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

Citation: *R. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 172

Tribunal File Number: AD-16-176

BETWEEN:

R. R.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division– Leave to Appeal Decision

DECISION BY: Neil Nawaz

DATE OF DECISION: May 16, 2016

REASONS AND DECISION

DECISION

[1] The Appeal Division (AD) of the Social Security Tribunal refuses the Application for Leave to Appeal.

INTRODUCTION

[2] In a decision dated October 17, 2015, the General Division (GD) of the Social Security Tribunal determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*.

[3] On January 18, 2016, the Applicant filed an Application for Leave to Appeal. The AD received the Application within the specified time limit.

THE LAW

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

[5] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[6] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The GD 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.

[7] 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

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

SUBMISSIONS

[9] The Applicant submits that the GD did not carefully review her appeal and did not recognize that she is incapable of a paying job, as confirmed by her treatment providers.

Natural Justice

[10] The Applicant also submits that the GD failed to observe a principle of natural justice by not reasonably considering reports of Dr. H.K. Wong, who considered her conditions "severe and prolonged." The Applicant claimed that her skin condition prevented her from working in the food industry, and her limited English did not permit her to function in an office setting. She said she was barred from physical labour by pain in her knees, back and shoulder.

Factual Errors

[11] The Applicant also submits that the GD based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it. In her application, she argued that the GD failed to consider that:

- She worked for barely four hours in her store and had a full-time employee. Her husband and son assisted her in the afternoon.
- Her skin condition was long continued as it started in 2007.
- She took prescribed medications costing hundreds of dollars.

- She did not have the capacity to pursue gainful employment and relied on her family to perform housework, a source of shame and anxiety for her.
- She wears plastic and cotton gloves at all times outside her home, which she finds embarrassing.
- She feels that she is a financial burden on her husband.
- Her prognosis is considered poor.

[12] The Applicant also submitted medical reports from Dr. H.K. Wong dated July 23, 2015 and January 16, 2016, Dr. Allison Sutton dated July 27, 2015 and Dr. Alfonso Verdejo dated July 8, 2015, as well as a Record of Employment for her former employee, A. K.

ANALYSIS

[13] The Federal Court of Appeal has held that whether an appeal has a reasonable chance of success is akin to determining if there is an arguable case at law: *Fancy v. Canada (Attorney General)*, 2010 FCA 63. Here, the Applicant has not persuaded me that she has an arguable case on the claimed grounds.

Natural Justice

[14] The Applicant suggests that the GD failed to observe a principle of natural justice by not reasonably considering the reports of Dr. H.K. Wong, specifically those dated July 13, 2015 and January 16, 2016. I note that the first was addressed by the GD in its reasons for dismissing the appeal, as were the reports of Dr. Sutton and Dr. Verdejo, which were resubmitted with the Application for Leave.

[15] Essentially, the Applicant requests that I re-weigh various items of evidence and come to a different conclusion than that made by the GD. This is beyond the scope of a leave application. The DESD Act does not contemplate a reassessment of the evidence before the GD at the leave stage. It does, however, require an applicant to satisfy the AD that there is at least one reviewable error that has a reasonable chance of success, and the Applicant has not done so in this regard.

[16] Based on my review of the file, there were two documents submitted with the Application for Leave that were not before the GD at the time of hearing: Dr. Wong's report of January 16, 2016 (which obviously was prepared after the hearing date) and a Record of Employment dated May 5, 2009. If the Applicant wishes to submit additional documents in support of her CPP disability application, those documents must relate to the grounds of appeal. However, the Applicant has not stated how they support the listed grounds of appeal. If the Applicant is asking me to consider those additional documents, reassess the evidence and decide in her favour, I am unable to do so at this stage given the constraints of subsection 58(1) DESDA.

[17] If there are any new facts or records which the Applicant intends to file in an effort to rescind or amend the decision of the GD, she must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations* and file an application to rescind or amend with the GD. Subsection 66(2) of the DESDA requires that an application to rescind or amend be made within one year after the day on which the decision in question is communicated to the parties. Under paragraph 66(1)(b) of the DESDA, an applicant must show that the new fact is important and would not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[18] An appeal is not a new hearing on the merits of the Applicant's claim for a disability pension. In short, there are no grounds on which I can consider the documents noted above for the purposes of an application for leave to appeal.

Factual Errors

[19] The GD made its decision after conducting what appears to be to be a thorough assessment of the record, weighing the evidence as it deemed appropriate. The Applicant had ample opportunity to present her side of the story, and it appears that she took full advantage of it, making several submissions in the more than two years it took for this matter to come to hearing.

[20] In my view, the Applicant failed to identify *any* erroneous finding of fact in the GD's reasons for its decision, much less one that was "perverse or capricious" or "without regard for

the material before it." All of the points listed in her Application for Leave were considered by the GD, with the exception of the recently-submitted evidence regarding her employee, which was presumably intended to show she had relief from the physical demands of being a shopkeeper. It must be noted that the Applicant's written submissions to the GD dated August 2, 2015 explicitly stated "she was the only employee" of the store in paragraph 5, and a cursory review of the hearing recording indicates that this assertion was uncontradicted in testimony. When asked at 19:40 whether they had ever considered hiring someone else, the Applicant's husband replied that they would not have been able to make any money had they done so.

[21] In *Simpson v. Canada (Attorney General)*, 2012 FCA 82 , the Federal Court of Appeal addressed an alleged failure to consider all evidence, holding that an administrative tribunal need not refer in its reasons to each and every piece of evidence before it, as it is presumed to have considered all of the evidence. Furthermore, assigning weight to evidence, whether oral or written, is the province of the trier of fact, and an administrative tribunal hearing an appeal of the type defined by s. 58 DESDA may not normally substitute its view of the probative value of the evidence .

[22] In listing a series of "facts" that the GD allegedly failed to take into consideration, the Applicant is essentially recapitulating her claim and asking me to reassess the evidence in her favour. I am unable to do this, as my authority permits me to determine only whether any of her reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. Appealing to the AD is not an opportunity for an applicant to re-argue their case.

CONCLUSION

[23] The Application is refused.

Member, Appeal Division