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

Citation: *G. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 340

Tribunal File Number: AD-16-666

BETWEEN:

G. K.

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 31, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is allowed.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated February 10, 2016. The GD had conducted a hearing by teleconference 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, 2013.

[2] On May 9, 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. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[3] The Applicant was 45 years old when she applied for CPP disability benefits on January 2, 2013. In her application, she disclosed that she held a BA in psychology from York University and a college diploma in human resources. She worked in a series of administrative positions and was last employed as an executive assistant, a job that ended shortly after she had arthroscopic knee surgery in September 2012.

[4] At the hearing before the GD on February 2, 2016, the Applicant testified that her knee took a long time to heal following surgery and is still occasionally painful. She said she had been diagnosed, among other conditions, with fibromyalgia, degenerative disc disease and osteoarthritis in her hands and fingers. She had migraine headaches several times per month. She slept all the time and was prone to dizziness. She also told the GD that she had applied for jobs in administration or human resources but only had one interview. She had not explored retraining as she would not be able to stay awake during classes.

[5] 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 her fibromyalgia was mild and her arthritis was managed with non-prescription medication. She had failed to accept treatment for her chronic pain and depression. Her migraines, glaucoma, sleep apnea and asthma were conditions she had lived with and managed for a long time. The GD also found that she was let go from her last full-time position for reasons unrelated to her conditions and left her final casual job for reasons related to her knee condition, which ultimately resolved.

THE LAW

[6] 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.

[7] 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.

[8] 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.

[9] 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]

[10] 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

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

SUBMISSIONS

[12] In her application requesting leave to appeal, the Applicant made the following submissions:

(a) In making its decision, the GD erred in law by applying the incorrect test for disability, stating at paragraph 82 that there was no evidence of a "severe pathological disability that would prevent her from any substantially gainful occupation. The proper test is whether the Applicant suffered from a "severe and prolonged disability," where "severe" is defined as "incapable of regularly pursuing any substantially gainful occupation."

(b) The GD based its decision on an erroneous finding of fact that it made in a perverse or capricious manner when it stated at paragraph 141 that "[n]either her family doctor nor any treating specialists had opined she was permanently restricted from any occupation as of her MQP of December 31, 2013." In fact, Dr. Dana Sarca's report dated November 26, 2013 concluded that she was unable to maintain any type of gainful employment. This report was before the GD at the time of hearing.

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

ANALYSIS

(a) Alleged Misapplication of Test for Disability

[13] The Applicant alleges that the GD misstated the test for disability at paragraph 82 of its decision. It is true that the test is incorrectly stated—the word "regularly" is missing and "pathological" has been inserted—but it is also true that the offending phrase follows the heading "Submissions." In this section, the GD obviously meant to do no more than summarize its understanding of the parties' respective positions, and paragraph 82 appears to be an awkwardly- phrased attempt to condense one of the Respondent's main submissions.

[14] I see no indication that the GD actually applied this incorrectly worded version of the test for disability. In fact, the GD did cite the correct test in paragraph 142, toward the end of its analysis. In my view, this ground would have no reasonable chance of success on appeal.

(b) Alleged Mischaracterization of Dr. Sarca's Report

[15] The Applicant objects to the GD's finding in paragraph 141 that "[n]either her family doctor nor any treating specialists had opined she was permanently restricted from any occupation as of her MQP of December 31, 2013." The Applicant referred to the penultimate paragraph of Dr. Sarca's November 26, 2013 report, which stated that she suffered from a "prolonged and severe disability" and was "unable to maintain any type of gainful employment."

[16] I agree that, on the face of it, the GD's finding stands at odds with the evidentiary record. For that reason, I see at least an arguable case on this ground.

CONCLUSION

[17] I am allowing leave to appeal on the sole ground that the GD may have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner when it mischaracterized or ignored Dr. Sarca's conclusions. I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

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

Member, Appeal Division