Federal Court  Cour fédérale

Date: 20180119

Dockets: T-771-17
T-787-17

Citation: 2018 FC 51

Ottawa, Ontario, January 19, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

HENRY FREDRICK MALOSHICKY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. BACKGROUND

[1] This decision concerns two applications for judicial review in which the applicant, Henry Maloshicky, requests that two decisions of the Social Security Tribunal – Appeal Division (SST-AD) be set aside. Both SST-AD decisions refused the applicant leave to appeal two decisions of the Social Security Tribunal – General Division – Income Security Section (SST-GD) on the basis that the appeals had no reasonable chance of success.

[2] The impugned decisions arise from two applications made by the applicant for a disability pension under the *Canada Pension Plan*, RSC 1985, c C-8 [*CPP*]. The first application was made in March 2011 (First Application) and the second in December 2012 (Second Application). Both were denied by Service Canada. In both cases, the denial was maintained following a request for reconsideration. The applicant appealed both decisions to the SST-GD, and both appeals were dismissed in separate decisions dated May 19, 2016. The two SST-AD decisions refusing leave to appeal the SST-GD decisions were made on April 28, 2017.

[3] For the reasons set out below, I have concluded that the two SST-AD decisions should stand and the present applications should be dismissed.

II. FACTS

[4] The applicant is 67 years old. He taught high school until October 1986. He claims he stopped due to symptoms related to his mental health issues. Specifically, he claims he was suffering side effects of depression from his medication for panic attacks. He began treatment with a psychiatrist, Dr. Fred Shane, in 1987. Dr. Shane prescribed many medications to the applicant over the years in an attempt to balance his chronic cycles of mania and depression. These medications sometimes provided short-term benefit but these benefits eventually proved only temporary.

[5] Dr. Shane continued treating the applicant until 2009 when Dr. Shane moved to Vancouver. Just before his departure, Dr. Shane shared his diagnosis of the applicant with another psychiatrist who would take over his treatment, Dr. David Hallat. Dr. Shane diagnosed

the applicant with bi-polar mood disorder. However, Dr. Shane also indicated that, clinically, the applicant was more unhappy than depressed. He also indicated that the applicant's mood elevations never reached a level of mania.

[6] In 2010, Dr. Hallat confirmed the diagnosis of bi-polar mood disorder and added a mild to moderate case of cognitive impairment. Unlike Dr. Shane, Dr. Hallat stated the opinion that the applicant was disabled. In 2012, after the applicant's First Application was filed, Dr. Hallat signed a Certificate of Incapacity on behalf of the applicant.

[7] The applicant's employment history after 1986 is spotty. In the early years, he did business selling wood and making specialty machines. Though records show revenue from this business, the applicant claims that his net income was marginal because his condition limited how much he could work.

[8] The birth of two daughters to the applicant and his wife in 1991 and 1993, respectively, appears to have imposed additional limits on the time the applicant could devote to his business, at least for a few years.

[9] From January to December 2010 the applicant was employed part-time (about 75 hours per month) as a truck driver with KRW Enterprises (KRW). It appears that the applicant's work quality and attendance record while at KRW were good. It appears that the applicant left KRW after he took time off to care for his daughter who was ill.

[10] Following the First Application, the applicant began receiving *CPP* retirement benefits in April 2011 which had been requested along with the *CPP* disability pension.

[11] In 2012 the applicant found employment, first with Roger's Sewer & Water Ltd.(Roger's) (from April 3 to May 15), then with Perfanick Trucking (Perfanick) (from June 26 to August 31). The work at Roger's was seasonal and so its termination was not unexpected. The work at Perfanick ended with the applicant's dismissal for insubordination. It appears that his attendance and ability to do the job was adequate in both cases.

III. APPLICABLE LAW

[12] Paragraph 44(1)(b) of the *CPP* provides requirements for receiving a disability pension:

Benefits payable	**Prestations payables**
44 (1) Subject to this Part,	**44 (1)** Sous réserve des autres dispositions de la présente partie :
…	[…]
(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who	**b)** une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :
(i) has made base contributions for not less than the minimum qualifying period,	**(i)** soit a versé des cotisations de base pendant au moins la période minimale d'admissibilité,
(ii) is a contributor to whom a disability pension would have been payable at the time	**(ii)** soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il

the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or	est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	**(iii)** soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;

[13] Accordingly, to qualify for a disability pension under the *CPP*, an applicant must:

1. Be under 65 years of age;
2. Not be in receipt of a *CPP* retirement pension;
3. Be disabled; and
4. Have made *CPP* contributions for not less than the minimum qualifying period (MQP).

[14] The calculation of the MQP is provided for in paragraph 44(2) of the *CPP*. There is no dispute that the last date the applicant met the MQP was December 31, 1993.

[15] Paragraph 42(2)(a) of the *CPP* provides requirements for being considered disabled:

When person deemed disabled	**Personne déclarée invalide**
(2) For the purposes of this Act,	**(2)** Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	**a)** une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	**(i)** une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; …	**(ii)** une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[16] Accordingly, the applicant must establish that his disability is both severe (in the sense that he is incapable regularly of pursuing any substantially gainful occupation) and prolonged (in the sense that it is likely to be long continued and of indefinite duration or is likely to result in death).

[17] The concept of incapacity regularly of pursuing any substantially gainful occupation has been discussed in the jurisprudence. Firstly, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the *CPP*: *Klabouch v Canada (Social Development)*, 2008 FCA 33 at para 14 [*Klabouch*]. The determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work: *Klabouch* at para 15. Also, it is the incapacity which must be regular, not the employment: *Canada (Human Resources Development) v Scott*, 2003 FCA 34 at para 7. The yardstick is employability: *Granovsky v Canada (Employment and Immigration)*, 2000 SCC 28 at para 28.

[18] Because the applicant did not meet the MQP requirement when he filed the First Application in March 2011, he must rely on subparagraph 44(1)(b)(ii) of the *CPP* which provides for the possibility of a deemed earlier date for the application. Subsections 60(8) to 60(12) contemplate cases where the applicant "had been incapable of forming or expressing an intention to make an application on [his] own behalf". By virtue of subsection 60(10), such an earlier date may be deemed where the period of incapacity is continuous from the last MQP date.

[19] Accordingly, in order to qualify for a *CPP* disability benefit, the applicant must establish not only that his disability was severe and prolonged, but also that he was continuously incapacitated (in the sense that he could not form or express an intention to make the application) until the First Application was filed.

[20] The concept of incapacity under section 60 of the *CPP* is distinct from the notion of "capacity to work" when assessing whether a disability is severe and prolonged. It does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity, quite simply, of "forming or expressing an intention to make an application": *Canada (Attorney General) v Danielson*, 2008 FCA 78 at para 5. As stated in *Sedrak v Canada (Social Development)*, 2008 FCA 86 at para 3:

> The capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of his world view does not indicate a lack of capacity.

[21] Once an applicant has begun receiving *CPP* retirement benefits, he cannot qualify for *CPP* disability benefits. An exception is provided for in section 66.1 of the *CPP* which permits the applicant, in certain circumstances, to cancel the *CPP* retirement benefits. Under section 46.2 of the *Canada Pension Plan Regulations*, CRC, c 385, a request to cancel can be made within six months after retirement benefits begin. If such a request is not made within that period, the only way to cancel the benefits is if the applicant is deemed to be disabled before the benefits became payable: subsection 66.1(1.1) of the *CPP*. However, such a deemed date cannot be earlier than 15 months before the application for disability benefits is received: paragraph 42(2)(b) of the *CPP*.

[22] Finally, subsections 60(8) to 60(12) of the *CPP* (discussed above), which contemplate cases where the applicant was incapable of making an application, may apply to permit an earlier deemed date of application.

IV. IMPUGNED DECISIONS

A. *Decisions Regarding First Application*

(1) SST-GD Decision

[23] The SST-GD outlined the applicable law, the evidence regarding the applicant's work history and medical history, and the parties' submissions. The SST-GD analysed the issue of the applicant's alleged incapacity as well as the severity of his disability. Because it found that the applicant's disability was not severe, the SST-GD did not analyze the question of whether the disability was prolonged.

[24] On the issue of incapacity, the SST-GD noted that during the period in question, the applicant held a valid driver's license, had periods of employment, applied for regular Employment Insurance benefits, resided on his own and took care of his own finances. The SST-GD also considered the fact that the applicant completed his own application for *CPP* disability benefits, and acted on his own behalf in dealing with Service Canada in relation thereto. The SST-GD found that the applicant was not incapacitated.

[25] With regard to the severity of the disability, the SST-GD concluded that the applicant was not "incapable regularly of pursuing any substantially gainful occupation". In reaching this conclusion, the SST-GD considered a number of things, including:

[26] Dr. Shane's support for the applicant finding work, and his various conclusions which do not support a finding of incapacity to work;

1. The applicant's employment with KRW during most of 2010 with satisfactory work quality and without notable absences;
2. The fact that his termination from KRW was unrelated to his medical condition;
3. The fact that he received Employment Insurance benefits on the condition that he was capable of working; and
4. His ability to regularly attend work in 2012, with minimal absences, and to meet the demands of the jobs without assistance.

(2) SST-AD Decision

[27] The SST-AD refused leave to appeal, but it considered the issues raised by the applicant in assessing whether his appeal had any reasonable chance of success.

[28] The SST-AD noted that the limited grounds of appeal before it are provided for in subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34:

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte

error appears on the face of the record; or	ou non à la lecture du dossier;
(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.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[29] With regard to incapacity, the SST-AD found no error in the SST-GD's analysis and noted that it was not empowered to redo the analysis.

[30] The applicant argued that the SST-GD failed to properly consider the requirement for regularity in assessing the severity of his disability, asserting that he had been unable to work on a continuous, persistent or uninterrupted basis. The SST-AD concluded that the SST-GD had indeed considered the issue and had found that the applicant was able to attend work reliably on a consistent basis.

[31] The applicant argued that the SST-GD failed to consider that his employment after the last MQP date was with benevolent employers and should therefore not have been considered gainful employment. The SST-AD noted evidence that the applicant was not given special treatment by these employers, and that his work was by and large satisfactory. The SST-AD was satisfied that, though the SST-GD did not use the expression "benevolent employer", it had properly considered the issue.

[32] The applicant argued that the SST-GD erred in considering that the income earned in 2010 was sufficient to be considered substantially gainful. The SST-AD noted that the SST-GD's

analysis of “substantially gainful occupation” was not based on earnings, but on the nature and amount of the work and on the applicant’s ability to fulfill his responsibilities. The SST-AD found that this was not an error.

[33] The applicant argued that gaps in his medical records were beyond his control and should not be held against him. The SST-AD found that this was not a ground of appeal.

[34] The SST-AD concluded that the applicant’s appeal had no reasonable chance of success.

B. *Decisions Regarding Second Application*

(1) SST-GD Decision

[35] As indicated above, the Second Application was filed in December 2012. This is about 20 months after the applicant began receiving *CPP* retirement benefits.

[36] After outlining the applicable law, the evidence and the submissions, the SST-GD noted that the Second Application was filed too late to cancel the *CPP* retirement benefits, in order to qualify for *CPP* disability benefits. For reasons similar to those discussed in its decision concerning the First Application, the SST-GD found that the applicant was not incapacitated during the relevant period in order to permit an earlier deemed date of application.

(2) SST-AD Decision

[37] As with regard to the First Application, the SST-AD refused leave to appeal the SST-GD's decision in respect of the Second Application, but it considered the issues raised by the applicant in assessing whether his appeal had any reasonable chance of success.

[38] After noting the limited grounds of appeal, the SST-AD noted that disability for the purposes of obtaining *CPP* disability benefits and incapacity for the purposes of deeming an earlier date of application are distinct issues. Establishing disability is not sufficient to establish incapacity.

[39] The SST-AD found that some of the applicant's arguments called for reassessment of the evidence, which the SST-AD is not empowered to do. The tribunal found no errors in the decision of the SST-GD.

[40] As with regard to the First Application, the SST-AD concluded that the applicant's appeal had no reasonable chance of success.

V. ISSUE

[41] The only issue is whether the SST-AD erred in concluding that the applicant had no reasonable chance of success on appeal of either of the SST-GD's decisions in issue.

VI. ANALYSIS

[42] Most of the applicant's arguments focus on a review of the evidence concerning his disability, rather than on asserting errors by either the SST-GD or the SST-AD. Nevertheless, it is clear that the applicant asserts errors by those two tribunals on the issues of (i) the applicant's incapacity, and (ii) the severity of the applicant's condition.

A. *Standard of Review*

[43] Neither of the parties addressed the issue of standard of review in its submissions. A reasonableness standard of review applies to the impugned decisions denying leave to appeal to the SST-AD: *Atkinson v Canada (Attorney General)*, 2014 FCA 187 at paras 23-24; *Plaquet v Canada (Attorney General)*, 2016 FC 1209 at para 28. Because the impugned decisions concluded that the applicant's appeals from the SST-GD had no reasonable chance of success, I must consider whether, for each decision, that conclusion was reasonable.

B. *Incapacity*

[44] As discussed above, the applicant must establish that he was incapacitated during the entire period from December 31, 1993, until the filing of his First Application in March 2011 in order to qualify for *CPP* disability benefits. The issue is whether, during that entire period, the applicant was incapable of forming or expressing an intention to make an application. To establish such incapacity it is not sufficient to show simply that the idea did not occur to the applicant.

[45] Having considered the reasons cited by the SST-GD for finding that the applicant was not incapacitated during the relevant period, and the SST-AD's finding that that SST-GD did not err, I too find no error. I have been given no adequate reason to disagree with the reasoning of the SST-GD in this regard. I am particularly persuaded by the fact that the applicant had the capacity to make other applications for benefits on his own behalf during this period.

C. *Severity*

[46] Based on his memorandum of fact and law, the applicant's assertion that he was "incapable regularly of pursuing any substantially gainful occupation" seems to be based on the fact that, during the period in question, his condition prevented him from working "on a persistent and a continuous and uninterrupted basis."

[47] The question is not so much whether the applicant was able to work on a consistent basis, but rather whether his inability to work was consistent. When this criterion is combined with the requirement that the applicant establish that his disability was continuous from December 1993 to March 2011, the finding that the applicant was not sufficiently disabled can stand if he is reasonably found to have been able to work regularly in any substantially gainful occupation at any time in that period. In that regard, it seems clear that, at least during most of 2010, the applicant did indeed work regularly in substantially gainful occupation. I find the SST-GD's reasoning in this regard to be reasonable.

[48] With regard to the applicant's argument before the SST-AD that he had benefited from benevolent employers during this period (such that his employment should not have been

considered to be substantially gainful) I find the SST-AD's rejection to be reasonable for the reasons it gave in its decision.

D. *Conclusion on First Application*

[49] I conclude that it was reasonable for the SST-AD to conclude that the applicant's appeal in respect of the First Application had no reasonable chance of success.

E. *Second Application*

[50] In view of my conclusions above that it was reasonable to find that the applicant was not incapacitated and not sufficiently disabled, it follows that the applicant's appeal in respect of the Second Application likewise had no reasonable chance of success. It is not necessary to consider separately the decisions of the SST-GD and the SST-AD in relation to the Second Application.

VII. CONCLUSIONS

[51] The present applications for judicial review should be dismissed.

[52] Because the respondent has not sought costs, none shall be awarded.

JUDGMENT in T-771-17 and T-787-17

THIS COURT'S JUDGMENT is that the present applications are dismissed without costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-771-17, T-787-17
STYLE OF CAUSE:	HENRY FREDRICK MALOSHICKY v THE ATTORNEY GENERAL OF CANADA
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