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

Citation: *S. L. v. Minister of Employment and Social Development,* 2016 SSTADIS 262

Tribunal File Number: AD-16-719

BETWEEN:

S. L.

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: Shu-Tai Cheng

DATE OF DECISION: July 11, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) issued on February 26, 2016. The GD dismissed her application for disability benefits under the *Canada Pension Plan,* as it found that her disability was not "severe" at the time of her minimum qualifying period (MQP) of December 31, 2009.

[2] The Applicant takes the position that the GD erred in assessing whether her disability is severe. The Applicant's counsel argues that the GD erred in law and made serious errors in its finding of facts. To succeed on this application, the Applicant must show that the appeal has a reasonable chance of success.

[3] The Applicant filed an Application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on May 26, 2016, within the 90 day time limit.

SUBMISSIONS

[4] The Applicant seeks leave on the following grounds:

a) The GD made errors of law, errors of fact and of mixed fact and law;

b) The GD erred by not commenting on the Applicant's credibility; therefore it failed to weigh important evidence;

c) The GD does not mention the Applicant's functional limitations in its analysis;

d) The GD found that the Applicant "provided little to no evidence supporting any attempts to seek or maintain gainful occupation after she stopped working due to the MVA"; this was incorrect as the Applicant gave evidence during the hearing of mitigation efforts;

e) The 2010 decision of *MC v. MHRSD*, CP 26420 (PAB), refined the requirement to seek alternative work, and a failure to make efforts to obtain and maintain employment

following the onset of disability is not an absolute bar to finding that a claimant is disabled;

f) Reasonable explanations for failing to make more efforts to find employment were not considered by the GD;

g) The GD asked inappropriate questions about the Appellant's insurance dispute with her auto insurer and based its decision on irrelevant information on this topic;

h) The GD misinterpreted medical evidence in paragraph [18] of its decision;

i) The GD decision makes no mention of Dr. Elashaal, the diagnosis of chronic tendinitis of the bicep tendons and early osteoarthritis of the shoulder;

j) Paragraph [19] and [20] of the GD decision are unclear, use the expression "one-off" as concluding, and are impossible to respond to;

k) The GD Member only questioned the Applicant on two documents and both were outside the MQP;

l) The GD stated that the Applicant did not sustain a psychological impairment approaching the MQP; this is incorrect and shows that the GD did not weigh all the evidence and ignored the fact that the Applicant was assessed and had "developed a Pain Disorder with a General Medical Condition and Psychological Factors";

m) The GD dismissed Dr. Waisman's opinion as not leading to active treatment without providing reasons for doing so; and

n) Reports of Dr. Waisman, Dr. Ahmad, Dr. Yousif, Dr. Garber, and Dr. Speinza's were ignored because they were commissioned in the context of insurance litigation, but they deal directly with the Applicant's psychological disability and ability to work.

[5] The Respondent was not asked by the AD to file submissions regarding the Application.

THE LAW

[6] Although a leave to appeal application is a first and lower hurdle to meet than the one that must be met on the hearing of the appeal on the merits, for leave to be granted, some arguable ground upon which the proposed appeal might succeed is required: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ 1252 (QL). In *Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 41, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* states that the only grounds of appeal are 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.

ANALYSIS

[8] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and at least one of the reasons has to have a reasonable chance of success, before leave can be granted.

[9] The grounds and reasons relied upon by the Applicant fall into four categories: (1) the GD did not properly apply the jurisprudence to the facts; (2) the GD preferred some medical evidence over other medical evidence on the basis that the latter was "one off" or obtained in the context of insurance litigation; (3) the GD did not comment on the Applicant's credibility; and (4) the GD took into consideration irrelevant facts and ignored relevant evidence.

Error of Law

[10] In respect of category (1), the GD decision applied *Villani v. Canada (A.G.)*, 2001 FCA 248 and *Inclima v. Canada (A.G.)*, 2003 FCA 117 and distinguished *Jean v. MSD* (June 8, 2005), CP 21909 (PAB), *MHRD v. Bennett* (July 10, 1997), CP 4757 (PAB) and *Leduc v. MNHW* (January 29, 1988), CP 1376 (PAB). It did not refer to *MC v. MHRSD*, CP 26420 (PAB).

[11] The Applicant argues that *MC* "redefined the requirement to seek alternative work" and by not considering the explanation of the Applicant (on failure to make more efforts to find employment), the GD committed an error of mixed fact and law.

[12] Pension Appeals Board (PAB) decisions are not binding on the GD. Therefore, the GD was not required to treat the PAB cases that the Applicant relied upon as legal precedent. Failure to consider a PAB decision or apply one is not, on its face, an error of law.

[13] The GD decision applied *Villani,* and concluded "In the real world context, there is little that coincides with *Villani* in [the Applicant's] favor." The GD considered the Applicant's age, education, language proficiency and previous work experience.

[14] On *Inclima*, the GD concluded that the Applicant did not satisfy *Inclima* because she provided little to no evidence supporting any attempts to seek or maintain gainful occupation after she stopped working due to the MVA.

[15] However, application of *Inclima* is predicated on there being evidence of work capacity. The GD decision does not explain how it concluded that the Applicant had residual capacity to pursue alternate employment.

[16] On the grounds that the GD erred in law in making its decision, the appeal does have a reasonable chance of success.

Errors of Mixed Fact and Law

[17] The GD decision used the expression "one off" in paragraphs [14], [19] and [20]. The GD referred to medical reports obtained in the context of insurance litigation in paragraphs [13], [14], [23] and [24].

[18] Specifically, the GD decision stated:

> [13] The Tribunal after review of the details has given greater weight to the evidence emanating from the medical doctors who provided active treatment to the Appellant. Among these of note are Dr. Elshaal [8] (l); Dr. Patel [8] (t); Dr. Jasey [8] (u); Physiotherapy as per GD-6 (almost 150 pages) per [8] (v); Dr. Desai [8] (w); and Dr. Ram [8] (x) in particular.
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> [14] The Tribunal has given lesser weight to one off assessments carried out for generally private insurance matters, litigation of MVA claims, providing justifications of why the Appellant was not capable of doing her pre MVA duties, and other similar matters. Most of these are identifiable in paragraph [8] subsections {(m); (n); (o); (p); (q); and (s)}. The Tribunal notes that this contribute to the large bulk of the evidence on file. While informative in nature, these have rarely led to or guided to active treatment as there is little citing of his by those treating the Appellant as doctors, specialists and others as noted in paragraph [13].
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> [19] These one off statements or observations are not the sufficiency that the Tribunal needs to determine but these corroborate the Respondent submissions and assertions that the Appellant progressed leading up to her MQP of December 31, 2009. There is no determination in reference to the Appellant being incapacitated to pursue or attempt to pursue gainful occupation as of her MQP of December 31, 2009.
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> [21] The one-off reports while providing some insights do not supersede or significantly affect the voracity [sic] of the evidence of treating medical doctors and specialists as discussed. The Tribunal has previously noted and from a physical disability perspective these are a Neuropsychological Assessment Report by Dr. Sapienza [8](n) and HD Assessments vocational assessment per [8](o).
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> [23] The Tribunal next assesses mental disability issues claimed by the Appellant. There is little no evidence other than in one of assessments of Dr. Waisman [8] (m); Dr. Sapienza [8] (n); Dr. Ahmed [8] (p); and Dr. Garber [8] (s). These assessments happen in generally floodgate fashion in 2009 and early 2010 to support Appellant's efforts for Aviva Canada Inc. insurance benefits or MVA litigations purposes. There is very little no evidence provided by the Appellant in terms of clinical follow-ups or treatment follow ups from these assessments. The end result is that the MVA case was settled with insurance company(ies) around December 2011.

> [24] The Tribunal finds that while any physical element has mental aspects, there is little to no evidence that these contributed in any significant ways to undermine the Appellant's physical capacities or created mental disabilities of significance.

[19] The Applicant argues that the GD preferred some medical evidence over other medical evidence on the basis that the latter was "one off" or obtained in the context of insurance litigation and that in so doing, it committed an error of mixed fact and law.

Paragraphs 13 and 14 of the GD decision

[20] In paragraph [14] the GD gives "lesser weight" to the "one off assessments" carried out in the context of insurance litigation. The basis for this is that "while informative in nature" they "rarely lead to or guided to active treatment". As a result, the GD appears to have discounted the medical reports of 6 specialists who assessed the Applicant in the one year period prior to her MQP. I note that there were no other medical reports in 2009 referred to in the GD decision. There was only one other pre-MQP medical report, related to a day surgery on the left shoulder, and the surgeon's notes.

[21] Paragraph [13] states the medical evidence which was given "greater weight" by the GD. Six items are noted. One is the CPP Medical Report filed with the CPP application. A second relates to notes of the surgeon treating the Applicant's shoulder. A third relates to physiotherapy notes. The last two are reports related to observations in 2013 and 2014, years after the MQP.

[22] Consequently, the GD discounted two thirds of the medical evidence and almost all of the observations made in the year prior to the MQP. It did this on the basis that the reports were produced in the context of insurance litigation. These findings are of concern and warrant further review.

Paragraphs 19 and 20 of the GD Decision

[23] The phrase "are not the sufficiency that the Tribunal needs to determine but they corroborate" in paragraph [19] of the GD decision is confusing. What the statements and observations are insufficient to determine is not clear.

[24] In paragraph [20], the GD found that the “one-off” reports did not supersede or affect the other medical evidence which it preferred. This is problematic for the same reasons discussed in paragraphs [20] to [22] above.

Paragraphs 23 and 24 of the GD Decision

[25] The GD stated that “there is little no evidence” on mental disability issues other than the four assessments and reports done in 2009 in the context of insurance litigation. It then concluded that there is “little to no evidence” that the Applicant’s “mental aspects” contributed in any significant way to undermine her physical capacities or created mental disabilities of significance.

[26] Essentially, the GD seems to disregard four medical reports relating to the mental disability issues of the Applicant and then finds that there is little or no evidence that mental disability issues contributed in any significant way to the Applicant’s disability. This reasoning warrants further review.

[27] This ground of appeal - errors of mixed fact and law in the GD’s treatment of medical evidence obtained in the context of insurance litigation - has a reasonable chance of success.

Credibility

[28] The argument that the GD did not comment on the Applicant’s credibility, however, does not have a reasonable chance of success. That the GD decision did not state that the Applicant’s testimony was credible or not credible is not, of itself, an error in law or an error of fact.

Irrelevant Facts and Relevant Evidence

[29] In terms of category (4) of the Applicant’s grounds and reasons for appeal, a significant part of the facts and evidence at issue are related to the arguments raised in category (3). Therefore, this ground of appeal has a reasonable chance of success.

[30] In the circumstances, whether the GD erred in law or erred in fact and law in making its decision warrants further review.

[31] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal.

[32] On the ground that there may be an error of law or errors of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[33] The Application is granted.

[34] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[35] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division