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

Citation: *M. S. v. Minister of Employment and Social Development,* 2017 SSTADIS 760

Tribunal File Number: AD-17-888

BETWEEN:

M. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: December 20, 2017

Canada

REASONS AND DECISION

DECISION

[1] The application for leave to appeal (Application) is granted.

OVERVIEW

[2] The Applicant was injured in a motor vehicle accident in 2014. Prior to the accident, he had worked for a local plant but had stopped working in 2013 when the plant closed. He had also experienced a Workplace Safety Insurance Board injury to his back, which he experienced while working at the plant. He applied for a disability pension in 2015, claiming that he was no longer capable regularly of pursuing gainful employment.

[3] The General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant had failed to prove he was severely disabled on or before his minimum qualifying period (MQP) date, which in this case was December 31, 2015.

[4] The Applicant filed an Application with the Tribunal's Appeal Division on November 20, 2017, citing several erroneous findings of fact made by the General Division in its October 19, 2017, decision.

ISSUE

[5] The issue before me is whether the appeal has a reasonable chance of success on the grounds that the General Division based its decision on an erroneous finding of fact.

LEGAL TEST

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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. Leave to

appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.[1]

[7] According to subsection 58(1) of the DESD Act, the only grounds of appeal are that the General Division failed to observe a principle of natural justice; erred in law in making its decision; or 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.

ANALYSIS

[8] The Applicant's representative submits that the General Division made two erroneous findings of fact that led the General Division to determine that the Applicant was not entitled to a disability pension under the CPP:

- At paragraph 6 of the General Division decision, the Tribunal member found that the Applicant had a grade 12 education and had obtained a certificate as an electrical and mechanical technician. In fact, the Applicant's representative submits that the Applicant never graduated high school and, although he apprenticed as an auto mechanic in his native country of Croatia, he never obtained a certificate as an electrical and mechanical technician.
- At paragraph 54 of the decision, the General Division found that the Applicant had worked for many years in a light to moderate physical capacity. However, his representative argues that there is evidence in the record that confirms that his job as a machine operator was a medium strength category position.

[9] The Applicant's representative submits that these erroneous findings of fact, having been relied on by the General Division in making its decision, resulted in the General Division's improper conclusion that the Applicant did not qualify for a disability pension.

[10] In *Klabouch*,[2] the Federal Court of Appeal held that it is the applicant's capacity to work that determines the severity of the disability and not the applicant's diagnosed health condition. Applicants must demonstrate that they are incapable of performing any substantially gainful

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[1] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[2] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

employment, and not simply that they cannot perform their regular job. Applicants must also provide objective medical evidence that supports their claim that they cannot work, along with evidence that they have made reasonable efforts to obtain work but that those efforts have failed as a result of their health condition.

[11] The severity of a disability must also be assessed in a "real world" context.[3] This means that a decision-maker should consider certain factors such as an applicant's age, education level, language proficiency, and past work and life experiences when assessing the impact that an applicant's health condition has on their capacity to work. The Applicant's representative has argued that the General Division assessed the Applicant's capacity to work in the context of an education level much higher than the one that the Applicant had actually attained. If the argument that the General Division misconstrued evidence in the record is proven on its merits, this would be an error pursuant to paragraph 58(1)(*c*) of the DESD Act.

[12] Leave to appeal is granted as I find that the Applicant has argued a ground of appeal that has a reasonable chance of success.

[13] Although the Applicant's representative has also argued that the General Division erred in its finding regarding the category of physical strength required of the Applicant in his employment as a machine operator, I am not required to address this submission once leave has been granted on an enumerated ground found in subsection 58(1) of the DESD Act. The Federal Court of Appeal in *Mette*[4] stated that it is unnecessary for the Appeal Division to address all of the submitted grounds of appeal that an applicant raises. In *Mette*, Dawson J.A. stated that "[…] it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave."

CONCLUSION

[14] The Application is granted.

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[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[4] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

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

Meredith Porter
Member, Appeal Division