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

Citation: *M. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 4

Tribunal File Number: AD-16-1191

BETWEEN:

**M. 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: January 6, 2017

## REASONS AND DECISION

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated September 20, 2016, 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, 2010. The Applicant filed an application requesting leave to appeal on October 11, 2016, without setting out any grounds of appeal.

## BACKGROUND

[2] In response to a letter dated October 13, 2016 from the Social Security Tribunal that she identify grounds of appeal, the Applicant filed additional submissions on October 19, 2016 (AD1A), requesting that the Appeal Division "look at all the doctor reports". On October 25, 2016, the Applicant provided a copy of a prescription and requested a review of the medical records (AD1C).

[3] As the Applicant had yet to sufficiently identify any grounds of appeal, the Tribunal sought some clarification. In particular, in its letter of November 1, 2016, the Tribunal enquired as to whether she was suggesting that the General Division had erred by failing to consider some of the medical records.

[4] On November 8, 2016, the Applicant indicated that she had already furnished the Tribunal with all of her available information and that she was seeking a reconsideration of her application for a disability pension (AD1D).

[5] On December 23, 2016, the Applicant advised that she was in the hospital on December 15 and 16, 2016 and had undergone surgery on her left hand and wrist. She further advised that on December 16, 2016, she fell and injured her left hand, which required reconstructive surgery (AD1E). On January 3, 2017, the Applicant provided an update regarding her status (AD1F).

## ISSUE

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

## ANALYSIS

*[7]* Subsection 58(1) of the *Department of Employment and Social 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.

[8] 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.

[9] The Applicant did not provide any grounds of appeal, despite requests from the Tribunal. She submits that the evidence establishes that she is severely disabled. However, neither the leave nor the appeal allow for a reassessment or redetermination of the evidence that was before the General Division, unless there is a reviewable error in connection with that evidence. The Applicant does not allege that to be the case. The General Division has already tried this evidence.

[10] As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or denied. Neither the leave nor the appeal provides opportunities to re-litigate or re-prosecute the claim.

*[11]* Similarly, the Federal Court pronounced in *Canada (Attorney General) v. O'Keefe,* 2016 FC 503 and more recently in *Marcia v. Canada (Attorney General),* 2016 FC 1367 that new evidence does not constitute a ground of appeal. As the Federal Court stated in *Marcia,*

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General),* 2014 FC 1100 at para 73).

[12] I am not satisfied that the appeal has a reasonable chance of success on the basis of any new medical records, or on the basis that the Applicant has had other medical issues since her hearing before the General Division.

[13] That, however, does not end my assessment of this leave application, for the Federal Court has cautioned the Tribunal against mechanistically applying the language of section 58 of the DESDA when it performs its gatekeeping function: *Karadeolian v. Canada (Attorney General),* 2016 FC 615 at para. 10 and *Griffin v. Canada (Attorney General),* 2016 FC 874 at para. 20. In *Griffin,* the Federal Court held that the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence.

[14] The medical evidence before the General Division included various consultation reports of specialists, including orthopaedic surgeons and rheumatologists. The evidence also included several diagnostic reports, as well as reports and the clinical chart summary of the Applicant's family physician. However, there was little in the way of medical evidence that was prepared in or around the end of the minimum qualifying period.

[15] My own review of the hearing file indicates that the General Division succinctly and accurately summarized the medical evidence before it. Much of the medical evidence was prepared after the end of the minimum qualifying period and, as the General Division member noted, there was an "absence of any information in the medical reports... at the time of her [minimum qualifying period]". In other words, the medical reports and records which were prepared after the end of the minimum qualifying period did not address the Applicant's disability at or around the end of the minimum qualifying period. It was for this

reason that the General Division was unprepared to assign any weight to these reports. My review of the hearing file does not indicate that the General Division either overlooked or possibly misconstrued important evidence. As such, I am not satisfied that the appeal has a reasonable chance of success.

## CONCLUSION

[16] Given the considerations above, the application requesting leave to appeal is dismissed.

Janet Lew
Member, Appeal Division