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

Citation: *K. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 204

Tribunal File Number: AD-16-550

BETWEEN:

K. M.

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

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 9, 2016

DECISION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) issued on January 13, 2016. The GD dismissed her application for disability benefits under the *Canada Pension Plan*, as it found that her disability was not "severe" at the time of her minimum qualifying period (MQP) of December 31, 2009.

[2] The Applicant takes the position that the GD erred in assessing whether her disability is severe. The Applicant's counsel argues that the GD failed to observe a principle of natural justice, erred in law and made serious errors in its finding of facts. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

[3] While certain documents in the record are in the French language, the GD decision is in English, the Applicant filed the application for leave to appeal (Application) in English and the Applicant's counsel has corresponded to the Tribunal in English.

[4] The Applicant filed the Application with the Appeal Division (AD) of the Tribunal on April 12, 2016, within the 90 day time limit.

SUBMISSIONS

[5] The Applicant seeks leave on the following grounds:

a) The GD failed to observe a principle of natural justice by not permitting the hearing to proceed in person when it based its decision on an assessment of subjective versus objective medical evidence and without assessing the Applicant's subjective condition;

b) The GD erred in law by failing to consider all of the Applicant's disabling conditions, failing to apply the principles set out in *Inclima v. Canada (A.G.)*, 2003 FCA 117, speculating about the Applicant's ability to obtain or maintain employment, failing to properly apply the principles in *Villani v. Canada (A.G.)*, 2001 FCA 248, improperly referring to the evidence of Dr. Meng as objective and the evidence of Dr. Yeats as subjective and preferring one to the other on this basis, and applying the wrong test

regarding “severe disability” in its analysis; and

c) The GD made erroneous findings of fact without regard to the material before it by failing to consider the disabling psychological conditions of the Applicant (present prior to 2009) and referring only to the Applicant’s physical condition (a stroke in 2010).

[6] The Respondent was not asked by the AD to file submissions regarding the Application.

THE LAW

[7] Although a leave to appeal application is a first and lower hurdle to meet than the one that must be met on the hearing of the appeal on the merits, for leave to be granted, some arguable ground upon which the proposed appeal might succeed is required: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). In *Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

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

ANALYSIS

[9] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[10] The grounds and reasons relied upon by the Applicant fall into four categories: (1) the GD did not permit an in person hearing to proceed but decided the matter on the record and based its decision in part on an assessment of subjective versus objective evidence; (2) the GD did not properly apply the jurisprudence to the facts; (3) the GD preferred some medical evidence over other medical evidence on the basis that the former was objective and the latter was subjective; and (4) the GD failed to consider the psychological conditions of the Applicant although there was ample evidence of the Applicant's depression and disabling psychological conditions on or before the MQP.

[11] In respect of category (1), the GD stated:

> [2] The hearing of this appeal was by on the record for the following reasons:
>
> a) The member has decided that a further hearing is not required.
>
> b) The issues under appeal are not complex.
>
> c) There are no gaps in the information in the file or need for clarification.
>
> d) Credibility is not a prevailing issue.
>
> e) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[12] The GD decision referred to excerpts of the medical evidence in the file that it considered the most pertinent. At paragraph [32], the GD stated:

> [32] The Tribunal determines that the medical evidence of Dr. Yeats is subjective and the medical evidence of Dr. Meng is objective. Dr. Yeats wrote a letter on December 15, 2014 indicating that the Appellant was not able to pursue gainful employment since 2006 because of her alcohol addiction and physical condition due to a car accident on June 6, 2008. The Appellant indicated in her CPP disability questionnaire, date stamped by the Respondent on July 3, 2012, that she was unable to work because of the stroke she had had in October 9, 2010. She also noted that she stopped working at Microsoft in 2006 because she was laid off and there was no mention that she stopped working there because of her medical condition. On January 15, 2009 Dr. Meng noted that the Appellant looked quite well after her car accident on June 6, 2008 and was only experiencing stiffness in her neck

[13] The Applicant argues that there was a breach of natural justice in that the Applicant should have been heard in person in order for the GD to assess the Applicant's subjective level of pain and limitations and that basing a decision on a categorization of some medical evidence as objective and other medical evidence as subjective without giving the Applicant an opportunity to clarify this evidence was unfair.

[14] An appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22.

[15] Here, the Applicant is not arguing that the GD was not impartial (i.e. was partial) but rather that she was not given a full opportunity to present her case before the GD.

[16] The *Social Security Tribunal Regulations* permit the Income Security Section of the GD to make a decision on the basis of the documents and submissions filed pursuant to subsection 28(a). The GD determined that no further hearing was required and made its decision on the basis of the record.

[17] While the Applicant would have preferred to be heard in person, for the reasons she has given, this argument is insufficient to have a reasonable chance of success. Section 68 of the *Canada Pension Plan Regulations* enumerates the types of documents that a person who files an application for disability benefits must provide to the Respondent and to the Tribunal. In appropriate cases, the GD can therefore make a decision regarding a disability determination on the basis of the record. The Applicant has not adequately explained why it was not appropriate in the present case to make a decision on the basis of the record. As for the GD's categorization of medical evidence as objective or subjective, this submission is discussed below.

[18] The appeal does not have a reasonable chance of success on the basis of the ground of a breach of natural justice.

[19] The arguments in category (2) and (3), however, do have a reasonable chance of success. In particular:

(a) the GD cited the *Inclima* decision but concluded that the Applicant had residual capacity to pursue alternate employment without explaining how it arrived at this conclusion;

(b) it cited the *Villani* decision and identified the "Villani factors" but did not analyze how the Applicant's personal characteristics or circumstances affected her capacity regularly of pursuing any substantially gainful occupation; and

(c) it preferred some medical evidence over other medical evidence on the basis that the former was objective and the latter was subjective without an adequate explanation of why one medical report was objective and the other was subjective.

[20] In respect of category (4), there is medical evidence in the record - Yeats' clinical notes and report and Scully's report - that the Applicant was suffering from psychological conditions, namely alcohol addiction and depression, leading up to the MQP. However, the GD characterized the evidence of Dr. Yeats', at paragraph [31], as indicating that the Applicant had a stroke causing a severe disability in 2010 without making any reference to the psychological conditions. As well, the GD did not mention depression in its analysis of "severe" and mentioned but did not discuss alcohol addiction.

[21] The GD decision analyzed the Applicant's physical limitations and abilities in some detail. It also mentioned alcohol addiction in its summary of the medical evidence. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal concluded that when determining if a claimant is disabled under the *Canada Pension Plan* all of the claimant's conditions must be considered, not just the main one. It is not clear to me that the GD considered the cumulative effect of the Applicant's physical and psychological conditions in this case.

[22] In the circumstances, whether the GD erred in law or erred in fact and law in making its decision warrants further review.

[23] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into

the enumerated grounds of appeal. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal.

[24] On the ground that there may be an error of law or an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[25] The Application is granted.

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

[27] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division