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

Citation: *S. J. v. Minister of Employment and Social Development*, 2016 SSTADIS 336

Tribunal File Number: AD-16-615

BETWEEN:

S. J.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 30, 2016

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated January 28, 2016. The GD conducted a hearing by teleconference on January 20, 2016 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, 2009.

[2] On April 26, 2016, within the specified time limitation, the Applicant's representative filed an application requesting leave to appeal, advancing numerous grounds of appeal and relying on various legal authorities. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division (AD) may only be brought if leave to appeal is granted, and the AD must either grant or refuse leave to appeal.

[4] Subsection 58(1) of the DESDA sets out that 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.

[5] 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."

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] F.C.J. 1252. The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada (Attorney General),* 2010 FCA 63.

[7] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

ISSUE

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

SUBMISSIONS

[9] The Applicant's representative submitted a nine-page letter with the application for leave, much of it summarizing the documents comprising the hearing file that was before the GD. Where possible, I have identified specific allegations and categorized them under the following headings:

Erroneous Findings of Fact

[10] The Applicant submits that the GD based its decision on the following erroneous findings of fact made in a perverse and capricious manner or without regard for the material before it:

(a) In paragraph 33 of its decision, the GD found that the majority of medical evidence filed on behalf of the Applicant was dated post-MQP and did not relate

to the period prior to December 31, 2009. The Applicant alleges that there is, in fact, evidence on file of numerous ailments that have developed since 2007.

(b) In paragraph 34, the GD found that medical reports dated after the MQP did not prove on a balance of probabilities the Applicant suffered from a severe disability. The Applicant alleges that the GD mischaracterized many of these post-MQP reports and suggests that they do, in fact, support a finding of severity.

(c) In paragraph 38, the GD declared that it was unable to place weight on Workplace Safety and Insurance Board (WSIB) reports and evaluations that were not on file. In fact, practically all of the medical documentation on file prior to 2012 was addressed to the WSIB.

(d) In paragraph 41, the GD noted that the Applicant faced some barriers due to language, education and work experience. However, the GD made no mention of the barriers or limitations recognized by Service Canada.

Errors of Law

[11] The Applicant submits that the GD erred in law in making its decision, whether or not the error appeared on the face of the record:

(a) The GD failed to apply *Barata v. Minister of Human Resources and Development* (January 17, 2001), CP15058 (PAB) in focusing on the Applicant's medical conditions separately and not considering their collective effect on her ability to work.

(b) The GD failed to apply *MHRD v. Bennett* (July 10, 1977), CP 4757 (PAB) in giving inadequate consideration to the "regular" aspect of the CPP requirement. A claimant should not be expected to find a philanthropic, supportive, flexible employer who is prepared to accommodate her disabilities.

ANALYSIS

Erroneous Findings of Fact

(a) Quantity of Post-MQP Medical Evidence

[12] The Applicant objects to the GD's statement that the majority of medical evidence was dated after the MQP and did not relate to the period prior to December 31, 2009, but my review of the hearing file indicates that the GD's statement was not inaccurate. It would have been one thing had the GD dismissed out of hand all evidence prepared after the MQP, but it did not do this. Rather, the GD grouped and summarized all of the post-MQP reports that it considered to be relevant, noting where they referenced the Applicant's condition before December 31, 2009. At no point did the GD suggest that the Applicant's medical conditions all originated after the MQP—only that none was severe during the eligibility period.

[13] It is an established principle of administrative law that a tribunal need not refer to each and every item of evidence before it but is deemed to have considered all of it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). It was also open to the GD as the trier of fact to sift through the relevant facts, assess the quality of the evidence and determine what, if any, it chose to accept or disregard, before deciding on its weight and ultimately coming to a decision based on its interpretation and analysis of the evidence before it. Hence, I can find no arguable case that the GD erred in its consideration of the post-MQP evidence, arising out of the fact that it placed less weight on some of it than the Applicant submits was appropriate.

(b) Substance of Post-MQP Medical Evidence

[14] The Applicant disputes the GD's finding in paragraph 34 of its decision that the medical reports dated after December 31, 2009 did not show she suffered from a severe disability as of the MQP. It referred to specific instances where it alleges the GD mischaracterized the substance of selected medical reports. I will address them in order:

[15] The GD wrote: "The CT scan in December 2010 significant improvement [*sic*] in the right sternoclavicular joint in comparison to the 2008 image." The Applicant objects to the

GD's omission of the next sentence in the report: "There is significant residual narrowing of the right sternoclavicular joint in comparison to the left with which may also be degenerative."

[16] As noted earlier, an administrative tribunal is not obligated to refer to every item in the evidentiary record and is free to deem certain facts material or not. First, it is not immediately obvious that right sternoclavicular narrowing is a marker of "severity." I also note that the Applicant is referring to the final paragraph of the CT report, which summarizes more detailed findings contained in the body. Those findings indicate that the narrowing was present previously. If the GD took this to mean there had been no further degeneration over two years, it had a rational basis to regard the narrowing as immaterial.

[17] The GD wrote: "Dr. MacDonald noted deterioration in the Appellant's condition and a GAF [Global Assessment of Functioning] score of 40-45 in July 2012 over two years after the MQP." The Applicant took issue with this statement, noting that Dr. MacDonald also said in the same report that she continued to experience high levels of chronic pain with secondary depression, anxiety and panic symptoms. The Applicant also cited various other psychological reports to argue that she was severely disabled by reason of her mental health, among them Dr. MacDonald's reports from March 2009 and December 2013.

[18] I see no error in the part of the GD, which appears to have reviewed and weighed the relevant evidence on the Applicant's psychological conditions and made findings that are defensible on the facts. While the Applicant may not agree with the GD's interpretation of Dr. MacDonald's reports, it is not my role here to retry the evidence but to determine whether the GD based its decision on a factual error. Here, I see no arguable case that it did.

[19] The GD wrote: "Dr. Segedi wrote a letter dated in March 2013 in support of the Appellant. The report however enumerated diagnostic conclusions for the years 2010 and 2011. The conclusions do not relate back to the date of the MQP." The Applicant objects to this statement because she alleges that Dr. Segedi clarified her disability in 2010-11 only at the request of Service Canada and, in any case, the GD made no reference to pain and restricted movement of the lower back, which was mentioned in the report.

[20] Again, the Applicant has failed to identify a specific erroneous finding of fact made by the GD in its discussion of Dr. Segedi's March 2013 report. The GD was within its authority to omit this particular reference to back pain, which it presumably deemed to have lesser significance than the Applicant's other claimed conditions. Moreover, I must note that the GD *did* refer to Dr. Segedi's findings on back pain, referencing other reports in paragraph 27 and 29 of the decision.

[21] The GD wrote: "The doctor [Segedi] opines in September 2012 that the Appellant suffers from a severe and prolonged disability. This opinion is dated over two years after the date of the MQP." The Applicant disagrees with this statement, noting that, while it was "unfortunate" she did not apply for benefits in 2012, she had genuine pain well before that, and the GD did not analyze objective and subjective medical findings from 2009-11 by family practitioner and psychiatrist.

[22] Again, the Applicant has identified no factual error. In my view, the balance of this submission is so broad that it amounts to a request to rehear the evidence, which the GD has already considered. The Applicant is in effect recapitulating her claim and asking me to substitute my assessment of the evidence in her favour. However, I am unable to do this, as my authority permits me to determine only whether the GD has committed any errors that fall within the specified grounds and whether any of them have a reasonable chance of success. Appealing to the AD is not an opportunity for an applicant to reargue their case, and I see no reasonable chance of success on this ground.

[23] The GD wrote: "The diagnosis of fibromyalgia was made well after the date of the MQP." The Applicant refers to Dr. MacDonald's December 2013 comment; "She was severely impaired as of my first meeting with her in April 2008."

[24] The Applicant has brought nothing forward to contradict the GD on this point. Even if Dr. MacDonald believed the Applicant was severely impaired in 2008, he does not mention fibromyalgia in this report. I also note that whether a claimant's disability is "severe," for the purpose of determining disability under the CPP, is a legal question that is under the purview of the GD.

(c) WSIB reports

[25] The Applicant alleges that the GD erred when it stated that in paragraph 38 that it could not place weight on WSIB reports and evaluations that were not on file. She notes that practically all of the medical documentation on file prior to 2012 was addressed to the WSIB.

[26] I will admit that I am unsure what the Applicant is attempting to say with this submission. In paragraph 37, the GD rejected the Applicant's suggestion that it should be influenced by a decision of the WSIB, correctly noting that workers' compensation regimes are governed by a set of rules that differ from the CPP. The GD also noted that, in any event, the decision of the WSIB was not on file, nor was a functional assessment generated pursuant to that claims process. It appears the Applicant's representative made reference to these documents during oral argument, prompting the GD to make its declaration that it could not place weight on documents that were not available to it.

[27] In my view, the statement should not be controversial. It is axiomatic that a decision-maker cannot rely on material to which it has no access. The Applicant highlights the fact that much of the medical documentation on file was addressed to the WSIB, but there is no indication that the GD dismissed, or reflexively gave less weight to, those reports on that basis.

[28] I see no reasonable chance of success on this ground.

(d) Barriers Based on Language, Education and Work Experience

[29] In paragraph 41, the GD noted that the Applicant faced some barriers due to language, education and work experience but found that they did not prevent her from pursuing employment, despite her impairments. However, the Applicant alleges that the GD "made no mention of the barriers or limitations recognized by Service Canada."

[30] The Applicant did not specify what barriers or limitations unmentioned by the GD were nonetheless recognized by Service Canada. What I do see in paragraph 41 is an attempt on the part of the GD to take into account the Applicant's background and personal characteristics in assessing whether there is still a place for her in the workforce. The GD is autonomous and not

bound by any concessions that the Respondent may have previously made during its internal adjudicatory process.

[31] I see no arguable case here.

Errors of Law

(a) Failure to Consider Collective Effect of Conditions

[32] The Applicant submits that the GD erred in law by failing to take into account the totality of her conditions in determining that her impairments were less than severe. Although she cites *Barata*, a decision of the Pension Appeals Board (PAB) that is not binding on the AD, the Federal Court of Appeal has held in cases such as *Bungay v. Canada (Attorney General)*, 2011 FCA 47 that all of a claimant's conditions must be considered, along with their collective impact on her functionality.

[33] The GD is specifically alleged not to have considered the all of the medical conditions, which include arm and hand pain, poor circulation, dizzy spells, irritability, sleep problems and anxiety and depression. Having reviewed that section of the GD's decision, I see no reasonable chance of success on this ground. The GD summarized much of the medical evidence, which documented, to varying degrees, the Applicant's medical conditions and associated symptoms. As discussed earlier, it is trite law that a trier of fact need not refer to each and every item of evidence before it when setting out reasons for its decision, and it was within the GD's authority to make its own determination about which of the Applicant's claimed impairments were significant and which were not. The GD's analysis discussed in detail the Applicant's diagnoses of carpal tunnel syndrome, fibromyalgia, chronic pain and depression, and the fact that it did not explicitly mention her symptoms of dizziness, sleeplessness and poor circulation does not necessarily mean that they were excluded from consideration.

[34] I see no arguable case that the GD ignored the Applicant's secondary complaints or failed to give consideration to her whole condition.

(b) Failure to Consider Regularity

[35] The Applicant submits that the GD erred in law by disregarding the "regular" aspect of the disability severity test. Paragraph 42(2)(a) of the CPP demands consideration of whether an applicant was "incapable regularly of pursuing any substantially gainful occupation," a test that I note was correctly stated by the GD several times throughout its decision.

[36] Of course, merely stating a test does not necessarily mean that it was applied in practice. *Bennett* is another non-binding decision of the PAB, but there is a line of authority (*D'Errico v. Attorney General*, 2014 FCA 95; *Atkinson* v. *Canada (Attorney General)*, 2014 FCA 187) that refines the concept of regularity, linking it to predictability—the capacity of a claimant to come to a place of employment whenever and as often as is necessary. The Applicant has not pointed to a specific instance in which the GD misapplied the test. It is important to recall that there is no onus on the GD to show that the Applicant is capable of regular employment; rather, the burden of proof lies on the Applicant to show that she is incapable "regularly" of pursuing a substantially gainful occupation. In this case, the GD, having weighed the available evidence, was not persuaded that the Applicant suffered from a disability that impeded her from reliably attending school or work as of December 31, 2009.

[37] I see no reasonable chance of success on this ground.

CONCLUSION

[38] As the Applicant has not presented an arguable case on any ground, the application for leave to appeal is refused.

Member, Appeal Division