

Federal Court



Cour fédérale

Date: 20191118

Docket: T-2042-18

Citation: 2019 FC 1437

Ottawa, Ontario, November 18, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

DAVID SULLIVAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

Introduction

[1] The Applicant, David Sullivan, has been denied Canada Pension Plan [CPP] disability benefits for the medical condition, Bell's Palsy. He asks for judicial review of the decision of the Appeal Division [AD] of the Social Security Tribunal of Canada [SST] who refused his appeal from the General Division [GD].

[2] Mr. Sullivan represented himself on this matter.

Relevant Background

[3] Mr. Sullivan was diagnosed with Bell's Palsy in December 2014. As a result, he has left-sided facial paralysis, which affects his speech, the functioning of his left eye, and his ability to eat and drink. He also experiences headaches and ringing in his ears. He explains that he now has high blood pressure and anxiety. He describes his energy level as very low. According to Mr. Sullivan, his life has changed dramatically after experiencing Bell's Palsy.

[4] Mr. Sullivan was 49 years old when this happened and was employed as a sales agent in a call centre. He went on medical leave and he received disability benefits through Medavie Blue Cross until April 2017.

[5] Mr. Sullivan has not returned to the workforce since December 2014.

[6] On March 3, 2016, he applied for a CPP disability pension. His application was denied as he failed to establish that he had a severe and prolonged disability. The GD noted that the two-part test under the CPP requires a disability to be both severe and prolonged on a balance of probabilities. A disability is considered severe if a person is incapable regularly of pursuing any substantially gainful employment. A disability is prolonged if it is continued, and, of an indefinite duration.

[7] The GD noted that "It's not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work." The GD considered the evidence including the medical evaluations, therapist reports, and personal factors

such as age, level of education, language proficiency, and past work and life experience. The GD concluded that there were no personal circumstances that would restrict Mr. Sullivan's ability to find a job given his limitations.

[8] The GD noted that Mr. Sullivan "believes that he will never work" even though testing showed that he has the capacity for some work. The GD also noted that he made no efforts to explore possible employment options.

SST Appeal Division Decision

[9] In September 2018, Mr. Sullivan appealed to the AD arguing that the GD made errors in failing to define "substantially gainful occupation" within the meaning of the CPP.

[10] The AD found that Mr. Sullivan did not have an arguable case. The AD explained that its role is not to reweigh the evidence but to ensure that the GD properly assessed the evidence. Upon review of the evidence and listening to recording of the GD hearing, the AD concluded that the GD correctly assessed the evidence and properly considered the meaning of "substantially gainful" as it is defined in the CPP. Furthermore, the AD found that the GD's conclusion about Mr. Sullivan's residual work capacity was reasonably based upon an assessment of all the evidence.

[11] The AD concluded that the GD did not overlook or misconstrue any relevant evidence. The AD found that "... the [GD] summarized the most important pieces of evidence; gave reasons for preferring some pieces of evidence over others; and explained why it was not

convinced, on a balance of probabilities, that the Applicant had established the onset of a severe disability during the relevant period.”

[12] The AD did not grant Mr. Sullivan leave to appeal from the decision of the GD, as the AD concluded that there was no reasonable chance of success in respect of any ground of appeal.

Preliminary Matter

[13] The Respondent noted that the proper respondent in this matter is The Attorney General of Canada and they ask to have the style and cause amended. I agree, and the style and cause shall be amended accordingly with immediate effect.

Issue

[14] Mr. Sullivan argues that the AD erred by finding that he is capable of “substantial gainful employment”. He says they overlooked and misconstrued the relevant evidence indicating otherwise.

Standard of Review

[15] On judicial review, this Court considers the decision of the AD against the reasonableness standard of review (*Tracey v Canada (Attorney General)*, 2015 FC 1300, at paras 21-22; and *Parchment v Canada (Attorney General)*, 2017 FC 354, at para 14;).

[16] A decision is reasonable if it demonstrates “justification, transparency and intelligibility within the decision-making process”, allowing the Court to determine “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” (*Dunsmuir*, para 47)

[17] In this case, the question is whether it was reasonable for the AD to conclude that Mr. Sullivan’s appeal did not have a reasonable chance of success (*Rouleau v Canada (Attorney General)*, 2017 FC 534, para 29).

Analysis

[18] Mr. Sullivan argues that he is not capable of being gainfully employed within the meaning of the CPP legislation. He relies upon the opinion of his family physician Dr. Broeren, who states, as follows, in her report of June 22, 2017:

This is clearly a very challenging case. Should David return to work, his job will have to be very tailored to his particular needs and limitations. At the present time, he is considered to be totally disabled and I do not foresee any significant improvement in his condition.

[19] He also points to the assessment of Caroline Roy, a registered occupational therapist, to argue that the AD overlooked and misconstrued relevant evidence, which supports that he is incapable of pursuing any “substantially gainful occupation”. Ms. Roy states, as follows, in her assessment dated August 24, 2017:

Mr. Sullivan’s performance during the assessment demonstrated his tolerance doing computer tasks in a clinic setting for a maximum of 3 to 4 hours. Please note that the client required

frequent breaks and the use of his eyes drops during the assessment. After 4 hours of sustained computer work simulations, the client demonstrated a significant decrease in his performance (speed, posture, vision). He also reported that he would require a nap after testing.

It is the evaluator's opinion that Mr. Sullivan wouldn't be able to dependably sustain computer tasks for prolonged periods of time day in and day out 5 days per week.

[20] Mr. Sullivan also points to the Functional Abilities Evaluation he underwent in March 2017, which found as follows:

Mr. Sullivan demonstrated full sedentary level abilities, with some functional abilities in the Light and Medium strength levels. Mr. Sullivan would likely be capable of full time work, provided it does not exceed the sedentary level of physical demands. Due to reports of fatigue with prolonged standing and sustained walking, a job where Mr. Sullivan would either be seated for the full day, or able to sit as needed is recommended when considering return to work options.

[21] Mr. Sullivan argues that the lingering effects of Bell's Palsy, together with his age (53), and his five-year absence from the workforce, all establish that he is not capable of being "substantially gainfully employed" contrary to the conclusions of the GD and the AD. He argues that, at most, he would qualify for minimum wage employment and since he cannot work a full 40 hour week, he would not earn an amount equal to the maximum monthly CPP disability pension.

[22] On judicial review, it is not the role of this Court to reconsider or reweigh the evidence. Rather, this Court ensures that the AD, in its appeal function, undertook the proper considerations of the issues raised by Mr. Sullivan.

[23] The record shows that the AD acknowledged the mixed evidence and noted that the central issue was Mr. Sullivan's residual work capacity. On this, Mr. Sullivan argues that his capacity to work would be so limited that it cannot properly be considered "substantially gainful employment" within the meaning of the CPP.

[24] In considering the likelihood of success of Mr. Sullivan's appeal, the AD noted that the GD reviewed the evidence including an occupational therapy assessment, which demonstrated that Mr. Sullivan was able to complete tasks on a computer for three to four hours with no change to his speech pattern. Additionally, the GD considered the functional ability evaluation concluded that he was capable of sedentary work on a full-time basis. Finally, a transferable skills analysis identified four suitable occupations for Mr. Sullivan.

[25] The AD was satisfied that the GD reasonably considered this evidence to conclude that Mr. Sullivan had residual work capability. However, Mr. Sullivan did not make any effort to obtain employment. The AD concluded that the GD assessment was reasonable and that Mr. Sullivan's request for an appeal had no reasonable chance of success.

[26] Mr. Sullivan has not been able to point to evidence or factors that were not considered by the AD. Although I acknowledge that Mr. Sullivan clearly sees himself as completely disabled from employment, that is not supported by the medical and occupational evidence on the record. Although the evidence is mixed, this was properly considered by the AD. The failure of Mr. Sullivan to attempt to return to some form of work weighed against his claim (*Inclima v Canada* (AG), 2003 FCA 117).

[27] This is not a case where important evidence was overlooked or misconstrued (*Karadeolian v Canada (Attorney General)*, 2016 FC 615, at para 10). Rather, Mr. Sullivan is of the view that the opinion of his family doctor that he is totally disabled, should trump all the other assessments and evaluations of his residual work capacity. However, that opinion stands in contrast to findings to the contrary, and in contrast to the fact that Mr. Sullivan has not actually attempted a return to work in any form. Accordingly, the decision of the AD is reasonable and there is no basis for this court to intervene.

Conclusion

[28] I am therefore dismissing this judicial review. In the circumstances, I decline to award costs.

JUDGMENT in T-2042-18

THIS COURT'S JUDGMENT is that this judicial review is dismissed. No costs are awarded.

“Ann Marie McDonald”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2042-18

STYLE OF CAUSE: DAVID SULLIVAN v THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: FREDERICTON, NEW BRUNSWICK

DATE OF HEARING: NOVEMBER 12, 2019

JUDGMENT AND REASONS: MCDONALD J.

DATED: NOVEMBER 18, 2019

APPEARANCES:

David Sullivan APPLICANT – ON HIS OWN BEHALF

Sandra L. Doucette FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nil SELF-REPRESENTED APPLICANT

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