Citation: *M. G. v. Minister of Employment and Social Development,* 2016 SSTADIS 345

Tribunal File Number: AD-16-582

BETWEEN:

M. G.

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: September 2, 2016

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1]   The Applicant seeks leave to appeal the decision of the General Division (GD) dated January 15, 2016. The GD had previously conducted a hearing by way of written questions and answers 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, 2004.

[2]   On April 18, 2016, within the specified time limitation, the Applicant filed an application requesting leave to appeal, advancing numerous grounds of appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[3]   The Applicant applied for CPP disability benefits in April 2013. In her application, she disclosed that she holds two bachelor's degrees and has completed many training courses in subjects such as PC software, financial planning, securities and life insurance. She has held a variety of jobs, most notably as a correctional officer for young offenders during the 1990s. She was most recently employed as a casual research assistant with the Centre for Addiction and Mental Health in 2011 and as a part-time retail sales associate from 2010-14. Dr. Lunney, her psychotherapist, claimed that post-traumatic stress disorder, depression and anxiety had rendered her disabled from work as of 1997.

[4]   On October 2, 2015, the GD sent the Applicant a series of written questions related to her recent work history, her medical conditions and the treatments she was receiving for them. The Applicant provided detailed responses by way of a letter dated November 6, 2015.

[5]   In its decision, the GD dismissed the Applicant's appeal, finding that she had not provided sufficient evidence that she suffered from a severe disability as of the MQP date. The GD noted that the only available documents dated prior to December 31, 2004 were Dr. Lunney's clinical notes, which did not indicate any significant PTSD episodes or symptoms of depression and anxiety. The notes also showed that the Applicant was searching for jobs, networking, writing and attending training courses. Post-MQP reports suggested therapy was effective in managing her symptoms of complex PTSD. As the Applicant was 40 years old at the time of MQP, with a good education and fluency in English, the GD found that, on a balance of probabilities, she was capable of some form of work.

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 Appeal Division (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(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.

[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]   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.

[10]   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

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

SUBMISSIONS

[12]   The Applicant submitted a 13-page letter with her application for leave that contained detailed commentary and annotation of the GD's decision. She cited many instances in which she claimed the GD failed to observe principles of natural justice and based its decision on erroneous findings of fact.

[13]   Among the Applicant's allegations was that the GD (or some other party) "sneakily" redacted relevant details from the evidentiary record. In particular, the Applicant alleges that the clinical notes of Dr. Lunney were altered with without any advance notice or explanation. She claims that the redacted portions of those notes were relevant to her psychological condition in the period surrounding her December 2004 MQP.

[14]   In addition, she argues that it was unfair of the GD to hold her hearing by way of written questions and answers, thereby depriving her of her right to be heard. She claims that if she had had an opportunity to present her case in person, she would have brought forward Dr. Lunney as a witness to add context to the clinical notes and fill in gaps where necessary.

ANALYSIS

[15]   Without making an assessment of the merits of the Applicant's submissions, I find there is at least an arguable case that the GD disregarded principles of natural justice in considering redacted documents without offering the Applicant an adequate opportunity of reply.

CONCLUSION

[16]   On this basis, application for leave to appeal is granted. I invite the parties to provide submissions on whether a further hearing is required and, if so, what form of hearing might be appropriate.

Member, Appeal Division