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

Citation: *M. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 196

Tribunal File Number: AD-16-651

BETWEEN:

M. T.

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: Janet Lew

DATE OF DECISION: May 31, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 9, 2016. The General Division determined that a hearing was not required and proceeded on the record. It found that the Applicant had not established that she had a severe disability under the *Canada Pension Plan* and that she therefore was not entitled to a disability pension. The Applicant filed an application requesting leave to appeal to the Appeal Division on May 6, 2016. For the Applicant to succeed, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[3] The Applicant raises several grounds of appeal. She alleges that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, erred in law in making its decision and 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] The Social Security Tribunal provided a copy of the leave materials to the Respondent. However, the Respondent did not file any written submissions.

ANALYSIS

[5] Subsection 58(1) of the *Department of Employment and Social Development* (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.

[6] Before I can consider granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the 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.

a) Natural justice and errors of law

[7] The Applicant submits that she should have been entitled to an in-person hearing, on the basis of her counsel's submissions of February 9, 2016 and her Hearing Information form. She alleges that the General Division failed to observe a principle of natural justice, as it ignored her request for an in-person hearing and assessed her claim on the basis of the documentary record. She notes that the General Division had determined that an appeal on the record was appropriate as the issues under appeal were not complex, there were no gaps in the information in the file or any need for clarification, credibility was not an issue and she was provided with fairness and natural justice in proceeding in this manner. She alleges that this determination constitutes an error on the record.

[8] The Social Security Tribunal sent a letter dated December 30, 2015 to the parties encouraging them to complete an attached Hearing Information Form and to return it to Social Security Tribunal within 10 days, so that the Member assigned to the matter could consider the information before making a decision on how to proceed. Neither party submitted a Hearing Information Form or any response for that matter within 10 days.

[9] On January 6, 2016, the Social Security Tribunal sent a letter to the parties indicating that the Member of the General Division who had been assigned to the matter intended to make a decision on the basis of the documents and submissions filed. The letter also indicated that if the parties had any additional documents or submissions to file, these

had to be received by the Tribunal by no later than February 10, 2016, and any responses were to be filed by no later than March 11, 2016. The letter reads in part:

> **FILING PERIOD**
>
> If parties have additional documents or submissions to file, they must be received by the Tribunal no later than **February 10, 2016**. A copy of any new documents received by the Tribunal will be provided to the other parties and they will be given an opportunity to respond.
>
> **RESPONSE PERIOD**
>
> The Filing Period is followed by a Response Period. If a party wishes to respond to any documents filed during the Filing Period, the response must be received by the Tribunal no later than **March 11, 2016.**

[10] The Applicant's counsel wrote to the Social Security Tribunal on February 9, 2016, seeking an in-person hearing on behalf of the Applicant. He explained that an in-person hearing was required as the Applicant would otherwise be "severely prejudiced". He indicated that although the application and supporting documentation might be helpful, "in no way does it detail the extent of [the Applicant's] severe and prolonged disability". The Applicant's counsel also argued that a full oral hearing with an in-person appearance was required to hear *viva voce* evidence from witnesses, including from the Applicant's family physician concerning the Applicant's cancer diagnosis. The Applicant's counsel proposed to call five witnesses, including the Applicant. Finally, counsel indicated that, after a hearing date was scheduled, he would provide additional written submissions, although he did not indicate what issue(s) his submissions would address. It is unclear why the Hearing Information form and request for an in-person hearing were not submitted until February 9, 2016, well past the deadline which the Social Security Tribunal had set in its letter of December 30, 2015..

[11] The General Division rendered its decision on February 9, 2016. There is no indication in the decision that the Member had received and reviewed the Applicant's counsel's letter and Hearing Information form.

[12] Certainly the Applicant could have expected that she could file any additional documents and submissions up to and including February 10, 2016, given that the letter

dated January 6, 2016 from the Social Security Tribunal indicated she could file documents and submissions by no later than that date. The General Division should have waited until this date had passed before rendering its decision. However, that may be a moot concern, given that the Applicant did not file any additional documents and submissions which addressed the merits of her claim to a disability pension. At most, her counsel's letter of February 9, 2016 alluded to forthcoming written submissions. However, this raises the question as to whether there are any circumstances, such as the interests of justice, which might warrant a consideration of documents which have been filed late. In this particular case, for instance, the General Division might have reconsidered the appropriateness of the form of hearing, had it been aware of a proposed witness list.

[13] There may be an arguable case that the General Division should have at least considered: (1) the Applicant's counsel's letter of February 9, 2016 and Hearing Information Form, despite the fact that they were filed late; (2) and if so, whether it remained appropriate to proceed with the appeal on the record, on the basis of the documents before it; and (3) whether it should extend the time for filing any submissions. I am satisfied that the appeal has a reasonable chance of success, on the basis that the General Division may have failed to observe a principle of natural justice in ensuring that the Applicant had a fair opportunity to present her case, when it appears that it did not consider her counsel's letter of February 9, 2016 and the Hearing Information form.

(b) Error of law

[14] The Applicant's counsel argues that the General Division erred as it relied on an opinion of a hematologist in concluding that she could work. The Applicant's counsel explains that the hematologist had limited involvement in her medical care and treatment, to the extent that he only interpreted blood tests. The Applicant's counsel argues that the hematologist never expressed an opinion on the Applicant's ability to work, yet the General Division relied upon his clinical records in concluding that she could work. The Applicant's counsel argues that the General Division should have instead relied on the opinion of the Applicant's family physician, as he was her primary treating physician involved in her overall care.

[15] The hematologist's consultation reports, dated July 29, 2009, November 3, 2009 and November 3, 2010, and can be found at GD4-58, GD4-98 and GD4-97 of the hearing file. They indicate that the hematologist's involvement was greater than merely interpreting blood tests. Indeed, his reports indicate that he provided a diagnosis, reviewed the Applicant's current status, examined her and also provided an opinion on her management. Essentially the Applicant is calling for a reassessment and re-weighing of the evidence. As the Federal Court held in *Tracey*, it is not within the Appeal Division's jurisdiction to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. Neither the leave proceeding, nor the appeal, provides opportunities to re-litigate or re-prosecute the claim. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

(c) Erroneous finding of fact

[16] The Applicant's counsel did not identify any specific erroneous findings of fact upon which he alleges the General Division based its decision in a perverse or capricious manner or without regard for the material before it, and I am therefore unprepared to grant leave to appeal on this specific ground.

CONCLUSION

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

[18] 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. Any submissions, including those addressing the merits of the appeal, should be filed within the time permitted under the DESDA.

[19] 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