

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190327

Docket: A-46-18

Citation: 2019 FCA 59

**CORAM: DAWSON J.A.
WEBB J.A.
NEAR J.A.**

BETWEEN:

HENRY FREDRICK MALOSHICKY

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on March 27, 2019.
Judgment delivered at Winnipeg, Manitoba, on March 27, 2019.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**WEBB J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] In March of 2011, the appellant applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. The application was denied because the appellant was found not to have a severe and prolonged disability as at December 31, 1993, the end of the appellant's Minimum Qualifying Period. The appellant's request for reconsideration of this decision was denied.

[2] In December 2012, the appellant applied a second time for Canada Pension Plan disability benefits. This application was denied because the appellant was then in receipt of a Canada Pension Plan retirement pension and he was out of time to convert this pension to disability benefits under the Plan, and because he did not demonstrate that he was incapable of applying earlier for disability benefits. The appellant's request for reconsideration of this second denial of benefits was also denied.

[3] The appellant appealed both decisions to the General Division of the Social Security Tribunal. The General Division dismissed each appeal. The appellant then sought leave to appeal the General Division's decisions to the Appeal Division. The Appeal Division refused both applications for leave to appeal because it was not satisfied that the appeals had a reasonable chance of success.

[4] The appellant then filed two applications for judicial review in the Federal Court seeking review of the two decisions of the Appeal Division denying him leave to appeal. For reasons cited as 2018 FC 51, the Federal Court dismissed the applications for judicial review. The Federal Court found that in both applications the Appeal Division's conclusion that an appeal from the General Division had no reasonable chance of success was reasonable.

[5] The appellant now appeals to this Court from the judgment of the Federal Court.

[6] On this appeal the Court has a limited mandate: it must consider whether the Federal Court selected the correct standard of review and applied it properly.

[7] In its decision dismissing the applications for judicial review the Federal Court correctly selected the reasonableness standard of review.

[8] As to the application of the standard of review, leave to appeal a decision of the General Division may be granted only when an appellant satisfies the Appeal Division that the proposed appeal has a reasonable chance of success on one of the three grounds of appeal set out in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (Act). These grounds are: a breach of natural justice or jurisdiction; an error of law; or, a decision based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Leave is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success (subsection 58(2) of the Act).

[9] In respect of the 2011 application, the Appeal Division noted that the appellant alleged that he had been incapacitated since August 1987. If true, his application could have been deemed to have been made earlier. The Appeal Division considered that the General Division had cited and applied the correct test for incapacity. The General Division had found that the appellant had worked during the applicable time frame, lived independently, was financially responsible and had been capable of applying for regular Employment Insurance benefits. The Appeal Division also considered the appellant's allegation that he was incapable of pursuing on a regular basis any substantially gainful occupation. The Appeal Division reviewed the reasons of the General Division, including its finding that the evidence of the appellant's employers in 2010 and 2012 showed that the appellant's attendance was good and that he was able to attend to work when required and was able to meet the demands of the job. The Appeal Division also

considered the appellant's submission that the General Division had failed to consider that he worked for a benevolent employer. Again, the Appeal Division reviewed the reasons of the General Division and was satisfied that it had turned its mind to the issue and had considered the nature of the appellant's employment, the demands placed upon him, and whether he was able to fulfil his duties and responsibilities without the need for any special accommodations. Based on this review, the Appeal Division concluded that the proposed appeal had no reasonable chance of success.

[10] The Appeal Division's conclusions were open to it on the record before it and they were reasonable.

[11] In respect of the 2012 application, the Appeal Division noted that the General Division had found that the appellant was not eligible for a disability pension because he was already in receipt of a Canada Pension Plan retirement pension, and there was no basis on which he could cancel his retirement pension in favour of a disability pension. The Appeal Division found no error in the analysis of the General Division. The General Division had considered whether the appellant had been incapacitated so that his application for a disability pension could have been deemed to have been made earlier. The Appeal Division again noted that the General Division had cited and applied the correct test for incapacity and had found that because the appellant lived independently, was financially responsible and was capable of applying for regular Employment Insurance benefits, he did not meet the definition of "incapacity". The Appeal Division found no error in the analysis of the General Division.

[12] Again, the conclusions of the Appeal Division were open to it on the record before it and they were reasonable.

[13] In respect of both the 2011 and 2012 applications, the Appeal Division reasonably concluded that the proposed appeals had no reasonable chance of success.

[14] It follows that the Federal Court did not err in dismissing the applications for judicial review and I would dismiss this appeal.

[15] The respondent no longer seeks costs.

“Eleanor R. Dawson”

J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-46-18

STYLE OF CAUSE: HENRY FREDRICK
MALOSHICKY v.
THE ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: MARCH 27, 2019

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

DATED: MARCH 27, 2019

APPEARANCES:

Henry Fredrick Maloshicky FOR THE APPELLANT
ON HIS OWN BEHALF

John Unrau FOR THE RESPONDENT

SOLICITORS OF RECORD:

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