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

Citation: *K. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 292

Tribunal File Number: AD-16-550

BETWEEN:

K. M.

Appellant

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: Shu-Tai Cheng

DECIDED: On the Record

DATE OF DECISION: August 2, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On June 9, 2016, the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal on the grounds of error of law or error of mixed fact and law. The decision of the GD appealed from relates to the finding that the Appellant's disability was not "severe" at the time of her minimum qualifying period (MQP) of December 31, 2009.

[2] The Tribunal requested the parties' submissions on the mode of hearing, whether one is appropriate and, also, on the merits of the appeal.

[3] The Respondent filed submissions which concede the appeal. In particular, the Respondent submits that the GD committed an error in law in identifying and applying the appropriate test and made erroneous findings of facts without regard to the material before it.

[4] In light of the Respondent's submissions, it was unnecessary for the Appellant to make submissions.

[5] This appeal proceeded on the basis of the record for the following reasons:

a) The lack of complexity of the issues under appeal; and

b) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[6] In the circumstances, it is unnecessary to hold an oral hearing at the AD.

ISSUES

[7] Whether the GD erred in law in making its decision or 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.

[8] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision of the GD.

LAW AND ANALYSIS

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

[10] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraphs 58(1)(b) and (c) of the DESD Act.

[11] In particular, the decision granting leave to appeal stated:

> [19] The arguments in category (2) and (3), however, do have a reasonable chance of success. In particular:
>
> (a) the GD cited the *Inclima* decision but concluded that the Applicant had residual capacity to pursue alternate employment without explaining how it arrived at this conclusion;
>
> (b) it cited the *Villani* decision and identified the "Villani factors" but did not analyze how the Applicant's personal characteristics or circumstances affected her capacity regularly of pursuing any substantially gainful occupation; and
>
> (c) it preferred some medical evidence over other medical evidence on the basis that the former was objective and the latter was subjective without an adequate explanation of why one medical report was objective and the other was subjective.

> [20] In respect of category (4), there is medical evidence in the record - Yeats' clinical notes and report and Scully's report - that the Applicant was suffering from psychological conditions, namely alcohol addiction and depression, leading up to the MQP. However, the GD characterized the evidence of Dr. Yeats', at paragraph [31], as indicating that the Applicant had a stroke causing a severe disability in 2010 without making any reference to the psychological conditions. As well, the GD did not mention depression in its analysis of "severe" and mentioned but did not discuss alcohol addiction.
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> [21] The GD decision analyzed the Applicant's physical limitations and abilities in some detail. It also mentioned alcohol addiction in its summary of the medical evidence. In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal concluded that when determining if a claimant is disabled under the *Canada Pension Plan*, all of the claimant's conditions must be considered, not just the main one. It is not clear to me that the GD considered the cumulative effect of the Applicant's physical and psychological conditions in this case.
>
> [22] In the circumstances, whether the GD erred in law or erred in fact and law in making its decision warrants further review.
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> [23] 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.
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> [24] On the ground that there may be an error of law or an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

[12] The Respondent submitted that GD committed an error in law in identifying and applying the appropriate test and made erroneous findings of facts without regard to the material before it, and that the matter should be returned to the GD for redetermination. I agree, based on my review of the file.

[13] The GD erred in law in making its decision (in the application of the appropriate legal test as described in paragraph [11] above) and its decision was based on erroneous findings of fact that the GD made in a perverse or capricious manner or without regard for the material before it (in its treatment and analysis of the medical evidence, as described in paragraph [11] above).

[14] Subsection 59(1) of the DESD Act sets out the powers of the AD. It states:

> The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[15] Considering the submissions of the parties, my review of the GD decision and the appeal file, I allow the appeal. Because this matter may require the parties to present evidence, a hearing before the GD is appropriate.

CONCLUSION

[16] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration.

Shu-Tai Cheng
Member, Appeal Division