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

Citation: *A. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 473

Tribunal File Number: AD-16-332

BETWEEN:

A. 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: Janet Lew

Date of Decision: December 7, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 30, 2015, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2015. The Applicant filed an application requesting leave to appeal on February 22, 2016, invoking several grounds of appeal.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

[5] The Applicant submits that the General Division erred in law and that it also 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.

Medical opinions

Diagnosis

[6] At paragraph 34, the General Division wrote that there was "no definite diagnosis confirmed either by her family physician or by her specialists" for her condition (at paragraphs 34 and 41). And, at paragraph 41, the General Division then wrote that the family physician had initially thought that the Applicant's symptoms could be related to multiple sclerosis but that this was discounted by her neurologists and "later by him".

[7] The General Division appears to have relied on the family physician's medical report dated August 13, 2015 (GD5-6 to GD5-8), in coming to its finding. The family physician wrote at GD5-7 that, "despite numerous neurological consultations there has not been a formal diagnosis made".

[8] The Applicant submits that the General Division erred in making this finding. She points to the family physician's conclusion in the same report. At GD5-8, he concluded that it was his "impression and medical opinion that [the Applicant] suffer[s] from multiple sclerosis. She has numerous symptoms commensurate with this disease".

[9] Despite finding that the diagnosis of multiple sclerosis was "later" discounted by the family physician, the medical report of August 13, 2015 (GD5-6 to GD5-8) was the most recent medical opinion before the General Division, and the family physician clearly was of the opinion by August 13, 2015 that the Applicant suffers from multiple sclerosis.

[10] Although a mere diagnosis alone is insufficient to establish severity, as the Federal Court of Canada suggested in *Plaquet v. Canada (Attorney General)*, 2016 FC 1209, a new diagnosis or one recently confirmed could impact and affect an applicant's employability. For this reason, it may have been critical to determining whether the diagnosis of multiple sclerosis had been made. Had the General Division recognized that the family physician

diagnosed the Applicant with multiple sclerosis, the member could have rejected the diagnosis, in the face of the documented medical history, but at the very least, the member might have considered how such a diagnosis could have impacted and affected the Applicant's capacity. I am satisfied that the appeal has a reasonable chance of success on this ground.

[11] At paragraph 42, the General Division also found that the Applicant's neurological examinations and assessments were "consistently normal". It was in part on this basis that the General Division determined that there was no supporting evidence as to why the Applicant was not able to undertake some form of employment. It came to this finding despite the evidence summarized at paragraph 14 that the MRI scan revealed multiple white matter lesions "more than expected of a person of the Appellant's age". The neurologist indicated that the findings could indicate vasculitis, migraine, multiple sclerosis or microangiopathic disease. While the results of the MRI would not have established severity, I am satisfied that the appeal has a reasonable chance of success on the ground that the General Division may have erred in suggesting that the MRI results were normal, given the neurologist's interpretation.

Capacity

[12] The Applicant argues that the General Division further erred in finding at paragraph 42 that there was no supporting evidence as to why she is not able to undertake some form of employment, given that there were medical opinions that squarely addressed this issue. Indeed, she points out that the General Division noted some of the supporting evidence that she could not undertake some form of employment at paragraphs 20 and 25. At paragraph 20, the General Division wrote that the family physician concluded in his report of November 5, 2013 that the Applicant remains "disabled from gainful employment because of her symptoms". And, at paragraph 25, the General Division noted that, in the family physician's most recent report of August 13, 2015, he believed that the Applicant would be an unreliable employee. The member did not explain nor address in particular why she discounted the family physician's opinion of November 5, 2013 regarding the Applicant's capacity, before concluding that there was no supporting evidence as to why she was unable

to undertake some form of employment. I am satisfied that the appeal has a reasonable chance of success on this ground.

Other grounds of appeal

[13] The Applicant has raised other grounds of appeal as well, but as the Federal Court of Appeal in *Mette v. Canada (Attorney General),* 2016 FCA 276 indicated, it is unnecessary for the Appeal Division to address all of the grounds of appeal raised by an applicant. In response to the Respondent's arguments in that case that the Appeal Division was required to deny leave on any ground it found to be without merit, Dawson

J.A. stated that subsection 58(2) of the DESDA "does not require that individual grounds of appeal be dismissed".

[14] Given the relative strength of the grounds upon which I have granted leave to appeal, I find it unnecessary to address these other grounds.

CONCLUSION

[15] The application for leave to appeal is allowed.

[16] This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division