



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. A. v. Minister of Employment and Social Development*, 2016 SSTADIS 256

Tribunal File Number: AD-16-425

BETWEEN:

C. A.

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: Janet Lew

DATE OF DECISION: July 7, 2016

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 9, 2016. 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, 2014.

[2] The Applicant filed an application requesting leave to appeal on February 10, 2016, on the ground that 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. However, the Applicant did not specify the alleged erroneous finding of fact. She submitted that her condition has deteriorated and that she remains under the care of a psychiatrist. She filed a copy of a receipt from a pharmacy, showing that she continues to take anti-depressants (AD1-6).

[3] The Social Security Tribunal (Tribunal) invited the Applicant to identify the erroneous finding of fact and any evidence which she alleged the General Division did not consider. The Applicant notified the Tribunal by telephone on May 10, 2016 that she did not have anything further to add.

[4] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[6] The Applicant alleges that she has not seen any improvement in her condition. Indeed, her overall condition has deteriorated, as evidenced by the increasing dosages of her medication. She claims that she continues to have impaired memory, which affects her

activities of daily living. She noted that she quit school in 2014 and into 2015, and although attempted to resume her studies in February 2015, had to drop out. She returned again in September 2015 and continues to persevere. The Applicant notes that, at the end of 2014, she also attended ten sessions of a Depression Group with the Canadian Mental Health Association, for which she earned a certificate of achievement (AD1-7). Despite this, she still struggles with her focus. She is hampered by poor concentration and has difficulty making decisions. She has also experienced increased physical pain and together with her mental health issues, finds that she is unable to do any type of work or socialize with others.

[7] The Applicant did not identify any alleged erroneous findings of fact, though pointed to paragraph 38 of the decision of the General Division.

[8] The Tribunal provided a copy of the leave materials to the Respondent. However no written submissions were received from the Respondent.

ANALYSIS

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

[10] 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, before leave can be granted. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[11] The Applicant submits that both her physical condition and mental health issues have continued to deteriorate since 2014. Her activities of daily living are still affected. She provided copies of a pharmacy receipt and a certificate of achievement to show that she has ongoing issues. The Applicant is seeking to either introduce new evidence or to clarify existing issues. In *Tracey*, the Federal Court determined that a tribunal is under no obligation to consider new evidence. Further, failure to do so no longer constitutes a proper ground of appeal in and of itself.

[12] Essentially the Applicant is seeking a reassessment. However, a review or reassessment of the evidence also does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

[13] The Applicant alleges that 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 evidence before it. She points to paragraph 38 of the decision, which reads:

[38] The evidence of the Appellant is to the effect she has been unable to work because of neck, shoulder, low back, hip, knee, and wrist pain since she stopped working in April 2012, and depression which began shortly thereafter. The Appellant's only treatment for pain after she stopped working in April 2012, and prior to her MQP, has been a viscosupplementation injection in each knee in 2012. The Appellant's treatment for depression has been medication, attendance with a psychiatrist at six to eight week intervals since 2013, five group and five private therapy sessions from December 2014 to February 2015. She has never been hospitalized for any mental illness. The Appellant's psychiatrist reported in January 2013 the Appellant's memory, orientation, and other cognitive functions were intact. The psychiatrist's only other report in March 2014 noted the Appellant's condition was moderate to severe and will continue for another year or more. He did not report her condition worsened in the interval between when first seen in January 2013 and his report of March 6, 2014. There is no subsequent report from the psychiatrist as to the Appellant's condition contemporaneous to her MQP and since.

[14] The Applicant has not identified any particular errors in paragraph 38. That, however, does not end my assessment of this leave application, for the Federal Court has

cautioned the Tribunal against mechanistically applying the language of section 58 of the DESDA when it performs its gatekeeping function: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 at para. 10. The Federal Court suggests that the Tribunal should examine the medical evidence and compare it to the decision under consideration. It wrote, “If important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave”.

[15] My own review of the hearing file indicates that, while the General Division may not have fully set out all of the medical evidence in detail, the General Division succinctly and accurately summarized the medical evidence. While there was medical evidence for 2012 and 2013, there was relatively little medical evidence for 2014 to show how the Applicant might have responded to counselling and other treatment efforts. As the General Division noted, there was no subsequent report from the psychiatrist which might have addressed the severity of the Applicant’s disability at the end of her minimum qualifying period. My review of the hearing file does not indicate that the General Division either overlooked or possibly misconstrued important evidence. As such, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

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

Janet Lew
Member, Appeal Division