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

Citation: *M. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 470

Tribunal File Number: AD-16-358

BETWEEN:

M. T.

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 5, 2016

REASONS AND DECISION

INTRODUCTION

[1] On November 30, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) issued a decision in which it determined that the Applicant did not qualify for a disability pension under the *Canada Pension Plan*. On February 24, 2016, the Appeal Division of the Tribunal received a request for leave to appeal the General Division decision, (the Application).

GROUNDS OF THE APPLICATION

[2] The Applicant's representative submitted that the General Division: -

(a) erred in law; and

(b) based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

[3] His submissions fall into three main categories: -

1. The General Division made erroneous findings of fact regarding the Applicant's capacity to work at the time of her minimum qualifying period (MQP) of December 2011. Under this head, the Applicant's representative submitted that she had made an attempt to return to work on modified duties with her former employer as well as other attempts to work at "highly accommodated light work" all of which were unsuccessful due to her health conditions. He made the further submission that the Applicant's functional difficulties were indicative of her lack of retained work capacity and that she continues to seek medical treatment and rehabilitation.

2. That the General Division erred in law by failing to consider the totality of the evidence. This submission was made in respect of what her representative stated was the Applicant's progressively worsening medical condition and the side effects of her medication.

3. Lastly, the Applicant's representative submitted that the General Division failed to properly assess severity within the real world context. He submitted that it did not assess the evidence that the Applicant has "only limited ability to perform Activities of daily living and requires assistance from others".

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,* (DESD), Act govern the grant of leave to appeal. Subsection 56(1) provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Thus, the leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[6] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1] In *Canada (Attorney General) v. O'Keefe* 2016 FC 503, the Federal Court examined the jurisdiction of the Appeal Division to grant leave to appeal, stating that:-

> [36] Leave to appeal a decision of the SST-GD may be granted only where a claimant satisfies the SST-AD that their appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. No other grounds of appeal may be considered (*Belo-Alves,* above, at paras 71-73).

[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:[2] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

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

a. The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

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[1] 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."

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

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 fall within any of the stated grounds of appeal.

ANALYSIS

[10] For the following reasons, the Appeal Division finds that the Applicant's submissions do not reveal grounds of appeal that would have a reasonable chance of success. First, the Appeal Division finds that in the main, the submissions were little more than an invitation for it to reweigh the evidence in favour of the Applicant. In *Tracey* it was made clear that on an application for leave to appeal, this is not the role of the Appeal Division, which must confine its enquiry to whether the General Division erred in the manner set out in subsection 58(1) of the DESD Act. Nonetheless, the Appeal Division proposes to address each of the submissions made by the Applicant's representative

Did the General Division base its findings about the Applicant's retained work capacity on erroneous findings of fact?

[11] The General Division concluded that the evidence did not support a finding that the Applicant did not have retained work capacity. It stated its conclusions in the following paragraphs of the decision: -

> [32] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.),* 2003 FCA 117). In this case, the Appellant attempted to return to part-time work doing a standing job of counting and sorting clothing, without success. However, she has not attempted to find any other employment or attempted to improve her English language skills. The Tribunal finds that she has not made reasonable efforts at obtaining and maintaining employment that were unsuccessful due to her health condition.
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> [33] The Tribunal also acknowledges that the Appellant may not be able to return to work as a hearing aid wiring technician, which was demanding in terms of her time (full-time hours) and responsibilities (prolonged standing, use of tools). While the Tribunal acknowledges that she may not be able to return to this type of demanding work, she should be able to pursue other gainful occupations within her limitations.

[12] Based on the foregoing, the Appeal Division finds that the General Division did consider the Applicant's attempts at modified work, but found them not to be reasonable in her circumstances. The Appeal Division is unable to find that the General Division, as the trier of fact, based its decision on any erroneous finding of fact. Accordingly, this submission does not give rise to a ground of appeal that would have a reasonable chance of success.

Did the General Division fail to consider the totality of the evidence?

[13] The Appeal Division is not persuaded that the General Division erred as submitted by the Applicant's representative. The Applicant's representative made this submission in respect of her "worsening medical condition" and the fact that her medications left the Applicant drowsy. The Appeal Division finds that the General Division's discussion of the Applicant's medical conditions and symptoms at paragraphs 30 and 31 of the decision undermine this submission. At paragraph 30, the General Division discussed the diagnoses contained in various medical reports. It also discussed the comments made in these reports regarding the Applicant's ability to pursue regularly any substantially gainful employment.

[14] At paragraph 31, the General Division specifically discussed the implications of the medical reports with respect to improvement to her conditions and her ability to sustain employment, noting that the reports tended to advise a return to work in some form.

> [31] While the Tribunal noted the health concerns facing the Appellant, it also noted that her condition has improved and there is evidence of work capacity. For example, on October 24, 2011, Dr. Rehman reported that she has a GAF of 65 and that most of her symptoms are better on her current regimen. She was encouraged to prepare herself for a return to work in 6-8 months. Dr. Staab reported on June 12, 2010 that she is improving gradually and could likely return to work in 2-3 months. Similarly, Dr. MacRitchie noted improvement on January 21, 2010. Dr. Tsoi reported on June 23, 2010 that she is emotionally more stable and appears to have responded to psychological treatment. Dr. Macrichio reported on March 3, 2011 that she could return to work in 1-3 months on a graduated basis. Although several months after the MQP, Dr. Rehman reported on March 7, 2012 that her GAF is 65. He also noted that she has been on her medications (Celexa and Seroquel) since 2009. The Appellant also testified that she has been on the same medications for a "very long time", which indicates that they are helpful. With respect to her breast cancer, she completed breast cancer irradiation in October 2009 and it is currently in remission. The Tribunal also noted that she can sit for up to 45 minutes, stand for up to 20 minutes, walk for 30 minutes, lift up to 10 lbs and manage her personal needs.

[15] Taking the above into consideration and noting that the General Division also discussed and summarised the medical evidence in detail, following *Simpson v. Canada (Attorney General)*, 2012 FCA 82 (CanLII), the Appeal Division finds that it cannot be said that the General Division did not have regard to the totality of the evidence if it did not specifically refer to all the side effects of her medications. In Simpson, the Federal Court of Appeal held that, "…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." Accordingly, the Appeal Division is not satisfied that this submission contains grounds of appeal that would have a reasonable chance of success.

Did the General Division fail to properly assess severity within the real world context?

[16] The General Division properly stated at paragraph 29 of its decision that the severe criterion must be assessed within a real world context. It cited *Villani v. Canada (Attorney General) 2001 FCA 248* as the basis for this proposition and it set out the factors that are crucial to this assessment. The General Division also set out its rationale for how it applied the real world context in the Applicant's case.

> [29] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, in deciding that the Appellant's disability is not severe, the Tribunal considered that the Appellant was 49 years old as of the MQP with a grade 9 education and limited English language skills and work experience.

[17] However, the General Division did not end its analysis at this point. It went on to discuss and make findings in regard to the Applicant's retained work capacity as discussed earlier. The Applicant's representative submits that the General Division did not discuss the evidence that she had "only limited ability to perform activities of daily living and requires assistance from others". However, the General Division is not required to refer to every piece of evidence that was before it. In the face of what it found to be evidence of retained work capacity on or before the MQP, as distinct from the Applicant's present situation, the Appeal Division is not satisfied that the submission discloses a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[18] The Applicant's representative submitted that the General Division committed errors of law and based its decision, at least in part, on erroneous findings of fact. On the basis of the above analysis, the Appeal Division finds that his submissions do not disclose grounds of appeal that would have a reasonable chance of success.

[19] The Application is refused.

Hazelyn Ross
Member, Appeal Division