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

Citation: *L. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 35

Tribunal File Number: AD-16-365

BETWEEN:

L. 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: February 10, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 25, 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" on or before the end of her minimum qualifying period of December 31, 2013. The Applicant is requesting leave to appeal on the ground that the General Division based its decision on several erroneous findings of fact.

ISSUE

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

GROUNDS OF APPEAL

[3] Subsection 58(1) of the *Department of Employment and Social Development* (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 based its decision on several erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. Generally, the erroneous findings that she has identified are found in three areas:

(1) the evidence section of the decision

(2) the submissions of the Respondent

(3) the General Division's analysis

Evidence section of the General Division decision

[6] The Applicant alleges that the General Division made errors in the following paragraphs:

- Paragraph 9 – the decision indicates that the Applicant filed a claim with the Workplace Safety and Insurance Board (WSIB) in February 2011. The Applicant alleges that this is an error as she made her first claim in May 2010.

- Paragraph 10 – the General Division indicated that the Applicant returned to work on a graduated basis, commencing in November 2012, and that she ceased working in April 2013. She alleges that the General Division overlooked the fact that she did not work throughout this time. She was off work for four days in January 2013, due to a re-injury, and also missed close to two weeks of work in March 2013.

- Paragraph 12 – the General Division indicated that the Applicant participated in programs arranged by the WSIB. She alleges that the General Division overlooked the fact that she had also, of her own initiative, enrolled in a six-week chronic pain self-management program.

- Paragraph 18 – the Applicant indicates that she takes other pain relief medications which were not listed by the General Division.

- Paragraph 20 – she has been seen by her family physician since 2000, not May 2010. This is a clear error. The family physician's medical report of July 23, 2013, for instance, indicates that she has known the Applicant for "15-18 yrs in practice", and a medical record dated April 28, 2014 from Dr. Davis confirms that she has been the Applicant's family physician since 2002 (at page GD3-4 of the hearing file).

- Paragraph 24 – the General Division indicated that the Applicant is able to lift her arms over her head with good rotation in her shoulders. The Applicant notes that, despite this, she continues to experience pain and can lift her arms only once or twice.

- Paragraph 25 – the General Division noted that the Applicant's family physician stated that the Applicant should work no more than four hours per day, with restrictions.

- Paragraph 30 – the General Division noted that one of her physicians was of the opinion that she had attained maximum medical improvement. The Applicant does not allege any errors in respect of this paragraph.

- Paragraph 32 – The Applicant argues that the General Division erred in its finding as to when she underwent surgery.

[7] Generally, any statements that fall within the evidence section simply represent the General Division's summary of the evidence, as opposed to any findings of fact *per se.* To properly constitute a ground of appeal under paragraph 58(1)(*c*), the General Division had to have based its decision on that finding, and it had to have been done in a perverse or capricious manner or without regard for the material before it.

[8] The Applicant acknowledges that some of the facts set out by the General Division may be inconsequential. For instance, it was of no consequence whether the Applicant filed a claim with the WSIB in either May 2010 or February 2011, whether she had attended any pain management programs, or had undergone anterior cervical discectomy fusion in

September 2013 or December 2013. Findings of this nature do not meet the requirements under paragraph 58(1)(*c*) of the DESDA that the General Division base its decision on that finding. In these instances, the General Division did not refer to this evidence in its analysis of the evidence, or did not rely on these facts in coming to its decision.

[9] The Applicant does not dispute some of the evidence. For instance, she agrees with paragraph 24 that she is able to lift her arms above her head, but is of the view that the General Division failed to acknowledge that she can do this only once or twice and that she continues to experience pain. Clearly the General Division accepted that the Applicant experiences ongoing pain. At paragraph 52, the General Division described this as "chronic pain". The Applicant also does not dispute the evidence set out in paragraph 25, that she is able to work, but stresses that she was challenged to meet her job's demands, given her limitations. Essentially, she is requesting that the Appeal Division reconsider some of the evidence and her arguments, but a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

[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. Additionally, I am mindful of the words of the Federal Court in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[11] Although the General Division clearly erred at paragraph 20 in stating that Dr. Davis has been the Applicant's family physician since May 2010, in light of two separate medical records that indicate a much earlier date, nothing turned on this. Had the General Division preferred the opinion of another practitioner over the opinion of the family physician, on account of the fact that he or she was believed to have been following the Applicant for a longer period of time, that might have added a different consideration.

[12] As I have indicated, for the most part, nothing turns on the re-statements of the evidence. However, at paragraph 18, the General Division listed what it understood were the pain relief and other medications taken by the Applicant, and at paragraph 52, found that

the Applicant's chronic pain was being managed conservatively with a "single anti-inflammatory medication". The Applicant alleges that the General Division erred as she takes no less than three anti-inflammatory drugs, in the form of Advil, Voltaren and Aleve.

[13] I note that the only reference in the General Division's decision to the Applicant being managed with a single anti-inflammatory medication appears in the Respondent's submissions. It appears that the General Division unequivocally accepted these submissions in its analysis, although it did not independently verify them against the evidence.

[14] However, it is not clear that there was any documented evidence before the General Division that she was taking these anti-inflammatories at the material time, i.e. by the end of her minimum qualifying period (although it may be that she was taking them in late 2015, when the Applicant appeared before the General Division).

[15] The only documented reference to Advil and Voltaren is in the Applicant's letter dated April 24, 2014 (GD3-1 to 2), which falls after the end of the minimum qualifying period, and there are no documented references that the Applicant was taking Aleve at this time either. Indeed, in the Questionnaire accompanying her application for a disability pension, dated July 2013, the Applicant notes that she is not taking any medication at that time (GD6-97). Similarly, a medical report prepared at about that same time indicates that she is not taking any medications (GD6-78 to 81). A series of clinic notes prepared between February 2015 and June 2015 (GD10-5 to 10) list several medications, including even iron supplements, but there is no mention of any anti- inflammatory medication, other than Celebrex, though it had been discontinued by February 2015.

[16] Despite its undue reliance on the Respondent's submissions, I am not satisfied that the appeal has a reasonable chance of success on this particular ground that the General Division made an erroneous finding of fact regarding her use of anti- inflammatory medication. After all, the General Division would have had to base its decision on that erroneous finding of fact, and given that there is no documentary evidence to support the Applicant's allegation that she was taking multiple anti- inflammatory medications on or before the end of her minimum qualifying period, it becomes irrelevant whether she subsequently began taking these after the minimum qualifying period had passed, because it

does not otherwise address the issue of whether she had a severe disability by the end of her minimum qualifying period.

Section on the Respondent's submissions

[17] The Respondent's submissions do not represent the General Division's findings of fact and therefore the Applicant's argument regarding the Respondent's submissions do not properly constitute grounds of appeal under paragraph 58(1)(*c*) of the DESDA. Much of the Applicant's argument in any event responds to the Respondent's submissions. This calls for a reassessment, but as I have indicated above, a review or reassessment of the evidence does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

Analysis section of the General Division decision

[18] The Applicant submits that the General Division made the following erroneous findings of fact, at:

- Paragraph 45 – the General Division noted that the Applicant is a part-time crossing guard.
- Paragraph 47 – the General Division noted some of the Applicant's physical restrictions.
- Paragraph 51 – the General Division noted the results of diagnostic examinations of the Applicant's left wrist and hand, which showed no significant abnormalities.
- Paragraph 52 – the General Division stated that the Applicant's chronic pain was being managed conservatively with a single anti-inflammatory medication, exercise and weight control.
- Paragraph 55 – the General Division determined that it was unnecessary to make a finding on the prolonged criterion.

[19] At paragraph 45, the General Division indicated that the Applicant works as an "on-call" part-time crossing guard. The Applicant has not identified any specific erroneous finding of fact that she alleges was made by the General Division, other than to state that the member failed to appreciate the physical duties and responsibilities of a crossing guard. However, I understand that the Applicant is of the position that the General Division found that because she was engaged in part-time employment as a crossing guard, that she was necessarily capable regularly of pursuing a substantially gainful occupation. Given that the General Division categorically dismissed any notion that this could constitute gainful employment, I am not satisfied that the General Division made any erroneous finding of fact regarding her employment as a crossing guard.

[20] The Applicant submits that the General Division erred at paragraph 47 in failing to list all of her physical restrictions. While the General Division could have listed other physical restrictions, I do not see any error in this paragraph. Had the General Division stated that the only restrictions were those that it set out, that she not do any "pushing or pulling and limited lifting and carrying", this would have constituted an error, but as it is, the General Division did not suggest that these were her only restrictions.

[21] At paragraph 51, the General Division indicated that diagnostic imaging of the left wrist and hand on July 7, 2014 showed no significant abnormalities. However, the member did not make any findings from these results, and the Applicant does not contest the General Division's reference to the x-rays, other than to add that the physiatrist,

Dr. Feloiu, has advised her to wear a left hand brace to protect her left thumb wrist joint. This does not constitute an error under subsection 58(1) of the DESDA.

[22] The Applicant submits that the General Division erred at paragraph 52 in suggesting that her disability could not be severe, if she chose to limit management of her disability to conservative measures. Again, this asks for a reassessment, but it is not the role of the Appeal Division to undertake a review or reassessment of the evidence.

[23] Finally, the Applicant argues that the General Division ought to have considered whether her disability is prolonged.

[24] The test for disability is two-part and if a claimant does not meet one aspect of this two-part test, then he or she will not meet the disability requirements under the *Canada Pension Plan.* As the General Division indicated, it is unnecessary to undertake an analysis on the prolonged criterion when the appellant has not established that he or she is severely disabled. In *Klabouch v. Canada (Social Development)*, 2008 FCA 33 (CanLII) at para. 10, the Federal Court of Appeal stated that:

> [...] The two requirements of paragraph 42(2)(*a*) of the [Canada Pension Plan] are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the [*Canada Pension Plan*] fails.

[25] The Federal Court affirmed this approach in *McCann v. Canada (Attorney General),* 2016 FC 878, stating that "the fact of concentrating on one feature of the test and of not making any findings regarding the other … does not constitute an error". The Federal Court determined that Mr. McCann's argument that the Appeal Division should have granted leave on the basis of the failure of the General Division to consider the "prolonged" part of the disability test was bound to fail.

NEW EVIDENCE

[26] The Applicant has provided updated medical records, including medical reports dated April 28, 2016 and October 3, 2016 from her specialist.

[27] It has now become well-settled law that new evidence generally does not constitute a ground of appeal. As the Federal Court recently held in *Marcia v. Canada (Attorney General),* 2016 FC 1367:

> [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).

[28] While new evidence can be considered on an appeal to the Appeal Division in very limited circumstances, i.e. where they address any of the grounds of appeal, those circumstances are not present here.

CONCLUSION

[29] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division