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

Citation: *W. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 475

Tribunal File Number: AD-16-364

BETWEEN:

W. M.

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: Hazelyn Ross

Date of Decision: December 6, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] In July 2012 the Applicant made simultaneous applications for a *Canada Pension Plan*, (CPP), retirement pension and a CPP disability benefit. This application concerns only the refusal to issue her a CPP disability benefit. In its decision issued on December 29, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) found that, on balance of probabilities, the Applicant did not have a severe disability as of the end of her minimum qualifying period, (MQP), that is, December 31, 2014. Accordingly, it determined that a disability pension was not payable to the Applicant.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on February 26, 2016.

GROUNDS OF THE APPLICATION

[3] The Applicant submits that the General Division made its decision without regard for material before it. She submitted that the General Division did not place sufficient emphasis on how her cardiac condition, her husband's suicide attempts and other factors impacted her mental health condition.

ISSUE

[4] The Member must decide if the appeal has a reasonable chance of success.

THE LAW

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[7] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[8] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, which are:

> (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.

[9] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal give rise to grounds of appeal.

ANALYSIS

[10] The Applicant submits that in coming to its decision, the General Division did not place sufficient emphasis on the underlying physical conditions that led to her mental health issues. She submits that the General Division erred in this respect. Having examined the Tribunal

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

record as well as the General Division decision, the Appeal Division is not persuaded that the General Division erred as the Applicant alleged.

[11] The issue before the General Division was whether it was more likely than not that the Applicant had a severe and prolonged disability on or before her MQP ended.

[12] In making its decision the General Division reviewed the documentary evidence. It summarised the events and medical reports at paragraphs 14 through 20 of the decision. As well, the General Division considered the Applicant's oral evidence which included descriptions of her working conditions, stressors as well as her personal and health situation after she stopped work.

[13] The Appeal Division finds that the General Division accepted that the Applicant could not return to her former employment but also found that she had not met her onus to establish that she had a severe and prolonged disability as defined by the CPP. In the determination of the General Division, the documentary evidence did not establish that the Applicant was disabled from all work.

[14] The Appeal Division also finds that, at paragraph 44 of the decision, the General Division specifically turned its mind to and addressed the Applicant's anxiety and stress issues. In so doing, it considered the very factors that the Applicant states were not given sufficient weight in the General Division's determination.

[15] The General Division is tasked with weighing the evidence before it. It did so. It found that in light of the evidence regarding the absence of psychiatric care, or involvement in long-term counselling or medication, it was unable to find that the Applicant's stress and anxiety rendered her incapable regularly of pursuing any substantially gainful occupation. This weighing is captured in paragraph 44 of the decision:

> [44] The anxiety and stress issues create a different picture for the Tribunal. The evidence indicates that the Appellant's insurance company accepted her disability on the basis of a major depressive episode, multiple family stressors and decreased mood for which the Appellant needs counselling. The mental factors are cited as the main cause of the Appellant's disability. With this diagnosis, the Tribunal questions what steps the Appellant has taken to address her situation. She is not under the care of a psychologist or psychiatrist;

> she did some counselling in X, but is not involved in long-term or ongoing counselling; and she refuses to take medications because she has seen what medications did to her husband and the resulting effect on herself and her family life. The Appellant readily admits that her constant moving around has not helped participation in any stable counselling effort. The ongoing state of flux leaves the Appellant in an unfortunate situation. The Tribunal accepts the Appellant's explanation of her helplessness with respect to her spouse's condition. It adds to the instability present in her life. The difficulty that the Tribunal has is accepting this explanation as proof of a severe disability affecting the Appellant.

[16] The General Division, as trier of fact, is tasked with weighing evidence: *Tracey v. Canada (Attorney General),* 2015 FC 1300 at para. 46.[2] It is not for the Appeal Division to substitute its own views for those of the General Division. In this case, the Appeal Division finds that the General Division gave ample consideration to the Applicant's health issues as well as their impact on her mental health. Accordingly, the Appeal Division is not persuaded that the Applicant has raised grounds of appeal that would have a reasonable chance of success.

[17] Furthermore, this was not the sole basis of the General Division's decision. The General Division was also persuaded that the Applicant had not demonstrated sufficient attempts to seek medical attention for her anxiety and stress or to find alternate employment. Relying on *A.P. v MHRSD* (December 15, 2009) CP 26308 (PAB), which it found persuasive, the General Division concluded that as there was little evidence that the Applicant had sought medical attention for her anxiety and stress, it could not find that she suffered a severe disability. In *A.P. v MHRSD,* the PAB stated that:

> An essential element of qualifying for a disability pension is evidence of serious efforts by the Appellant to help herself. This requirement extends to both the obligation to aggressively seek treatment and to the burden which accrues to all Appellants of establishing that reasonable and realistic efforts were made to find and maintain employment while taking into account the *Villani* personal characteristics and her employability.

[2] The function of this Court on a judicial review application is not to reassess the evidence or reweigh the factors considered by the RT in order to reach a different conclusion regarding the Applicant's admissibility to a disability pension, nor is it the role of the SST-AD when determining whether leave should be granted or denied

CONCLUSION

[18] The Applicant submitted that the General Division failed to adequately regard evidence of the impact of her medical conditions and other stressors on her mental health conditions of anxiety and stress. In the view of the Appeal Division the Applicant is really expressing her disagreement with the way in which the General Division weighed the evidence and asking the Appeal Division to reweigh the evidence and to find in her favour. As the Federal Court stated in *Tracey*, reweighing evidence is not the task of the Appeal Division and the Appeal Division does not find that the General Division erred as alleged. Therefore, based on the above analysis, the Appeal Division is not satisfied that the Applicant has put forward grounds of appeal that would have a reasonable chance of success.

[19] The Application is refused.

Hazelyn Ross
Member, Appeal Division