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

Citation: *D. F. v. Minister of Employment and Social Development*, 2018 SST 68

Tribunal File Number: AD-17-523

BETWEEN:

D. F.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: January 24, 2018

Canada

REASONS AND DECISION

INTRODUCTION

[1] On April 12, 2017, the General Division of the Social Security Tribunal of Canada determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable.

[2] The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on July 20, 2017.

ISSUE

[3] The Appeal Division must decide whether the appeal has a reasonable chance of success.

THE LAW

Leave to Appeal

[4] According to ss. 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an applicant may bring an appeal to the Appeal Division only if the Appeal Division grants leave to appeal. The Appeal Division must either grant or refuse leave to appeal.

[5] Subsection 58(2) of the DESDA provides that the Appeal Division refuses leave to appeal if it is satisfied that the appeal has no reasonable chance of success. An arguable case at law is a case with a reasonable chance of success [see *Fancy v. Canada (Attorney General)*, 2010 FCA 63].

Grounds of Appeal

[6] According to s. 58(1) of the DESDA, the only grounds of appeal are as follows:

(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.

SUBMISSIONS

[7] The Applicant submits that the General Division made errors of fact contrary to s. 58(1)(*c*) of the DESDA.

Allegation Regarding Ignored Evidence

[8] First, the Applicant asserts generally that the General Division did "not include" his Catastrophic Impairment Evaluation from April 2016 "as part of its assessment." This may amount to an allegation under s. 58(1)(*c*) of the DESDA that the General Division ignored evidence in reaching its decision.

Alleged Inconsistencies in the General Division's Decision

[9] The Applicant relies in his application for leave to appeal on a list of "inconsistencies" in the General Division's decision, namely the following:

- The description of the Applicant's medications is incomplete (para. 12).
- The statement taken from the Applicant's questionnaire for CPP in which he indicated that he could no longer work because of his medical condition as of October 30, 2012, is misleading because it was the Applicant's physician who determined on November 17, 2014, that he could no longer work (para. 16).

- The description of what took place in the emergency room (ER) on the day of the Applicant's motor vehicle accident (MVA) is incomplete and contains an inaccurate reference to the Applicant contacting his union to say he would not be at work (para. 11).

- The relevance of the reference to the Applicant's disc herniation and his prior MVA from 2001 is not clear to the Applicant (para. 40).

- The reference to the fact that the Applicant rejected injections as recommended by Dr. Death is inaccurate because Dr. Death indicated that injections would not help (para. 13).

Reply to Respondent Submissions

[10] The application for leave to appeal also includes a reply to each of the Respondent's submissions as summarized in para. 34 of the General Division's decision. The Applicant seems to be under the impression that these pleadings were actually the reasons the General Division denied his claim for disability benefits, which is not the case. The Applicant argues here that

- he followed all doctor recommendations relating to exercise and activity;

- no one suggested a referral to a sleep study as part of his treatment;

- the occupational therapist who indicated he may see improvement in function with rehabilitation should be rejected since the General Division rejected evidence from another occupational therapist;

- he has seen specialists, and he did see a psychiatrist for assessment.

ANALYSIS

[11] The Applicant did not raise a ground of appeal under s. 58(1) of the DESDA that has a reasonable chance of success.

Allegation Regarding Ignored Evidence

[12] The Catastrophic Impairment Evaluation referenced in the application for leave to appeal was before the General Division and formed part of the record when it made its decision (GD5- 61). There is no arguable case that the General Division ignored the content of that evaluation under s. 58(1)(*c*) of the DESDA. The General Division is presumed to have considered all of the evidence and does not have to refer to each and every piece of evidence before it [see *Simpson v. Canada (Attorney General)*, 2012 FCA 82]. In any event, it seems that some of the General Division's description of the evidence came directly from that evaluation even if the source was not expressly acknowledged. For example (at para. 10), the General Division indicated that the Applicant coaches sports and rests all day in order to take care of his children. This is reflected in the Catastrophic Impairment Evaluation (GD5-80).

Alleged Inconsistencies in the General Division's Decision

[13] The Applicant raises several issues he refers to as "inconsistencies" that do not raise an arguable case under s. 58(1)(*c*) the DESDA.

[14] The General Division's decision did contain a description of the Applicant's medication, but that description appears to have been taken directly from the Applicant's evidence on the subject—there is no arguable case for an error here under s. 58(1)(*c*) of the DESDA, and in any event the General Division did not base its decision on the question of which medications the Applicant took.

[15] The fact that the Applicant was not able to work at his previous job immediately following the MVA was not in dispute. The General Division's description in the decision on this issue was merely a reference to the Applicant's evidence in his questionnaire for CPP about when he was unable to work.

[16] The details in terms of the description of the MVA and the subsequent ER visit did not form the basis of the General Division's decision about the Applicant's capacity to work on or before the end of the MQP and therefore cannot form the basis of an error under s. 58(1)(*c*) of the DESDA.

[17] The reference to the Applicant's herniated discs after his first MVA and before his second MVA raises no arguable case for an error under s. 58(1)(*c*) of the DESDA. The Applicant was not clear as to the relevance of this information. It appears that the General Division referenced the discs because the Applicant argued that his second MVA exacerbated that injury.

[18] The Applicant indicates that it was not Dr. Death who recommended injections. A review of the decision (at para. 24) indicates that it may well have been Dr. Viana who made that recommendation. Regardless, nothing turns on the identity of the physician who recommended the injections—the General Division found that the Applicant did not "give convincing evidence as to why he would not go along with the recommended treatment" (para. 46). The Applicant's evidence was that there were conflicting medical opinions about the injections.

Reply to Respondent's Submissions

[19] The Appeal Division has reviewed the content of the Applicant's arguments about the Respondent's submissions. None of these arguments are linked to the grounds of appeal in the DESDA, and are more in the nature of re-argument. In the absence of a ground of appeal to link these arguments to, the Appeal Division cannot consider them.

[20] The Applicant bears the onus of providing all the evidence and arguments required under s. 58(1) of the DESDA [see *Tracey v. Canada (Attorney General)*, 2015 FC 1300]. However, the Appeal Division should go beyond a mechanistic review of the grounds of appeal [see *Karadeolian v. Canada (Attorney General)*, 2016 FC 615]. The Appeal Division examined the record and is satisfied that the General Division did not overlook or misconstrue the evidence. The General Division reviewed the available medical evidence for information about the Applicant's restrictions (and his capacity for work) on or before the MQP date and ultimately found that evidence to be lacking. The General Division reviewed and rejected the opinion of Ms. Sydor (an occupational therapist) who stated that the Applicant was not capable of returning to any competitive employment (paras. 23 and 55). The General Division preferred the evidence from Dr. Clifford (physiatrist) who noted that the Applicant's soft tissue injuries did not mean he suffered a complete inability to engage in any employment (para. 56). The General Division heard testimony from the Applicant confirming that since his MVA, he has

not made efforts to apply for any type of work or to retrain—that evidence was not ignored or misconstrued.

CONCLUSION

[21] The application for leave to appeal is refused.

Kate Sellar
Member, Appeal Division