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

Citation: *R. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 319

Tribunal File Number: AD-15-1169

BETWEEN:

R. C.

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: Hazelyn Ross

DATE OF DECISION: August 17, 2016

REASONS AND DECISION

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

INTRODUCTION

[2] On June 30, 2015 the General Division of the Tribunal issued its decision in the Applicant‘s appeal of a reconsideration decision that upheld the Respondent’s decision to deny her application for a disability pension under the *Canada Pension Plan*, (CPP). The General Division determined that the Applicant did not meet the criteria set out in paragraph 42(2)(a) of the CPP and, therefore, was not eligible for a disability pension.

REASONS FOR THE APPLICATION

[3] Initially, the Applicant submitted that the General Division had breached a principle of natural justice when it decided her appeal. (AD1) Subsequently, her representative submitted that the General Division had committed errors of law and that its decision was based on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.(AD3)

ISSUE

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

THE LAW

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), govern the grant of leave to appeal. Subsection 56(1) provides that “an appeal to the Appeal Division may only be brought if leave to appeal is granted.” Thus, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[6] Subsection 58(3) provides that “the Appeal Division must either grant or refuse leave to appeal.” In order 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 would have a reasonable chance of success by raising an arguable case in his application for leave.[2] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[8] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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.

[9] *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.

BACKGROUND AND PRELIMINARY ISSUE

[10] Before it can decide whether it should grant leave to appeal, the Appeal Division must determine whether the Application was filed outside of the 90-day time limit set out in subsection 57(b) of the CPP. The General Division issued the decision on June 30, 2015 and the Tribunal received an incomplete application for leave to appeal on October 15, 2015, about 5 days after the time limit had passed.[3]

[11] Following receipt of the incomplete application a series of written communications passed between the Applicant and the Tribunal. They were:-

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[1] Subsection 58(2) of the DESD Act provides that "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).
[3] This takes into account the deemed receipt provision in section 19 of the Social Security Tribunal Regulations.

1) On 4th November 2015, the Tribunal notifies the Applicant that her request is incomplete as it contains no ground of appeal. The Tribunal asks the Applicant asked to provide reasons for the application and also advised her that:-

> "If the Tribunal receives all of the missing information needed to complete your application by **December 7, 2015,** the Tribunal will accept your complete application as having been received on **October 15, 2015.**"

2) On December 10, 2015, the Tribunal receives the Applicant's response, dated November 18, 2015. The response is received after the December 7, 2015 deadline. Therefore, it does not meet the Tribunal's stipulation in its letter to the Applicant.

3) On December 16, 2015, the Tribunal writes to Applicant notifying her that her appeal appears to have been filed late and that a Member of the Appeal Division must decide whether to extend the time for filing the appeal. The tribunal did not ask the Applicant to make submissions on the application.

4) On December 22, 2015, a member of the Appeal Division asks the Applicant to provide additional information, in writing, and by January 26, 2016. The information requested was:-

> 1. Please explain what you mean by the phrases" and I was discriminated against and was advised during the meeting that the decision would more than likely not be in my favour" and ; "I was discriminated against and continue to be discriminated against with many government divisions".
>
> 2. Please explain any legal grounds for the discrimination claim, including what legislation, if any, you are relying on;
>
> 3. Please provide any additional evidence you have to substantiate these statements, including what exactly was said at the General Division hearing any by whom.
>
> 4. Please provide any evidence you have that the letters by Dr. Rupert you referenced in your application requesting leave to appeal were sent to or received by the Tribunal.

5) On January 21, 2016 the Tribunal received a request to extend the time to respond to the Appeal Division's questions together with an executed "authorisation to disclose". The Appeal Division granted the request extending the time to March 18, 2016.

6) On March 4, 2016 The Applicant requests and is sent a complete copy of her Tribunal file.

7) On March 17, 2016 the Applicant's representative files further submissions citing different grounds for the request.

Should the Appeal Division extend the Time for Filing the Request for Leave to Appeal?

[12] There is no application for an extension of the time for filing the request for leave to appeal before the Appeal Division. However, the Tribunal did advise the Applicant that her Application was considered late and that a Member would consider whether to extend the time for filing the appeal.

[13] In considering whether or not to grant the extension, the Appeal Division is guided by the decision of the Federal Court of Appeal, (FCA), in *Canada (Minister of Human Resources Development) v. Gattellaro,* 2005 FC 883. For the following reasons, the Appeal Division finds that this is an appropriate case in which to extend the time for filing the Application.

Intention to pursue the appeal

[14] The Appeal Division finds that the Applicant had a continuing intent to pursue the appeal. This is demonstrated by the fact that, while she was unrepresented when she filed the initial application, and while it was five days late, it was not egregiously late. Furthermore, the Applicant gave cogent reasons for the application, albeit not relating them to the terms of the statutory provisions. The Appeal Division is satisfied that a continuing intention to pursue the appeal has been demonstrated.

Has the Applicant provided a Reasonable Explanation for the Delay?

[15] As the Applicant was never asked to provide such explanation, this factor is moot.

Does the Applicant have an Arguable Case?

[16] The Applicant's representative argues that she has an arguable case. He submits that there is sufficient evidence in the Tribunal record to establish that the Applicant suffers from a mental health condition. The Applicant's representative submitted that, but for the General Division errors, the Applicant would have been found to meet the CPP definition of severe and prolonged disability. The Applicant's representative relies on the diagnoses made by the Applicant's family physician and by Dr. Pilowsky, which he claimed the General Division either disregarded or misinterpreted. The Appeal Division finds that the Applicant has raised an

arguable case, namely, that the General Division may have based its decision on an erroneous finding of fact, in regard to the severity of the Applicant's mental health condition.

What is the Prejudice to the Other Party?

[17] In the view of the Appeal Division, if the extension is granted, the possible prejudice to the Respondent lies mainly in delay. However, the Appeal Division is satisfied that the Respondent would be able to prepare and present its case, should the extension be granted and should the application for leave be allowed as there is little chance that evidence would be lost or witnesses be unavailable.

Is Granting an Extension to the Time Limit in the Interest of Justice?

[18] (Canada) Attorney General v. Larkman, 2012 FCA 204 enjoins decision-makers who are considering whether or not to grant a request for an extension of time to consider the best interest of justice. In this case, given the Applicant's present mental health condition and the *de minimis* nature of the original delay as well as the mandate in section 3 of the Tribunal Regulations to conduct proceeding as informally and quickly as the circumstances and the considerations of fairness and natural justice permit, the Appeal Division is persuaded that it is appropriate to extend the time for filing the Application.

[19] For all of the above reasons, the Appeal Division extends the extend the time limit for filing the application for leave to appeal

ANALYSIS

[20] In her initial application, (AD1) the Applicant claimed that the General Division had breached a principle of natural justice and had discriminated against her. In his submissions to the Tribunal, the Applicant's representative did not address the questions raised by the Appeal Division in its letter of December 22, 2015. In fact, he appears to have abandoned completely the Applicant's claim that the General Division breached a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. Instead the Applicant's representative submitted that the General Division made errors of law and errors of fact and failed

to comply with section 12 of the *Interpretation Act*. Nonetheless, for completeness, the Appeal Division will address all of the bases raised by the Applicant.

The General Division breached a principle of natural justice.

[21] The Applicant had alleged that the General Division breached a principle of natural justice or otherwise acted beyond its jurisdiction or refused to exercise its jurisdiction. She set out the ways in which she felt the General Division had committed the breach. She made an allegation of bias, stating that she had been "pre-judged". The Appeal Division asked for clarification, however, as stated earlier, it did not receive a response to its questions. Accordingly, the Appeal Division finds that there is no basis before it on which it could determine that the General Division may have breached natural justice as originally suggested by the Applicant.

Submissions made by the Applicant's representative

[22] The Applicant's representative raised three objections to the General Division decision, namely, the findings of the General Division that :-

a. the majority of the evidence is dated after her MQP
b. The Applicant was able to work; and
c. The Applicant did not provide any evidence of attempts at alternate employment on or before the MQP.

The Majority of the Evidence is dated after the Applicant's MQP

[23] The Applicant's representative acknowledged that her minimum qualifying period, (MQP), ended on December 31, 2011. He also acknowledged that she must be found to have become disabled on or before December 31st, 2011. However, he submitted that while the reports are dated after the MQP, they establish that her mental health condition pre-dated the MQP. He also argued that on the strength of the Applicant's testimony that she left her employment because she was bullied; it was open to the General Division to make the inference that the Applicant's disability began in 2009.

Should the General Division have inferred onset of disability in 2009?

[24] This submission raises the question of how a post-MQP diagnosis is to be treated. In her questionnaire for disability benefits (GT1-68) the Applicant stated that she stopped working because of post-traumatic stress, anxiety, depression and high blood pressure. She related these

conditions to harassment at work. (GT1-72) The General Division noted that in August 2011, the Applicant was diagnosed with obsessive-compulsive personality disorder and post-traumatic stress disorder. This diagnosis conflicted with earlier diagnoses of major depression. Nonetheless, these diagnoses were made prior to the end of the Applicant's MQP. (GT1-06

[25] The Tribunal record contains several reports that created after the Applicant's MQP that give varying diagnoses of major depressive episode, post-traumatic disorder and depression. In the view of the Appeal Division, the post-MQP reports did not present new evidence or make a new diagnosis of a pre-existing condition. Medical reports making the same diagnoses were available prior to the MQP: *Gilroy v. Canada (Attorney General),* 2010 FCA 302.

[26] The General Division decision acknowledged the Applicant's mental health conditions, but turned a) on the absence of effort to find alternate employment when it was recommended that she stay active and b) that the reports did not indicate that the disability was permanent. (See GT1-66 / 67). That prognosis did not appear until after the end of the MQP, (GT1-85), by which time the Applicant had been off work for several years. While it may well be that the Applicant's condition worsened, given the contradictions in the medical evidence, it is not clear to the Appeal Division that there was a sufficient evidentiary basis on which the General Division could have found that, in 2009, she was disabled by reason of her mental health condition. Accordingly, the Appeal Division is not satisfied that this submission discloses a ground of appeal that would have a reasonable chance of success.

[27] The Applicant's representative also submitted that the General Division failed to consider the probability that the Applicant was disabled on or before her MQP when it found that she may have become disabled after December 31, 2011. He attached new evidence to the application for leave, in the form of a medical report that support that the Applicant's condition pre-dates 2010 or possibly earlier (AD3-11). Under the DESD Act, an appeal cannot be grounded on new evidence: *(Tracey v. Canada (Attorney General),* 2015 FC 1300).

Did the General Division ignore the medical evidence in the disability application?

[28] The Applicant's representative also submitted that the General Division ignored the medical evidence in the Applicant's disability application. (AD3-5) He submitted that the

medical evidence included a diagnosis of Major depression, PTSD and Disparities Mellitus. The prognosis for recovery was described as “poor”. (AD3-6)

The Appeal Division is not persuaded of this submission. The General Division set out the medical evidence at paragraphs 11 through 26 of the decision. The medical report to which the Applicant’s representative refers is the CPP medical questionnaire completed by Dr. Rupert, the Applicant’s family physician, on July 25, 2011. The General Division acknowledged the report and its prognosis at paragraph 12 of its decision. It is well settled that a Tribunal is presumed to have read all of the documents that were before it. However, a Tribunal is neither required, nor expected, to refer to every report: *Dossa v. Canada (Pension Appeals Board),* 2005 FCA 387. An error of law will arise only where the deficiencies in the reasons of the trier of fact, here the General Division, prevent meaningful appellate review that: *Doucette v. Canada (Minister of Human Resources Development),* 2004 FCA 292 (CanLII).

[29] As stated earlier, the General Division’s reasons leave no doubt as to why the Member found as they did. On reading the reasons, the Appeal Division is satisfied that the General Division did have regard to the totality of the medical evidence including Dr. Robert’s prognosis for the Applicant.

The Finding that the Applicant retained Work Capacity

[30] The Applicant’s representative submitted that the General Division disregarded or misinterpreted evidence when it found that Dr. Pilowsky was of the opinion that the Applicant could return to work.

[31] He submits that in her report of the 15th March 2012, Dr. Pilowsky concluded that the Applicant was disabled from all work and that General Division erred by placing reliance on her earlier report in which she stated that the Applicant was willing to attempt a gradual return to work. The Applicant’s representative submitted that the General Division improperly relied on only one sentence in the report dated April 19th, 2010 as opposed to the report in its entirety. He submitted that in a medical report dated April 19th, 2010, Dr. Pilowsky noted that the original diagnosis was based on an assessment dated February 18, 2010. The diagnosis included “Major Depressive Episode, Severe and Post-Traumatic Anxiety with an original GAF of 45.

[32] Dr. Pilowsky's report of April 19th, 2010 is brief. It is addressed to the Applicant's case manager. In the report, Dr. Pilowsky answers several questions. The report states:-

> I am writing to provide an update for Ms. R. C., who has completed four psychotherapy sessions. For the record, Ms. R. C. was initially interviewed in my office on February 18th, 2010.
> **1. Original diagnosis - Assessment dated February 18, 2010.**
> - Major Depressive Episode, Severe (296.23 in the DSM-IV)
> - Symptoms of Post-traumatic Anxiety
> **2. Original GAF:** 45
> **3. Treatment Participation:**
> - Active, punctual, and participates in her homework when she attends.
> **4. Techniques used:**
> - Psychoeducation
> - Relaxation
> - Goal setting
> - Cognitive-Behavioural Therapy: Life Chart, Anxiety Habituation chart
> - Cognitive Restructuring
> - Solution- focused thinking
> - Supportive Counselling
> **5. Symptoms improved:**
> - Initiative to socializing with friends and family.
> - Increased optimism.
> **6. Symptoms remaining**
> - Ruminations about the grievances suffered at her place of employment.
> - Marital problems that have ensued since she has stopped working as she is angry at her husband's reported interference in trying to encourage her to socialize with family and friends.
> - Depressed mood.
> - Diminished sense of self-worth and self-esteem.
> - Anxiety.
> - Frustration at her current state.
> **7. Current Diagnosis:**
> - Major Depressive Episode, Severe (296.23 in the DSM-IV)
> - Symptoms of Post-traumatic Anxiety
> **8. Current GAF:** 45
> **9. From a psychological perspective, is Ms. R. C. able to return to work?** At the present time, Ms. R. C. is not able to work; however, she is willing to make a gradual return to work.
>
> Yours truly,
> Dr. J. Pilowsky,
> Psychologist

[33] The Appeal Division finds that while it is true that the report does indicate a then current diagnosis of major depressive episode, it also qualifies the Applicant's incapacity to work, limiting it to "at the present time". CPP disability benefits are not available on a short term basis: *Canada (Minister of Human Resources Development) v. Henderson,* 2005 FCA 309. In the result, the Appeal Division finds that the General Division did not place an improper

reliance on that part of the report dealing with the Applicant's capacity to work. The Appeal Division also finds that the General Division did not disregard or misinterpret evidence when it found that Dr. Pilowsky was of the opinion that the Applicant could return to work.

[34] **The Applicant has not established that her efforts at obtaining and maintaining any substantially gainful occupation were unsuccessful because of her health conditions**

[35] Applicant's for a CPP disability pension are required to show not only that they have a serious health problem, but where there is evidence of work capacity, must also how that their efforts at obtaining and maintain employment have been unsuccessful by reason of their health condition: *Inclima v. Canada (Attorney General)* 2003 FCA 117.

[36] The Applicant's representative submitted that the General Division failed to state the client's evidence at the hearing, specifically that she met an employer that was hiring and during the meeting with the employer the Applicant broke down and cried. The Appeal Division finds this statement accurate. However, the Appeal Division is not persuaded that the omission gives rise to an error. The Appeal Division finds that the effort must be what the FCA described as a "serious effort": *Villani v. Canada (Attorney General),* 2001 FCA 248. I am not persuaded that meeting with a potential employer, who the Applicant knew, in a situation she described as not being a formal interview, qualifies as a serious attempt to obtain and maintain alternate employment. Leave to appeal cannot be granted on the basis of this submission.

CONCLUSION

[37] The Applicant's representative submitted that the General Division erred in law and disregarded supportive evidence in its determination that the Applicant did not meet the CPP definition of "severe and prolonged" disability as of the MQP. On the basis of the foregoing, the Appeal Division is not satisfied that his submissions disclose an arguable case that would have a reasonable chance of success on appeal.

[38] The Application is refused.

Hazelyn Ross
Member, Appeal Division