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

Citation: *P. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 110

Tribunal File Number: AD-16-318

BETWEEN:

P. D.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: March 9, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 19, 2015. After conducting a teleconference hearing, the General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" at her minimum qualifying period of December 31, 2004. The Applicant filed an application requesting leave to appeal on February 15, 2016, alleging that the General Division had 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. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[3] The Applicant's representative, a U.S.-based consultant, submits that a major point in the General Division's decision was that the Applicant had not received or sought mental health treatment during certain periods prior to her minimum qualifying period, and that there were gaps in treatment. The Applicant's representative submits that the Applicant denied any suggestions at the hearing before the General Division that there were gaps in her mental health treatment, and asserted that she saw her psychotherapist throughout this timeframe.

[4] The Applicant's representative states that after the hearing, she investigated the Applicant's assertions. She submits that the manner in which the psychotherapist numbers his medical records suggests that his office omitted to include them in previous requests for records. The representative submits that "there is a high probability that the inclusion of those notes would shed more light on the severity of [the Applicant's] mental health condition prior to her [minimum qualifying period]".

[5] The Social Security Tribunal provided a copy of the leave materials to the Respondent, but the Respondent did not file any written submissions.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (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.

[7] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court of Canada recently approved this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[8] There is no suggestion by the Applicant that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law nor identified any erroneous findings of fact which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision. The Applicant has not cited any of the enumerated grounds of appeal.

[9] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some particulars of the error or failing committed by the General Division which fall into the enumerated grounds of appeal under subsection 58(1) of the DESDA. The application is deficient in this regard and I am not satisfied that the appeal has a reasonable chance of success.

[10] The Applicant may have received an incomplete set of medical records from one of her medical practitioners, but this does not speak to any of the grounds of appeal under subsection 58(1) of the DESDA, nor suggest that there was any error on the part of the General Division.

[11] The Applicant's representative indicates that the complete medical records of the psychotherapist could "shed more light" on the severity of the Applicant's medical condition prior to her minimum qualifying period, but the complete records were not before the General Division. In *Tracey*, the Federal Court determined that there is no obligation to consider any new evidence. Indeed, Roussel J. wrote:

> Under the current legislative framework however, the introduction of new evidence is no longer an independent ground of appeal (*Belo-Alves* [*v. Canada (Attorney General),* 2014 FC 1100], at para 108).

[12] While clearly the complete medical records of the psychotherapist are intended to support the Applicant's allegation that there were no gaps in mental health treatment prior to and up to her minimum qualifying period, for the purposes of a leave application and the appeal, the documents should at least address the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Applicant's representative has not indicated how the complete medical records of the psychotherapist might fall into or address any of the enumerated grounds of appeal. If the Applicant's representative is requesting that we consider any new facts, re-weigh the evidence and re-assess the claim in the Applicant's favour, I would be unable to do so at the leave stage, given that subsection 58(1) of the DESDA restricts the grounds of appeal. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to verify any claims which the Appellant might have made at the hearing before the General Division, and to establish that she had regularly undergone mental health treatment prior to her minimum qualifying period.

[13] If the Applicant's representative is proposing to file these additional medical records in an effort to rescind or amend the decision of the General Division, the Applicant must comply with the requirements set out in sections 45 and 46 of the *Social Security*

Tribunal Regulations, and must also file an application for rescission or amendment with the same Division that made the decision, which in this case is the General Division. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division case has no jurisdiction in this case to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so, which in this case is the General Division.

[14] I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[15] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division