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

Citation: *T. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 41

Tribunal File Number: AD-16-395

BETWEEN:

T. L.

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 13, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 28, 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, 2009.

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 is requesting leave to appeal on the grounds that (1) the General Division failed to observe a principle of natural justice and otherwise refused to exercise its jurisdiction, and (2) erred in law and in fact.

Form of hearing

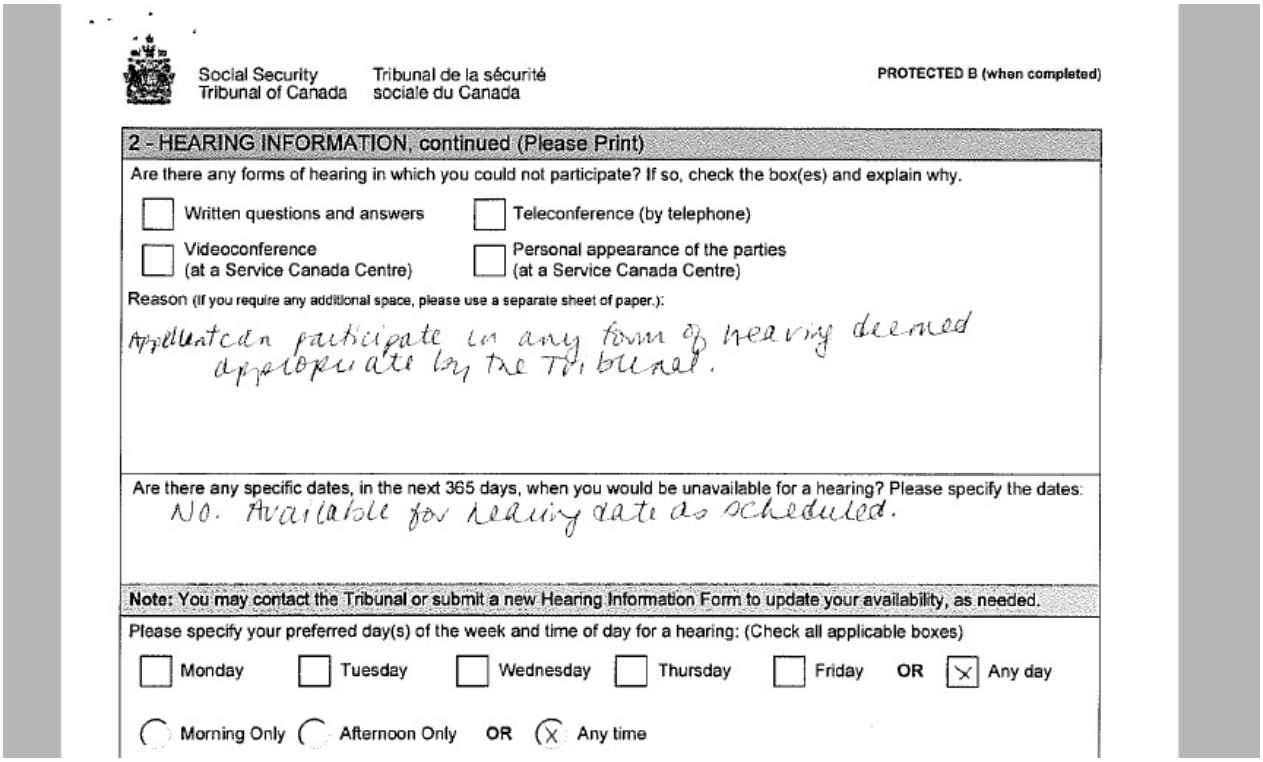
[6] The General Division conducted a hearing by way of questions and answers, on the basis that there were gaps in the information in the hearing and/or there was a need for clarification. The General Division issued a notice of hearing on November 9, 2015, directing the Applicant to provide a complete copy of the medical report of a psychiatrist (GD2-52). The Applicant provided this report to the Social Security Tribunal within the requested timeframe.

[7] The Applicant submits that by proceeding in this manner, the General Division failed to observe a principle of natural justice and otherwise refused to exercise its jurisdiction when it failed to conduct an in-person hearing. The Applicant argues that it was essential to any notions of procedural fairness that she should have been provided with an opportunity to clarify any inconsistencies in the medical evidence, such as the date of onset of her depression and any gaps regarding her attempts at retraining and upgrading. The Applicant argues that had the General Division clarified these key pieces of evidence, this could have established that she was severely disabled on or before the end of her minimum qualifying period.

[8] There is no entitlement as of right to an in-person hearing under the DESDA. Section 28 of the *Social Security Tribunal Regulations* (Regulations) permits a member to make a decision on the basis of the documents and submissions filed, while section 21 of the Regulations permits a member to hold a hearing by way of written questions and answers, teleconference, videoconference or other means of telecommunications, or by the personal appearance of the parties.

[9] The Hearing Information Form completed on behalf of the Applicant (GD4) indicates that the information provided would assist the General Division member to decide the appropriate form of hearing and schedule a hearing. The Applicant indicated that she

would be represented and that she would be the only witness. The Applicant also indicated that she could participate in any form of hearing deemed appropriate by the Tribunal and that she was also available any day of the week for a hearing, as scheduled by the Tribunal. The portion of the Hearing Information Form was completed on behalf of the Applicant as follows:



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PROTECTED B (when completed)

2 - HEARING INFORMATION, continued (Please Print)

Are there any forms of hearing in which you could not participate? If so, check the box(es) and explain why.

☐ Written questions and answers ☐ Teleconference (by telephone)

☐ Videoconference (at a Service Canada Centre) ☐ Personal appearance of the parties (at a Service Canada Centre)

Reason (If you require any additional space, please use a separate sheet of paper.):

Appellant can participate in any form of hearing deemed appropriate by the Tribunal.

Are there any specific dates, in the next 365 days, when you would be unavailable for a hearing? Please specify the dates:

NO. Available for hearing date as scheduled.

Note: You may contact the Tribunal or submit a new Hearing Information Form to update your availability, as needed.

Please specify your preferred day(s) of the week and time of day for a hearing: (Check all applicable boxes)

☐ Monday ☐ Tuesday ☐ Wednesday ☐ Thursday ☐ Friday OR ☒ Any day

◯ Morning Only ◯ Afternoon Only OR (X) Any time

[10] There was no indication at that time that the Applicant could not participate by way of written questions and answers, or other.

[11] After the Notice of Hearing was issued indicating that the appeal would proceed by way of questions and answers, the Applicant filed an additional medical report (GD5) but otherwise did not object to the form of hearing. The leave application was the first instance whereby the Applicant objected to the form of hearing.

[12] In *Murphy v. Canada (Attorney General)*, 2016 FC 1208, the matter proceeded without a hearing on the basis of a file review. The Federal Court noted that Ms. Murphy had been given notice that the General Division intended to conduct a paper appeal. She had

been invited to comment and submit additional material, but took no position in that regard. The General Division explained why it proceeded in this manner. It determined that the issues under appeal were not complex, there were no gaps in the information in the file or any need for clarification, credibility was not a prevailing issue, and the form respected the requirements under the Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[13] In seeking leave, Ms. Murphy did not attack the form of hearing. Yet, the Federal Court was doubtful, given the facts, that a proper *Villani* assessment could take place without a *de novo* hearing before the General Division, given Ms. Murphy's limited education and limited ability to make written representations, her speech impediment as documented by the Social Security Tribunal staff, and the difficulty she had expressing her thoughts.

[14] The Applicant is also of limited education, but overall, the factual circumstances of the matter before me differ in some respects. The Applicant was and continues to be represented by counsel, so there is less of an issue that she was or is unable to represent herself, to the extent that Ms. Murphy was unable. The nature of the Applicant's disabilities also differs.

[15] Having been alerted that the hearing would proceed by way of questions and answers, the Applicant could have sought to file written submissions to address any perceived gaps regarding her attempts at retraining and upgrading, or any inconsistencies in the date of onset of her depression.

[16] In these submissions before me, the Applicant has not sought to address what the inconsistencies in the date of onset of her depression might be. The Applicant insists nonetheless that she was deprived of the opportunity to address any gaps or inconsistencies, because there was no *de novo* hearing before the General Division.

[17] The General Division did not identify a specific date of onset of depression, other than to state that the Applicant's depression began after the end of the minimum qualifying period had passed. At paragraph 35, the General Division concluded that the Applicant's

mental health issues began after the minimum qualifying period of December 31, 2009 had passed, and that this was "substantiated by the family doctor's report, Dr. O'Toole's report (2012) and Dr. Gerber's report (2013)".

[18] In the evidence section, the General Division noted that the Applicant's family physician diagnosed the Applicant with major depression since April 2012. The Applicant was subsequently referred to a psychiatrist in August 2012 regarding depression. The psychiatrist indicated that the Applicant's mental health issues had begun two years prior to their meeting (i.e. in mid-2010), although as noted in paragraph 20 of the decision, the Applicant had had a previous episode of depression approximately 10 years ago. The Applicant saw another psychiatrist in July 2013. The General Division indicated that the Applicant reported to this psychiatrist that she began feeling depressed once she began fighting with her insurance company and that she had begun taking anti- depressants approximately six months prior to seeing him. The medical report (GD5-7) indicates that the Applicant reported that she started getting depressed about four or five years ago, which would have placed the onset of her depression sometime prior to or around the end of the minimum qualifying period.

[19] Although I am not satisfied that the issue of an inconsistency in the evidence regarding the onset of the Applicant's depression could be addressed only in a *de novo* hearing, I am satisfied that the General Division may have erred in failing to address whether the Applicant's depression began on or before the end of the minimum qualifying period.

[20] The General Division was entitled to reject the psychiatric report regarding the onset of the Applicant's depression, had it determined that the Applicant had reported a different date than she had to her own family physician and another psychiatrist, but the General Division instead found that the Applicant had consistently reported to each of her health caregivers that her depression began sometime after 2009. This finding may have been perverse, in light of the psychiatric report of July 2013 (GD5).

[21] Furthermore, if the General Division did not consider whether the Applicant might have suffered from depression prior to the end of the minimum qualifying period, it may not

have considered the totality of the evidence on a cumulative basis and this could constitute an error of law.

[22] 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".

[23] I will allow the Applicant to address any issues regarding the perceived gaps in attempts at retraining and upgrading at the hearing of the appeal in this matter. I will nonetheless briefly comment regarding the remaining ground.

Expert opinion

[24] The Applicant further submits that the General Division erred in fact and in law by preferring the opinion of the Applicant's family physician over that of a vocational rehabilitation consultant on the issue of her employability. The General Division indicated that the family physician was of the opinion that the Applicant required a sedentary position, while the vocational rehabilitation consultant was of the opinion that the Applicant not only was unable to perform physically demanding employment, but also would have difficulty with a job that entailed sitting for prolonged periods.

[25] As the trier of fact, it was open to the General Division to assess the evidence and assign the appropriate weight to the evidence. The General Division is entitled to prefer some evidence over other evidence. While the General Division did not engage in an extensive analysis of the expert opinions, clearly the General Division relied on and preferred the reports of the Applicant's family physician, as he had known her for 20 years and was therefore familiar with her condition.

[26] The General Division did not address one significant consideration. The vocational assessment had been conducted in August 2012, several years after the end of the minimum

qualifying period had passed. However, the Applicant was required to prove that she was severely disabled on or before the end of her minimum qualifying period. Given that the vocational assessment had taken place several years after the end of the minimum qualifying period, there was no basis whereby the General Division could have relied upon that opinion to establish that she was severely disabled by December 31, 2009.

CONCLUSION

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

[28] 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