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

Citation: *D. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 236

Tribunal File Number: AD-16-327

BETWEEN:

D. C.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 27, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 17, 2015. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2013. The Applicant applied for leave to appeal on February 19, 2016, alleging that the General Division failed to observe a principle of natural justice and erred in law. For the Applicant to succeed on this application, 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's appeal arises out of paragraph 50 of the decision of the General Division. The paragraph reads:

> [50] . . . In assessing severity, the Tribunal places considerable weight on the January 15, 2013 discussion between the Appellant and the Respondent. At that time, the Appellant relayed the family doctor's opinion that the Appellant was unable to return to her previous occupation but that alternate employment was not precluded with treatment. This evidence is important because it specifically refers to work capacity rather than being a blanket statement concerning "disability".

[4] The notes of the telephone discussion between the Applicant and the Respondent can be found at page GD4-45 of the hearing file before the General Division. The notes read as follows:

> 2013/01/15@1230: call to client. No return to - thopedic[*sic*]
> surgeon since June 2012 report on file

> IIIth [*sic*] options surgical listed-no FCE completed though noted on file as pending no date for same. no [*sic*] further pain management noted or planned* [*sic*] of note finished physiotherapy in September 2012 no return as plateaued no other treatments noted. Criteria discussed severe and prolonged explained-client indicates GP indicates she is unable to return to previous occupation as heavy work however with treatment alternate employment is not precluded. Treatment has been limited physio [*sic*], Percocet and Cymbalta-treatrnent options not exhausted. C. COADY R.N. [emphasis added]

[5] The Applicant submits that the General Division was wrong to place considerable weight on this evidence. The Applicant argues that if the General Division was going to place considerable weight on this evidence, it should have provided her with an opportunity to respond to or challenge the evidence. She indicates that she had not been alerted and was unaware that the General Division would rely on the telephone records. She claims that her counsel listened to the audio recording and could not find any mention or reference to the telephone record. Similarly, she notes that neither of the Respondent's submissions, dated August 29, 2014 or September 23, 2014, raises any arguments in connection with the telephone record.

[6] Secondly, the Applicant argues that the telephone record is unreliable, as it is untested evidence and contains double hearsay (though as it apparently documents a telephone discussion involving her, she could have given evidence as to whether the notes accurately set out whatever information she might have provided to the Respondent's employee). She argues that generally hearsay evidence is inadmissible under the rules of evidence, unless it has been open to test by cross-examination. Neither the medical practitioner nor the Respondent's employee testified at the hearing.

[7] Thirdly, she argues that the telephone record is ambiguous and it is unclear whether the opinion that alternate employment is not precluded belongs to the medical practitioner or to the Respondent's employee.

[8] Finally, she argues that the phrase "… with treatment alternate employment is not precluded …" does not necessarily mean that she is capable regularly of pursuing any

substantially gainful occupation. She notes that there is no description of what this alternate employment may entail or how this may fit the legal definition of disability under the *Canada Pension Plan*. She notes also that this telephone discussion occurred approximately one year prior to the end of her minimum qualifying period. She submits that the General Division should have assessed her disability closer to or at the end of the minimum qualifying period.

[9] The Applicant submits that paragraph 51 of the decision suggests that the General Division based its decision largely on this telephone discussion, when it wrote:

> All of these factors, particularly the discussion in January of 2013, suggest that it would have been reasonable for the [Applicant] to attempt lighter work after she stopped working as a health care aid. As a result, the Tribunal finds that the [Applicant] did not have a severe disability up to at least January 15, 2013 ... [emphasis added]

[10] The Applicant argues that if the General Division member determined that the telephone record was material, he should have asked the Applicant to address the issue, otherwise failing to do so "resulted in a serious breach of procedural fairness, and natural justice".

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

ANALYSIS

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

[13] I need to be satisfied that the reasons for appeal fall within any of these grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[14] The Applicant argues that the General Division largely based its decision on the notes of a telephone discussion that occurred approximately one year prior to the end of her minimum qualifying period. However, paragraph 51 indicates that while the General Division member found that the Applicant did not have a severe disability up to at least January 15, 2013 (when the telephone discussion took place), the General Division then turned its mind to whether a severe disability arose between January 15, 2013 and December 31, 2013 and continued through to the date of the hearing. At paragraph 51, the General Division member concluded:

> Thus, in order to meet the "severity" criterion, the [Applicant] will have to establish that a severe disability arose between January 15, 2013 and December 31, 2013 and also continued through to the date of hearing.

[15] The General Division then assessed the severity of the Applicant's disability after January 15, 2013 and up to December 31, 2013, over the span of 12 paragraphs. Hence, it cannot be said that the General Division relied largely on the telephone record of January 15, 2013 to determine whether she could be found disabled by the end of her minimum qualifying period. Its reliance on the telephone record was restricted to the timeframe up to approximately January 15, 2013. I am therefore not satisfied that the appeal has a reasonable chance of success. It is clear to me that the General Division did not rely on the telephone record of January 15, 2013 in assessing whether the Applicant could be found disabled by the end of her minimum qualifying period of December 31, 2013.

[16] Given this, it is unnecessary for me to address the other issues which the Applicant has raised, including the extent to which the formal rules of evidence apply in an administrative tribunal setting.

CONCLUSION

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

Janet Lew
Member, Appeal Division