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

Citation: *S. O. v. Minister of Employment and Social Development*, 2018 SST 901

Tribunal File Number: AD-18-531

BETWEEN:

S. O.

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: September 14, 2018

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, S. O., is a high school graduate who has work experience as a truck driver. He is now 59 years old and was most recently employed in August 2015. This appeal comes from his fourth application for disability benefits under the *Canada Pension Plan* (CPP).

[3] In his three previous applications (in 2009, 2010, and 2014), the Applicant claimed that he was unable to work because of a torn rotator cuff and degenerative changes to his cervical spine. On each occasion, the Respondent, the Minister of Employment and Social Development (Minister), refused the application, finding that the Applicant's claimed disability was not "severe and prolonged," as defined by the CPP, during the minimum qualifying period (MQP), which ended on December 31, 2010.

[4] In his latest application, which he submitted in July 2016, the Applicant claimed that respiratory problems, caused by chronic obstructive pulmonary disorder and a related bacterial infection, were also contributing to his inability to work. The Minister again refused the application, finding that the Applicant's lung condition was not severe and that it had, in any event, developed after the MQP.

[5] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division conducted a hearing by teleconference and, in a decision dated June 12, 2018, dismissed the appeal, finding, on balance, that the Applicant was capable of substantially gainful work as of the MQP. The General Division took particular notice of the Applicant's testimony that, up to August 2015, he was able to work up to eight hours per day.

[6] On August 21, 2018, the Applicant requested leave to appeal from the Tribunal's Appeal Division, submitting that the General Division committed errors in the course of rendering its decision.

[7] Having reviewed the General Division's decision against the underlying record, I have concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

APPLICANT'S SUBMISSIONS

[8] The Applicant expressed his disagreement with the General Division's conclusion that he was not disabled as of the MQP. He also alleged that the General Division erred by refusing to accept evidence relating to his claim before the Nova Scotia Workers' Compensation Board (WCB). He said that, after he sustained a job-related injury in October 2010, he saw his family physician, Dr. C.B. Stacey, who filled out a claims form on his behalf. The Applicant suggests that if the General Division had reviewed his WCB file it would have seen that his claim was successful, disproving its finding that he was capable of employment as of December 31, 2010.

[9] The Applicant enclosed with his leave to appeal application the following documents:

- a letter from the WCB dated August 14, 2018, confirming that the Applicant had received temporary earnings replacement benefits for the period of October 13, 2010, to February 2, 2012;
- a WCB physician's report dated October 15, 2010, and completed by Dr. Stacey;
- the first page of an undated WCB accident report;
- a letter dated October 14, 2009, from Dr. Vikram Venugopal, orthopedic specialist; and
- an outpatient assessment summary dated March 11, 2010, by J. MacGowan, physiotherapist.

ISSUES

[10] According to s. 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 to the Appeal Division only if the Appeal Division grants leave to appeal,[1] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is equivalent to an arguable case at law.[3]

[11] I must determine whether the Applicant has an arguable case on the following questions:

Issue 1: Did the General Division err in finding that the Applicant was not disabled?

Issue 2: Did the General Division breach a principle of natural justice by refusing to consider information about the Applicant's WCB claim?

ANALYSIS

Issue 1: Did the General Division err in finding that the Applicant was not disabled?

[12] The Applicant submits that the General Division dismissed his appeal despite evidence that he has a severe and prolonged disability, according to CPP criteria. He argues that the General Division refused to recognize that his limitations have rendered him effectively unemployable.

[13] I do not see a reasonable chance of success on appeal here. The Applicant's submissions are, in essence, a repetition of the argument that he has already presented to the General Division. They do not address how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error of law, or relied on an erroneous finding of fact. My review of the General Division's decision indicates that it comprehensively summarized the evidence about the Applicant's respiratory problems, as well as the information

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[1] DESDA at ss. 56(1) and 58(3).
[2] *Ibid*. at s. 58(1).
[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

on file about his shoulder and back pain, which was the basis of his previous CPP disability applications. The General Division followed this with a thorough analysis of the ways in which the Applicant's conditions affected his capacity to regularly pursue substantially gainful employment during the MQP. In doing so, the General Division took into account the Applicant's background—including factors such as his age, education, and work experience—but found that it was not a significant impediment to his capacity to perform work as of December 31, 2010.

[14] Broad allegations of error are insufficient grounds of appeal. In the absence of detailed reasons, I find the Applicant's argument on this point to be so broad as to amount to a request to retry the entire claim. If the Applicant is asking me to reassess the evidence and substitute my judgment for the General Division's, I am unable to do so. My authority as an Appeal Division member permits me to determine only whether any of a claimant's reasons for appealing fall within the grounds specified under s. 58(1) of the DESDA and whether any of these reasons have a reasonable chance of success.

Issue 2: Did the General Division breach a principle of natural justice by refusing to consider information about the Applicant's WCB claim?

[15] The Applicant suggests that the General Division treated him unfairly by refusing to consider evidence from his 2010 WCB claim.

[16] I do not see an arguable case for this submission. I have reviewed the audio recording of the teleconference hearing of May 30, 2018, and, while the Applicant referred to his workplace injury on several occasions,[4] I did not hear him specifically ask the General Division to admit WCB-related documents. The record indicates that the Applicant attempted to submit additional documents on June 23, 2018, but the Tribunal returned them to him because, by that time, the General Division had already issued its decision.

[17] The Applicant had ample opportunity to submit evidence to the General Division before the hearing. I note that, on March 6, 2018, he filed a notice of readiness indicating that he had nothing else to add to the file.

[4] See, for example, the Applicant's remarks at 10:00 of the audio recording.

[18] The Applicant has now submitted five WCB-related documents with his leave to appeal application. I assume that some of them are the same documents that he attempted to submit to the General Division after it issued its decision. Putting aside the fact that they were submitted late, I doubt that they would have assisted the Applicant's appeal even if the General Division had considered them. First, the General Division was already aware that the Applicant had been approved for 14 months of temporary earnings replacement benefits in 2010–12 because he testified to that effect at his hearing. Second, and more importantly, the Applicant's successful claim at the WCB was strictly irrelevant to the General Division's deliberations because workers' compensation plans are governed by a set of statutory criteria that significantly differ from those of the CPP.

[19] I cannot consider the WCB-related documents either, given the constraints of s. 58(1) of the DESDA, which do not permit the Appeal Division to admit new evidence or hear arguments on the merits of disability.[5] Once a hearing before the General Division has concluded, there is a very limited basis upon which any new or additional information can be submitted. However, a claimant does have the option of making an application to the General Division to rescind or amend its decision.[6]

CONCLUSION

[20] Since the Applicant has not identified any grounds of appeal under s. 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	S. O., self-represented

[5] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100.
[6] A claimant seeking to rescind or amend a decision of the General Division must comply with the requirements set out in s. 66 of the DESDA and ss. 45 and 46 of the *Social Security Tribunal Regulations*, which impose strict deadlines and require an applicant to demonstrate that any new facts are material and could not have been discovered at the time of the hearing without exercising reasonable diligence.