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

Citation: *C. P. v. Minister of Employment and Social Development,* 2016 SSTADIS 383

Tribunal File Number: AD-16-704

BETWEEN:

C. P.

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 30, 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 27, 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) ending December 31, 2013.

[2] On May 18, 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, the Applicant made the following submissions:

(a) As per the WSIB decision, the GD failed to mention that she also hurt her back, along with her right hip and buttocks, at the time of her 2011 injury.

(b) While she quit her position at the church to attend school after the injury, she would not have attended school had there been no prognosis of recovery. Although the GD was correct to note in paragraph 10 that she met all accommodated deadlines during her university studies, this would not be practical in the real world. No employer would offer accommodations to complete assignments for times or days that suit her.

(c) In paragraph 12, the GD downplayed her anxiety diagnosis by stating that her "only other health-related condition was anxiety." She feels that that her anxiety

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

is very debilitating and significantly affects her activities of daily living. Moreover, she also suffers from debilitating severe fatigue.

(d) In paragraph 13, the GD wrote that she only takes Tylenol #3 and Lorazepam occasionally. It is a well-known fact that no physician will prescribe these medications for other than occasional use, let alone for chronic pain.

(e) In paragraph 13, the GD stated that she had not seen a psychiatrist since 2015 but failed to mention that her last psychiatrist was not like her previous one, who provided cognitive therapy. The GD also did not mention that she had constant interaction with Canadian Mental Health to deal with her frequent panic attacks.

(f) In paragraph 23, the GD misinterpreted the MRI of the lumbosacral spine. While her left side may be producing symptomology, the right S1 nerve root is definitely producing symptomology.

(g) In paragraph 27, the GD relayed that Dr. Lena discharged her from his care back to her family doctor. The GD neglected to note that she was discharged by Dr. Lena because there was nothing more he could do for her—she had true nerve pain, and he recommended surgical intervention.

(h) The decision of the GD was based on erroneous allegations that she would have continued employment if hired past the contract. There was a predetermined endpoint to her employment, and it would have caused her great anxiety not to complete the contract. She denies that she would have pursued other employment.

(i) At the time of the hearing, she was unable to obtain medical progress notes from Dr. Lising, dated January 2014 to present, as he demanded what she felt were unreasonable administrative charges. She continues to work toward obtaining these records. She also expects to submit a report from her physiotherapist, which was she said was “mysteriously absent” from the hearing file, as was Dr. Cooper’s report.

ANALYSIS

(a) WSIB Decision and Back Injury

[10] The Applicant implicitly criticizes the GD for ignoring a decision of the WSIB (presumably the January 30, 2013 decision letter at GD-108 of the hearing file), but she should be aware that workers' compensation regimes apply a completely different set of standards from CPP disability. In any case, it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions.[3] It was within the authority of the GD, as trier of fact, to assign weight—or none at all—to each item of evidence as it saw fit.

[11] As for the Applicant's back pain, there are numerous references to it throughout the decision, and I see no indication that the GD ignored it.

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

(b) University Courses

[13] The Applicant objects to the reference in the decision to her ongoing enrollment in university courses but does not identify any specific factual errors that the GD may have made. The GD inferred from her completion of the courses that that she had some capacity, but the Applicant did not explain how that inference was unreasonable. She has argued here that the kinds of accommodations she was given would not be available in a "real-world" work environment, but it is evident from the decision that the GD was aware of those accommodations. The AD is not a forum in which the merits of a claim can be reargued. If the Applicant is requesting that I reconsider some aspect of 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. In the absence of any suggestion the GD disregarded material evidence, I see no arguable case on this ground.

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

(c) Anxiety

[14] The Applicant alleges the GD "downplayed" her anxiety diagnosis, but I see no indication of this. Paragraph 12 briefly summarizes the Applicant's Questionnaire for Disability Benefits, and its reference to her anxiety condition appears to do no more than reflect Box 20 "Other health-related conditions," in which she listed only "Anxiety."

(d) Tylenol #3 and Lorazepam

[15] Again, the Applicant has not claimed that the GD committed a factual error in describing her use of the above prescription medications, only that it failed to include what she feels is appropriate contextual information about their indications for chronic pain. I do not see any indication that the GD mischaracterized the Applicant's treatment regime or that it drew an adverse inference from the Applicant's "occasional" use of these drugs. In short, I see no reasonable chance of success on this ground.

(e) Psychiatric Treatment

[16] The Applicant fails to identify any specific error the GD may have made in summarizing her testimony about her psychiatric treatment. She had opportunities prior to and during the hearing before the GD to introduce such evidence, and she cannot now introduce new evidence in requesting leave to appeal from the AD. I see no arguable case on this ground.

(f) Lumbosacral MRI

[17] The Applicant alleges that the GD misinterpreted this MRI report in paragraph 23 of its decision, but my review of the primary document (GD3-72) suggests the GD fairly summarized its findings. The Applicant appears to be suggesting that the GD ignored a finding in the report of right-side symptomology, but I suspect she has mistaken the section headed "History," which merely documents the patient's subjective complaints, for the objective results generated by the scan. I see no arguable case on this ground.

(g) Discharge from Dr. Lena's Care

[18] Once again, the Applicant has not specified how the GD misrepresented evidence. In my view, paragraph 27 contains a fair and accurate summary of the Lena report, bearing in mind that no decision can be expected to capture every nuance of the evidence before it. The GD neglected to note that she was discharged by Dr. Lena because there was nothing more he could do for her but, as previously noted, an administrative tribunal is presumed to have considered all evidence. In any case, it is unlikely that this omission had any bearing on the outcome of the decision.

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

(h) End of Employment Contract

[20] The Applicant alleges GD based its decision on an erroneous finding that she would have continued employment had she been rehired after her last contract ended in January 2013. She also suggested that she struggled to see the contract through to completion, but her allegation does not contradict anything in the GD's decision, which in paragraph 8 states: "She testified she would have continued working part time at the women's shelter if not laid off, notwithstanding she had some difficulty performing her job duties prior to being laid off."

[21] In addition, having reviewed the recording of the hearing (from the 51:10 mark onward), I find that the Applicant's testimony essentially corresponded to the GD's account of it. In response to questioning, she said that she would have carried on working had her contract been renewed, although she did qualify this statement by saying it would have not have been easy, and she would probably have quit eventually.

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

(i) Additional Documents

[23] An appeal to the AD is not ordinarily an occasion on which new 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 need 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.

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

CONCLUSION

[25] As the Applicant has not raised any grounds that would have a reasonable chance of success on appeal, the application is refused.

Member, Appeal Division