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

Citation: *Minister of Employment and Social Development v. J. P.,* 2016 SSTADIS 480

Tribunal File Number: AD-16-1318

BETWEEN:

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

Applicant

and

J. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: December 11, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) dated August 28, 2016. The GD had earlier conducted a hearing by way of teleconference and determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found her disability was "severe and prolonged" during the minimum qualifying period ending December 31, 2016.

[2] On November 25, 2016, within the prescribed time limit, the Applicant filed an application with the Appeal Division requesting leave to 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 Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESDA provides that "Leave to appeal is refused if the Appeal Division 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.

[7] At the leave stage, the Applicant does not have to prove the case. Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.[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*.[2]

ISSUE

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

SUBMISSIONS

[9] The Applicant submits that the GD erred in law as follows:

(a) It failed to provide sufficient reasons as to why the oral testimony of the Respondent was preferred over the objective medical evidence to the contrary;

(b) It failed to apply the legal test, as stated in *Klabouch v. Canada (Social Development)*,[3] in considering whether the Respondent had capacity to work;

(c) It failed to apply the legal test, as stated in *Inclima v. Canada (Attorney General)*,[4] and consider whether the Respondent made attempts at retraining or other employment other than her former occupation, including part-time or sedentary employment.

[10] The Applicant also submits that the GD's preference for the subjective testimony of the Respondent over objective medical evidence amounted to an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it.

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[3] *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33.
[4] *Inclima v. Canada (Attorney General),* 2003 FCA 117.

ANALYSIS

Sufficiency of Reasons

[11] The Applicant notes that the GD's decision surveyed the evidence in five paragraphs, but only one of them referred to medical evidence, specifically a letter from the Respondent's family doctor, even though there were other reports, including some prepared by specialists, available. The Applicant alleges that the GD concluded the Respondent suffered from, among other conditions, irritable bowel syndrome (IBS), osteoporosis and fibromyalgia, but the available medical evidence did not indicate diagnoses for these conditions.

[12] Having reviewed the decision, I must disagree that the GD's summary of evidence referred only to a letter from the Applicant's family doctor; there was also a clear reference to the November 2015 report from a psychiatrist, Thierry Raherinaivo. I also disagree that there were no diagnoses for IBS, osteoporosis and fibromyalgia. Dr. Pelletier listed the first two in his December 2014 CPP Medical Report, and raised fibromyalgia, which he said he had omitted to mention previously, in his February 2016 letter of support. While a December 2001 Moncton Hospital discharge summary showed "no evidence" of IBS, the March 2012 bone mineral density test did, contrary to the Applicant's assertion in paragraph 38 of its submissions, indicate objective signs of osteoporosis (a T-score of less than 2.6 being "within the osteoporotic range.")

[13] In my view, the GD had at least some medical basis, beyond the Respondent's mere testimony, for finding that she suffers from, not just depression, but also IBS, osteoporosis and fibromyalgia. Where the Applicant appears to have difficulty is the GD's presumed reliance on diagnoses of IBS and fibromyalgia made by a family physician, in the absence of lab results or specialist reports corroborating those findings.

[14] All that being said, I think there is a question here worthy of further exploration: How much evidence—medical or not—is required to justify a finding that a CPP disability claimant suffers from conditions that are indicated largely by subjectively reported symptoms that cannot be verified by so-called "objective" tests?

[15] I see at least a reasonable chance of success on this ground.

Functional Capacity Inquiry

[16] The Applicant cites the *Klabouch* case, which holds that it is not the diagnosis, but the capacity to work, that determines the severity of a claimed disability under the CPP. It alleges that the GD, in its decision, merely quoted from *Klabouch* but did not meaningfully analyze the available evidence in an effort to determine how the Respondent's medical conditions affected her ability to pursue substantially gainful employment.

[17] I see a reasonable chance of success on this ground. The section of the GD's decision in which it analyzes the severity of the Respondent's claimed disability contains seven paragraphs, four of which are simple statements of the ratios of leading cases. In only one of the paragraphs does the GD attempt to substantively apply the statutory definition of "severe" to the Respondent's particular situation:

> [23] When each condition is taken separately, it is possible to conclude that they may resolve given enough time and proper treatment. However, the Tribunal must look at the Appellant as a whole. Given her inability to take certain medications because of her IBS and lack of a kidney, she is having difficulty improving her depression and fibromyalgia. Also, there is a lack of mental health treatments available to her due to her location. And her depression and resulting lack of energy makes exercising to improve her fibromyalgia difficult. When taken together, it is easy to see how the Appellant's condition would be difficult to treat. Considering her symptoms, it is unreasonable to expect her to be able to work on a regular basis. She was already let go of one position due to her increasing absenteeism, and her conditions have gotten worse. She would not be able to guarantee to a future employer that she would be able to work on a regular basis.

[18] In my view, this passage raises an arguable case that the GD, having accepted the Applicant's diagnoses, took for granted that they left her functionally incapable of work. Even if the Respondent does indeed suffer from depression, fibromyalgia, IBS and osteoporosis, the GD is obliged to inquire whether she might still be capable of some form of work better suited to her symptoms. As noted by the Applicant, there seems to have been little or no consideration given to whether the Respondent ever considered retraining or investigating alternative forms of employment and, if so, how her medical conditions prevented her from pursuing these options.

CONCLUSION

[19] I am allowing leave to appeal on all grounds for which the Applicant has claimed.

[20] I invite the parties to provide submissions on whether a further hearing is required and, if so, what the type of hearing is appropriate.

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

Member, Appeal Division