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

Citation: *M. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 239

Tribunal File Number: AD-16-244

BETWEEN:

M. B.

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

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 28, 2016

REASONS AND DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] The Applicant appeals from the decision of the General Division dated October 28, 2015 that found she was not eligible for disability benefits pursuant to paragraph 42(2)(a) of the *Canada Pension Plan, (CPP),* (the Application).

GROUNDS OF THE APPLICATION

[3] Counsel for the Applicant submitted that the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before it. The Applicant submitted:-

> "I am, in fact, disabled according to the definition of the Department of Human Resources and Skills Development Act and I do suffer from a severe and prolonged disability that is indefinite in duration and prevents me from working any type of job that is either full-time, part-time or seasonal."

ISSUE

[4] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE GOVERNING STATUTORY PROVISIONS

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act,* (DESD Act) govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[6] Subsection 58(1) of the *Department of Employment and Social Development, (DESD), Act,* sets out the only three grounds of appeal, namely:-

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

[7] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. 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."

[8] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 41 and in *Fancy v. Canada (Attorney General),* 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[9] *Tracey v. Canada (Attorney General),* 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the applicant's reasons for appeal fall within any of the stated grounds of appeal.

The General Division decision is based on an erroneous finding of fact.

[10] Counsel for the Applicant submitted that the erroneous finding of fact arose from the General Division's disregard of the Applicant's oral testimony regarding the extent of her

[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).

depression; its effect on her ability to work; and the circumstances of her lay-off from work; and the negligible weight it gave to Dr. Warsi's medical report of December 13, 2012. (AD1-7)

[11] A decision is perverse or capricious if there is insufficient evidence to support its findings and conclusions; has regard to irrelevant considerations or fails to have regard or to place sufficient weight on relevant considerations. *D.R. v. Canada (Minister of Employment and Social Development)* AD-15-53; Robert *Gravel v. Telus Communications Inc., 2011* FCA 1. The Appeal Division is not satisfied that the General Division decision meets these criteria.

[12] Counsel for the Applicant submitted she had been suffering from major depressive disorder, a disabling condition, since at least December 2011. This latter is according to Dr. Yakoub in his September 3, 2013 response to Counsel for the Applicant (GD4-21). The General Division did not dispute Dr. Warsi's diagnosis that the Applicant suffers from major depressive disorder, in fact, in his report of June 19, 2012, Dr. Warsi notes that the Applicant's symptoms have been ongoing since she emigrated from Bosnia. However, the General Division noted that the diagnosis came a year after the end of the Applicant's minimum qualifying period, (MQP) and that her psychiatric history prior to June 2012 was scant.

[13] The General Division performed an extensive analysis of the medical reports that touch on the Applicant's depression and concluded that on or prior to her MQP, there was no medical evidence of a depression that would be serious enough to have prevented the Applicant from suitable employment. (para. 54)

[14] The General Division noted that the Applicant was first referred to and saw Dr. Warsi in June 2012, more than 5 months after the end of her MQP. The General Division provided an explanation as to why it was giving little weight to Dr. Warsi's December 13, 2012 medical report. It set them out in detail at paragraphs 58 and 59 of the decision; noting that Dr. Warsi's statement that the Applicant was unable to return to work in the near future fell short of addressing her long-term prospect of returning to work. The General Division noted the contradiction between his medical report (clinical notes) of December 13, 2012 and previous clinical notes when Dr. Warsi observed that the Applicant was feeling and doing better with a more stable mood. (GD4-2 to GD4-8) Dr. Warsi noted a change in the Applicant's mood after she was denied CPP benefits; and he added Lorazepam 0.5 mg to her medication regime to

address the change. (GD4-9 to GD4-10) Dr. Warsi recorded no further change until December 13, 2012, when he noted that the Applicant continued to feel depressed. (GD4-14)

[15] In the context of a situation where the Applicant had been able to work for most of the twenty years that she had been in Canada by the time she was diagnosed with major depressive disorder and had seen improvement in her condition after receiving treatment; the Appeal Division is satisfied that the General Division decision did not have regard to irrelevant considerations.

[16] The Appeal Division is also satisfied that the General Division did not fail to have regard or to place sufficient weight on relevant considerations. In fact, the General Division considered all of the Applicant's medical conditions and not just her depression in coming to its determination. The Appeal Division finds that there was an evidentiary basis by which the General Division could come to its conclusion that, on or prior to her MQP of December 31, 2012, the Applicant did not suffer from a severe and prolonged medical or mental health condition that would render her incapable regularly of pursuing any substantially gainful occupation.

[17] Counsel for the Applicant expressed the Applicant's dissatisfaction with the way in which the General Division treated her evidence as well as Dr. Warsi's December 13, 2012 medical report. Counsel expressed the Applicant's desire for a new hearing before the Appeal Division. However, per *Tracey v. Canada (Attorney General),* 2015 FC 1300, weighing evidence on an application for leave is not the role of the Appeal Division; nor is the hearing before the Appeal Division a hearing *de novo* such that the Applicant would have had a second opportunity to present that evidence. These submissions do not constitute grounds upon which leave to appeal could be granted.

CONCLUSION

[18] For all of the above reasons, the Application is refused.

Hazelyn Ross
Member, Appeal Division