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

Citation: *S. F. v. Minister of Employment and Social Development,* 2016 SSTADIS 177

Tribunal File Number: AD-16-174

BETWEEN:

S. F.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: May 18, 2016

Canada

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] The Applicant applies for leave to appeal, (the Application), from the decision of the General Division of the Tribunal issued October 30, 2015. The decision determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* (CPP).

GROUNDS OF THE APPEAL

[3] The appeal is based on paragraph 58(1)(c) of the Department of Employment and Social Development, (DESD), Act being formulated in the following terms:-

> "If the Member had correctly interpreted the facts before her and erred in her conclusions regarding prolonged disability she would have found that Ms. S. F. suffered from a severe and prolonged disability at the time of her MQP in December 2006." (AD1-4)

ISSUE

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

THE GOVERNING STATUTORY PROVISIONS

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. 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."

[7] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] 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.

[8] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

[9] *Tracey v. Canada (Attorney General),* 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal

SUBMISSIONS

[10] On the behalf of the Applicant, her counsel submitted that the General Division erred by misinterpreting and coming to erroneous conclusions about the evidence that was before it and by omitting to consider the totality of her medical conditions.

ANALYSIS

[11] In the view of the Appeal Division the Applicant's stated reason for the Application does not, by itself, support the grant of leave as it appears to be speculative and to do no more than express the Applicant's disagreement with the decision. However, in setting out the reasons for the appeal, Counsel for the Applicant amplified the reason for the Application,

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[1] [1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

allowing the Appeal Division to get a better sense of the basis of the Application. Counsel for the Applicant makes two main submissions, namely:-

1. the General Division Member erred in her treatment of the test for "prolonged" disability under the CPP; and

2. erred in her treatment of the facts surrounding the Applicant's schooling and job placement.

The General Division erred with respect to its treatment of "prolonged disability"

[12] Counsel for the Applicant submitted that the General Division came to an erroneous finding that the Applicant's incontinence problem would be ameliorated if she stopped smoking. In the view of Counsel for the Applicant the General Division reached an erroneous conclusion when it found that "one of the main factors argued by the Appellant was that she was incapable of working due to stress incontinence." Counsel argued that this conclusion was inconsistent with the earlier finding that stress incontinence had not prevented the Applicant from working in the past.

[13] The Appeal Division is not persuaded by Counsel's arguments. At paragraph 54 of the decision, the General Division writes,

> [54] "the file indicates that the Appellant experienced incontinence for 13 years prior to her consultation with Dr. Kochar in 2004 and that it had worsened in the past six years. She stopped working in 2001 due to injuries. The evidence shows that she was able to work despite incontinence and that this was not a factor in her leaving work in 2001."

[14] The Appeal Division finds no inconsistency in the reasoning of the General Division. In August 2004, Dr. Kochar (GD5-62) noted stress incontinence linked to the Applicant's COPD and coughing as one of the Applicant's medical conditions. He advised the Applicant to lose weight and to give up smoking. As the General Division stated, Dr. Kochar noted that the Applicant had had the condition for some thirteen years, which means that in 2004 the Applicant had been suffering stress incontinence since 1991. There was no dispute that the Applicant stopped working in 2001. Thus, she continued to work for ten years despite her problem of incontinence before she stopped working. When she did, it was not due to incontinence; her stated reason was because she had been "injured." (GD5-93) At paragraph 12 of its decision, the General Division records that this was also part of her evidence at the hearing.

[15] In the same paragraph, the General Division notes that it was the Applicant's testimony that she could not return to work in 2004 because of her COPD and incontinence. (Decision at para. 12). These are not conclusions that were drawn by the General Division but a restatement of facts and evidence. The Appeal Division fails to appreciate how error arises from these circumstances. Consequently, the Appeal Division finds that these submissions do not give rise to a ground of appeal that would have a reasonable chance of success.

[16] Counsel for the Applicant also argued that the General Division failed to consider the totality of the Applicant's medical conditions and their effect on her ability to engage in any substantially gainful occupation. Counsel made the following submission:-

> While it was argued that incontinence was one of the medical conditions that should be considered in the overall picture of the Appellant's health and had some effect on her ability to work, it is submitted that the other medical conditions from which Ms. S. F. suffers would have rendered her incapable of regularly engaging in a substantially gainful occupation even if the incontinence was not present. The Member erred in failing to consider whether the other conditions would meet the test for severe and prolonged even in the absence of the stress incontinence and COPD. (AD1)

[17] *Bungay v. Canada (Attorney General),* 2011 FCA 47 stands for the proposition that "all of a claimant's possible impairments that affect employability are to be considered, not just the biggest impairments or main impairments." This principle was previously set out by the Pension Appeals Board in *Taylor v. MHRD* (July 4, 1997), CP 4436, which decision is of persuasive value to the Tribunal. Thus, it would be an error of law if the General Division were to fail to consider the totality of the Applicant's medical conditions in its assessment of whether or not she met the CPP definition of 'severe and prolonged."

[18] At paragraph [52] the General Division states,

> The Appellant argues that the combined effect of her impairments rendered her incapable regularly of pursuing any substantially gainful employment on or before December 31, 2006.

[19] This paragraph relates to the previous paragraph [51] wherein the General Division set out and considered the effect of the Applicant's medical conditions as they existed prior to the end of her minimum qualifying period, (MQP), of December 31, 2006. The General Division addressed the result of diagnostic testing in relation to the Applicant's osteoarthritis and mild

carpal tunnel syndrome. The General Division also addressed the result of a pulmonary function test and the 2006 clinical note that indicated that the Applicant suffered from COPD and used an inhaler. As well, the General Division addressed the Applicant's diagnosis of anxiety disorder and stress incontinence. These medical issues were addressed further in paragraphs 54-56 of the General Division decision.

[20] Further, in the view of the Appeal Division paragraphs 51 and 52 of the General Division decision must be read in conjunction with paragraph 53, wherein the General Division accepted that the Applicant "was incapable of physically demanding work"; but found evidence of work capacity residing in the Applicant's successful completion of a three-year degree programme and a one-year job placement between 2002 and 2006.

[21] The General Division did not address either the Applicant's diabetes or elevated blood pressure. In the strict application of *Bungay*, the omission points to an error of law. However, given the General Division's finding, as set out above, that despite her medical conditions the Applicant retained work capacity; the Appeal Division finds that the error is not so significant as to ground an appeal.

The General Division erred with respect to its treatment of the facts surrounding the Applicant's schooling and job placement.

[22] Counsel for the Applicant also submitted that The Member erred in finding that the Applicant's schooling and placements showed a capacity to work, yet at the same time concluding that she had failed to show that an effort at obtaining and maintaining employment was unsuccessful by reason of her health conditions. The Appeal Division finds that the General Division's reasoning is logical and does not demonstrate error. The case law, for example, (*Inclima v. Canada (A.G.)*, 2003 FCA 117 requires an applicant to show both a serious health problem and, where there is evidence of work capacity, as for example regular attendance at school, to show that their efforts at obtaining and maintaining employment were rendered unsuccessful by reason of their health condition.

[23] The General Division found that the Applicant by virtue of completing "four years of post-secondary education including community placements indicates a capacity to pursue substantially gainful employment whether full-time or part-time." Having weighed the evidence

of the Applicant's lone attempt to find work after her schooling and job placement were completed, the General Division concluded that she had "not shown that [her] effort at obtaining and maintaining employment was unsuccessful by reason of her health condition." The Appeal Division finds that the General Division did not err in its conclusion.

[24] Counsel for the Applicant made additional submissions regarding the appropriate interpretation of the Applicant's course work at Laurentian University and Cambrian College and her subsequent placements. In the view of the Appeal Division these are no more than additional argument in support of the position that the evidence be reweighed. Per *Tracey*, reweighing evidence is not the role of the Appeal Division.

CONCLUSION

[25] 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. For the above reasons set out above the Appeal Division is not satisfied that Counsel's arguments raise grounds of appeal that would have a reasonable chance of success. Accordingly, the Application is refused.

Hazelyn Ross
Member, Appeal Division