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

Citation: *K. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 379

Tribunal File Number: AD-16-697

BETWEEN:

K. V.

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 28, 2016

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 22, 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, 2016.

[2] On May 16, 2016, within the specified time limitation, the Applicant 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 the application requesting leave to appeal, the Applicant's authorized representative alleged that the GD failed to observe a principle of natural justice by placing insufficient weight on the medical report of Dr. Adam Samosh dated May 12, 2015. The Applicant suggests that the GD unreasonably discounted the family doctor's report because he concluded that the Applicant met the statutory definition of "severe and prolonged" without relying on objective findings supported by medical observations.

[10] The Applicant has since been seen by Dr. Keith Sequeira, a physical medicine and rehabilitation specialist, who concluded that she suffers from a "permanent, long and serious vocational disability from a physical standpoint and a repetitive strain injury that has been present for three years."

---

[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 included with her application for leave the reports of Drs. Sequeira and Samosh, dated May 2, 2016 and May 9, 2016, respectively.

ANALYSIS

[12] The Applicant submits that the GD failed to observe principles of natural justice by giving insufficient weight to Dr. Samosh's report. In particular, the Applicant objects to the GD's discussion in paragraph 27 of the decision:

> The Tribunal acknowledges the report authored by Dr. Samosh who upon reading the definition of disability rules under the CPP concluded the Appellant met the definition. The Tribunal notes his opinion was based on a "review of the Appellant's file." The Doctor appears to make a broad conclusion not based on objective findings supported by medical observations but rather as an advocate for the Appellant. He does not relate on what basis her right arm injury and pain in her left arm makes her incapable regularly of pursuing any substantially gainful occupation. The Tribunal does not place sufficient weight on the medical report of Dr. Samosh which appears to have a conclusion without the underlying objective observations and information to indicate on what foundation his conclusion was reached.

[13] The Applicant is alleging that the GD's treatment of the Samosh report amounted to a lapse of procedural fairness, but I am unable to agree. Beyond merely stating that the doctor's opinion should have been given more weight, the Applicant has not specified any factual error in the passage quoted above, nor has she explained how the GD's reasoning was unfair.

[14] Having reviewed the Samosh report, I see no indication that it was mischaracterized by the GD. As noted by the GD, Dr. Samosh, who appears to have had little or no previous involvement with Applicant, states that he based his assessment on a file review. There is no suggestion in the report that Dr. Samosh interviewed the Applicant or performed his own examination. The courts have held that it is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might choose to accept or disregard, and to decide on its weight. In *Simpson v. Canada (AG)*,[3] the Federal Court of Appeal considered the scope of the authority of the Pension Appeals Board to assess evidence:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

[3] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

[15] In this case, the GD chose to give lesser weight to a report for defensible reasons that it took pains to explain in its decsion. For this reason, I see no reasonable chance of success for this ground of appeal.

[16] Finally, I note that the Applicant has submitted two medical documents that were prepared after the GD's decision was issued. Both concluded that she meets the CPP's "severe and prolonged" test for disability.

[17] An appeal to the AD is not ordinarily an occasion on which additional evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the AD any authority to make a decision based on the merits of the case. Once a hearing before the GD has concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the GD to rescind or amend its decision, but he or she would have to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations.* Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

CONCLUSION

[18] The application is refused.

Member, Appeal Division