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

Citation: *M. T. v. Minister of Employment and Social Development,* 2016 SSTADIS 155

Tribunal File Number: AD-15-1333

BETWEEN:

M. T.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 29, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 6, 2015. The General Division conducted an in-person 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" prior to the minimum qualifying period (MQP) of December 31, 2015. On December 9, 2015, the Applicant's representative filed a lengthy application requesting leave to appeal, advancing numerous grounds of appeal and relying on various legal authorities. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[2] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[3] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

ISSUE

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

SUBMISSIONS

Erroneous Findings of Fact

[5] The Applicant's representative submits that the General Division based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

(a) At paragraph 44 of its decision, the General Division stated that the Applicant's earnings for 2013 were not "token wages," and there was no indication as to how

they were determined. In doing so, it disregarded evidence that the $17,741 she reported represented earnings of the company, which were reflected in her income as sole owner of the business.

(b) At paragraph 46, the General Division concluded that the Applicant could perform both part-time and full-time work, particularly as of the date of her MQP, when there was no evidence to support this determination.

(c) At paragraph 48, the General Division noted that the Applicant had attended both English and French language classes, suggesting that, "apart from her native Serbian… she is multilingual… and is able to speak and write in several languages." There was no evidence to support this finding.

Errors of Law

[6] The Applicant's representative submits that in making its decision the General Division erred in law, whether or not the error appeared on the face of the record:

(a) The Tribunal failed to apply *Attorney General of Canada v. Dwight-St. Louis,* 2011 FC 492 by giving insufficient consideration to the available evidence that the Appellant's disability was severe in the context of her personal circumstances.

(b) The Tribunal failed to apply *L.F. v. Minister of Human Resources and Skills Development* (PAB CP26809 September 20, 2010) by failing to consider whether the Applicant's sporadic work at the family pizza restaurant was meaningful and competitive.

(c) The Tribunal failed to apply *E.J.B. v. Canada (Attorney General),* 2011 FCA 47 by inadequately considering all of the Applicant's conditions and their collective impact on her functionality.

(d) The Tribunal failed to apply *D'Errico v. Attorney General,* 2014 FCA 95 by failing to consider the "regular" aspect of the disability severity test.

(e) The Tribunal failed to apply *Cochran v. Canada (Attorney General),* 2003 FCA 343 by focusing on the Applicant's current medical health without considering the medical evidence around the time of her MQP.

ANALYSIS

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out that the only grounds of appeal are 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.

[8] 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.

Erroneous Findings of Fact

Characterization of the Applicant's 2013 Earnings

[9] The Applicant submits that the General Division disregarded evidence that the $17,741 she reported in 2013 represented corporate, not personal, earnings. She states that as sole owner of the family business, all corporate income was reported on her tax return, even though the pizza restaurant was effectively a partnership between herself, her husband and her son. The latter two actively worked in the business, while she did not after 2013.

[10] Having reviewed the General Division's decision, I find this is a valid ground of appeal. The General Division based much of its decision on the existence of these earnings but

apparently did not make an in-depth inquiry into their origin: "There is no indication as to how her wages while working for her company were determined. It is however in all probability for the work she was doing on part time and occasionally full time as a bookkeeper and office administrator." The recording of the oral hearing may indicate that there was extensive questioning on this issue, but for now there would appear to be an arguable case that the General Division made a finding of fact without regard to the material before it.

Indication of Capacity for Part-time or Full-time Work

[11] The Applicant submitted that the General Division had no basis to support its determination that she was able to perform both part-time and full-time work as of the MQP date. The Applicant pointed to her self-employment questionnaire, in which she stated that she worked no more than 2.5 hours per week, and her income tax statement from 2014, which showed no income for that year.

[12] Whether the Applicant was capable of any work at all as December 31, 2015 is, of course, the central issue of her appeal to the Social Security Tribunal. One can disagree with the General Division's conclusion, but it was within its jurisdiction to make it. It is true that the General Division glossed over the fact that the Applicant had no earnings after 2013. In testimony and in an earlier self-employment questionnaire, the Applicant declared that she stopped working as of December 2013, but the General Division did not believe her when she said she was present at the restaurant for many hours each day but was no longer significantly involved with the family business. However, this finding was informed by many factors, including the Appellant's past history of active work at the restaurant, consideration of the medical evidence and an assessment of credibility. In the end, I find this ground of appeal so broad as to essentially amount to a request for a reassessment, which is beyond the scope of a leave application.

[4] I see no reasonable chance of success on this ground.

Finding that the Applicant Is Multilingual

[5] In its decision, the General Division described the Applicant as "multilingual," noting that, in addition to her native Serbian, she was able to speak and write in English and French.

This finding was based on the Applicant's seven months of French lessons and nine months of English lessons, as well as her roles in dealing with the public while working in the family pizza restaurant in Kitchener, Ontario.

[6] It seems possible, even likely, that one might acquire proficiency in English after living and working in Ontario for nearly15 years, but it is hard to image how one might approach fluency in French after only a few months of FSL classes. While it might be strictly true that the Applicant is "multilingual" if she is fluent in one language (Serbian) and even minimally proficient in another (English), French is not likely to be part of her repertoire. Moreover, "multilingual" (as opposed to "bilingual") is a term usually reserved for the ability to communicate in more than two languages.

[7] It appears that the General Division was attempting to make a larger point about the Applicant's intelligence and adaptability as a labour market participant, but the evidence does not appear to support this finding. This may be a material error in that the General Division's decision to deny the claim hinged, at least in part, on that finding. I am satisfied that this ground of appeal carries with it a reasonable chance of success.

Errors of Law

Failure to apply *Dwight-St. Louis*

[8] The Applicant's representative referred to this precedent in arguing that it is not enough for a tribunal to merely recognize its obligation to consider the *Villani* factors, it must actually apply them to the Applicant's condition and personal circumstances. It also quoted and underlined a passage that stressed the necessity of discussing a piece of evidence before discounting it. The Applicant's representative then summarized medical opinions in the evidentiary record that contemplated whether the Applicant would be capable of returning to employment, specifically reports from Dr. Richardson (June 26, 2012), Dr. Surapanen (October 14, 2012) and Dr. Nedimovic (May 4, 2015).

[9] I note that the first two of these reports were summarized in the evidence section of the General Division's decision and were explicitly referenced in the analysis. It is true that the General Division made no reference to Dr. Nedimovic's May 2015 letter, but that does not

necessarily mean it ignored that evidence or failed to consider it. In Newfoundland and Labrador *Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, the Supreme Court of Canada remarked that a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion.

[10] The Applicant's representative acknowledges that while the General Division did discuss some of this evidence, it did so in the context of equating the Applicant's ownership and/or attendance at her family business as evidence of her capacity for employment, leading to both a factual and legal error. The test for severity is not whether the Applicant could attend at her family business on a day-to-day basis (which she does in order to not be alone throughout the day), but whether she is capable regularly of pursuing any substantially gainful occupation.

[11] This, I believe, mischaracterizes the reasoning of the General Division, which rooted its decision not merely in the Applicant's daily attendance at the family restaurant, but also in her lack of credibility when describing her activities while on the premises. For reasons explained at some length in paragraphs 43 and 47, the General Division did not fully believe the Appellant when she said she spent nine or ten hours per day at the restaurant but worked only intermittently at activities as varied as keeping accounts, ordering supplies and taking telephone orders. As the finder of fact, it was within the General Division's jurisdiction to make a finding of credibility and base its assessment of the Applicant's functionality on it. I would not challenge the General Division's authority to weigh medical reports or place them in what it sees as proper context.

[12] I see no reasonable chance of success on this ground.

Failure to apply L.F.

[13] It was submitted that the General Division gave inadequate consideration to whether the Applicant's work at her pizza restaurant was meaningful and competitive. There is a body of case law (led by *Atkinson* v. *Attorney General of Canada,* 2014 FCA 187) that evidence of a so-called "benevolent employer" must be taken into account where a claimant remains in the workforce despite her claimed disability. In its decision, the General Division described the Applicant as "self-employed" but this was not strictly true. A cursory review of the evidence

indicates that, although the corporation may have solely been registered in her name, it was nonetheless a family business in which her husband and son played active roles and held beneficial interests. There was little in the General Division's decision about whether the Applicant's family might have held her work performance to something less than a commercial standard.

[14] I see at least an arguable case on this ground of appeal.

Failure to apply E.J.B.

[15] The Applicant's representative submits that the General Division erred in law by failing to consider all of the Applicant's conditions in determining that her impairments fell short of severe, specifically her chronic pain syndrome, major affective disorder, low back pain due to degenerative disc disease and spinal stenosis, high stress, sleep disturbance, and an oblique tear of her left medial meniscus and a suspected anterior cruciate ligament tear.

[16] I do not agree. A review of the evidence indicates that the Applicant's claim was largely founded in complaints of chronic back pain, and the allegedly overlooked conditions are, for the most part, either sources or by-products of that pain. While the General Division did not prepare a comprehensive discussion for each condition, it did refer to them (if only glancingly) while conducting a fairly detailed inquiry into the Applicant's functionality, addressing selected medical reports if they were deemed relevant. The Applicant's psychiatric assessment was analyzed and contrasted with evidence related to her daily activities. Her knee problems were noted at paragraph 49 as contributors to her restrictions in mobility, and in any case the General Division conceded that the Applicant was barred from physically active work. The appeal eventually came down to whether she was capable of the prolonged postures required for sedentary work.

[17] I see no reasonable chance of success on this ground.

Failure to apply D'Errico

[18] The Applicant submits that the General Division committed an error in law by not considering how her impairment prevented her from "regularly" pursuing employment, which

the Federal Court of Appeal interpreted to mean “consistent frequency.” In this. I would note that this issue is part and parcel of the question, discussed above, as to whether the family business constituted a competitive work environment.

Failure to apply Cochran

[19] The Applicant submits that the General Division erred in failing to consider the medical evidence around the time of her MQP of December 31, 2015, focusing instead on her health during the period in which she last showed earnings. I would agree that there is at least an arguable case here. Much of the General Division’s analysis dwells on 2013, when the Applicant reported an income of more than $17,000, which was taken as evidence of capacity to work at that time. Afterward, despite reporting no income, the Applicant continued to go into the restaurant every day for hours at a time, and the General Division inferred from this that she was still performing substantially gainful work,

[20] As the decision contains only a brief consideration of the final two years of the Appellant’s eligibility period, I am satisfied that the appeal has a reasonable chance of success on this ground.

APPEAL

[21] As discussed above, I will allow this appeal to go forward on the following grounds:

(a) Whether the General Division made an erroneous finding of fact in:

- Characterizing the Applicant’s 2013 earnings;
- Describing the Applicant as multilingual.

(b) Whether the General Division made an error in law in:

- Failing to apply *Atkinson* by not taking into account evidence of a benevolent employer;
- Failing to apply *Cochran* by not considering the medical evidence around the time of the Applicant’s December 31, 2015 MQP.

[22] If the parties intend to file submissions, the parties may also wish to consider addressing the following issues:

(a) Whether the appeal can or should proceed on the record, or whether a further hearing is necessary.

(b) Based on the grounds upon which leave has been granted, whether the standards of review should be employed? If so, how? If not, what is the applicable test? What are the appropriate remedies, if any?

[23] I invite the parties to make submissions also 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).

CONCLUSION

[24] The Application is granted.

[3] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division