracting, did not prevent me from hearing and understanding nearly every word that was said during the 76-minute hearing.

[14] Mr. R. M.'s job as a handyman at Sign Art Centre was discussed on four occasions[9] during the hearing. Although I am open to further submissions on this point, I did not hear Mr. R. M. testify to the effect that he probably could have worked "more hours" in 2015. In its decision, the General Division conveyed the impression that installation assignments were available on request and that Mr. R. M. chose not to take them for reasons other than his health or ability. However, the audio indicates that Mr. R. M. clearly said that Sign Art offered him up to 15–20 hours per week but sometimes two weeks would pass between calls. He said that he was probably last on the call list and that they did not call him the next summer. He said that he did not know why but suspected that his bipolarity had something to do with it: "I was getting nervous, because I felt like they were watching me all the time…"[10]

[15] The General Division also wrote that Mr. R. M. said he "did not look for any other work while working part time in the summer at Sign Art," but the recording seems to suggest otherwise. At 41:19 of part 1, there was this exchange:

> Q: Why could you not get another job while you worked for Sign Art?

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[8] Found at GD5-7.
[9] Part 1 from 13:50 to 16:50 and 41:10 to 42:40; part 2 from 11:00 to 12:20 and 20:10 to 20:55.
[10] Part 1, 42:20.

A: I have no idea.

Q: Did you look?

A: Not as much as I should have, but I tried. No one was willing to give me a chance, I guess. I'm not sure.

[16] Later, at 20:15 of part 2, the subject came up again, although this time Mr. R. M. indicated that he hoped to get more hours at Sign Art:

Q: Again, you didn't look for other jobs while working at Sign Art? Or in between the periods?

A: Well, because she had me working enough in that summer where I thought maybe I could work here part-time in the summer and then I could maybe get on there full-time or something. And nothing ever happened after that.

[17] In my view, there is at least an arguable case that the General Division based its decision on an erroneous finding that Mr. R. M. was not looking for substantially gainful work in 2015 or may have passed up opportunities for same. In doing so, it may have found him capable of more regular performance than the evidence warranted.

CONCLUSION

[18] I am granting leave to appeal on all grounds. I invite the parties to provide submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[19] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division