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

Citation: *W. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 393

Tribunal File Number: AD-16-698

BETWEEN:

W. L.

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: October 7, 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 20, 2016. The GD had earlier conducted an in-person hearing 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, 2011.

[2] On May 17, 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 a 30-page addendum to the application requesting leave to appeal, the Applicant's representative made the following submissions:

(a) The GD erred in law by not applying the proper test to determine whether the Applicant continues to have a severe and prolonged disability and by failing to properly consider the combined effect of the Applicant's medical conditions. In particular, the GD failed to consider the following factors:

(i) The Applicant has a lengthy work history performing predominantly manual labour and has never worked in a sedentary job.

(ii) No employer would realistically consider offering her a job given her myriad medical problems and functional restrictions.

---

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

(iii) Her age, medical conditions and past work experience would prevent her from upgrading her skills.

(b) The GD erred in law by failing to attach significant weight to the Applicant's uncontradicted oral evidence as to the impact of her medical conditions and by disregarding her testimony relating to statements contained in the medical reports In particular, the GD failed to consider the following factors:

(i) An adjudicator must have regard for the evidence in its entirety, including a claimant's sworn testimony. Both subjective and objective evidence are relevant in CPP disability determinations.

(ii) Chronic pain cannot be proven by objective evidence. The main evidence in these cases is subjective evidence or a claimant's verbal description of pain. While X-rays may not have disclosed any severe findings in this case, the GD could not discount the Applicant's testimony that her pain was severe and ongoing.

(iii) The GD may place weight on medical reports after the MQP if the disorder could have been diagnosed earlier. In this case, the GD failed to place sufficient weight on Dr. ElMaraghy's report dated February 3, 2011, and Dr. Fedoruk's report dated October 21, 2015.

ANALYSIS

[10] Much of the Applicant's submissions amount to a restatement of evidence and arguments that, from what I was able to determine, were already presented to the GD. The Applicant also summarized general principles, enshrined in statute and case law, that govern the adjudication of claims for CPP benefits. If she 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 within the specified grounds of subsection 58(1), and whether any of them have a reasonable chance of success.

[11] That said, the Applicant's submissions did contain a few specific allegation of error, which I will address in order.

Proper Test

[12] My review of the decision indicates that the GD correctly cited the "severe and prolonged" test for disability in paragraphs 5, 49 and 63, and then analyzed in detail the Applicant's claimed medical conditions; principally chronic shoulder pain and carpal tunnel syndrome, and whether they affected her capacity to regularly pursue substantially gainful employment during the MQP. I see no reasonable chance of success on this ground.

Combined Effect

[13] The Applicant claims that the GD failed to consider all of the Applicant's conditions and their collective impact on her functionality but, having reviewed the GD's analysis, I do not think this claimed ground has a reasonable chance of success. The bulk of the GD's decision consisted of summaries of what it judged to be significant medical evidence, which documented, to varying degrees, the Applicant's many complaints. However, it is inaccurate to say that the GD simply disregarded her conditions, as it was noted in paragraphs 51 and 52 that:

> In December 2011 the Appellant suffered from right shoulder pain due to a rotator cuff injury and she had right and left sided carpal tunnel syndrome. Surgery had been attempted on the right wrist but was not successful.
>
> The Appellant also had intermittent back pain, headaches and suffered from depression which appeared to be manageable with the use of Effexor. She was able to walk four blocks in distance but at that point she got out of breath.

[14] These paragraphs suggest that the GD made a full and genuine attempt to sort through the Applicant's various complaints to determine whether they constituted a "severe" disability prior to the end of the MQP. I see no arguable case that the GD ignored the Applicant's secondary complaints or failed to give consideration to her whole condition.

Lengthy Work History

[15] The Applicant alleges that the GD ignored her lengthy work history performing predominantly manual work and the fact that she has never worked in a sedentary job. I do not see an arguable case on this ground. In paragraph 9 of its decision, the GD noted that the Applicant spent 15 years at Tim Horton's and listed some of her responsibilities, all of which involved a component of physical labour. The GD also referred to an April 2012 vocational assessment that concluded that the Applicant, in view of her education and work history, would require significant upgrading of her skills and computer training.

Unemployability

[16] The Applicant criticizes the GD for not recognizing that "no employer would realistically consider offering her a job," but this submission was presented at the hearing, and the Applicant cannot now reargue her case before the AD, which is empowered only to remedy errors that fall into a set of defined categories. In any case, I note that the GD arrived at its decision after conducting a survey of available medical assessments and functional testing results.

[17] I see no reasonable chance of success on this ground.

Age, Work Experience and Medical Conditions

[18] The Applicant submits that the GD disregarded her personal profile when it found that her impairments would not prevent her from upgrading her skills. Again, I see no arguable case on this point. My review of the decision indicates that the GD was well aware of the Applicant's background when it assessed her functionality, noting in paragraph 58:

> The Appellant was middle-aged at the time of the MQP. While the Appellant's general academic skills are low she worked in the hospitality industry for 15 years and rose to the position of shift manager. This would indicate transferable skills and attributes such as dependability, organization and managing people.

[19] It is clear the GD based its decision, in part, on the fact that the Applicant managed to complete vocational upgrading courses. In the absence of any specific allegation of error, I would not interfere with the GD's finding on this point.

Oral Evidence

[20] I see no indication that the GD failed to give due consideration to the Applicant's testimony, which was summarized at length in its decision. While the Applicant may not agree with the GD's conclusions, 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.

[21] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all of the evidence. In *Simpson v. Canada (AG)*[3], the appellant's counsel identified a number of medical reports which she said that the Pension Appeals Board, the predecessor to the AD, ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning 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….

[22] I see no arguable case on this ground.

Chronic Pain

[23] The Applicant is correct in noting that chronic pain is recognized as a real condition, even if it is often unsupported by objective findings. In *Nova Scotia v. Martin*, [4] the Supreme Court of Canada ruled that chronic pain is a medical condition that can be genuinely disabling and that peremptorily dismissing a claimant's evidence of this condition is a potential violation of section 15 of the Charter of Rights and Freedoms.

---

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

[4] *Nova Scotia (Worker's Compensation Board) v. Martin* [2003] SCC 54

[24] However, it is not enough to simply disclose a diagnosis of chronic pain; a claimant for CPP disability must also furnish evidence that her condition causes functional limitations that prevent her from working.[5] This approach is entirely consistent with *Martin*, which recognizes that a key issue for administrators of compensation schemes is when chronic pain crosses the threshold to permanent impairment.

[25] I see no reasonable chance of success on this ground.

Post-MQP Evidence

[26] It is a principle of administrative law that a tribunal is deemed to have considered all the evidence and need not refer to each and every document before it. As discussed, it was open to the GD to assign weight to the evidence as it saw fit. While the decision made no specific reference to Dr. ElMaraghy's report of February 3, 2011, it did refer to several of the orthopedic surgeon's other reports from before and after that date. In addition, the decision referred explicitly to Dr. Fedoruk's report of October 21, 2015 and provided a detailed synopsis of his findings.

[27] I see no arguable case on this ground.

CONCLUSION

[28] As I have found no reasonable chance of success on any ground claimed by the Applicant, the application is refused.

Member, Appeal Division

[5] *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB)