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

Citation: *N. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 260

Tribunal File Number: AD-16-840

BETWEEN:

N. 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

DECISION BY: Hazelyn Ross

DATE OF DECISION: July 7, 2016

DECISION AND REASONS

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

INTRODUCTION

[2] The Applicant seeks leave to appeal the decision of the General Division issued on March 14, 2016, (the Application). In its decision the General Division found that the Applicant did not have a disability that was severe and prolonged as defined by the CPP and, therefore was not eligible for a disability pension under *Canada Pension Plan, (CPP).*

GROUNDS OF THE APPLICATION

[3] Two reasons are advanced for the Application. First, that the General Division erred in law and, secondly, that the General Division based its decision on an erroneous finding of fact, which it made in a perverse or capricious manner.

ISSUE

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

THE LAW

[5] Appeals to the Appeal Division are governed by sections 56 to 59 of the *Department of Employment and Social Development (DESD) Act*. Three grounds of appeal are set out section 58 (1):- **58(1) Grounds of Appeal** –

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

[6] Subsections 56(1) and 58(3) of the DESD Act govern the granting of leave to appeal. Subsection 56(1) makes clear that leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division, providing that, "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) makes the grant or refusal of leave mandatory. To obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1]

[7] An applicant satisfies the Appeal Division that his appeal has a reasonable chance of success by raising an arguable case in his application for leave.[2] The Federal Court of Appeal has equated an arguable case to a reasonable chance of success. *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[8] *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

ANALYSIS

The General Division erred in law

[9] In setting out the reasons for the Application, Counsel for the Applicant argued that,

> "had the General Division applied the correct test for a severe and prolonged disability under the Canada Pension Plans and correctly interpreted the facts before him he would have concluded that the Applicant had a severe and prolonged disability as of the end of her minimum qualifying period, (MQP) date of December 31, 2009."

He amplified these reasons in a schedule to the Application, arguing that the General Division "erred in law by placing undue reliance on medical reports generated by the insurer in October and November 2009 and by selectively quoting the conclusions of some assessors and not other assessors." (AD1-5) He indicated that the impugned reports found at GD3-406 to GD4-491

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[1] (58(2) "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."
[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

were generated for or by the Applicant's insurer between the period October and November 2009 and argued that the General Division should have placed less reliance on them because the insurer was adverse in interest to the Applicant

[10] Counsel for the Applicant made the further submission that the General Division did not mention the findings of a neurological assessment dated November 10, 2009, which indicated that the Applicant had evidence of post-traumatic vertigo related to her motor-vehicle accident and also has cervical and lumbar strain injuries. Furthermore, the assessment contradicted the General Division's finding that by 2007, the Applicant's headaches had largely resolved. In the view of Counsel for the Applicant this report had the potential to change the decision of the General Division.

[11] The neurological assessment is found at GD3-417 of the Tribunal record. It forms part of the Executive Summary to a report prepared by Dr. Vincent Tester for Sibley & Associates, the Applicant's insurers, dated October 30, 2009. The assessment was made by Dr. Lang, who noted the presence of cervical and thoracic back pain with associated headaches that persisted despite traditional treatment. Dr. Lang indicated that the Applicant had undergone percutaneous rhizotomies that had provided her with some relief and that she could potentially benefit from a thoracic facet rhizotomy. He concluded his assessment with the finding that the Applicant's medical condition rendered her completely unable "to engage in any employment for which she is reasonably suited by education training or experience." (GD3-417)

[12] The Appeal Division finds that the submission of Counsel for the Applicant that the General Division ignored the favourable, neurological assessment is not supported. The General Division summarised the documentary evidence in paragraphs 10 through 102. A summary of Dr. Lang's November 2009 report with the diagnoses and prognoses to which he had arrived is contained in paragraphs 76 and 77. At paragraphs 158 through 160 of the decision, the General Division specifically refers to, analyses the reports of Dr. Tester, a chiropractor; Ms. Kathryn Eyre, a physiotherapist; Dr. Lang, a physiatrist; Dr. Mehdiratta, a neurologist; Dr. Zakzanis, a psychologist; and Ruth Billet, who carried out a vocational assessment of the Applicant.

[13] The General Division considered Dr. Lang's conclusion that the Applicant could not return to any of the jobs she held before the accident (para. 158) and it agreed that she could not return to any job that involved heavy lifting.

[14] Counsel for the Applicant submitted that the neurological assessment ran counter to the General Division's finding that the Applicant's headaches had largely resolved by 2007. This conclusion originates in the April 2007 report by Dr. Deans who indicated that the Applicant has made just such a report to him. While the Applicant disputed this report, the General Division preferred the evidence of other reports and set out clearly why, even though it was not making an adverse credibility finding, it preferred Dr. Dean's report to the Applicant's testimony. The law is clear that the General Division is entitled to make such a preference. *Klabouch v. Canada (minister of Social Development)*, 2008 FCA 33.

[15] Counsel for the Applicant also submitted that the General Division should have placed primary reliance on the findings of the assessing neurologist, Dr. Mehdiratta. He also argued that the General Division erred by failing to comment on the statement by the insurer's vocational rehabilitation expert that the Applicant was not work ready. It is trite law that a decision-maker need not refer to every single piece of evidence that informed its decision. However, in this case the General Division did comment on the report of the vocational rehabilitation expert. It simply did not do it in a manner more suitable to the Applicant. This amounts to asking the Appeal Division to reweigh the evidence, which per *Tracey*, it cannot do. The Appeal Division cannot grant leave to appeal simply because the Applicant believes the General Division should have given more weight to non-insurer medical reports, which incidentally, Counsel for the Applicant did not identify. Indeed, much of the medical documentation originated with the insurer.

[16] The second ground that was advanced by Counsel for the Applicant is that the General Division based its decision on an erroneous finding of fact, which it made in a perverse or capricious manner when it concluded that by 2007, the Applicant's headaches had largely resolved, ignoring the result of a neurological assessment GD3-417 that ran counter to the finding of the General Division at paragraphs 154-157 of the decision. The Appeal Division has

already touched on this issue in the above discussion and finds that the General Division had a rational basis for its decision. Thus no error of fact arises.

CONCLUSION

[17] Counsel for the Applicant submitted that the General Division made errors of law and 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. In light of the above discussion the Appeal Division is not satisfied that Counsel's submissions give rise to grounds of appeal that would have a reasonable chance of success.

[18] The Application is refused.

Hazelyn Ross
Member, Appeal Division