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

Citation: *S. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 156

Tribunal File Number: AD-16-148

BETWEEN:

S. K.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

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 September 22, 2015. 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, 2004.

[2] The Applicant's counsel obtained an extension of time to February 15, 2016 to file an application requesting leave to appeal. She subsequently filed an application requesting leave to appeal on February 11, 2016 alleging that the General Division failed to observe a principle of natural justice and further, that it 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. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

ISSUES

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

SUBMISSIONS

[4] The Applicant's counsel 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, when it found:

(a) that the Applicant was not continuously disabled since December 2004, despite the evidence of her family physician that she has had and continues to have an overall condition that is severe and prolonged since December 2004. Counsel submits that the family physician was well-positioned to assess the Applicant's medical conditions and their disabling effect and that the General Division therefore should have addressed the family physician's opinion and indicated why it did not accept it, and

(b) that the Applicant was capable of working because she worked after 2004, despite the evidence which indicated that she was ultimately unsuccessful due to the effects of her disabilities. Counsel submits that one can infer from the Applicant's employment and losses of employment that she was unable to work despite her efforts.

[5] The Applicant's counsel submits that the General Division failed to observe a principle of natural justice in not giving adequate reasons addressing the Applicant's family physician's evidence on a central point.

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

ANALYSIS

[7] 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.

[8] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within at least one of 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.

[9] The Applicant's representative submits that the General Division based its decision on erroneous findings of fact without regard for the material before it. 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.

(a) Family physician's opinions

[10] The Applicant argues that the General Division should have unconditionally accepted Dr. Belgaumkar's medical opinion dated August 18, 2014 (at GD4-13) that the Applicant has had a medical disability that has been severe and prolonged since 2004. In the letter dated August 18, 2014 (at GD4-13), Dr. Belgaumkar wrote:

> [The Applicant] is well known to me and has been a patient in my general family practice for almost ten years. Since 2004, the time she started under my care, she has struggled with multiple medical conditions. She has had and continues to have an overall condition that is severe and prolonged since the time of December 2004. These conditions have significantly influenced her ability to maintain steady employment since 2004. I support her decision to appeal refusal of CPP benefits to her.

[11] This was the extent of Dr. Belgaumkar's letter of August 18, 2014.

[12] The General Division not only acknowledged Dr. Belgaumkar's letter of August 18, 2014, but also accepted her opinion that the Applicant has struggled with multiple medical conditions since 2004. However, the General Division clearly rejected the family physician's opinion that the Applicant has a severe and prolonged disability for the purposes of the *Canada Pension Plan*. After referring to Dr. Belgaumkar's letter of August 18, 2014, it wrote, "… it is the [Applicant's] capacity to work and not the diagnosis of the disease that determines whether the disability is 'severe' ". The General Division indicated that it was unprepared to unconditionally accept Dr. Belgaumkar's opinion regarding the severity of the Applicant's disability, without going beyond the medical diagnoses and assessing her capacity for work.

[13] The General Division referred to *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, where the Federal Court of Appeal held that individuals who might experience significant and prolonged health challenges nonetheless may not qualify for a disability

pension if they are found to be capable regularly of pursuing a substantially gainful occupation. The General Division was guided by this.

[14] The General Division found that the Applicant had the capacity regularly of pursuing a substantially gainful occupation after the end of her minimum qualifying period. It found that the Applicant demonstrated work capacity after December 31, 2004, when she was gainfully employed from July 20, 2007 to February 1, 2008, from November 2010 to April 2011 and from May 2011 to October 2011. The General Division found that the Applicant worked full-time for close to a year, from November 2010 to October 2011. The General Division noted that the Applicant left work or missed work occasionally, but nonetheless found that the Applicant was working full- time and was therefore engaged in a substantially gainful occupation.

[15] Thus, given the scope of its analysis, it cannot be said that the General Division failed to explain altogether why it did not accept Dr. Belgaumkar's opinion. The Applicant contends however that the General Division's reasons were insufficient on such a central point.

[16] The Supreme Court of Canada has held that reasons must be sufficiently detailed to enable the parties to understand why a particular decision was made. The decision is to allow for effective appellate review and provide public accountability: *R. v. R.E.M.*, 2008 SCC 51 (CanLII), [2008] S.C.J. No. 52 (S.C.C.) and in *R. v. Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869 (S.C.C.). The Supreme Court of Canada has also stated that reasons need not be fulsome and need not address all of the evidence or submissions of a party. Reasons are sufficient as long as the reasons allow the reasoning court to understand why the tribunal made its decision: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708.

[17] Here, the General Division explained the legal basis upon which it rejected Dr. Belgaumkar's opinion. The General Division also outlined the evidence it accepted or rejected and the reasons it accepted that evidence. Consequently, I am not satisfied that the

appeal has a reasonable chance of success that the decision of the General Division lacked sufficient reasons.

[18] The Applicant also argued that her family physician was well-positioned to assess her medical conditions and their disabling effect on her, and that the General Division therefore should have unreservedly accepted Dr. Belgaumkar's opinion.

[19] Apart from the fact that Dr. Belgaumkar did not state the basis upon how she concluded that the Applicant's disability has been severe and prolonged since December 2004, if health caregivers render opinions on the prolonged and severe nature of an applicant's disability, this usurps the role of the General Division as the trier of fact. The question whether an applicant can be found disabled for the purposes of the *Canada Pension Plan* is reserved for the General Division. It is for the General Division to assess whether an applicant meets the statutory requirements under the *Canada Pension Plan,* as it involves considering a number of requirements, including medical evidence, an applicant's personal characteristics, and where some residual capacity is exhibited, an applicant's efforts at obtaining and maintaining any substantially gainful occupation, amongst other factors. Here, the General Division noted the family physician's opinion that the Applicant has been struggling with multiple medical conditions since 2004. The Tribunal accepted this opinion, however determined that it is the Applicant's capacity to work and not the diagnosis of the disease that determines whether the disability is severe, as defined by the *Canada Pension Plan.*

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

(b) Employment after 2004

[21] The Applicant's counsel submits that the General Division based its decision on an erroneous finding of fact that it made without regard to the material before it when it found that the Applicant was capable of working by virtue of the fact that she worked after 2004, despite the evidence which indicated that she was ultimately unsuccessful due to the effects of her disabilities. Counsel submits that one can infer from the Applicant's employment and losses of employment that she was unable to work despite her efforts.

[22] The fact that an applicant's employment might have been relatively short-lived is not the test. The test to apply when determining disability is not an applicant's employability, but rather, whether he or she is incapable regularly of pursuing any substantially gainful occupation. As the Applicant was employed, the test before the General Division was whether her employment qualified as being a substantially gainful occupation.

[23] The General Division acknowledged that the Applicant occasionally missed work or left work early, but it found that she was working full-time. The General Division determined whether the Applicant could be said to have been capable regularly of pursuing any substantially gainful occupation. To this end, the General Division examined the Applicant's employment for the timeframes July 20, 2007 to February 1, 2008, November 9, 2010 to April 30, 2011 and from May 2, 2011 until October 31, 2011. The General Division found that, despite occasionally missing some work or leaving work early, the Applicant was able to work on a full-time basis for forty hours per week and that this employment lasted for almost a year. The General Division found that this employment qualified as substantially gainful. Although the General Division did not review the Applicant's earnings, I note that the earnings history (GD5-30) indicates that the Applicant had earnings of approximately $28,000 in 2011. The level of earnings in 2011 alone could have suggested that the Applicant had been engaged in a substantially gainful occupation.

[24] Essentially, the Applicant is seeking a reassessment of the evidence. As the Federal Court held in *Tracey*, it is not within the Appeal Division's jurisdiction 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, provide opportunities to re-litigate or re-prosecute the claim. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

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

CONCLUSION

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

Janet Lew
Member, Appeal Division