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

Citation: ***M. R. v. Minister of Employment and Social Development,*** **2016 SSTADIS 104**

Date: March 03, 2016

File number: AD-15-1051

APPEAL DIVISION

Between:

M. R.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: **Hazelyn Ross, Member, Appeal Division**

DECISION

[1] The Social Security Tribunal, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] On June 20, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision in which it dismissed the Applicant's appeal from a reconsideration decision. The Applicant seeks leave to appeal the General Division decision, (the Application).

Preliminary Issue

[3] The Applicant's original Notice of Appeal was deficient. It contained no reference to any ground of appeal and thus did not conform to the requirements for making an appeal set out in section 35 of the *Social Security Tribunal Regulations.* The Tribunal gave the Applicant the opportunity to correct the deficiencies in her Application, which she did by a letter date stamped as having been received by the Tribunal on September 18, 2015.

GROUNDS OF THE APPEAL

[4] The Applicant submitted that the General Division made errors of law in its decision and failed to give generous construction to subparagraph 43(2)(a)(i) of the *Department of Employment and Social Development, (DESD), Act.* Additionally, she submitted that the General Division made erroneous findings of fact in a perverse or capricious manner or without regard for the material before it. Her arguments were: -

a. That her particular circumstances "are "unique" and should be given a generous construction with reference to the "real world". The Applicant stated, " I do not believe consideration has been given to my advanced age, the extraordinary efforts made to be self-informed about my medical condition and my continued efforts to search out solutions. I should be recognized as a self-motivated, very highly functioning individual"

b. That the General Division relied improperly on socio-economic considerations, namely that it did not recognize that the ability to

attend physiotherapy is strictly a socio-economic consideration that depends on a particular person's financial situation.

c. The accommodations provided by her benevolent employer have been misinterpreted as s socio-economic consideration when they relate to her unique physical need and her relations with her employer.

d. The General Division erred when it found that she had attended physiotherapy for two specific periods. She stated that there was no indication in her submission that the physiotherapy was limited to these 2 specific "Rehabilitation" Programmes. She indicated that she "had previously submitted a Schedule- "Appointments" (GT3-7) that states that I attended 46 appointments in the 2013 calendar year (NB. - including physiotherapy appointments}. The General Division did not at any time ask me about physiotherapy treatments after 2009. This was an incorrect assumption by the General Division that I did not attend physiotherapy after 2009 even though I had filed documents to the contrary

e. Furthermore, the Fluid Isometrics Practice mentioned in the decision (30) above is PHYSIOTHERAPY TREATMENT. This practice was developed and is administered by Deanna Hansen, C.A.T., as a therapy for her patients to use at home. (C.A.T. is the acronym for Certified Athletic Therapist which is physiotherapy.) Refer to (GTl-53) the letter dated September 13, 2011 from Dr. Loris Cristante which concludes with the following statement:
"I would recommend that the patient continues her present conservative treatment with emphasis on physiotherapy/stabilization and reconditioning of the cervical segment."

[5] The Applicant also submitted that, contrary, to the conclusion of the General Division, she no longer anticipates continuing to work with her employer for the foreseeable future.

[6] Lastly, the Applicant argues that while the General Division arranged an in-person hearing because there were gaps in the information on file, the General Division asked her very few questions and failed to make a proper determination under the law.

ISSUE

[7] The Appeal Division must decide whether the submissions of the Applicant relate to a ground or grounds of appeal that would have a reasonable chance of success?

ANALYSIS

[8] The important date to keep in mind is December 31, 2011. This is the date when the Applicant's minimum qualifying period ended. It is also the date by which she had to establish she was suffering from a disability that was both severe and prolonged as defined by the *Canada Pension Plan, (CPP).*

[9] The Applicant argued that the General Division did not pay sufficient consideration to her advanced age, the efforts she made to inform herself about her medical conditions and to address them.

[10] She also argues that the General Division had placed undue reliance on socio-economic factors, arguing that the ability to pay for physiotherapy is a socio-economic factor that the General Division could not consider. The Appeal Division finds that there is no evidence in the decision that the General Division improperly considered socio-economic factors or for that matter that it mischaracterised the nature of the accommodations that her employer made for her. The Appeal Division finds that where the General Division mentioned the employer's accommodations, they are mentioned in the context of a determination concerning the Applicant's retained work capacity. When the General Division mentioned socio-economic factors, it was to indicate that they are not relevant to a determination of whether an applicant has a severe and prolonged disability. Accordingly, leave to appeal cannot be granted on these bases.

[11] The Applicant argues further that the General Division erred in respect to the number of physiotherapy sessions she had attended. At paragraph 40 the General Division stated: .the Tribunal noted that the Appellant had not attended physiotherapy since 2009 and there is no evidence that she attended physiotherapy subsequent to her consultation with Dr. Cristante

[12] If it is established that the Applicant did I, in fact, participate in physiotherapy treatments beyond 2009 and beyond her consultation with Dr. Cristante then that would be an error of fact. If the error was made in a perverse or capricious manner or without regard for the facts that were before the General Division the error would be a reviewable one.

[13] The Applicant submitted that the treatment provided by Deanna Hansen constitutes physiotherapy. She relies on the statement of Dr. Cristante[1] as indicating that she was indeed undergoing physiotherapy. In the view of the Appeal Division Dr. Cristante's statements does not assist the Applicant because Dr. Cristante's statement made in September 2011 and recommending that the Applicant continue conservative treatment with an emphasis on physiotherapy cannot be divorced from his earlier statement that, "she underwent some physiotherapy and massage therapy." (GT1-52) there is no indication that the Applicant followed his recommendation and, thus, no evidence that the General Division committed an error of fact that it made in a perverse or capricious manner or without regard for the material before it.

[14] Furthermore, even if the General Division had erred regarding the nature of the Fluid Isometrics Practice, the Appeal Division finds that this was not an error of fact that was made in a perverse or capricious manner or without regard for the material before it. The General Division considered it when it considered the Applicant's treatment regime. Furthermore, the Appeal Division is of the view, that if there was an error, which it does not find, it was not an error that was material to the General Division decision. The decision turns on the fact that the Appellant had demonstrated by virtue of her employment with Mediation Services that she had retained work capacity well beyond the end of her MQP.

[15] At the time of the hearing, which was held subsequent to the Applicant's MQP, the Applicant remained employed as an assistant bookkeeper. Her employer had made accommodations to allow her to perform her duties. The Appeal Division finds that this is not a socio-economic consideration. It is what is expected of a reasonable employer. In the circumstances, the question of whether the Applicant had demonstrated that she was incapable regularly of pursuing any substantially gainful occupation was rendered moot. Therefore, any error in relation to the General Division's appreciation of the nature of the Fluid Isometrics Practice is not sufficient to ground the appeal.

[16] Similarly, the fact that the Applicant now no longer anticipates working with her employer for the foreseeable future is not relevant to the determination of whether she met

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[1] At GT1-53In his letter to Dr. Lukie, Dr. Cristante made the following recommendation "I would recommend that the patient continues her present conservative treatment with emphasis on physiotherapy/stabilization and reconditioning of the cervical segment."

the criteria for severe and prolonged disability on or before December 31, 2011. This is not a ground on which the appeal would have a reasonable chance of success.

[17] The Applicant also argued that while the General Division arranged an in-person hearing because there were gaps in the information on file the Member asked very few questions of her. She linked this to a failure on the part of the General Division to make a proper determination under the law. The Appeal Division can find no support in law for this proposition. The General Division is charged with taking and weighing the evidence. The Appellant had the opportunity to present all of her evidence and the Appeal Division finds that it is reasonable to infer that the General Division would have asked whatever questions it deemed necessary to fill in the gaps. Accordingly, the Appeal Division finds that, without reference to actual breaches that prejudiced the Applicant, her allegation is entirely speculative and, thus, does not give rise to an error of any kind. Leave to appeal cannot be granted in respect of this submission.

CONCLUSION

[18] The Applicant submitted that the General Division made errors of law in its decision and failed to give generous construction to subparagraph 43(2)(a)(i) of the *Department of Employment and Social Development, (DESD), Act.* Additionally, she submitted that the General division made erroneous findings of fact in a perverse or capricious manner or without regard for the material before it. On the basis of the foregoing the Appeal Division finds that the Applicant has failed to meet her onus to satisfy it that her appeal would have a reasonable chance of success.

[19] Leave to appeal is refused.

Hazelyn Ross
Member, Appeal Division