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

Citation: *Minister of Employment and Social Development v. B. P.,* 2016 SSTADIS 178

Tribunal File Number: AD-16-583

BETWEEN:

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

Appellant

and

B. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: May 19, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 20, 2016. The General Division found that the Respondent had a severe and prolonged disability in January 2011 when she was no longer able to continue working at her part-time job as a cashier. It determined that the Respondent was deemed disabled in March 2012 and that payment of a Canada Pension Plan disability pension therefore should commence as of July 2012.

[2] The Applicant applied for leave to appeal on April 20, 2016. The Applicant submits that the General Division erred in law, acted beyond its jurisdiction and based its decision on an erroneous finding of fact, in a perverse or capricious manner or without regard for the material before it. The Applicant can only succeed on this application if I am satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[4] The Applicant argues that the General Division made the following errors:

(a) erred in law by failing to consider that there was no medical evidence or any objective medical evidence to support its conclusion that the Respondent had a severe and prolonged disability;

(b) erred in law by failing to analyze the Respondent's functional limitations at the date of the end of her minimum qualifying period of December 31, 2010; and,

(c) exceeded its jurisdiction and made an error of fact without regard to the material before it when it found that the date of onset was January 2011 when

she was no longer able to continue working at her part-time job as a cashier. The Applicant argues that there is no evidence on record to support such a finding. The Applicant submits that if the General Division arbitrarily chose January 2011 to coincide with the end of the Respondent's prorated minimum qualifying period of January 2011, this would amount to exceeding its jurisdiction.

[5] The Social Security Tribunal provided a copy of the leave materials to the Respondent. However, the Respondent did not file any written submissions.

ANALYSIS

[6] Before leave can be granted, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[7] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to 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.

(a) Medical evidence

[8] The Applicant contends that the General Division failed to consider that there was no medical evidence to support its conclusion that the Respondent had a severe and

prolonged disability. The Applicant argues that there was no supporting medical evidence that the Respondent experienced lower back pain and that the evidence with regard to the Respondent's knee pain at her minimum qualifying period suggested only mild symptoms. The Applicant notes that the Respondent's physician was of the opinion that the prognosis is "guarded" and dependent on a specialist's recommendation. The Applicant also notes that the Respondent failed to provide any specialists' recommendations. Nevertheless, the General Division relied heavily on the Respondent's testimony that she will require knee surgery and will be unable to have the surgery until she is at least 60 years old.

[9] The Applicant argues that the General Division was required to consider objective medical evidence and at least address why it chose to rely on the Respondent's testimony in the absence of any supporting medical evidence. The cases cited by the Applicant in support of this proposition include *Villani v. Canada (Attorney General)*, 2001 FCA 248 at para. 50; *Gorgiev v. Canada (Minister of Human Resources Development)*, 2005 FCA 55 at para. 4; *Canada (Attorney General) v. Fink*, 2006 FCA 354 at para. 2; *Warren v. Canada (Attorney General)*, 2008 FCA 377 at para. 4; and *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140 at para. 27.

[10] The evidence is set out at paragraphs 8 to 24, and the analysis regarding the severity of the Respondent's disability is set out at paragraphs 28 to 38. There appears to have been little in the way of medical records that pre-date the end minimum qualifying period or the prorated period of January 2011, apart from an opinion of the Respondent's retired family physician and x-rays of the Respondent's right knee and lumbar spine taken on January 21, 2011 (GD3-53 and GD3-54). It appears that the General Division largely based its decision on the Respondent's testimony and subjective evidence before it. Indeed, there were limited references in its analysis to any of the medical opinions. The General Division noted the family physician's opinion of June 2013, but otherwise did not refer to, nor rely on any opinions that might have either been prepared at or around the minimum qualifying period or the prorated period, or might have addressed the Respondent's condition at that time.

[11] As the Federal Court of Appeal has stated, it is settled law that some objective medical evidence of an applicant's disability is required. It is not altogether apparent from the General Division decision whether there was any objective medical evidence at or around the end of the minimum qualifying period before it, or if there was, whether the General Division considered it, in finding that the Respondent was disabled for the purposes of the *Canada Pension Plan* within her prorated period. I am satisfied that this raises an arguable case and that the appeal has a reasonable chance of success on this ground.

[12] The Applicant also argues that there is insufficient medical evidence to find that the Respondent's disability is either severe or prolonged by the end of her minimum qualifying period. Had this been the basis upon which leave to appeal had been sought, I would have dismissed the application.

(b) Functional limitations

[13] The Applicant argues that the General Division erred in law when it failed to analyze the Respondent's functional limitations at the date of the end of her minimum qualifying period of December 31, 2010. The Applicant further argues that the error is apparent because there was so little evidence of a disability at the minimum qualifying period. It is the Applicant's position that the medical evidence at the minimum qualifying period suggests mild symptoms and that most of the medical evidence is dated well past the Respondent's minimum qualifying period.

[14] The Applicant contends that the General Division ignored the fact that the Respondent's symptoms may have been aggravated by events and symptoms that occurred well past her minimum qualifying period. According to the Applicant, the General Division failed to distinguish between the evidence at the minimum qualifying period and the evidence after this timeframe, nor did it consider how the symptoms may have changed after the minimum qualifying period had passed.

[15] The Applicant argues that all of these factors demonstrate that the General Division failed to consider the Respondent's functional limitations at the minimum qualifying period.

[16] To some extent, the Applicant is requesting a reassessment, which is not the role of the Appeal Division. However, there is some overlap with the preceding ground of appeal and this ground will be considered in that context, for the purposes of the appeal.

(c) Cessation of work

[17] The Applicant submits that the General Division exceeded its jurisdiction and based its decision on an erroneous finding of fact without regard to the material before it when it found that the date of onset was January 2011, at which point the Respondent was no longer able to continue working at her part-time job as a cashier. The Applicant argues that there was no evidence on the record to support such a finding. The Applicant submits that if the General Division arbitrarily chose January 2011 to coincide with the Respondent's prorated minimum qualifying period of January 2011, this would amount to exceeding its jurisdiction.

[18] The General Division indicated in the evidence section that the Respondent worked as a cashier at a grocery store from 2010 to 2011 and that she stopped work due to chronic pain and functional limitations. The General Division noted that the Respondent trained as a personal support worker in 2012 and that she worked as a personal support worker from February 20, 2013 to March 13, 2013, and as a personal support worker and housekeeper for three days at the end of May 2013. She apparently stopped working after March 2013 and again in May 2013 due to chronic back pain and knee pain.

[19] Significantly, the General Division failed to indicate when in 2011 the Respondent reportedly stopped working as a cashier at the grocery store. The Questionnaire accompanying the Respondent's application for a disability pension confirms that the Respondent worked between 2010 and 2011, however, the Respondent indicated that she was "unsure of exact dates" when she worked at the grocery store (GD3-63). She questioned the months and days when she might have worked at the grocery store. The Record of Earnings indicates that the Respondent had some earnings for 2011, but it alone does not indicate when those earnings might have been realized. From this, I do not see how the General Division could have relied on the Questionnaire or the Record of Earnings to come to a finding that the Respondent stopped working in January 2011.

[20] The Applicant filed an affidavit of a paralegal, who transcribed portions of the audio recording of the hearing before the General Division. In the portions transcribed by the paralegal, the Respondent is alleged to have testified that she last worked at the grocery store in 2010. The Respondent did not provide a definitive date when she stopped working at the grocery store.

[21] It is unclear how the General Division found that the Respondent had stopped working in January 2011, as there does not appear to have been any evidence before it to support such a finding. On this basis, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[22] The application for leave to appeal is granted.

[23] I invite the parties to make submissions as to whether a hearing is required or whether the appeal can be done on the record. If they advocate for a hearing, the parties should make submissions in respect of the form that the hearing should take (i.e. whether it should be conducted by teleconference, videoconference or other means of telecommunication, whether it should be held in-person or conducted by exchange of written questions and answers). If a party requests a hearing other than by exchange of written questions and answers, I invite that party to provide an estimate of the time required to prepare oral submissions.

[24] This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division