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

Citation: *V. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 751

Tribunal File Number: AD-17-473

BETWEEN:

V. P.

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 19, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant was born in Cambodia, where he worked as a fisherman. He came to Canada in 1989 and has since worked as a cook, in automobile manufacturing, and in window installation. He says that he fell from a ladder in July 2012, and stopped working the following month due to his injuries. He applied for a disability pension under the *Canada Pension Plan* (CPP) in August 2014, but his application was refused 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), which held a videoconference hearing in April 2017, but the appeal was later dismissed.

[2] In June 2017, the Applicant filed this application requesting leave to appeal with the Tribunal's Appeal Division. For the reasons described below, I have decided to grant leave to appeal.

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 General Division is required to consider and assess all of the evidence that has been submitted, including new evidence that was not considered by the Minister at the time of its earlier decisions. In contrast, the Appeal Division is more 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 (also known as 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.

[5] A second important difference created 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 have asked 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 based its decision on an erroneous finding of fact made without regard for the evidence before it (AD1). More specifically, the Applicant alleges that the General Division

a) erred by either putting too much weight on Dr. Tong's clinical notes (GD13) or by failing to put enough weight on the Limitations to Participation form that he completed on October 9, 2014 (GD2-87);

---

[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.

b) failed to give sufficient weight to the report of the Applicant's treating psychiatrist, Dr. Lo, who only started treating the Applicant after the expiration of his minimum qualifying period (GD2-55); and

c) failed to give sufficient weight to the Applicant's significant language barrier, limited education and lack of transferable skills.

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

Alleged Errors of Fact

[9] On the one hand, the Federal Court has recognized that leave to appeal should normally be refused when applicants seek only to reargue their position or have the evidence reweighed.[4] On the other hand, the Federal Court has also concluded that the Tribunal is not trapped by the precise grounds for appeal that are raised and should examine the underlying evidence and compare it to the decision being reviewed.[5] When important evidence has potentially been overlooked or misconstrued, then leave to appeal should normally be granted, notwithstanding technical problems with the application requesting leave to appeal.

[10] Based on my review of the documentary evidence, I am satisfied that leave to appeal should be granted in this case, since the General Division potentially misconstrued Dr. Tong's clinical notes, which it then used to undercut the conclusions that he expressed in other medical reports (GD2-63 and 87). At paragraph 37 of the General Division's decision, for example, it relied on Dr. Tong's clinical notes to conclude that the Applicant's sleep and mood had improved and that his pain had decreased. But in what way do Dr. Tong's clinical notes reveal the extent of those changes and how do they reflect on the Applicant's ability to work? Without deciding this issue, I am nevertheless persuaded that there is an arguable ground under paragraph 58(1)(*c*) of the DESD Act on which the appeal might succeed.

[11] Since I have granted leave on this ground, it is not necessary for me to consider all of the other issues that were raised by the Applicant. Nevertheless, all of the issues raised by the

[4] *Canada (Attorney General) v. Tsagbey*, 2017 FC 356.
[5] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615; *Griffin*, *supra*.

Applicant can be considered at the second step of the proceeding (i.e. the merits stage), as long as they are connected to subsection 58(1) of the DESD Act.[6]

[12] 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

[13] The application for leave to appeal is granted. As part of any additional submissions the parties might file, they are also invited to comment on whether an oral hearing should be held at the merits stage (i.e. teleconference, videoconference or in-person).

Jude Samson
Member, Appeal Division

[6] *Mette v. Canada (Attorney General)*, 2016 FCA 276.