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

Citation: *G. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 146

Tribunal File Number: AD-16-443

BETWEEN:

G. M.

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: April 26, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 14, 2016. 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*" by the end of her minimum qualifying period, on December 31, 2015. The Applicant filed an application requesting leave to appeal on March 17, 2016. She can only succeed on this application if I am 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 contends that the General Division based its decision on an erroneous finding of fact that it made in a perverse and capricious manner or without regard for the material before. In particular, the Applicant argues that she did not clearly explain her lack of ability to focus or concentrate on tasks, multitask, learn new things, maintain her balance, successfully create an online business, or handle noisy conditions or "*busyness*".

[4] The Applicant submits that the General Division erred in finding that she is "*capable regularly of pursuing a substantially gainful occupation*" because she was working 4 to 5 hours per day at a home-based marketing business. She maintains that she had either failed to mention or failed to make clear that she takes several breaks during the day, at which time she partakes in other unrelated activities (such as playing games and crossword puzzles).

[5] At paragraph 29 of the decision, the General Division wrote: "*neither doctor referred to whether she had a capacity for part-time work*." The Applicant advises that she reviewed her situation with her physician on February 29, 2016 and that it then became clear

to her that she was likely less capable carrying out various aspects of her life than she had previously thought. The Applicant described some of her current restrictions, including work limitations. She stated that she does not know what other jobs she could perform efficiently enough for a prospective employer.

[6] The Applicant filed a letter dated February 29, 2016 from her family physician. He wrote that the Applicant continues to display several symptoms, including dizziness, poor concentration and inability to maintain focus for more than one hour, as well as reduced capacity to retain information that she has read. He wrote that all of these symptoms prevent the Applicant from returning to her previous work as a dietitian and that she is unable to work on a full-time or part-time basis at any occupation at this time (AD1-6).

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

ANALYSIS

[8] 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.

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

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

(a) Erroneous finding of fact

[11] To be considered to have made an erroneous finding of fact under subsection 58(1) of the DESDA, the General Division would have had to base its decision on that erroneous finding of fact, which it made in either a perverse or capricious manner or without regard for the material before it.

[12] The fact that the Applicant might have either failed to mention or did not clarify her evidence regarding her home-based business (or any other evidence for that matter) does not mean that an erroneous finding of fact was made by the General Division.. If the material was not before it, it cannot be determined that its finding of fact was made without regard for the material before it.

[13] Essentially, the Applicant is seeking to either introduce new evidence or to clarify existing evidence. In *Tracey*, the Federal Court determined that a tribunal is under no obligation to consider new evidence. Furthermore, failure to do so is no longer constitutes a proper ground of appeal in and of itself. Similarly, the Federal Court also held that 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 application nor the appeal hearing provides opportunities to re-litigate or re-prosecute the claim. Therefore, I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Physician's report of February 29, 2016

[14] Along with the leave application, the Applicant filed a medical report dated February 29, 2016.

[15] In a leave application, any new facts or medical evidence should relate to the grounds of appeal. The Applicant has filed the report in support of her claim to a Canada Pension Plan disability pension, rather than in support of any of the grounds of appeal under subsection 58(1) of the DESDA.

[16] Given the limited scope of the authority which subsection 58(1) of the DESDA provides to me, I cannot consider the medical report of February 29, 2016, re-weigh the evidence and re-assess the claim in the Applicant's favour. Neither the leave application nor the appeal provides an opportunity to re-assess or re-hear the claim to determine whether the Applicant is disabled as defined by the *Canada Pension Plan*.

[17] If the Applicant has provided the physician's February 29, 2016 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 proceed to also file an application to rescind or amend the General Division itself. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA requires that an application to rescind or amend a decision be made within one year of the day on which the decision was communicated to the parties. 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. Subsection 66(4) of the DESDA does not provide jurisdiction to the Appeal Division 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. In this case, that jurisdiction lies exclusively with the General Division.

[18] The physician's report of February 29, 2016 does not raise nor relate to any grounds of appeal. I am therefore unable to consider it for the purposes of addressing a leave application.

CONCLUSION

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

Janet Lew
Member, Appeal Division