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

Citation: *V. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 121

Tribunal File Number: AD-16-169

BETWEEN:

V. 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 29, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 17, 2015. After a videoconference 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, 2013. The Applicant filed an application requesting leave to appeal on January 15, 2016, alleging that the General Division made a number of errors. 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 submits that the General Division failed to observe a principle of natural justice when it refused her request for an adjournment and when it refused to admit medical records. The Applicant further submits that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it and that it erred in law in making its decision. The Applicant seeks to have the decision of the General Division reversed.

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

ANALYSIS

[5] 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.

[6] It is not enough to simply recite each of the grounds. 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 approved this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Natural justice

[7] The Applicant submits that the General Division made a number of decisions and followed a number of procedures which denied her a fair hearing or an opportunity to fairly present her case.

i. **adjournment request**

[8] After receiving the Notice of Hearing dated June 3, 2015, the Applicant sought to change the date of hearing, as she felt she required additional time to obtain supporting expert opinion for the hearing before the General Division. The Applicant alleges that the Social Security Tribunal refused to change the date of hearing by telephone. The Applicant alleges that the Social Security Tribunal only grants such requests if they were made within two days of the date that appeared on the Notice of Hearing. The Applicant submits that two days was inadequate, particularly in this case, as she did not receive the Notice of Hearing until close to two weeks after it had been sent to her.

[9] The Applicant made a formal written request for an adjournment of the hearing before the General Division, on the grounds that she was waiting to see two medical

specialists and anticipated obtaining supportive opinions from them. She advised that she was currently waiting to see a physiatrist in late November 2016 and a thoracic and vascular specialist in late 2018. She explained that the appointment with the thoracic and vascular specialist was well into the future, as there is a lengthy waiting list to see him. The Applicant requested a hearing date in either February 2019 or later, after seeing the thoracic and vascular surgeon, or in March 2017 or later, after seeing the physiatrist.

[10] The General Division refused the Applicant's request for an adjournment, as it determined that the medical reports which the Applicant anticipated obtaining would not be relevant or significant. The Notice of Hearing reads, "the adjournment was requested to file more documents; however, the documents will not be relevant or significant." The General Division did not provide any further explanation.

[11] The Applicant submits that the refusal was premature, as the General Division Member could not know whether the documents or reports would be relevant or have any probative value, without seeing them.

[12] The Applicant has since obtained a medical report dated August 26, 2015 from her physiatrist. She submits that the medical report is definitive and establishes that her disability was severe and prolonged by her minimum qualifying period.

[13] The Notice of Hearing dated June 3, 2015 (AD1-35) indicates that the parties could seek an administrative change of the hearing date by contacting the Social Security Tribunal by telephone within two days of receiving a Notice of Hearing. In this case however, although the Applicant contacted the Social Security Tribunal within two days of receiving the Notice of Hearing, it appears from the notes on the hearing file that she sought a change of hearing date well into the future, into October 2016 or 2017. The notes also indicate that the Social Security Tribunal invited the Applicant to submit an adjournment request in writing with reasons.

[14] The Applicant's submissions suggest that she was necessarily entitled to a change of hearing date. The Applicant might have come to this expectation, as the Notice of Hearing states that she could make a request for a change, and that a "new hearing will be

scheduled taking into consideration your availability". However, the administrative change offered by the Social Security Tribunal seems to contemplate that such changes are made typically because of the unavailability of a party. Implicit in this is that the hearing would be scheduled soon thereafter, to a date convenient to that party. The Applicant's circumstances were markedly different, as she sought a change of hearing date well into the future.

[15] The Social Security Tribunal offers administrative changes in dates of hearing as a matter of courtesy to parties, but there is no statutory right or entitlement to a change of hearing. It is unclear here whether the Social Security Tribunal considered the Applicant's telephone request for a change of hearing date and if so, on what basis it might have declined to change the hearing date. Despite the fact that the Social Security Tribunal held out that a new hearing date would be scheduled if she made the request within two days, I am not satisfied that the appeal has a reasonable chance of success that there was a breach of the principles of natural justice on this issue alone. For one, the request to change the hearing date was well into the future. While convenience and availability are considered, the Applicant's request under the circumstances was outside the realm of reasonableness, particularly as her minimum qualifying period is December 31, 2013. Secondly, and more significantly, the Social Security Tribunal communicated to the Applicant that she could request an adjournment of the hearing by writing to the Social Security Tribunal. This avenue remained open to her to seek an adjournment or change of hearing date.

[16] Section 11 of the *Social Security Tribunal Regulations* provides for adjournments of hearings. The section indicates that the Social Security Tribunal does not grant adjournments automatically.

[17] There is no dispute that the adjournment of a hearing is a discretionary matter. The paramount consideration is whether an adjournment is necessary to ensure a fair hearing on the merits of the matter. The discretion must be exercised in accordance with the interests of justice, which, in turn, requires a balancing of the interests of each of the parties: *Cal-Wood Door, a division of Timberland Inc. v. Olma,* [1984] BCJ No. 1953 (CA).

[18] The General Division refused the adjournment request. It recognized the Applicant's request to file more documents, however considered that the documents would not be relevant or significant. Simply put, the General Division was not satisfied that there was clear and convincing evidence to justify the adjournment of the hearing to 2017 or February 2019 or beyond. There should be some basis upon which to find that the General Division did not properly exercise its discretion in determining whether an adjournment of the proceedings was appropriate and that a fair hearing could not be otherwise had, taking all of the circumstances into account. While it may not have provided detailed reasons, one can infer that the General Division determined that the documents were not essential to ensuring a fair hearing as it found that they would not be relevant or significant, likely because the proposed medical opinions would have been prepared well after the Applicant's minimum qualifying period. I am not satisfied that the appeal has a reasonable chance of success on this ground.

ii. admissibility of records

[19] The Applicant alleges that she filed a physiatrist's consultation report and medical note, both dated January 16, 2014, with the Social Security Tribunal, but discovered during the hearing of the appeal that neither document was included in the file. The Applicant alleges that she endeavoured to file both documents with the General Division Member, who reportedly refused to admit the documents, on the basis that the Applicant had missed a deadline for filing documents. The Applicant submits that the two medical documents were "crucial" to her case, as they directly addressed the issue of whether her disabilities could be considered severe and prolonged on or before her minimum qualifying period.

[20] The General Division was aware that the Applicant had seen her physiatrist on January 16, 2014 and noted that it did not have a copy of that report. The General Division permitted the Applicant to read from the physiatrist's medical note that she was still unable to return to work with her employer due to pain and fatigue. This seems to suggest that the General Division determined that the contents of the medical note were relevant and that the General Division might have been prepared to admit the consultation reports and medical note of January 16, 2014 into evidence.

[21] There is no indication in its decision that General Division considered the issue of the admissibility of these two medical documents, or that the issue even arose (although in fact the General Division may have made an oral decision on this issue). In other words, it is not clear from the decision whether the Applicant attempted to file the two documents during the hearing.

[22] Nonetheless, I am satisfied that the appeal has a reasonable chance of success on the ground that the General Division may have erred if it determined that two January 16, 2014 documents were inadmissible as the Applicant had missed a filing deadline. The Applicant saw the physiatrist shortly after her minimum qualifying period of December 31, 2013 had passed, and given that she had last seen the physiatrist in May 2013, he might have been able to address her medical condition since then. It seems that the documents may have had some probative value on the issues before the General Division. If indeed the General Division addressed the issue of the admissibility of the two documents, it should have indicated on what basis it considered the two documents inadmissible. The mere fact that the Applicant might have missed a filing deadline is alone insufficient to refuse to admit documents, as the General Division has some discretion to admit any late records, taking into account the balance of prejudice to both parties and the interests of justice. Assuming that the issue of the admissibility of records arose, it is not apparent from its decision that the General Division properly exercised its discretion and considered both the balance of prejudice to the parties and the interests of justice.

[23] If the Applicant hopes to succeed on this ground of appeal, she is going to, at a minimum, adduce some evidence or provide some proof of her attempts to file these two records during the hearing, and that the General Division thereby deemed the two records inadmissible because she had missed a filing deadline. The best evidence of her attempts likely will be to provide the timestamp on the recording of the hearing to show that she tried to file the two documents at the hearing, and that the General Division Member refused to admit them as she was too late in doing so. (I acknowledge that the Applicant testified that she has had difficulty listening to other tapes, but hopefully the recording of the hearing will be less difficult for her.) If the Applicant is unable to adduce such evidence, the appeal may well fail.

[24] If the General Division considered the issue of the admissibility of the records and did not restrict itself to considering whether the Applicant had missed a filing deadline and if it considered the appropriate legal tests for the admissibility of documents, then it may not have erred.

(b) Erroneous findings of fact

[25] The Applicant submits that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

[26] To qualify as an erroneous finding of fact under subsection 58(1) of the DESDA, the General Division had to have based its decision on that erroneous finding of fact, and the erroneous finding of fact had to have been made in either a perverse or capricious manner or without regard for the material before it.

[27] The Applicant submits that the General Division should have considered the physiatrist's consultation report and medical note. It may have been an error for the General Division not to have admitted the two documents into the hearing file, but that does not thereby mean that those documents were before the General Division. Subsection 58(1) does not does not refer to nor contemplate materials which may have been deemed inadmissible by the General Division Member. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Error of law

[28] The Applicant submits that the General Division erred in law as it should have found her disabled under the *Canada Pension Plan.* The Applicant submits that the evidence shows that her disabilities were severe and prolonged and that she unsuccessfully attempted to return to work on a graduated basis several times. She relies on her physiatrist's opinions, as set out in his medical reports dated August 28, 2012, May 22, 2013, January 16, 2014 and August 26, 2015.

[29] These submissions call for a reassessment of the facts and reweighing of the evidence. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. Neither the leave nor the appeal provides opportunities to re-litigate or re-prosecute the claim. I am not satisfied that the appeal has a reasonable chance of success on the ground that I should conduct a reassessment of the evidence.

NEW FACTS and NEW MEDICAL EVIDENCE

[30] The Applicant has filed additional medical records with the leave application. They include the physiatrist's consultation report and medical note dated January 16, 2014 and consultation report dated August 15, 2015.

[31] In a leave application, any new facts or medical evidence should relate to the grounds of appeal. The Applicant has filed the consultation report and medical note dated January 16, 2014 in support of her allegation that the General Division Member failed to observe a principle of natural justice in refusing to admit the two documents. I have considered the January 16, 2014 consultation report and medical note in the context of the Applicant's allegations that the General Division failed to observe a principle of natural justice.

[32] It is not altogether apparent that the physiatrist's consultation report of August 15, 2015 relates to any of the grounds of appeal raised by the Applicant. When the Applicant sought an adjournment of the proceedings in July 2015, it was based on the grounds that she wished to obtain supporting medical opinions from two specialists, one in November 2016 and the other in late 2018. There was no mention in her request for an adjournment that she would be seeing the physiatrist later that same year in 2015, or that she would be providing a consultation report in connection with the 2015 visit.

[33] If the Applicant is requesting that we consider the consultation report of August 15, 2015, re-weigh the evidence and re-assess the claim in her favour, I am unable to do so at this juncture, given the limitations of subsection 58(1) of the DESDA. Neither the

leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan*.

[34] 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).

[35] If the Applicant has provided the physiatrist's August 15, 2015 consultation report in an effort to rescind or amend the decision of the General Division, she must now 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. 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. The Respondent may have a sound argument that the consultation report of August 15, 2015 should have been discoverable by the time of the hearing before the General Division, given that the Applicant's visit with the physiatrist had just been weeks before the hearing.

[36] Under subsection 66(4) of the DESDA, the Appeal Division in this 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.

[37] The physiatrist's consultation report of August 15, 2015 does not raise nor relate to any grounds of appeal and I am therefore unable to consider it for the purposes of a leave application.

CONCLUSION

[38] The application for leave to appeal is granted.

[39] I invite the parties to make submissions in respect of the form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers). If a party requests a hearing other than by written questions and answers, I invite that party to provide time estimates for oral submissions.

[40] This decision granting leave in no way presumes the result of the appeal on the merits of the case, but as I have indicated above, the Applicant will need to adduce some evidence that she attempted to file the physiatrist's report and note, and that the General Division deemed them inadmissible because she had missed a filing deadline.

Janet Lew
Member, Appeal Division