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

Citation: ***J. M. v. Minister of Employment and Social Development*****, 2016 SSTADIS 173**

Date: May 12, 2016

File number: AD-16-450

APPEAL DIVISION

Between:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

Leave to Appeal

Decision by: **Hazelyn Ross, Member, Appeal Division**

DECISION

[1] Leave to appeal to the Appeal Division of the *Social Security Tribunal*, (the Tribunal), is granted.

INTRODUCTION

[2] In a decision dated February 16, 2016, a Member of the Tribunal's General Division found that the Applicant met the definition of "severe and prolonged" set out in paragraph 42(2)(a)(i) of the *Canada Pension Plan*, (CPP). The General Division determined that the Applicant became disabled as of November 2015. The Applicant seeks leave to appeal from this decision, (the Application), specifically, with respect to the deemed date of disability.

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that, in determining the deemed date of disability to be November 2015, the General Division breached ss. 58(1)(c) of the *Department of Employment and Social Development Act*, (the DESD Act) in that its decision was based on erroneous findings of fact made in a perverse and capricious manner without regard to all of the material before it; as well as erred in law.

ISSUE

[4] The Appeal Division must decide if the appeal has a reasonable chance of success.

APPLICABLE LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] By virtue of ss. 58(2) of the DESD Act, an applicant is, required to satisfy the Appeal Division that his appeal would have a reasonable chance of success. Thus leave to appeal is refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success". An applicant satisfies the Appeal Division that his appeal

[1] Subsections 56(1) and 58(3) of the DESD Act govern the granting of leave to appeal, providing that "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." Subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

would have a reasonable chance of success by raising an arguable case in his application for leave.[2] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[6] The DESD Act sets out the grounds of appeal at ss. 58(1). These are the only grounds of appeal. The provision reads as follows:-

> 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.

[7] In order to grant the Application, the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the grounds of appeal set out above. The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

ANALYSIS

[8] At ss. 42(2)(b) the CPP addresses the question of when a person can be deemed to have become disabled. The statutory provision provides that a determination be made in "prescribed manner." At the same time the statutory provision limits the period of retroactivity during which a person can be deemed to have become disabled to fifteen months prior to the date the application was received. According to the Tribunal record at GD4-14, the Respondent received the Applicant's application for a CPP disability pension on April 15, 2013. Therefore, in the Applicant's case the maximum period of retroactivity goes back to January 2012. The full text of ss. 42(2)(b) is:-

> 42(2) *When person deemed disabled* - For the purposes of this Act,
>
> (b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person – including a

[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

> contributor referred to in subparagraph 44(1)(b)(ii) – be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

[9] Counsel for the Applicant submits that November 2015 is not the correct date of onset of disability. She submitted that the medical information on file supported the fact that the General Division miscalculated the date of disability. Counsel for the Applicant also submitted that there is clear information on file to support the present Application. She does not, however, suggest what the correct date of deemed disability is.

[10] In her submissions, Counsel for the Applicant refers to the Applicant's evidence regarding her reasons for stopping work, noting that the Applicant testified that she left her last employment because she had been unable to regularly attend and carry out her duties as a dietary aide at the retirement home at which she had worked from June 2010 to June 2011. Counsel for the Applicant cited and relied on her testimony that "in the last six months she missed a lot of shifts due to her health condition."

[11] The Appeal Division infers that Counsel for the Applicant is suggesting that the Applicant's disability commenced at least in the last six month of her employment at the retirement home. Based on the provisions of paragraph 42(2)(b) of the CPP, and the date the Respondent received the application for the disability pension, the Appeal Division cannot make such a finding. Therefore, without further clarification, this argument does not disclose a ground of appeal that would have a reasonable chance of success.

[12] Counsel for the Applicant also submitted that the General Division committed an error of law, or error of mixed fact and law with respect to its finding that the Applicant did not have continuity of care prior to November 2015. In Counsel's submission, the General Division finding is not based on the facts and documents that were on file. Counsel for the Applicant made the further argument that continuity of care is irrelevant to the date of onset of disability and is an error that the Appeal Division should remedy. (AD1A-5)

[13] The Appeal Division concurs with the argument of Counsel for the Applicant with regard to the concept of "continuity of care". The Appeal Division is unable to find any support for the position that the deemed date of disability can be determined relative to this

concept. Accordingly, the Appeal Division finds that Counsel for the Applicant has raised an issue that points to an error of law and, therefore, to a ground of appeal that may have a reasonable chance of success.

[14] Counsel for the Applicant also argued that the General Division disregarded medical evidence, namely that "there was a substantial disregard of all the medical evidence that was before it." The Appeal Division is not persuaded by this submission. Noting that, per *Oliviera v. Canada (Minister of Human Resources Development),* 2003 FCA 213, it is now well settled that a Tribunal need not make express reference to in its reasons to all of the oral and documentary evidence presented, the reasons show that the General Division both set out the medical evidence as well as referred to it in its analysis. The Appeal Division cannot reweigh the evidence. Thus, the Appeal Division finds that this submission does not indicate a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[15] Counsel for the Applicant submitted 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. Counsel for the Applicant also submitted that the General Division committed errors of law in regarded to its determination of the Applicant's deemed date of disability. The Appeal Division finds that an arguable case has been raised with respect to the concept of "continuity of care". Leave to appeal is granted in this regard.

[16] The Application is granted.

Hazelyn Ross
Member, Appeal Division