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

Citation: *I. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 297

Tribunal File Number: AD-16-608

BETWEEN:

I. V.

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: Neil Nawaz

Date of Decision: August 4, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated January 26, 2016. The GD had conducted a hearing by videoconference 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 December 31, 2011.

[2] On April 26, 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 49 years old when she applied for CPP disability benefits on November 9, 2012. In her application, she disclosed that she had the equivalent of a high school education from Sri Lanka, her country of origin. After immigrating to Canada in 1994, she attended ESL and computer classes and took a full-time job as an order pick-up to delivery person at a publishing company. She stopped working there in April 2009 after she developed neck and back pain, headaches and dizziness.

[5] At the hearing before the GD on November 18, 2015, the Applicant testified about her background and work experience. She also described her symptoms and how they limited her ability to function at home and at work. She said that she had fainted and fallen on a warehouse

conveyor belt four or five times starting in 2008. She said that she had had numerous investigations and treatments, but her doctors were unsure what was wrong with her.

[6] In its decision, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, she retained work capacity and did not suffer from a severe disability as of the MQP. The GD found that, while her doctors may not have been able to objectively verify or find a cause for the Applicant's dizziness, she was able to predict when she was going to have an episode, giving her an opportunity to place herself in a safe position for the one or two minute duration of the spell.

THE LAW

[7] 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.

[8] 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.

[9] 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.

[10] 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

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

arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[11] 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

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

SUBMISSIONS

[13] In her Application Requesting Leave to Appeal, the Applicant submitted that in coming to its decision, the GD made the following errors:

(a) It failed to observe principles of natural justice by erroneously concluding that the Applicant had work capacity because she was able to "predict" when she was going to have a dizzy spell, thereby enabling her to "place herself in a safe position for one or two minutes." The Applicant submits that she is not always able to predict her fainting spells and that she suffers from a constellation of other impairments resulting in a severe disability. Furthermore, the GD accepted the Applicant as a credible witness yet rejected her evidence that she was severely disabled. The GD also failed to recognize several objective medical findings supporting the Applicant's disability.

(b) It erred in law in concluding that the Applicant did not, on a balance of probabilities, establish that she suffered from a severe disability. The GD ignored the Applicant's oral evidence and significant medical findings supporting claims of multilevel pain, frequent dizzy spells and fainting, cognitive impairments, fatigue and non-restorative sleep. The GD also erred in law in concluding that the Applicant could somehow predict her dizzy spells, find a safe place to faint and

[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63

then continue working, which is in clear contradiction to applicable legal principles.

(c) It based its decision on an erroneous finding that the Applicant could predict her fainting spells and thereby retained work capacity. Furthermore, the GD failed to consider significant medical documentation, including objective evidence, setting out the Applicant's significant impairments, which show she is disabled from a constellation of impairments.

ANALYSIS

[14] Although the Applicant's appeal is nominally based of all three grounds enumerated in subsection 58(1) of the DESDA, it would appear they all properly fall under the category of factual error. As there is considerable repetition and overlap among the Applicant's allegations, I will address them under the following headings:

GD erroneously concluded Applicant had capacity because she could predict dizzy spells

[15] The Applicant alleges the GD erred in basing its conclusion that she had work capacity because she was able to "predict" when she was going to have a dizzy spell, thereby enabling her to "place herself in a safe position for one or two minutes."

[16] My review of the decision indicates that the GD devoted much of its analysis (paragraphs 103-06, 109-10 and 113-14) to considering the nature and extent of the Applicant's episodes of dizziness and whether they affected her capacity to pursue "regular" employment. It concluded, based on its reading of the evidence, that incipient headaches rendered the dizzy spells, which the GD found to be relatively infrequent and of brief duration, predictable and manageable.

[17] The Applicant has not disputed that she told the GD that her dizzy spells tended to start with increased pain at the top of her head. The GD acknowledged her testimony that she sometimes knew when the dizziness was coming and sometimes did not, but it appeared to place greater weight on Dr. Ronald Wilson's January 2010 report, in which he relayed the Applicant's history of "characteristically" experiencing headaches before the dizziness.

[18] It was open to the GD as finder of fact to weigh the available evidence and make an assessment about the predictability of the Applicant's dizzy spells and their effect on her ability to regularly pursue substantially gainful employment. The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all of the evidence or placed inappropriate weight on selected items of evidence. In *Simpson v. Canada (AG)*[3], the appellant's counsel identified a number of medical reports which she said that the Pension Appeals Board—the predecessor to the AD—ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact….

[19] I see no arguable case on this ground.

GD found Applicant credible yet rejected her evidence that she was severely disabled

[20] The Applicant seems to suggest that in finding her credible, the GD was obliged to accept her evidence in its entirety. My review of the decision indicates that, while the GD considered the Applicant's testimony, it did not actually make a specific finding on her credibility. However, even if it had, the GD would have been within its authority, having weighed all of the relevant evidence, to prefer the contents of medical reports over the Applicant's testimony.

[21] I do not see a reasonable chance of success on this ground.

GD failed to consider objective and other evidence supporting Applicant's disability

[22] The Applicant alleges that the GD failed to consider significant medical documentation, including objective evidence, setting out the Applicant's significant impairments.

---

[3] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

[23] As the Applicant has not named any specific item of evidence that the GD disregarded, I must find the Applicant's claimed grounds of appeal to be so broad that they amount to a request to retry the entire claim. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[24] In the absence of any alleged specific factual errors, I am unable to consider granting leave under this claimed ground of appeal.

GD failed to consider the totality of the Applicant's condition

[25] The Applicant alleges that the GD erred in failing to consider that a "constellation of impairments" rendered her disabled. The Applicant did not specify which impairments she believes the GD overlooked, but it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions.[4] That said, I have reviewed the GD's decision and found no indication that it ignored, or gave inadequate consideration to, any of the Applicant's major complaints.

[26] The GD's decision contains a comprehensive summary of the medical evidence, including many reports that document investigations and treatment for the Applicant's various medical problems. The decision closes with an analysis that meaningfully discusses the written and oral evidence before concluding that the Applicant's conditions and their symptoms—either individually or in their totality—did not preclude her from performing all forms of work.

[27] I see no arguable case on this ground.

---

[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

CONCLUSION

[28] The Application is refused.

Member, Appeal Division