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

Citation: *D. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 294

Tribunal File Number: AD-16-613

BETWEEN:

D. F.

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 3, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated January 27, 2016. The GD conducted an in-person hearing 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, 2014.

[2] On April 27, 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 56 years old when she applied for CPP disability benefits on September 16, 2011. In her application, she disclosed that she suffered from major depression and type 2 diabetes, which she claimed rendered her disabled from work. She was last employed in March 2011, when she took sick leave from her position as an executive assistant at a charitable organization.

[5] At the hearing before the GD on August 12, 2015, the Applicant testified about her education and work experience. She also described her medical condition and associated symptoms and how they made it increasingly difficult for her to function at work and at home. She said that she had sought psychiatric treatment and taken antidepressants and anti-anxiety

medications to limited effect. Since her last depressive episode in 2011, her condition had become worse.

[6] In its decision of January 27, 2016, the GD dismissed the Applicant's appeal, finding that, on a balance of probabilities, she did not suffer from a severe disability as of the MQP. In the GD's view, the available medical evidence suggested that the Applicant retained residual capacity that did not preclude modified work. In addition, it found that she had not discharged her obligation to seek alternate employment or explore retraining.

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 the GD made the following errors in concluding that she was not disabled:

(a) The GD stated that the psychiatrist's September 2011 report did "not indicate functional impairment restrictions or complications related to the Applicant's claimed disability of major depressive disorder," yet Dr. Prince, in his report to Great West Life, found that she was probably never going to be employable and her Global Assessment of Functioning (GAF) score indicated serious symptoms.

(b) The GD found that the Applicant had an employer that offered modified work, and she stopped working not because of her medical conditions, but her desire to obtain a job with increased salary and benefits. However, the evidence indicates that when she switched positions, she was already experiencing difficulty despite modifications. She was essentially working against doctor's orders and failing at it. She tried this new position but quickly found it no better and could not cope. She attempted to mitigate her situation and should be applauded for it.

(c) The GD found that the Applicant had not sought alternative employment or retraining, ignoring evidence that the reason she did "not feel up to it" was due to her major depressive disorder. The Applicant submits that the GD trivialized her depression and failed to consider the totality of her condition, which also

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

included colitis and cognitive impairments. It also disregarded the "real world" test set out by *Villani v. Canada*,[3] requiring that an applicant's personal characteristics be taken into account.

(d) The GD found that there was nothing in the medical evidence to indicate how or why the Applicant's last depressive episode was significantly different from previous episodes, in which she successfully recovered and returned to work. In doing so, it ignored reports and notes from her treating physicians that each successive episode was more serious than the last, and it became harder and harder to re-enter the workforce. "By the third time it was impossible. It was the straw that broke the camel's back."

ANALYSIS

[14] I will address in detail only the Applicant's first ground of appeal. The thrust of her submissions on this ground is that the GD mischaracterized the findings of the Applicant's psychiatrist. In its decision, the GD devoted four paragraphs to analyzing Dr. Prince's reports:

> [37] In a medical report dated September 13, 2011, Dr. Prince noted the Appellant's relevant physical findings and limitations as "very limited family support" and went on to recount the difficulties the Appellant had with her husband and two adult sons, all of whom required her care and attention.
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> [38] In a letter dated February 23, 2012, Dr. Prince noted that the Appellant's depression is progressing in severity, longer in intensity and more frequent with shorter time in between. He opined that she was not capable of any meaningful work which would generate an income to support her and help her deal with her two sons.
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> [39] While Dr. Prince's February 2012 letter is supportive of Appellant's attempt to obtain a disability pension, it is irrelevant whether Appellant could work in a manner sufficient to generate an income to help her deal with her two sons; such work need only be substantially gainful.
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> [40] Dr. Prince's noted physical findings and limitations in September 2011 do not indicate functional impairment, restrictions or complications related to the Appellant's claimed disability of major depressive disorder.

[15] The GD based its decision in part on the absence of any functional restrictions listed in Dr. Prince's CPP Medical Questionnaire dated September 13, 2011. However, I note that Dr. Prince mentioned specific functional restrictions in other reports, such as the Manulife Attending Physician's Updates dated March 30, 2009 and April 21, 2009 ("poor concentration") and June 4, 2009 ("all cognitive functions impaired"), as well as letters dated

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[3] *Villani v. Canada (Attorney General)*, 2001 FCA 248

June 18, 2009 (“she has significant cognitive and functional impairment”) and February 23, 2012 (“any future employment would have very [*sic*] extreme stress and her ability to cope would be quite limited”). I also note that there is no mention in the GD’s decision of Dr. Prince’s Great West Life Initial Attending Physician’s Statement dated June 9, 2011 (p. GT2-154), in which he set out specific GAF scores that would be expected to have bearing on the Applicant’s capacity to perform work. On the basis of these documents, I see an arguable case that the GD made an erroneous finding of fact in characterizing Dr. Prince’s assessment of the Applicant’s functional abilities.

[16] The GD also dismissed Dr. Prince’s letter of February 23, 2012, because it was “irrelevant” whether the Applicant was unable to work in a manner sufficient to generate an income to help her deal with her two sons—such work needed only to be substantially gainful. However, Dr. Prince also concluded his letter with a more unequivocal statement: “Ms. D. F. is depressed with a chronic and recurring disorder and is unable to work.” These words came with no qualifications, and they would appear to be incompatible with the interpretation given by the GD to the earlier statement. If the Applicant is arguing that the GD was unreasonably selective in its use of Dr. Prince’s statements, then it has at least an arguable case on this ground.

[17] Finally, I must note that it appears the Respondent removed selected portions of the documentary evidence that was before the GD. In particular, Dr. Prince’s response in Box 6B of the CPP Medical Report (p. GT1-69) was edited to remove details about the medical conditions of the Applicant’s sons, for whom she is apparently the sole caregiver. It is possible that this information was relevant to the Applicant’s disability claim, particularly since she and her psychiatrist submitted that she has been under psychological stress, and her family responsibilities contributed to her depression and anxiety. As the GD based its decision, at least in part, on what was *not* in Box 6B, I find that any redactions to the CPP Medical Report constitute a possible breach of a principle of natural justice. Although the GD made no mention of these redactions in its decision (and indeed it is unclear whether the GD member even noticed them), I find there is at least an arguable case that the Respondent failed to provide relevant information.

CONCLUSION

[18] As there is a reasonable chance of success for the Applicant's first enumerated ground, I am granting leave to appeal. As well, although I do not find it necessary to discuss them in detail at this juncture, I am granting leave on the other enumerated grounds.

[19] The parties will also be welcome to make submissions on whether the Respondent acted contrary to the principles of natural justice in failing to provide all relevant information in its control.

[20] I invite the parties to provide submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

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

Member, Appeal Division