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

Citation: *D. E. v. Minister of Employment and Social Development,* 2016 SSTADIS 381

Tribunal File Number: AD-16-699

BETWEEN:

D. E.

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 29, 2016

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated February 16, 2016. The GD had earlier 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) ending December 31, 2005.

[2] On May 16, 2016, within the specified time limitation, the Applicant's authorized representative filed an application for leave to appeal with the Appeal Division (AD) of the Social Security Tribunal 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 stated that she was unable to work as of her MQP date due to depression and fibromyalgia, which was diagnosed in September 2004. The Applicant referred to Dr. O'Keefe's report, which she said discussed debilitating pain in her knees, fingers, shoulders, chest and lateral hips. The report also mentioned she was "loaded with trigger points." She said her symptoms had progressed over time, and she had been unable to return to work in any capacity.

[10] The Applicant alleges that her appeal to the GD was denied because of a "lack of objective medical evidence" as of the MQP date. The Applicant states that she referred to the aforementioned O'Keefe report in her submissions but forgot to send it in with the rest of her documents. She argues that the GD failed to observe a principle of natural justice by refusing her offer to submit the report after the hearing.

---

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

[11] The Applicant alleges that the GD advised her at the hearing that it did not need to see the report itself, but she disagrees with this view. The report described her diagnosis and the pain she was experiencing in October 2004, which was not well documented by my family doctor at the time. The GD erred in law in relying solely on medical evidence to determine whether or not she suffered from a serious and prolonged medical disability. The GD also based its decision on an erroneous finding of fact made in a perverse or capricious manner.

ANALYSIS

[12] While the Applicant has broadly asserted that the GD committed errors in fact and law, she has provided no supporting details that would permit an evaluation of the claimed grounds. What remains is an allegation that the GD failed to observe a principle of natural justice when it prevented her from presenting her case in full. Specifically, the Applicant suggests the GD unfairly and unreasonably refused her an opportunity to submit an important medical report that would have confirmed her diagnoses and symptoms during the MQP.

[13] It is clear from its decision that the GD was influenced by the dearth of documentary medical evidence from the period prior to December 31, 2005, noting:

> The challenge in assessing the appeal is the lack of objective medical information within her qualifying period. There are no reports from Dr. Gomez although she continues to be the Appellant's family doctor. The report from Dr. O'Keefe was not submitted. Nor were any of the insurer reports from the time she filed for long-term disability.

[14] I agree with the Applicant that Dr. O'Keefe's report, which was apparently written in September or October of 2004, would have been a potentially significant item to put before the GD. I also note that the Applicant, in several letters to the Respondent and later the GD, referred to the contents of the O'Keefe report in support of her disability claim. That said, the Applicant submitted her application for CPP disability benefits in July 2013, and it was incumbent on her during the 2½ years prior to the hearing to use her best efforts to obtain and submit all relevant medical evidence.

[15] In her application, the Applicant implies that, once she realized the O'Keefe report was not in the hearing file, she asked if she could forward a copy to the GD following the hearing but was told by the presiding member that she did not need to see the report itself. I have

reviewed the pertinent segment of the recording of the hearing and can find nothing in the member's conduct that strikes me as contrary to natural justice or procedural fairness. At the 30:50 mark, after the Applicant mentioned her 2004 consultation with Dr. O'Keefe, the member noted that there was no report from the rheumatologist in her file. When the Applicant expressed surprise, the member advised her that she saw references to Dr. O'Keefe in correspondence and assured her that it was "pretty obvious" she had seen Dr. O'Keefe 12 years previously and been diagnosed with fibromyalgia. The Applicant did not offer to submit Dr. O'Keefe's report to the GD post-hearing, and in her testimony she made no more than passing reference to findings from that report. It should also be noted that the GD did not ignore Dr. O'Keefe in its decision, which quoted at length the Applicant's written submissions, including this passage:

> Dr. D. O'Keefe who determined that it was FMS/CFS causing my symptoms. Dr. O'Keefe stated that although she knew I had this illness, she did not treat it and was not aware of anyone that did so I had no referral and nowhere to tum for help. This was in September 2004.

Even if the Applicant had pressed the matter and succeeded in submitting the report to the GD, I find it unlikely that it would have had a significant effect on the GD's reasoning.

[16] The Applicant also alleges that the GD erred in relying solely on medical evidence to determine whether or not she suffered from a serious and prolonged medical disability. I agree that a trier of fact cannot simply disregard testimony without good reason,[3] but that does not appear to be the case here. In its decision, the GD summarized the Applicant's oral evidence and acknowledged her "thorough review" of her condition. On the other hand, it is within the authority of an administrative tribunal to weigh the evidence as it sees fit, and I do not see any element of unfairness if the GD, as it did in this case, chose to assign a premium to documentary medical evidence that pertained to the Applicant's condition many years ago.

[17] Finally, I must note that the AD has no jurisdiction to rehear disability claims on their merits. If the Applicant is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, I am unable to do this. My authority as a member of the AD permits me to determine only whether any of the Applicant's reasons for appealing fall

---

[3] *Grenier v. Canada (MHRD)*, 2001 FCT 1059

within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[18] I see no reasonable chance of success on any of the grounds put forward by the Applicant.

CONCLUSION

[19] The application is refused.

Member, Appeal Division