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

Citation: *L. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 157

Tribunal File Number: AD-16-177

BETWEEN:

L. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

DECISION BY: Neil Nawaz

DATE OF DECISION: April 29, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated October 26, 2015. The GD conducted a hearing by way of teleconference on October 22, 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, 2008.

[2] On January19, 2016, within the prescribed time limit, the Applicant's representative filed an application with the Appeal Division (AD) requesting leave to appeal.

THE LAW

[3] 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."

[4] 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."

[5] According to subsection 58(1) of the DESD Act 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.

[6] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[8] The Applicant's representative submits that in making its decision, the GD erred in law by failing to consider and apply *Orozco v. MHRD* July 2, 1997 CP 5390 (PAB), a case that was presented at the hearing. It held that a medical diagnosis made subsequent to an Appellant's MQP should be considered provided the evidence is causally connected to the applicant's prior medical condition or injury.

[9] The Applicant's representative also submits that, having disregarded *Orozco,* the GD then based its decision on erroneous findings of fact, leading it to conclude that there was no evidence the Applicant was suffering from any severe psychological medical condition prior to her MQP.

ANALYSIS

[10] The Federal Court of Appeal has held that whether an appeal has a reasonable chance of success is akin to determining if there arguable case at law: *Fancy v. Canada (Attorney General),* 2010 FCA 63.

***Failure to Consider or Apply* Orozco**

[11] The Applicant's representative claims that *Orozco* was specifically presented to the GD. I see no record of this in the documentary record, but she may have relied on it during oral arguments. While it is true that the GD did not make reference to *Orozco* in its decision,

an administrative tribunal need not explicitly address each and every precedent brought to its attention during submissions.

[12] In any event, *Orozco* was issued by the Pension Appeals Board, a predecessor body to the AD and, while its decisions may exert influence, they not do carry the force of law. Although the PAB recognized the concept of retrospective assessment on several occasions, the GD was within its jurisdiction to assess the factual evidence in this case without necessarily finding a pre- MQP date of onset.

[13] That said, I see no indication that the GD disregarded the possibility of retrospective assessment. The reports of Dr. Daly dated March 28, 2013 and Dr. Waisman dated February 22, 2014 were fairly summarized and addressed in the analysis as part of a larger discussion on the Applicant's psychological condition during the MQP. The GD did not dismiss any report simply because it was dated after the MQP. I also note that the GD made explicit mention (at paragraph 36) of Dr. Waisman's conclusion that the Applicant suffered a severe impairment from a major depressive disorder and pain disorder immediately after her April 2006 motor vehicle accident, which "precluded most useful occupational function in the areas for which she is reasonably suited by education, training, and experience."

[14] For these reasons, I am not satisfied there is an arguable case on this ground.

Mischaracterization of Dr. Waisman's Conclusions

[15] Having summarized Dr. Waisman's report, the GD then noted at paragraph 49 of its decision that:

> Dr. Waisman's assessment was to the effect she is substantially unable, as opposed to precluded, from any occupation, and his opinion did not indicate such incapacity existed prior to the Appellant's MQP.

[16] The Applicant's representative alleges the GD mischaracterized Dr. Waisman's assessment to mean no incapacity existed prior to the Applicant's MQP. In this, I have to agree there is at least an arguable case that the GD made an erroneous finding of fact without regard to the material before it. It is apparent that the GD wrestled with the implications of Dr.

Waisman's report, which it said found the Applicant "substantially unable" to perform any occupation as opposed to "precluded" from perform any occupation—overlooking that Dr. Waisman did in fact use the word "precluded" on several occasions. More significantly, the GD said that Dr. Waisman recognized no incapacity prior to the MQP, but the Applicant's representative highlighted several passages in which he referred to "impairments" related to affect regulation, depression and chronic pain and that he categorically linked to the April 2006 MVA.

[17] Similarly, there is an arguable case to be made that the GD erred when it said at paragraph 55 that "there was no evidence that the Appellant was suffering from any severe mental illness prior to her MQP…" While the GD rightly observed that the Applicant made no reference to depression or associated symptoms in her Application for Benefits and Notice of Appeal, it is not true there was no evidence of severe mental illness. There were Dr. Waisman's retrospective diagnoses, but there was also Dr. Kleinman's September 2008 assessment, in which he expressed concern the Applicant was developing chronic pain syndrome; Dr. Sabga's May 2009 report in which he identified among the Applicant's main conditions situational depression from chronic pain; and Dr. Kurtesz's December 2013 report, wherein he diagnosed the Applicant with a mild MVA-related brain injury that resulted in ongoing impairments with respect to concentration, memory and depression.

Drawing Questionable Inference from Nonattendance at Work Hardening

[18] The GD's decision was based in part on the Applicant's failure to attend a work hardening program, in apparent defiance of the recommendations of several assessors. The Applicant's representative submits that this constituted an erroneous finding of fact because the GD disregarded conditions and qualifiers attached to those recommendations. In May 2008, Dr. Jasey recommended enrollment in a work hardening program only if she were first to complete extensive physiotherapy. In August 2008, Dr. Kleinman also advised work hardening but also cautioned that the Applicant's prognosis was poor.

[19] Neither of these concerns was mentioned by the GD when it found that the Applicant had not completely fulfilled her obligation to mitigate her disabilities by pursuing all vocational alternatives. I find this ground of appeal carries a reasonable chance of success.

[20] After reviewing the appeal docket, the GD's decision and the arguments in support of the Application, I conclude that the appeal has a reasonable chance of success. The Applicant raised legal and factual questions with possible responses that might justify setting aside the decision under review.

CONCLUSION

[21] I am allowing leave to appeal on the grounds that the GD may have made erroneous findings of fact by: (i) mischaracterizing Dr. Waisman's conclusions and (ii) drawing an unsupported inference from the Applicant's non-attendance at a work hardening program.

[22] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

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

Member, Appeal Division