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

Citation: *K. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 465

Tribunal File Number: AD-16-924

BETWEEN:

K. C.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: November 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 April 22, 2016. The GD, having earlier conducted a hearing by way of written questions and answers, 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 July 13, 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 (Minister of Human Resources Development).*[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 (A.G.).*[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 representative submitted:

(a) The GD based its decision on the following erroneous findings of fact :

- Paragraph 12 indicates the Applicant has participated in all treatment plans offered to her and put forth reasonable efforts, despite persistent pain and an inability to walk distances.

- Paragraph14 indicates the Applicant was prescribed a combination of medication—Lyrica 75 mg twice daily and Oxycocet two to three per day for pain. As per paragraph 15, Dr. Rankin considered the Applicant's prognosis to be poor.

- Paragraph 24 notes the Applicant's statement that she has memory and concentration difficulties as a result of side effects from taking painkillers.

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

She has significant functional limitations that would prevent her from performing even "highly accommodated light work."

(b) The GD erred in law by failing to consider the totality of the evidence, including:

- Supplementary Attending Physician's Statements dated March 16, 2015 and June 9, 2016, in which Dr. Rankin found that the Applicant had a severe fracture of the right lower leg with no improvement in her condition despite ongoing treatment.
- The Applicant's effort to improve her health and return to work despite the severity of her condition and her functional incapacity to perform light or even highly sedentary work.

ANALYSIS

Errors of Fact

Compliance with Treatment

[10] The Applicant notes that she followed recommended treatments for her medical conditions, but my review of the decision indicates the GD made no finding that she was non-compliant and drew no inferences from her medical care of lack thereof. The Applicant's submissions referred to a physiotherapy report summarized in paragraph 12 of the decision but did not identify how it was inaccurate.

[11] As the Applicant has not identified any specific factual error, I am unable to consider granting leave under this ground of appeal.

Medication

[12] The Applicant cites paragraphs 14 and 15 of the GD's decision in support of a claim that, while she has been taking strong painkillers, her family physician has deemed her prognosis poor. Again, the Applicant has failed to specify an error in either of the passages,

which in my review appear to be no more than accurate summaries of two items of underlying documentary evidence.

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

Memory and Concentration

[14] The Applicant suggests that the GD should have given more weight to her statement that painkillers have impaired her powers of memory and concentration. I see no arguable case on this ground. 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…

[15] In this case, the GD chose to give lesser weight to the Applicant's statement for defensible reasons that it explained in its decision. For this reason, I see no reasonable chance of success for this ground of appeal.

Errors in Law

Totality of Medical Evidence

[16] The Applicant alleges that the GD erred in law by failing to consider the totality of the evidence, including medical reports indicating that her right leg fracture rendered her incapable of sedentary work despite ongoing treatment.

[17] I find this ground of appeal to be so broad that it amounts to a request to retry the claim. Having reviewed the GD's decision, I see no indication of that it disregarded any material aspect of the Applicant's condition, either whole or in part. While it is true that the GD did not specifically refer to Dr. Rankin's March 2015 and June 2016 statements, it is a truism of

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

administrative law that each and every item of evidence need not be referred to in a decision-maker's reasons. In any event, the GD did discuss several earlier reports by Dr. Rankin, none of them differing in substance from those cited by the Applicant.

[18] If the Applicant is requesting that I reconsider and reassess the evidence and decide in his favour, then I am unable to do this. My authority permits me to determine only whether any of her reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[19] I am not persuaded that the Applicant has an arguable case on this ground.

CONCLUSION

[20] As the Applicant has submitted no grounds of appeal that would have a reasonable chance of success, the application is refused.

Member, Appeal Division