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

Citation: *M. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 115

Tribunal File Number: AD-15-1345

BETWEEN:

M. P.

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 15, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division rendered on September 14, 2015. The General Division conducted a videoconference hearing on September 8, 2015 and 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" on or before her minimum qualifying period of December 31, 2012. The Applicant's representative filed an application requesting leave to appeal on December 14, 2015. She alleges a number of grounds. 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 on any of the grounds cited by the Applicant?

SUBMISSIONS

[3] The representative submits that the General Division:

(a) based its decision on an erroneous finding of fact that the Applicant was not following treatment recommendations, and in particular, had not been taking Wellbutrin XL;

(b) errerd in finding that the Applicant had not attempted any part-time or sedentary employment, despite the fact she is illiterate, has a poor command of the English language and lacks transferable skills; and

(c) erred in law in failing to consider the Applicant's subjective experiences and the impact her symptoms has on her ability to engage in regularly scheduled gainful occupation: *MHRD v. Chase* (November 6, 1998), CP 06540 (PAB) and *G.B. v. MHRSD* (May 27, 2010), CP 26475 (PAB).

[4] The Social Security Tribunal copied the Respondent with the leave materials, but the Respondent did not file any written submissions.

ANALYSIS

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* 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.

[6] 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.

(a) Compliance with treatment recommendations

[7] At paragraph 17 of its decision, the General Division noted that the Applicant testified that she had been taking Wellbutrin XL since it had been prescribed to her in 2012. The General Division then concluded at paragraph 40 that if Dr. Thakur had recommended that the Applicant start Wellbutrin XL in October 2014, then the Applicant must not have been following recommendations from Dr. Toma to start taking Wellbutrin XL in August 2012, notwithstanding the Applicant's testimony on this point. The General Division found that the Applicant was not following recommendations that she start taking Wellbutrin XL in October 2014.

[8] The representative submits that there was no evidence – either in the hearing file or in the Applicant's own testimony before the General Division – that the Applicant was not following the treatment recommendations to the best of her ability.

[9] The representative notes that the Applicant's physician Dr. Thakur recommended that the Applicant reduce or discontinue Effexor and that she start Wellbutrin XL to help with weight loss and increase motivation. The representative submits however that the Applicant had reported to Dr. Thakur that she had been taking Wellbutrin XL since August 2012, and that this must have been lost in translation. The representative submits that the General Division erred in concluding that the Applicant was not following treatment recommendations.

[10] There are other means whereby the Applicant could have obtained evidence to show that she was taking Wellbutrin XL or any other prescription medication. She could have obtained a Pharmanet Patient record through the College of Pharmacists of British Columbia (although this likely would have resulted in some costs to her), or a printout from the pharmacy from where she purchased any medications. Nonetheless, the General Division could only make a determination based on the evidentiary record before it, and it was open to it to have drawn conclusions from Dr. Thakur's recommendations, and to have preferred Dr. Thakur's evidence over the Applicant's own recollection as to what medications she was taking at a certain timeframe. It is apparent from Dr. Thakur's medical report (at GT5-2) that she had canvassed what medications the Applicant was taking at that time, so the General Division's conclusions that the Applicant was not taking Wellbutrin XL then were not unreasonable in this regard. (If it is unclear whether the Applicant continued to see Dr. Toma after June 2012, but if she did not continue seeing him, then this would have also raised questions about who would have been continuing to prescribe her Wellbutrin XL.) I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Attempt at employment

[11] The representative submits that the General Division erred in not considering the fact that the Applicant is illiterate, has a poor command of the English language and lacks

transferable skills, in finding that she had not attempted any employment. Essentially, the representative is submitting that the General Division failed to apply *Villani v. Canada (Attorney General)*, 2001 FCA 248, where the Federal Court of Appeal held that when assessing the severity of one's disability, there must be an "air of reality" and one must take into account an applicant's personal characteristics, such as his or her age, level of education, language proficiency and past work and life experience.

[12] The General Division considered the Applicant's personal characteristics at paragraphs 34 and 35 of its decision, and recognized that the Applicant has a number of barriers. The assessment of an applicant's circumstances is a question of judgment with which the Federal Court of Appeal cautioned against interfering: *Villani*, at para. 49.

[13] The Federal Court of Appeal also indicated that not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension, and that medical evidence is still needed: *Villani*¸ at para. 50. The General Division recognized this and ultimately determined that there was insufficient medical evidence documenting the Applicant's disability, treatment recommendations and prognoses for recovery.

[14] The General Division acknowledged that the Applicant would have difficult in returning to her previous employment. The General Division also found that, although the Applicant clearly had some restrictions and limitations, she nonetheless had some residual capacity, based on the evidence before it, and that she therefore had to attempt some employment "within her medical conditions and limitations". I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Subjective experiences

[15] The representative submits that the General Division failed to consider the Applicant's subjective experiences and the impact of her symptoms on her ability to engage in regularly scheduled gainful occupation. The representative however did not indicate what the Applicant's evidence was with respect to her subjective experiences and the impact of her symptoms.

[16] While an applicant's subjective experiences are material to the consideration of whether he or she can be considered severely disabled, the jurisprudence is clear that evidence of that alone is not the only measure by which one assesses disability, as medical evidence is still required.

[17] The representative relies on decisions of the Pension Appeals Board. In *Chase*, the Pension Appeals Board indicated that the subjective experiences of an applicant were important considerations, and in *G.B.*, the Pension Appeals Board indicated that the main evidence that it had to rely upon was the subjective evidence or the appellant's verbal description of his pain. However, the Pension Appeals Board in each case had extensive medical opinions before it and in *G.B.*, the Pension Appeals Board also indicated that it had to consider the medical reports, as well as the appellant's testimony. In *Chase*, the appellant had subjected herself to all medical treatments suggested to her over a six-year period. Those two authorities suggest that there must still be some supporting medical documentation.

[18] In this particular case, it is clear that the General Division determined that there was insufficient medical evidence. The Applicant here has been followed by her family physician, had been seen by at least two psychiatrists and was noted to have undergone physiotherapy. The General Division noted that there were no updated reports from the family physician Dr. Toma or the psychiatrist Dr. Thakur. The Applicant also had not seen a rheumatologist and had not had an MRI, as apparently had been recommended to her. Without this evidence, the General Division found it was unable to properly assess the appeal, as it did not know what recommendations might have been made, the Applicant's response to any treatments, and any diagnoses and prognoses made by these practitioners. While the General Division certainly could have considered the Applicant's subjective experiences and the impact of her symptoms on her, the Applicant would not have been able to offer an expert opinion on her diagnoses or prognoses, or some of the other matters which the General Division looked to in assessing the severity of the Applicant's disability.

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

CONCLUSION

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

Janet Lew
Member, Appeal Division