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

Citation: *D. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 398

Tribunal File Number: AD-16-475

BETWEEN:

D. B.

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 12, 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 December 22, 2015. 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).

[2] On March 23, 2016, the Applicant filed with the Appeal Division (AD) of the Social Security Tribunal an incomplete application for leave to appeal detailing alleged grounds for appeal. Following a request for further information from the AD, the Applicant perfected her application for leave on May 16, 2016, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

[3] In a decision dated October 4, 2016, I allowed an extension of time to appeal. In order to grant leave, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

DESDA

[4] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted. The AD must either grant or refuse leave to appeal. 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 General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division 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] 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.

[7] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success— *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

CPP

[8] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

> (a) Be under 65 years of age;
>
> (b) Not be in receipt of the CPP retirement pension;
>
> (c) Be disabled; and
>
> (d) Have made valid contributions to the CPP for not less than the MQP.

[9] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[10] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

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

SUBMISSIONS

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

(a) In paragraph 10 of its decision, the GD noted that the Applicant has tried numerous methods of controlling her pain with no relief. The fact that these interventions have been ineffective should not be held against her. As stated at the hearing, she is reluctant to take narcotics as she has already fallen asleep once at the wheel and was involved in a car crash as a result.

(b) In paragraphs 13 and 22, the GD wrote that the Applicant intended to cease her employment because her asthma was aggravated by second-hand smoke, disregarding her testimony that it was merely a contributing factor to her inability to perform her essential job duties. In fact, she wanted to leave her job because of the pain it caused her.

(c) In paragraph 22, the GD found that the Applicant had demonstrated an ability to fulfill her employment duties. This did not accurately represent her testimony, in which she said that she worked at the bingo hall for four months before resigning, because she could not handle the physical aspects of the job. Her employer subsequently provided her with further accommodations, but she could only sustain employment for an additional five months.

(d) In paragraph 23, the GD cites *Miller v. Canada*, 2007 FCA 237, but the Applicant believes that it depended on a significantly different set of facts from her situation. Whereas the claimant in *Miller* earned significant wages over a continuous two- year period, the Applicant worked for two periods of four and five months, respectively, for less than half the income.

(e) In paragraph 24, the GD found it "counterintuitive" that cigarette smoke drove her from her job, yet marijuana smoke did not irritate her lungs. This statement indicates the GD ignored evidence that the Applicant delivers marijuana to her system through the use of a vaporizer, which does not irritate the lungs as smoking would. Furthermore, the GD suggested she was not being personally responsible in managing her pain, although she testified smoking marijuana does not exacerbate her asthma.

ANALYSIS

Medical Treatments

[13] The Applicant suggests that the GD drew an adverse inference from the fact that she has seen little relief in her pain, despite receiving varied and numerous medical treatments. Having reviewed the decision, particularly the analysis, I must conclude that I see no reasonable chance of success on this ground. While the GD documented the many treatment modalities attempted by the Applicant, I see no indication that their lack of effectiveness was a factor in its reasoning. Similarly, contrary to the Applicant's allegation, I see nothing to suggest that the GD drew an adverse inference from her non-use of narcotic painkillers—the fact that she was involved in an automobile accident after she fell asleep at the wheel was clearly mentioned in paragraph 10.

Misrepresentation of Applicant's Testimony

[14] In paragraph 13, the GD wrote:

> The Appellant testified she gave her notice to the employer due to her asthma. Since the facility is not governed by anti-smoking laws the workplace has a heavy presence of smokers and the air is thick with second hand smoke. This aggravates her asthma so she

> is resigning. She testified that this job has been difficult and she finds herself crying on the way to and from work.

[15] The Applicant alleges that the GD based its decision on an erroneous finding of fact when determined that she resigned from her last job at a bingo hall solely because of cigarette smoke, ignoring her testimony that pain was also a major factor in her inability to carry on her duties.

[16] My review suggests that the GD did base its denial in part on the Applicant's purported ability to work at the bingo hall and her choice to leave that job for reasons other than her back pain. Indeed, it devoted paragraph 22 to a discussion on her failure to mitigate her impairments by seeking employment in a smoke-free workplace.

[17] At this point, I have not yet listened to the audio recording of the hearing. However, I see an at least an arguable case that there was an erroneous finding of fact if the Applicant can demonstrate that the GD distorted her testimony and then relied on that distortion in making its decision.

Earnings at Bingo Hall

[18] In paragraph 12, the GD wrote:

> The Appellant testified that she has been working at a Bingo Hall located on a Reservation. She indicated she has been working at the Bingo facility for about 10 months. She has worked about 20-40 hours per week. Her recent position involves standing at a ticket window, selling bingo cards. This position has increased her hours and a recent pay stub indicated she worked 77-78 hours based on a two week pay period.

[19] The Applicant alleges that the GD ignored important aspects of her testimony on this subject, including her claims that she quit the bingo hall twice—the second time after accommodations provided for her proved to be inadequate.

[20] My review of the hearing file reveals nothing that documents this recent job and related earnings, which suggests to me that all the evidence about it must have been given in testimony. Again, I see an arguable case on this ground, depending on what was actually said during testimony.

Miller v. Canada

[21] The GD cited *Miller* as benchmark for the Applicant's purported earnings of $17,000, which it found were earned over a 10-month period at the bingo hall. The Applicant argues this Federal Court of Appeal decision represents a poor comparison for the Applicant's circumstances, as it involved a claimant who earned substantially more over a longer period.

[22] I see a reasonable chance of success on this ground, particularly as it is not clear to me, having reviewed the written submissions before the GD, that the Applicant was afforded an adequate opportunity to respond to submissions, if any, on case law.

Use of Vaporizer

[23] The Applicant alleges the GD ignored the Applicant's evidence that she consumed marijuana through a vaporizer, thereby reducing smoke that might irritate her lungs.

[24] I agree that the GD's decision contains a note of skepticism that the Applicant, as an asthma sufferer, was doing everything reasonably possible to address her health problems by smoking marijuana. Having reviewed the documentary evidence, I see nothing to indicate the Applicant addressed her pain by "vaping" marijuana, but if she testified to this effect at the hearing and that testimony was then ignored by the GD, she may have an arguable case on appeal.

CONCLUSION

[25] I am allowing leave to appeal on the grounds that the GD may have based its decision on erroneous findings of fact by:

(a) Finding, contrary to the oral evidence, that the Applicant ceased her employment at the bingo hall solely because her asthma was aggravated by second-hand smoke;

(b) Disregarding her testimony she twice attempted to work at the bingo hall for short periods of four and five months, respectively;

(c) Ignoring her testimony that she consumed marijuana through the use of a vaporizer in order to not irritate her lungs.

[26] I am also allowing leave on the ground that the GD inappropriately cited *Miller v. Canada* to benchmark the Applicant's post-MQP earnings at the bingo hall.

[27] I invite the parties to provide submissions on whether a further hearing is required and, if so, what form of hearing is appropriate (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers).

[28] The parties are also free to make submissions on what remedies, if any, they believe are appropriate in this case.

[29] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division