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

Citation: *S. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 252

Tribunal File Number: AD-16-487

BETWEEN:

S. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

On Leave to Appeal

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 5, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated January 14, 2016. The GD conducted a hearing based on the documentary record and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was not "severe" prior to the minimum qualifying period (MQP) of February 28, 2014.

[2] On March 31, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division (AD) an Application Requesting Leave to Appeal detailing alleged grounds for appeal.

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

OVERVIEW

[4] The Applicant was born in February 1954 and has a long work history, with more than 25 years of valid earnings and contributions under the CPP. The hearing file indicates that she applied for early CPP retirement benefits in September 2013 and was approved as of March 2014. When she applied for the CPP disability pension on November 8, 2013, she was working full-time at Steel City Surplus, a job she left in June 2014.

[5] In its initial denial letter dated February 14, 2014, the Respondent advised the Applicant that she did not qualify for a disability pension because it had determined there was insufficient medical evidence that her claimed disability was severe and prolonged as of December 31, 2015—which was thought to be her MQP date at that point, as her most recent Record of Earnings (ROE) showed that she last had valid earnings and contributions in 2010, 2011 and 2012.

[6] In a letter dated April 3, 2014, the Applicant's representative requested reconsideration, although he made no further submissions. On July 29, 2014, the Respondent again denied the

Applicant's claim. On this occasion, the Respondent noted that the Applicant's MQP was now February 28, 2014, as her early retirement benefits had commenced as of March 2014. The Respondent advised the Applicant that there was insufficient medical evidence that her claimed disability was severe and prolonged as of the revised MQP date. It also cited the fact—which the Applicant had disclosed in a telephone conversation—that she had continued working until June 2014.

[7] The Applicant appealed the Respondent's second refusal to the GD on August 22, 2014. On January 28, 2015, the Respondent filed submissions with an attached ROE, updated as of January 24, 2015, indicating that the Applicant had recorded an additional year of valid earnings and contribution for 2013. As a result, it declared the Applicant's MQP would have been December 31, 2015, had she not received early retirement benefits as of March 2014. The Respondent reiterated its position that the evidence did not point to a severe and prolonged disability as of February 28, 2014. On May 27, 2015, the Respondent filed another written submission, which noted that the Applicant had reported $12,514 in earnings between January and June 2014, according to an attached ROE, updated as of May 22, 2015.

[8] The Applicant continued to submit medical reports as they became available. In submissions filed on November 5, 2015, she appeared to accept that the latest date by which she could be found disabled was February 28, 2014, arguing that the medical evidence indicated she was nonetheless incapable of regularly pursuing substantially gainful employment prior to that date. She submitted that while she remained at work until June 2014, it was "only under extreme difficulty" that she remained working. To interpret her remaining at work as proof that she could continue to work required a "quantum leap in logic." The Applicant also submitted that pursuant to subsection 66.1(1.1) of the CPP and subsection 46.2(2) of the CPP Regulations, she was permitted to request the cancellation of a retirement pension in favour of a disability pension since she had proved she was disabled prior to February 2014.

[9] In its January 14, 2016 decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, she did not suffer from a severe disability, under the definition set out in paragraph 42(2)(a) of the CPP, as of the MQP of February 28, 2014. While acknowledging that she was subject to some functional impairments, the GD found that her

post-MQP work suggested that her disability did not meet the disability threshold. The GD also determined that subsection 66.1(1.1) of the CPP and subsection 46.2(2) of the CPP Regulations did not allow cancellation of a retirement pension in favour of a disability pension if the date of onset was prior to the month the retirement pension commenced.

THE LAW

[10] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[11] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must not be in receipt of a CPP retirement pension.

[12] The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension. There is an exception to this provision and it is found in section 66.1 of the CPP.

[13] Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

[14] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

[15] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[16] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

[17] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[18] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[20] In its Application Requesting Leave to Appeal, the Applicant's representative submits the GD failed to observe principles of natural justice by relying on grounds to dismiss his client's appeal that differed from the grounds that were used to deny her claim at previous levels. At each level, she successfully addressed the reasons given for denying her entitlement to CPP disability benefits only to be presented with different grounds for denial at the next level. Given this lack of consistency, she should not have been expected to refute a "moving target." As a result, she was deprived of an opportunity to provide an argument, which resulted in a perverse decision inconsistent with the intended purpose of the CPP. The Applicant maintains she has multiple conditions, whose combined symptoms render her unable to work.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

She clearly meets the legislative criteria, and her stoic and determined approach to her conditions has been unfairly used against her.

ANALYSIS

[21] The Applicant submits that, in attempting to show that she met the CPP criteria for disability, she was forced to address a series of shifting positions put forth by the Respondent. In the process, she was denied her right to procedural fairness because she did not have a full opportunity to present her case.

[22] The role of the AD is to review decisions of the GD to ensure that they are defensible on the facts and the law. Section 54 of the DESDA permits the GD to confirm, rescind or vary a decision of the Respondent. For the purpose of determining disability, the GD has authority to hear the evidence, make findings of fact and apply those facts to the provisions of the CPP. While the GD is obliged to hear submissions from all parties, the GD is not bound by previous positions taken by the Respondent and is empowered to consider all issues and evidence afresh.

[23] Whether the Respondent shifted its position at the initial or reconsideration phases of its administrative review of the Applicant's disability claim is not relevant to the proceedings that occurred before the GD. As it happens, I have reviewed the Respondent's correspondence to the Applicant at all levels of the application and appeal process and have noted no inconsistences.

[24] It is true that the Respondent's assessment of the MQP was revised, but only in response to new information as it became available. At the time of the Applicant's application for the CPP disability pension in November 2013, her early retirement benefits had not yet commenced, and it was assumed that her MQP date would be December 31, 2015. When it subsequently became clear that she was in receipt of retirement benefits as of March 2014, her MQP was changed to February 28, 2014, in compliance with paragraph 44(1)(b) of the CPP, and this revision was communicated and explained to her in the letter of July 29, 2014.

[25] The Respondent has consistently maintained that there was insufficient medical evidence to support a finding of disability, whether the MQP was February 28, 2014 or December 31, 2015. In mid-2014, the Respondent received information that the Applicant carried on a full-time job until June 2014—after her application and MQP dates. It regarded this

information as another reason to deny the Applicant the disability pension and cited it in its letter of July 29, 2014.

[26] Since July 2014, the Respondent's position has been essentially unchanged and cannot be fairly said to represent a "moving target," as alleged by the Applicant. In its submissions of January 28, 2015 and May 27, 2015, the Respondent reiterated its argument that there was insufficient medical evidence to show the Applicant was disabled prior to February 28, 2014 and compelling evidence—her ongoing full-time job—that she remained capable of work after that date. After submitting its appeal to the GD in August 2014, the Applicant had more than a year to marshal evidence and argument to rebut the Respondent's position, and it took advantage of that opportunity, filing additional medical reports and submissions. While the Applicant may feel that she successfully addressed the Respondent's reasons for denying what she saw as her entitlement, it cannot be said that anything was settled until the GD heard and decided her case.

[27] I have reviewed the GD's assessment of February 28, 2014 as the MQP and find no error in fact or law. There is no evidence that the Applicant attempted to cancel her retirement benefit within the requisite six months and note that the Applicant raised no objection to the MQP date before the GD.

[28] In her Application for Leave to Appeal, the Applicant insists that she clearly meets the legislative criteria for disability and cites her multiple conditions, whose combined symptoms she claims render her unable to work. In doing so, the Applicant appears to be asking the AD to reweigh the evidence and decide in her favour, but I am unable to do this, as my authority permits me to determine only whether any of her reasons for appealing fall within the specified grounds and whether any of them have a reasonable chance of success. While the GD's analysis did not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the outcome is defensible on the facts and the law. An appeal to the AD is not an opportunity for an applicant to re-argue their case and ask for a different outcome.

[29] In short, the Applicant has put forward no grounds that carry a reasonable chance of success on appeal.

CONCLUSION

[30] The application for leave to appeal is refused.

Member, Appeal Division