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

Citation: *Minister of Employment and Social Development v. J. T.,* 2016 SSTADIS 193

Tribunal File Number: AD 16 205

BETWEEN:

Minister of Employment and Social Development

Applicant

and

J. T.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Neil Nawaz

DATE OF DECISION: May 31, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated October 27, 2015. The GD conducted a hearing by way of teleconference on October 27, 2015 and determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found her disability was "severe and prolonged" as of the minimum qualifying period (MQP) of December 31, 2009.

[2] On January 26, 2016, within the prescribed time limit, the Applicant's representative filed an application with the Appeal Division (AD) requesting leave to appeal.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), "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."

[4] Subsection 58(2) of the DESDA provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[5] According to subsection 58(1) of the DESDA 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

[6] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[8] The Applicant 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, specifically:

(a) It found that all of the Respondent's medical conditions and impairments were present and disabling as of the MQP, when in fact some were not even symptomatic until years later;

(b) It found the Respondent disabled in the absence of objective medical evidence of a severe and prolonged disability as of the MQP;

(c) It found the Respondent lacked the capacity for employment even though the available evidence, both before and after the MQP, showed she had the capacity to work at a sedentary occupation.

ANALYSIS

[9] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] 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.*[2]

[10] Before leave can be granted, 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.

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1. [1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)
2. [2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

Determining Secondary Medical Conditions Were Present as of MQP

[11] The Applicant alleges that the GD based its decision on an erroneous finding of fact without regard for the material before it when it applied the Federal Court of Appeal decision *Bungay* v. *Canada*[3] and found that all of the Respondent's medical conditions were limiting as of her MQP. The Applicant acknowledges that the GD correctly identified the Respondent's MQP as being December 31, 2009, but it then found all of her claimed conditions—including severe and constant left wrist and right shoulder pain, sleep disturbance, elevated blood pressure, diabetic complications, swollen legs and residual symptoms following parathyroid surgery— were disabling as of that date. While the Applicant concedes the Respondent's left wrist and right shoulder pain were present and may have been limiting as of December 31, 2009, it alleges there was no evidence on the record of any investigation or treatment for the remaining conditions as of the MQP, other than the Respondent's subjective complaints.

[12] In its reasons for its decision, under the heading "Guiding Principles," the GD cited *Bungay* in asserting that "all of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment." The GD also referred to a decision of the Pension Appeals Board (PAB), *Barata v. MHRD,* where it was stated*:* [4] "Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled."

[13] I agree that the ratios of these two cases are fairly stated. Although decisions of the now defunct PAB are not binding on either the GD or the AD, they carry persuasive force, and in any case, the principle articulated by *Barata* flows from *Bungay*, which is binding law. Both cases stand for the proposition that a claimant's medical condition must be assessed in its totality.

[14] If it is incorrect to focus on only the main impairment, then it is also an error to take into account complaints that have no basis in the evidence, and I find this ground has at least a reasonable chance of success. At paragraph 57 of its decision, the GD wrote:

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[3] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[4] *Barata v. MHRD* (January 17, 2001) CP 15058 (PAB)

> If the Appellant's disabling conditions were only the limitations arising from her left wrist injury the Tribunal would agree with the Respondent that her limitations and restrictions do not preclude all forms of gainful employment. However, as the *Bungay* and *Barata* decisions, supra, indicate the Tribunal should consider the cumulative effect of all of the Appellant's conditions and limitations. Her conditions and limitations include severe and constant left wrist and right shoulder pain, sleep disturbance, elevated blood pressure, diabetic complications, swollen legs and follow up after parathyroid surgery. Although some of her conditions such as the diabetic complications may have worsened after December 2009, all of the conditions were present and limiting as of the MQP.

[15] The GD thoroughly summarized the documentary evidence on which it relied. Having reviewed the relevant medical reports, I see no independent confirmation that sleep disturbance, elevated blood pressure, diabetic complications, swollen legs or follow up after parathyroid surgery were problematic prior to December 31, 2009, but I do see many specific statements from the Respondent's assessors and treatment providers that these secondary conditions were asymptomatic and non limiting as of the MQP.

[16] In this instance, there is an arguable case that the GD made erroneous finding of fact in a perverse or capricious manner or without regard for the material before it.

Finding Disability in Absence of Objective Medical Evidence

[17] The Applicant acknowledges that while the Respondent's left wrist and right shoulder pain were present and may have been limiting at the MQP, it argues that these conditions were not such that they met the CPP's test for severity. It cites *Warren v. Canada*[5] in support of the proposition that a finding of disability requires objective medical evidence. In its submissions, the Applicant lists and summarizes selected reports from various physicians in a bid to show the GD mischaracterized their findings.

[18] I cannot agree there is an arguable case on this basis. In contrast with the so called secondary conditions discussed above, there appears to be pre MQP objective evidence relating to the Applicant's left wrist and right shoulder, including imaging reports, orthopedic assessments and functional assessment evaluations. They contained ample and full discussions of the Applicant's wrist and shoulder complaints, and the GD was entitled to make its own analysis of those investigations.

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[5] *Warren v. Canada (Attorney General)*, 2008 FCA 377

[19] In *Simpson v. Canada*,[6] the Applicant identified a number of medical reports which the PAB was alleged to have ignored, given too much weight, misunderstood or misinterpreted. In dismissing the Applicant's application for judicial review, the Federal Court of Appeal held that:

> …assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact. . .

[20] In keeping with *Simpson*, the GD was acting within its jurisdiction in sifting through the relevant facts, assessing the quality of the evidence, determining what, if any, it chose to accept or disregard and deciding on their respective weights, before ultimately coming to a decision based on its interpretation and analysis of the material before it. Hence, I do not see how this ground has a reasonable chance of success, arising out of the fact that the GD chose to place more or less weight on some of the evidence than the Applicant submits was appropriate.

Finding of Unemployability Despite Evidence of Capacity for Sedentary Work

[21] The Applicant alleges the GD erred when it determined that the Respondent was incapable regularly of pursuing any form of substantially gainful employment as of the MQP in the face of evidence that she retained a capacity for lighter work within her restrictions. The Applicant supports this argument by referring to passages from reports and assessments in the evidentiary record, which it purports shows the Respondent is capable of lighter work.

[22] The Applicant also cites *Klabouch v. Canada*,[7] which holds that it is not the diagnosis, but the capacity to work, that determines the severity of a claimed disability under the CPP. In reviewing the GD's analysis of the medical reports and functional assessments, I see no indication that it ignored this principle and find instead a full inventory of the evidence, both for and against the Applicant's claim, and a good faith, albeit brief, assessment of all aspects of her functionality in paragraphs 54, 55 and 58.

[23] I conclude that the Applicant is essentially recapitulating its claim and asking me to reassess the evidence in its favour. I am unable to do this, as my authority permits me to

[6] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[7] *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33

determine only whether any of its reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. Appealing to the AD is not an opportunity for an applicant to re argue their case, and I see no reasonable chance of success on this ground.

CONCLUSION

[24] I am allowing leave to appeal on the grounds that the GD may have made an erroneous finding of fact when it determined the Respondent's disability was "severe" on the basis of secondary conditions for which there was no objective evidence at the time of MQP.

[25] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

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

Member, Appeal Division