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

Citation: *B. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 750

Tribunal File Number: AD-17-297

BETWEEN:

B. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: December 19, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant was born in Poland. He moved to Canada and worked in a number of jobs and obtained post-secondary training. He last worked at Lakeridge Health X with nuclear medical equipment. He was laid off from this work in 2010. He claims that he was disabled and no longer able to work since August 2011. The Applicant has been diagnosed with a number of medical conditions, including diabetes, diabetic retinopathy, nerve pain, hives, high blood pressure, attention deficit hyperactivity disorder, and mental illness. He also has side effects from the medication he takes for these conditions.

[2] The Applicant applied for a Canada Pension Plan disability pension in 2012. The Respondent refused the application initially and after reconsideration. The Applicant appealed the reconsideration decision to the Social Security Tribunal of Canada (Tribunal). On October 15, 2015, the Tribunal's General Division decided that his disability was not severe under the *Canada Pension Plan*. He appealed this decision and on August 10, 2016, the Tribunal's Appeal Division decided that the General Division had erred, and referred the matter back to the General Division for a new hearing. On January 13, 2017, the General Division again decided that the Applicant's disability was not severe. The Applicant filed a second application for leave to appeal (Application) with the Tribunal's Appeal Division on April 7, 2017.

ANALYSIS

[3] The *Department of Employment and Social Development Act* (DESD Act) governs the operation of this Tribunal. According to subsections 56(1) and 58(3) of the DESD Act, an appeal to the Appeal Division may be brought only if leave to appeal is granted, and the Appeal Division must either grant or refuse leave to appeal.

[4] The only grounds of appeal available to the Appeal Division under the DESD Act are the following:

> 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] Subsection 58(2) of the DESD Act provides that leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. I must decide whether the Applicant has presented a ground of appeal under section 58 of the DESD Act that has a reasonable chance of success on appeal.

[6] First, the Applicant asserts that he suffers from diabetic neuropathy, lower back pain, and dysesthesia pain. The Applicant also contends that he suffers from chronic pain, and includes a definition of this condition from Wikipedia. He further refers to the decision in *Curnew v. Minister of Human Resources Development*, CP12886 (PAB), which set out that it is difficult to establish when a progressive condition has its exact onset. This is not disputed and does not point to any error made by the General Division.

[7] The Applicant also points out that the Pension Appeals Board and courts have determined that chronic pain may not have objective medical evidence to substantiate it. This is also not disputed. The General Division accepted that the Applicant suffers from a number of medical conditions that cause pain, and that he experiences pain. The General Division acknowledged the Applicant's claim that he was unable to work because of the amount of narcotic medication he was taking for pain control, which caused him to be dizzy and impaired (see paragraphs 11, 49, and 50), and that substantial narcotic use could cause this impairment.

[8] The Applicant argues that the General Division erred as it did not place great weight on the information he provided from third-party sources about the potential side effects of the medication prescribed to him, and his mathematical calculation that this dosage must render him impaired such that in the context of impaired driving, he could be subject to legal sanction. Paragraphs 52 to 55 of the General Division decision clearly state that little weight was given to this evidence and why. With this argument, the Applicant is essentially asking the Appeal Division to re-evaluate and reweigh the evidence that was put before the General Division. This

is the province of the trier of fact, the General Division. The tribunal deciding whether to grant leave to appeal should not substitute its view of the persuasive value of the evidence for that of the tribunal that made the findings of fact (*Simpson v. Canada (Attorney General)*, 2012 FCA 82).

[9] Similarly, the Applicant contends that the General Division was biased because it disregarded evidence he produced from Alberta Oil Sands about drug or alcohol impairment at this workplace. This argument also relates to the weighing of evidence and is not a ground of appeal that has a reasonable chance of success on appeal for the reasons set out above.

[10] In addition, this argument does not point to any bias by the General Division. The decision clearly set out in a logical, intelligible, and defensible manner why no weight was placed on this evidence (paragraph 51). A bare allegation of bias is insufficient to establish this as a ground of appeal. The Applicant has provided nothing to support this allegation.

[11] The Applicant also submits that the General Division member failed to answer his question why the same government Minister would accept an incapacity to work for the purposes of Employment Insurance sickness benefits, but not for Canada Pension Plan disability benefits. This submission does not point to any error by the General Division. The correct legal test for the disability pension was set out in the decision and applied to the facts.

[12] Finally, in this regard, the Applicant disagrees with the General Division statement in paragraph 62 of the decision that “his various conditions are uncured but controlled to a degree by medication” and suggests that this contradicts the statement in paragraph 60 that there was very little treatment, aside from medication. These statements are supported by the evidence set out in the decision. They are not contradictory and do not point to any error made by the General Division.

[13] For these reasons, I find that the grounds of appeal set out above do not have a reasonable chance of success on appeal.

[14] However, the Applicant has presented one ground of appeal that may have a reasonable chance of success. He contends that the General Division erred as it placed weight on the fact that he collected regular Employment Insurance benefits in 2010, and that this indicated that he

was ready, willing, and able to work, despite his limitations at the minimum qualifying period (the date by which a claimant must be found to be disabled to be eligible to receive a disability pension). The Applicant submits that he had a sudden onset of diabetic retinopathy with hemorrhage in a retina in August 2011, which is when he began to receive Employment Insurance sickness benefits. He claims in the Application that because of blood in his eyes, laser eye surgeries and increasing pain and pain medication, he was no longer able to work. It does not appear that the General Division considered this. The decision states that the Applicant's argument on appeal was that he was disabled as a result of the effects of his medication. The Applicant's argument suggests that the General Division decision may have been based on an erroneous finding of fact made without regard for all of the material that was before it. It is not clear if such an error would be material, but it merits further consideration on appeal.

CONCLUSION

[15] The Application is granted only on the basis that the General Division may have based its decision on an erroneous finding of fact regarding the Applicant's receipt of Employment Insurance benefits, and the impact of his eye condition.

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

Valerie Hazlett Parker
Member, Appeal Division