



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *I. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 203

Tribunal File Number: AD-16-406

BETWEEN:

I. T.

Applicant

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 – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 8, 2016

REASONS AND DECISION

DECISION

[1] The Canada Social Security Tribunal (“the Tribunal”) refuses leave to appeal before the Appeal Division.

INTRODUCTION

[2] On November 28, 2015, the Tribunal’s General Division (“the GD”) deemed that the Applicant’s disability was not severe and therefore found that there was no need to rule on the prolonged criterion. The Applicant was present at the hearing and appeared in person. She was accompanied by her spouse and she testified. The Respondent was not present at the hearing.

[3] The GD’s decision was communicated to the Applicant on November 30, 2015, and was received by her on December 8, 2015.

[4] The Applicant’s representative filed an application for leave to appeal before the AD (“the Application”) on March 8, 2016. The Tribunal received the Application within the prescribed time limit.

[5] On April 1, 2016, the Tribunal requested that the parties file their submissions on the question as to whether leave to appeal should be granted or denied. The Applicant was asked in particular to provide the reasons for her appeal.

[6] The Applicant’s representative responded on April 28, 2016.

[7] The Respondent was invited to file additional submissions if he so wished. He responded on May 5, 2016.

ISSUE

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

THE LAW AND ANALYSIS

[9] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (“the DESD Act”) provide that “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and that the Appeal Division “must either grant or refuse leave to appeal”.

[10] 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.”

[11] Subsection 58(1) of the DESD Act states that the only grounds of appeal are 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.

[12] The application for leave to appeal is a preliminary step. It is a first, and lower, hurdle for the Applicant to meet than the one that must be met on the appeal on the merits. At the application for leave to appeal stage, the Applicant does not have to prove his case.

[13] The Tribunal will grant leave to appeal if one of the aforementioned grounds of appeal has a reasonable chance of success

[14] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the Act, whether there is a question of law, fact or jurisdiction, or relating to a principle of natural justice, the response to which might justify setting aside the decision under review.

[15] The Applicant states in her Application that:

- (a) she disputes the GD’s decision;

- (b) the GD erred in law in making its decision, as appears on the face of the record, and based its decision on an erroneous finding of fact that it made without regard for the material before it;
- (c) she suffers from a chronic condition and was suffering from that condition on December 31, 2012, in circumstances such that her fibromyalgia prevented her from pursuing any substantially gainful occupation whatever, whether full-time, part-time or casual;
- (d) she meets the criteria of the definition of severe and prolonged disability; and
- (e) the GD's decision did not result from an analysis of the relevant facts and law.

[16] The Tribunal requested that the Applicant outline the reasons for her appeal, as follows:

[Translation]

- **Reasons for your appeal**

Explain in detail why you are seeking leave to appeal from the General Division's decision. Under the Act, only three reasons may be considered:

Reason no. 1: *The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.* For example, an Appellant submitted a Record of Employment and that document was not entered in the appeal file.

Reason no. 2: *The General Division erred in law in making its decision.* For example, the General Division member based his decision on the wrong subsection of the applicable act.

Reason no. 3: *The General Division made a major error concerning the facts appearing in the appeal file.* For example, the General Division member indicated in his decision that the Appellant had submitted no Record of Employment, whereas the Appellant had indeed presented one and it was in the appeal file.

Please state the reason or reasons that apply to your case, providing as much detail as possible. It is not enough merely to state that an error was made or that a principle of natural justice was not observed. You must explain what the error was or the principle of natural justice that was not observed.

Please refer to specific pages of the documents in the file and to paragraphs of the General Division's decision.

The Tribunal must receive your written submissions no later than April 25, 2016.

Please note that if you do not provide the requested information by the specified date, the Tribunal Member may make a decision based on the information already on file.

[17] The response forwarded by the Applicant's representative was that the GD "made a significant error with respect to the facts appearing in the appeal file by not assigning the necessary weight to the medical evidence of [the Applicant's] health."

[18] The Respondent contends that the Applicant's response was submitted late and "has nothing to the application for leave to appeal." The Respondent submits that the Applicant is seeking to reargue her case and that, in the absence of submissions in support of the Application, the AD has no choice but to find that the appeal has no reasonable chance of success.

[19] The GD's decision addresses the evidence submitted on page 4 and summarizes the Applicant's medical history in paragraphs [9] to [13] and [17]. The GD's decision refers to the medical evidence pertaining to the Applicant's health.

[20] The GD found that the Applicant did not try to return to work or seek other employment and that the medical evidence "reveals a slight condition." The GD emphasized that a severe disability determination could not be granted until attempts to work in all types of employments had proven unsuccessful as a result of her condition. For those reasons, the GD found that the Applicant "did not have a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation whatever on or before December 31, 2012, and that continues to this day."

[21] From my reading of the appeal file and the General Division's decision, the Applicant's arguments concerning the medical evidence in the file were previously addressed by the GD. The Applicant contended before the GD that she suffers from a chronic condition and was suffering from that condition on December 31, 2012 in circumstances such that her

fibromyalgia prevented her from pursuing any gainful employment. She presented the same arguments before the AD.

[22] An appeal before the Tribunal's AD is not a new hearing on the merits of the Applicant's application for a disability pension.

[23] Mere repetition of the arguments already made before the General Division is not sufficient to show that one of the above grounds of appeal has a reasonable chance of success. Submissions to the effect that the SST-GD made "a significant error" in failing to assign the necessary weight to the evidence without providing details clarifying the nature of that error are also insufficient.

[24] The Applicant also contends that the decision contains an error in law that appears on the face of the record but did not indicate the nature of that error in law.

[25] Based on my reading of the GD's decision, the following statement is problematic:

[Translation]

[18] The Tribunal acknowledges that the Appellant is subject to limits as a result of her condition. However, a determination of severe disability cannot be granted until attempts to work in all types of employment have proven unsuccessful as a result of her condition. (Emphasis added)

[26] Although the GD cited *Inclima v. Canada (AG)*, 2003 FCA 117, in paragraph [18] of its decision, the application of that case to the present facts appears incorrect.

[27] Upon review of the appeal file, the General Division's decision and the arguments of the parties, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised a question pertaining to an error in law, described in paragraphs [24] to [26] above, the response to which may lead to the setting aside of the decision under review.

CONCLUSION

[28] Leave to appeal is granted but is limited by the above findings.

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

[30] I invite the parties to make submissions on the following questions: whether a hearing is appropriate; if so, the form of hearing; and the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division