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

Citation: *V. P. v. Minister of Employment and Social Development*, 2016 SSTADIS 363

Tribunal File Number: AD-16-319

BETWEEN:

V. P.

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: September 15, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 22, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), determined that a disability pension under the *Canada Pension Plan*, (CPP), was payable to the Applicant. On her behalf, Counsel for the Applicant has filed an application for leave to appeal, (the Application), with the Appeal Division of the Tribunal.

GROUNDS OF THE APPLICATION

[2] Counsel for the Applicant submitted that 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. Counsel takes issue with the date the General Division deemed the Applicant to have become disabled. He submits that she should have been found to be disabled as of October 26, 2012 and not April 2014.

ISSUE

[3] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[4] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development*, (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.

[5] 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] In *Canada (Attorney General) v. O'Keefe* 2016 FC 503, the Federal Court examined the jurisdiction of the Appeal Division to grant leave to appeal, stating that:-

> [36] Leave to appeal a decision of the SST-GD may be granted only where a claimant satisfies the SST-AD that their appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. No other grounds of appeal may be considered (*Belo-Alves,* above, at paras 71-73).

[6] 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] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63

[7] 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.

[8] *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.

SUBMISSIONS

[9] In support of the Application, Counsel for the Applicant submitted that:-

> "The decision of the chairperson in regards to the date of onset is logically inconsistent. While the chairperson accepted the disability when the surgery failed (December 20, 2013 and April 16, 2014 per paragraph 20 of the appeal decision), it makes no sense that she deemed the appellant to be capable of working until October 2014 (per paragraph 40 of the appeal decision). By way of highlighting

[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).

> the fundamental problem with the appeal decision, the appellant's disabling knee impairments were no less disabling prior to surgery, than they were when the two subsequent surgeries failed to correct it. At no time in between, could she reasonably have been expected to regularly pursue gainful employment.
>
> The prolonged disability is objectively documented in the file. The chairperson accepted the diagnosis but wrongly concluded that the disability only became permanent when the surgical corrections failed. In fact, the inability to work before the failed surgeries actually highlights that the disability was severe and permanent before the surgical corrections were even attempted. As such the date of disability should be changed to October 26, 2012. Paragraph 33 of the appeal decision appears at odd with the conclusion in paragraph 40. The appellant respectfully requests that this appeal be allowed." (*typed as written*)

ANALYSIS

[10] The Appeal Division finds that the General Division did not err as submitted by Counsel for the Applicant. First, Paragraph 20 sets out the medical evidence as it appears in the Tribunal record. It is not to be taken as setting out the General Division's view of the medical evidence. That view is contained in the "Analysis" portion of the decision.

[11] Secondly, the General Division nowhere states in paragraph 40 of the decision that it had found the Applicant capable of working until October 2014. Paragraph 40 states:-

> [40] The Tribunal finds that the Appellant had a severe and prolonged disability in April 2014, when her second knee surgery did not result in improvement in her pain and physical limitations. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of August 2014.

[12] The paragraph makes no mention of the Applicant being capable of working until October 2014.

Indeed, the General Division is clear in its analysis and its conclusions. It found the Applicant to have become disabled after the failure of her second knee surgery. As the trier of fact, it falls to the General Division to assess the evidence and to assign weight to it. Having done so, the General Division found that the Applicant had been suffering from bilateral knee pain since 2012. It also found that corrective surgery was performed on both knees in January and April 2014. The General Division found that the surgery did not relieve the Applicant's pain.

[13] Subsection 42(2)(b) of the CPP provides that a person is disabled when he or she is deemed to have become disabled.

> **(2)** *When a person deemed disabled* - a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person - including a contributor referred to in subparagraph 44(1)(b)(ii) - be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

[14] It is for the General Division to fix the date of disability. Based on the evidence before it, the General Division deemed the Applicant disabled after her second knee surgery in April 2014.

[15] A decision is perverse or capricious if there is no evidentiary basis to support that decision. *Marlowe v. Canada (Attorney General),* 2009 FCA 102. This is not the case here. Based on the Tribunal record and the General Division decision, the Appeal Division is satisfied that there was an ample evidentiary basis on which the General Division could find that the Applicant became disabled as of April 2014 following her second knee surgery. In fact, in the view of the Appeal Division it is equally reasonable to conclude that if surgery that was intended to correct a condition fails, then, all medical options having been exhausted, an applicant can be considered disabled as of the date of the failed surgery. Thus, the Appeal Division finds that there is no basis for it to interfere with the General Division's decision in the manner suggested by Counsel for the Applicant.

[16] Indeed, Counsel for the Applicant has put forward no rational explanation for why October 26, 2012 should be substituted as the deemed date of disability. He merely states that it should be. Even acknowledging that the Applicant testified that she felt she could no longer work after that date, this does not, *ipso facto,* mean that this is the date on which she became disabled for the purposes of the CPP. Disability must normally be supported on more than an applicant's claim that he or she suffers pain or discomfort that prevents employment: *Canada (Attorney General) v. Fink,* 2006 FCA 354. Thus, the Applicant still had the onus of establishing that as of October 2012, she was incapable regularly of pursuing any substantially gainful occupation and not just her usual employment. The General Division did not find that

this was the case and, based on the Tribunal record, and the reasoning in the decision, the Appeal Division is not persuaded that there is any reason to find that the General Division erred.

[17] Neither is the Appeal Division persuaded that paragraph 33 of the decision is inconsistent with paragraph 40, as paragraph 33 merely recounts the testimony of the Applicant and her daughter, which testimony the General Division found compelling.

[18] Accordingly, on considering the submissions of Counsel for the Applicant and taking the Tribunal record and the General Division's findings into consideration, the Appeal Division finds that no grounds of appeal that would have a reasonable chance of success have been disclosed.

CONCLUSION

[19] The Application is refused.

Hazelyn Ross
Member, Appeal Division