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

Citation: *V. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 29

Tribunal File Number: AD-16-951

BETWEEN:

V. T.

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: February 6, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated May 3, 2016. The General Division had earlier conducted an in-person hearing and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was "severe" during her minimum qualifying period (MQP) ending December 31, 2014, but it was not "prolonged."

[2] On July 21, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division an incomplete application requesting leave to appeal. Following a request for further information, the Applicant perfected her appeal on August 25, 2016, and her application was declared complete. 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 be brought only 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 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.*[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]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an 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 a letter accompanying her application requesting leave to appeal, the Applicant wrote that she did not agree with the General Division's decision. Her life changed drastically five years earlier, when she was afflicted with a virus that has left her with debilitating symptoms. Her head hurts and she cannot get out of bed. When she found herself unable to function at home, let alone a work environment, she was investigated and treated for vestibular dysfunction, although she has seen only limited improvement in her condition, despite her best efforts. Her problems are not life threatening, but there are days when she wonders if life is worth living.

[10] Her appeal before the General Division was declined because there is another treatment program available. It should be kept in mind that this treatment is for people who have suffered brain injury and strokes. While it would make her quality of life better, it could take a year or more to see improvement, and she cannot afford it. The program costs $7,000 for a year and

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

could take longer if more treatment is needed. Neither public health insurance nor her private health plan will cover its cost. The Applicant submits that she has done everything that has been asked of her and is still sick. The application and appeal process is difficult for her, and the thought of starting over again is completely overwhelming.

[11] In a letter dated July 25, 2016, the Tribunal reminded the Applicant of the specific grounds of appeal permitted under subsection 58(1) and asked her to provide more detailed reasons for her request for leave. On August 25, 2016, the Applicant submitted a letter in which she alleged that the General Division made an important error regarding the facts. She referred to Dr. Burbine's diagnosis of post-trauma vision syndrome (PTVS). She said that she was denied benefits because there was treatment available for this condition, but it only addressed what the virus did to her eyes, not what it did to her inner ear or nervous system. PTVS is a visual processing dysfunction that occurs secondary to a neurological insult. The recommended treatment may correct visual dysfunctions, but it will not strengthen or fix her inner ear or repair her nervous system. The Applicant also referred to selected reports from Drs. Henderson, MacLean and Lister, all of which were included in the documentary evidence before the General Division at the time of hearing.

ANALYSIS

[12] The Applicant suggests that the General Division dismissed her appeal despite medical evidence indicating that her condition was "severe and prolonged" according to the criteria governing CPP disability. However, outside of this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. I have carefully reviewed the Applicant's submissions, but with one possible exception, she has not described any deficiencies in how the General Division conducted the appeal, nor has she pointed to any material errors or omissions in its decision. Instead, the Applicant's submissions amount to a recapitulation of evidence and argument that were already presented to the General Division.

[13] The Appeal Division has no mandate to rehear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. It is

not sufficient for an applicant to merely state their disagreement with the decision of the General Division, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[14] In my view, the Applicant clearly identified only one potential error. The General Division dismissed the appeal because it found that, while the Applicant had a "severe" disability that prevented her from working during the MQP, it was not "prolonged," as there was an available treatment for her vision and balance problems—one that she had yet to try.

[15] There is a line of authority[3] that imposes an obligation on CPP disability claimants to follow reasonable medical advice. The General Division found that there was a reasonable prospect of recovery, based on Dr. Burbine's assessment of February 22, 2016, which said:

> PTVS responds to treatment and best results are achieved when the patient is engaged and supported in the therapy. As you know, a multidisciplinary approach involving all physicians and therapists is strongly recommended. Rehabilitation of the functional visual system generally takes 6 to 14 months of weekly sessions with everyone progressing at their own rate. When feasible, weekly or biweekly, therapy sessions are scheduled. I expect Valerie to do well because she still has many strengths in her visual system and she is keen to regain her wellness. I recommend a program of Vision Therapy.
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> I believe it may be possible for Valerie to recover some, perhaps the majority of her visual abilities, and to greatly reduce her resultant symptoms with proper visual rehabilitative therapy. Without Vision Therapy, Valerie will continue to suffer loss of quality of life due to the impairment of her visual abilities.

The Applicant now claims that Dr. Burbine's recommended treatment is beyond her financial resources and, in any case, it would not address the entirety of her medical condition.

[16] I see no reasonable chance of success on this ground. I have reviewed the relevant portions of the audio recording of the hearing, which confirms that the General Division discussed the implications of the Burbine report with the Applicant and asked her if she intended to pursue the vision therapy, as recommended. At the 1:11:29 mark, she replied:

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[3] *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187; *Kaminski v. Canada (Social Development)*, 2008 FCA 225 and *Warren v. Canada (Attorney General)*, 2008 FCA 377.

> I don't know. I just got the report… She [Dr. Burbine] said it will probably be $6,000 to $7,000, maybe $1,000 per month. Yes, I want to go, but it may take longer than six to fourteen months if I'm paying for it myself.

[17] The Applicant also indicated that she had not yet had an opportunity to consult Blue Cross.

[18] All of this was accurately relayed by the General Division at paragraph 42 of its decision, suggesting that it gave due consideration to the Applicant's testimony on this subject. It would have been one thing had the General Division ignored or distorted the Applicant's evidence about the cost or effectiveness of the treatment, but that did not happen here. In her testimony, the Applicant indicated that she was willing to pay for the recommended treatment, even if it was not covered by Blue Cross, with the only question being the period of time over which the estimated cost might be distributed. The General Division was within its authority, as trier of fact, to rely on this testimony and base its conclusions on it. Similarly, as the Applicant offered nothing in her testimony to refute the decidedly positive prognosis contained in Dr. Burbine's report, it was reasonable for the General Division to find that the prospect for recovery was good, provided all treatment recommendations were followed.

[19] Whether it is reasonable for an applicant to accept or reject treatment recommendations is a question for the trier of fact. To my mind, the Applicant's submissions on this ground either repeat evidence that was already before the General Division or contradict what she said at the hearing. As mentioned, the Appeal Division is not a forum in which to introduce new evidence or re-argue one's case on its merits. I should add that even if the Applicant had submitted clear evidence that the vision therapy was beyond her means, the General Division would have been entitled to disregard it; financial hardship is not a relevant consideration in the determination of eligibility for a disability pension.

CONCLUSION

[20] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave is refused.

Member, Appeal Division