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

Citation: *P. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 51

Tribunal File Number: AD-16-226

BETWEEN:

P. R.

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 20, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 6, 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 erred in law and that it based its decision on several erroneous findings of fact made without regard for the material before it.

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.

Errors of law

[5] The Applicant submits that the General Division erred in law in its application of "severe" as defined by the *Canada Pension Plan* and in its application of *Inclima v. Canada (Attorney General),* 2003 FCA 117.

[6] The Applicant argues that, rather than determining whether the Applicant was incapable regularly of pursuing any substantially gainful occupation, the General Division may have determined whether she could not work at all. At paragraph 36, the General Division wrote:

> The Tribunal finds that this evidence does not relate to a severe medical condition that would prevent the [Applicant] from any type of work. Even though Dr. Emery states the [Applicant's] symptoms affect her ability to work, he did not rule that the [Applicant] cannot work at all.

[7] At paragraph 39, the General Division indicated that it determined that the Applicant had not established that she had a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation. However, if the General Division ultimately applied a test for "severe" other than that defined by paragraph 42(2)(*a*) of the *Canada Pension Plan*, as might be suggested in paragraph 36, this would constitute an error of law. I am satisfied that the appeal has a reasonable chance of success on this ground.

[8] The Applicant asserts also that the General Division erred in finding that she had not met the requirements under *Inclima* that she show that any efforts at obtaining and maintaining employment had been unsuccessful by reason of her health condition. The General Division found that the Applicant had not provided evidence that she tried to seek any other employment suitable to her physical limitations and that she could not maintain employment due to her medical conditions. The Applicant argues that one can meet the test set out *Inclima* by showing one's efforts prior to one making an application for a Canada Pension Plan disability pension. She argues, in other words, that the requirement to obtain and maintain employment is not an ongoing obligation that continues until after one makes an application for a disability pension. The Applicant argues that the General Division ought to have considered the fact that she had occupied a sedentary position and that she

continually sought out new jobs to accommodate her progressively deteriorating condition. However, the General Division determined that the Applicant retained some work capacity and on that basis, it was entitled to require that she continue to show efforts at obtaining and maintaining employment appropriate for her limitations. I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

Erroneous findings of fact

[9] The Applicant argues that the General Division based its decision on the two following erroneous findings of fact made without regard for the material before it.

[10] For one, the Applicant argues that the General Division ought not to have considered the reports of Drs. Ma and Steed. The General Division determined that they did not find any significant abnormalities. The Applicant contends that their medical opinions were irrelevant with respect to her diagnosis of irritable bowel syndrome (IBS). The Applicant argues that one cannot rely on testing to confirm a diagnosis of IBS, unlike an illness such as cancer, as IBS is a "disease of exclusion". The Applicant argues that if the General Division ruled out a diagnosis of IBS on the basis of the opinions of Drs. Ma and Steed, it could not have fully appreciated the severity of the Applicant's symptoms of IBS. The Applicant relies in part on a printout from the Mayo Clinic website to support her claim that often the diagnosis for IBS is made after ruling out other conditions.

[11] The General Division did not have a copy of the printout from the Mayo Clinic. In my view, it cannot now be admitted to bolster the Applicant's assertions that IBS is an exclusionary disease. This evidence and submissions of this nature should have been made before the General Division, as it involves an assessment of that evidence. As the Federal Court pronounced in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in subsection 58(1) of the DESDA. In any event, I find these submissions without any substance, as the General Division accepted that the Applicant has IBS.

[12] However, as the General Division determined that the Applicant was diagnosed with IBS, as well as chronic migraine headaches and fibromyalgia, only in March 2015, after the end of the minimum qualifying period had passed, it may have erred in focusing on when the diagnosis was made and in suggesting that she therefore could not have had these conditions until March 2015. While a diagnosis alone is not determinative of the severity of one's disability, it may be an important consideration in appreciating the severity and the impact of a disability on one's capacity regularly of pursuing any substantially gainful occupation.

[13] Two, the Applicant argues that the General Division misapprehended the opinion of the family physician, Dr. Emery. The General Division noted that the family physician had provided notes that stated that the Applicant was unfit for work due to medical reasons and would be reviewed in one month's time, or simply that she would be reviewed in one month's time. The Applicant submits that the General Division erred in finding that the Applicant therefore could not have been severely disabled, on the basis of these notes. At paragraph 36, the General Division wrote, "Even though Dr. Emery states the [Applicant's] symptoms affect her ability to work, he did not rule that the [Applicant] cannot work at all." The Applicant argues that the General Division's findings do not comport with the preponderance of evidence before it, and that the notes were more relevant to the issue of the prolonged nature of her disability, rather to the severity question. To some extent, these particular submissions call for a reassessment, but as the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence and determine whether, as in this case, the medical notes are or are not consistent with the preponderance of evidence before the General Division. However, to the extent that the General Division's interpretation of the family physician's notes are perverse or capricious, then this would constitute an erroneous finding of fact under paragraph 58(1)(*c*) of the DESDA. It may be a perverse or capricious finding to conclude from the family physician's notes that the Applicant retained some capacity, if it was based on the statement that she was unfit for work and would be reviewed again, or that she would be seen again in one month's time. I am satisfied that the appeal has a reasonable chance of success on this ground.

NEW EVIDENCE

[14] Finally, the Applicant proposes to file new or updated medical records, including a printout of her drug history. As I have set out above, new evidence generally does not constitute a ground of appeal. While new evidence can be considered on an appeal to the Appeal Division in very limited circumstances, i.e. where it addresses any of the grounds of appeal, those circumstances are not present here. If ultimately the appeal is granted and the matter returned to the General Division for a redetermination, it would be for the General Division to decide on the relevancy and materiality of any new records.

CONCLUSION

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