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

Citation: *L. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 183

Tribunal File Number: AD-16-183

BETWEEN:

L. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Neil Nawaz

DATE OF DECISION: May 24, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated October 28, 2015. The GD conducted an in-person hearing on September 14, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was not "severe" prior to the minimum qualifying period (MQP) of December 31, 2017. On January 15, 2016, the Applicant's representative filed an application requesting leave to appeal, advancing numerous grounds of appeal and relying on various legal authorities. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

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

[3] Subsection 58(1) of the DESDA sets out that 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.

[4] 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."

ISSUE

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

SUBMISSIONS

Erroneous Findings of Fact

[6] The Applicant's representative submits that the GD based its decision on erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

(a) At paragraph 42 of its decision, the GD misidentified Dr. Ira Michael Price as a rheumatologist, rather than as an emergency doctor.

(b) At paragraph 43 of its decision, the GD incorrectly found that the Applicant had never been prescribed medical marijuana.

(c) At paragraph 44 of its decision, the GD incorrectly found that the Applicant was non-compliant with treatment and stated that no submissions were made as to why she refused to take prescribed medication.

(d) At paragraph 48 of its decision, the GD incorrectly stated that there was no indication the Applicant had been prescribed medication to deal with her mental health conditions or been referred to a psychiatrist.

Errors of Law

[7] The Applicant's representative submits that in making its decision the GD erred in law, whether or not the error appeared on the face of the record:

(a) The Tribunal misapplied *Gaudet v. Canada (Attorney General)* 2010 FCA 59 by failing to appreciate it concerned an application to admit "new facts" under former section 84(2) of the CPP.

(b) The Tribunal failed to apply *E.J.B. v. Canada (Attorney General),* 2011 FCA 47 by inadequately considering all of the Applicant's conditions and their collective impact on her functionality.

(c) Tribunal failed to apply *D'Errico v. Attorney General*, 2014 FCA 95 by failing to consider the "regular" aspect of the disability severity test.

ANALYSIS

[8] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General),* 2010 FCA 63.

[9] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

Erroneous Findings of Fact

Misidentification of Dr. Price

[10] The Applicant submits that the GD incorrectly identified Dr. Ira Michael Price, who purportedly prescribed the Applicant with medical marijuana, as a rheumatologist, when he was actually an emergency doctor in X.

[11] A review of the evidentiary record yields comparatively few references on Dr. Price, and there are apparently no primarily documents from him on file. When he is mentioned in Ms. R. M.'s reports and Dr. Arora's office notes, he is referred to as a "specialist" or a "marijuana specialist," although his actual board-certified field of expertise was never specified. As it appears a referral to Dr. Price was only contemplated after the Applicant's regular rheumatologist refused to prescribe medical marijuana, the GD may have assumed that Dr. Price was also a rheumatologist. If so, this was an understandable error (not one that was "perverse" or "capricious"), given the informality and apparent haste with which some of the clinical notes were written. In any case, this error is not material, and I do not see how the GD

would have come to a different conclusion had it correctly identified Dr. Price's specialty. As the GD was not disputing an essential point that the Applicant was attempting to make—that she sought a specialist referral in order to obtain a prescription for marijuana—the error cannot be said to have been made "without regard to the material before it."

[12] I see no arguable case on this ground.

Finding that the Applicant had never been prescribed medical marijuana.

[13] The Applicant submits that the GD incorrectly found that she had never been prescribed medical marijuana. It disputed the GD's statements in its decision that: (i) the records on file indicated no prescription for medical marijuana; (ii) Dr. Arora and Dr. Price both refused to prescribe her with medical marijuana and (iii) given the foregoing facts, any use of marijuana on her part was not monitored or managed by her treating physicians.

[14] The Applicant cited records dated February 19, 2013 (p. GD4-94) and July 3, 2013 (p. GD4-98) to support her claim that she had in fact been prescribed medical marijuana, but a close examination of these passages from Dr. Arora's clinical file show only that she had attended an appointment with Dr. Price. The outcome of that appointment is not clear, and I see no report on file from Dr. Price to confirm that he approved her for medical marijuana. I note that Dr. Arora's July 3, 2013 notes make no reference to marijuana, although the next entry—a July 11 transcription of R. M.'s progress report—does, but it merely relays what the Applicant told her counsellor.

[15] The Applicant presumably testified to the same effect at the hearing, but the fact that the Applicant says she was prescribed medical marijuana does not necessarily make it so, and in the absence of independent confirmation, the GD member was entitled to doubt whether such a prescription ever existed. That said, I note that the GD member flatly stated that Dr. Price (whom, as discussed above, she evidently believed was a rheumatologist) refused to prescribe the Applicant with medical marijuana, and I see no evidence in the file to support this.

[16] For this reason, I see an arguable case on this ground.

Finding of non-compliance with prescribed medications

[17] The Applicant submits that the GD committed an error of fact when it stated that the Applicant refused to take prescribed medications without reason, when there is both oral and written evidence that she did take her prescribed medications but, due to debilitating side effects, chose not to continue with them.

[18] It is clear enough that the GD found in paragraph 44 of its decision that the Applicant was non-compliant with her prescribed medications and that no submissions were made on why she refused to do so. On the face of it, the latter would appear to be at odds with paragraph 12 of the same document in which the GD member took note of the Applicant's testimony that she has "tried many medications but gets sick to the stomach." A brief perusal of the hearing recording confirms, as claimed by the Applicant, that there was a discussion about why the Applicant has not been able to tolerate prescription medications.

[19] I see an arguable case on this ground.

Finding that Applicant was not referred to a psychiatrist or prescribed psychoactive medication

[20] The Applicant argues that actual errors are contained in paragraph 48 of the GD decision:

> There is no indication that she has been prescribed medication to deal with her mental health conditions or been referred to a psychiatrist for consultation or treatment.

[21] As the Applicant concedes that she has never seen a psychiatrist, the GD was strictly correct to observe as much, even if she has consulted other mental professionals over the years. The GD was also within its jurisdiction to use this finding of fact in drawing inferences and assessing the severity of the Applicant's disability.

[22] The Applicant refers to several instances in the hearing file where her treatment providers referred to prescriptions for Ativan, Elavil, Cymbalta and Amitriptyline. On the face of it, this information contradicts the GD's finding, and I am therefore satisfied that this ground of appeal carries with it a reasonable chance of success.

Errors of Law

Misapplication of Gaudet

[23] The Applicant alleges the GD incorrectly applied *Gaudet* by citing it to discount a diagnosis as opposed to an assessment of functionality. The GD quoted the Federal Court of Appeal as follows:

> …identifying a medical condition in and of itself does not bring the applicant closer to a disability pension in the absence of persuasive evidence that the applicant was disabled within the meaning of the CPP as of their MQP date.

[24] As *Gaudet* dealt with an application to admit "new facts" (in that case, a diagnosis of fibromyalgia) under former subsection 84(2) of the CPP, it had no relevance, so it was argued, to the Applicant's section 44 of the CPP claim, in which the diagnosis was well established prior to the MQP .

[25] The Applicant further argues that in applying the principle for which *Gaudet* is purported to stand, the GD mischaracterized Dr. Suhail's October 2012 report, which offered not just a diagnosis of fibromyalgia, but also a discussion of how that medical condition would affect the Applicant's ability to work.

[26] I agree with the Applicant that *Gaudet* emerged from a different type of CPP application than the present case, but I do not agree with the suggestion that it is irrelevant here. The passage quoted by the GD reiterates settled law and is a variation on the maxim, "diagnosis does not equate to disability," which has been set out by *Klabouch* v. *Canada (MSD)*, 2008 FCA 33, among others.

[27] I see no reasonable chance of success on appeal on this ground.

Failure to apply E.J.B.

[28] The Applicant's representative submits that the GD erred in law by failing to consider all of the Applicant's conditions in determining that her impairments fell short of severe,

specifically her fibromyalgia, profound fatigue, low mood, anxiety, sleep disturbance and irritable bowel syndrome (IBS), which caused symptoms of fecal incontinence.

[29] I do not agree. Relaying the Applicant's testimony, the GD listed all of the above symptoms and/or conditions in paragraph 9 of its decision, and documented her description of their impact on her functional abilities in paragraph 10. The medical reports, including the assessments of her treatment providers, were comprehensively summarized, as were the parties' respective submissions. The analysis touched on all of the Appellant's complaints, to varying degrees, relying on findings of fact and addressing selected medical reports deemed relevant. The GD explicitly addressed the Applicant's IBS in paragraph 53 and evidently concluded, based on evidence it was only lightly medicated, that the symptoms were non-disabling. While the GD's discussion on this issue was brief and it did not arrive at the conclusion the Applicant would have preferred, it is not my role here to retry the evidence but to assess whether the outcome was acceptable and defensible on the facts and the law. It cannot be said that the GD simply ignored the Applicant's major complaints, and for that reason I see no reasonable chance of success on this ground.

Failure to apply D'Errico

[30] The Applicant submits that the GD committed an error in law by not considering how her impairment prevented her from "regularly" pursuing employment, which the Federal Court of Appeal interpreted to mean "consistent frequency." It is alleged that the GD Member failed to address the Applicant's evidence that she would not be a reliable employee because she cannot work to a schedule.

[31] The concept of "regular" has been explored in numerous decisions, recently in *Atkinson* v. *Canada (Attorney General)* 2014 FCA 187, where the Federal Court of Appeal stated that "predictability is the essence of regularity within the CPP definition of "disability." While the GD did not include an extended discussion on whether the Applicant's impairments would have prevented her from "regularly" pursing substantially gainful employment, there are several indications in its decision that it was mindful of the correct legal standard. In paragraphs 40 and 54, the GD explicitly referred to the *Villani v. Canada (A.G.),* 2001 FCA 248 reformulation of the severity test: Incapacity to pursue with "consistent frequency" any truly remunerative

employment. In paragraph 47, the GD considered the Applicant's condition in the context of the concept of "employability," referring to Canada (*Attorney General) v. Fink*, 2006 FCA 354, in which it was held that claimants must demonstrate that they suffer from pain or discomfort that prevents employment.

[32] In finding that the Applicant retained work capacity at the time of her MQP, the GD incorporated the "regularity" concept into its assessment. For this reason, I find that there is no arguable case on this ground.

CONCLUSION

[33] As indicated, the Application for Leave to Appeal is granted on the grounds that the GD appears to have made the following factual errors:

(a) Finding the Applicant had never been prescribed medical marijuana;

(b) Finding the Applicant was non-compliant with treatment and stating that no submissions were made as to why she refused to take prescribed medication;

(c) Finding there was no indication the Applicant had been prescribed medication to deal with her mental health conditions or been referred to a psychiatrist.

[34] I invite the parties to make submissions in respect of the form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers).

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

Member, Appeal Division