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

Citation: *H. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 360

Tribunal File Number: AD-16-689

BETWEEN:

H. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 14, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated February 9, 2016. The GD had earlier conducted a hearing by videoconference 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).

[2] On May 11, 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.

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 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(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.

[5] 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.

[6] 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 arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] 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

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

SUBMISSIONS

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

(a) The GD based its decision on an erroneous finding of fact when it stated at paragraph 43 that the Applicant's oral testimony was inconsistent with the evidence the hearing file;

(b) The GD based its decision on an erroneous finding of fact when it concluded there was no objective evidence of specific back pain;

(c) The GD erred in law in relying upon *Inclima v. Canada (A.G.),*[3] as there was no contrary evidence establishing that the Applicant had work capacity.

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC)
[2] *Fancy v. Canada (Attorney General),* 2010 FCA 63
[3] *Inclima v. Canada (A.G.),* 2003 FCA 117

ANALYSIS

(a) Misrepresentation of Applicant's Testimony

[10] In paragraph 43, the GD wrote:

> The Tribunal finds that the Appellant's oral testimony was not consistent with the evidence in the hearing file. The Appellant testified that her husband was the owner of the convince [sic] store and she worked their [sic] part time. She indicated that she stopped working at the convenience store in September 2011. In the Appellant's CPP disability questionnaire, date stamped by the Respondent on October 21, 2013, she indicated that she owned and operated a convenience store from November 28, 2003 until January 3, 2013. She closed the business because she lacked the money to operate her store. The Appellant stated that with the help of her family she worked as a cashier in her convenience store. She would often work with pain and she would have to sit down and apply ice to where she was feeling pain. Her husband was always with her while she worked. She also indicated on the CPP disability questionnaire that she was unable to work because of her medical condition on September 10, 2011.

[11] The Applicant alleges that the GD erred in finding inconsistency between her testimony and the documentary evidence. She submits that its error on this point of fact contributed to the GD's finding that her evidence was not credible. She testified before the GD that she was not the owner of the convenience store but worked there until September 2011. This, she said, was consistent with her questionnaire, which also stated that her husband was an employee of the business and continued working there until it closed in January 2013. The Applicant also submitted articles of incorporation and her CPP earnings and contribution statement to support her position.

[12] I find the Applicant has no reasonable chance of success on this ground. My review of the decision and the hearing file indicates that the GD had a reasonable basis for noting an inconsistency between what the Applicant wrote and what she said. In her questionnaire for disability benefits (GD5-50), she described herself as "self-employed" until January 3, 2013, a statement that stands at odds with what she herself acknowledges she told the GD. Although an appeal to the AD is not normally an occasion in which new evidence can be submitted, I note in passing that the articles of incorporation accompanying this application for leave indicate that the Applicant was indeed owner of the business, contrary to her testimony.

[13] The GD also appeared to be making the point, albeit awkwardly, that there was a discrepancy between two of the Applicant's responses in her questionnaire for disability benefits. As mentioned, she described herself as "self-employed" until January 3, 2013 (Box 7) but also said she could no longer work because of her medical condition as of September 10, 2011 (Box 16). The GD's account of the Applicant's testimony suggests that she clarified this point, insisting that she stopped working as of the earlier date.

[14] Still, it does not appear that the GD was incorrect in noting inconsistencies in the evidence, as he was entitled to do as trier of fact. For that reason, regardless of whether the GD relied on those inconsistencies to making a finding of credibility, I see no arguable case on this ground.

(b) Evidence of Objective Back Pain

[15] The Applicant alleges that the GD erroneously found the Applicant produced no evidence of specific back pain, when the decision itself referred to several imaging reports that indicated significant degenerative changes to the spine.

[16] On this ground, I see at least a reasonable chance of success. In its decision, the GD began its analysis by citing the ratios of a series of cases that presumably guided its reasoning. Among them was a case, *Pereira v. MHRD*,[4] which the GD said stood for the following proposition: Non-specific low back pain is a problem of activity intolerance that should be considered temporary since the degree of activity is increased with proper back care and management.

[17] In the following paragraph (39), the GD wrote:

> Low back pain is a symptom and not a diagnosis. In the absence of objective medical findings or psychological explanation, the following principles apply:
>
> (1) Non-specific low back pain should be re-defined as a problem of activity tolerance, not a medical condition;
> (2) Non-specific low back pain should be considered as temporary, not a permanent disability;

[4] *Pereira v. MHRD (*March 18, 1998), CP 5180

(3) Complaints of pain are not adequate to define a medically based problem; and
(4) Psychological factors identified as critical to the worker's activity tolerance (inability to work) might be diagnosed as a psychological, not a pain, disability: *D.M. v. MHRD* (February 19, 1997), CP 3858 (PAB).

[18] The placement of these citations suggests the GD made a finding that the Applicant suffered from "non-specific low back pain," although it did not explicitly say so. "Non-specific" is a term that is typically used to describe pain that is not associated with an identifiable cause and cannot be attributed to any underlying serious pathology. The Applicant denied that she suffered from "non-specific" back pain and pointed to four reports that, in her view, suggested significant degenerative changes:

- A June 2013 x-ray of the lumbar and thoracic spine that showed severe disc space narrowing at the T11-12 vertebral level;
- A September 2013 body scan that revealed abnormal activity in the thoracic and lumbar spine at the T11-12 and L1-2 vertebrate;
- Reference to a September 2013 x-ray that showed a compression fracture with spondylosis at T11-L2;
- An April 2014 MRI that indicated compression of the central right aspect of T12 with severe right neural foramina stenosis affecting the exiting right T11 nerve root.

[19] Although the GD summarized these imaging reports in paragraphs 22, 24, 25 and 28 of the decision, respectively, it made no reference to any of them in its analysis, except to endorse Dr. Su's view, expressed in his September 28, 2015 report, that the Applicant's symptoms were "non-medical factors." Based on my review of the decision against the relevant evidentiary record, I see an arguable case that the GD based its decision on an erroneous finding there was no evidence the Applicant suffered from specific back pain.

(c) *Inclima*

[20] The Applicant alleges that the GD erred in relying upon *Inclima*, as she denies there was any evidence that she had residual work capacity. I see an arguable case on this ground, even though the GD cited the correct test, noting that where there is evidence of work capacity, an

applicant must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of his or her health condition. However, as the Applicant has now made an issue of whether the GD fairly characterized the evidence supporting her back pain, it is now also an open question as to whether the Applicant has the residual capacity that is a necessary precondition to invoking *Inclima*.

CONCLUSION

[21] I am allowing leave to appeal on the grounds that the GD may have erred in (i) finding that the Applicant produced no evidence of specific back pain and (ii) invoking *Inclima* where there was no evidence of residual capacity.

[22] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

Member, Appeal Division