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

Citation: *J. P. v. Minister of Employment and Social Development*, 2017 SSTADIS 52

Tribunal File Number: AD-16-445

BETWEEN:

J. P.

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 December 29, 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, 2010.

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 erred under each of the grounds set out in subsection 58(1) of the DESDA. She alleges that the General Division ignored

the evidence before it and she therefore seeks a "fair review" of her appeal. The Social Security Tribunal (Tribunal) asked the Applicant to identify the evidence that she alleges was ignored by the General Division. She responded by letter dated April 18, 2016, advising that she had provided the Tribunal with this information on multiple occasions, describing it as "additional information". Otherwise, she did not provide any particulars of the allegedly overlooked information.

[6] The General Division conducted a review on the basis of the documentary record before it. The General Division set out the evidence in paragraphs 9 to 11 and conducted its analysis in paragraphs 15 and 16. The General Division indicated that the Applicant had developed chronic right shoulder pain resulting from a work-related injury in March 2009. The General Division also indicated that the Applicant had been referred to a shoulder specialist in late 2011 but declined an appointment until she was re-referred in October 2012. The General Division noted that in 2014, a physician opined that the Applicant t had a strong psychological component to her pain.

[7] There was extensive medical documentation in the hearing file before the General Division. The Applicant has undergone several diagnostic examinations and has been seen by different specialists, including a neurologist and orthopaedic surgeons, in relation to her chronic right shoulder pain. The first documented reference to any psychosomatic underlay to the Applicant's pain was in October 2010, in the independent medical examination (GT1-69), although it was not investigated at that time. In a consultation report dated December 6, 2011, to the Applicant's family physician, an orthopaedic surgeon suggested that the Applicant required "extensive support in the management of her apparent considerable stress level" (GT6-8 to 9). In a more recent consultation report dated February 3, 2014 (GT2-17 to 20), a pain consultant expressed the opinion that there was a strong psychological component to her pain and that the Applicant could benefit from upwards of a year of cognitive behavioural therapy (CBT). It is unclear whether the Applicant pursued any CBT as there is no documented record of this before the General Division.

[8] Although the General Division member did not provide extensive reasons and may not have referred to each of the medical opinions in the hearing file, the Applicant's pain diary, or any support letters, the member alluded to much of the evidence and it is clear that the General Division addressed what it considered were the primary issues. Short of the Applicant identifying specific pieces of evidence that she alleges were overlooked or ignored, and indicating what probative value they might have had, it can generally be presumed that the General Division considered all of the evidence before it: *Simpson v. Canada (Attorney General),* 2012 FCA 82.

[9] I would generally defer to the General Division's assessment of the evidence. After all, the Federal Court of Appeal has determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all of the evidence and the facts before it. In *Canada v. South Yukon Forest Corporation,* 2012 FCA 165 (CanLII), at para. 50, Stratas J.A. remarked that:

> […] trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[10] Although the matters before the Federal Court of Appeal were decidedly more complex and the documentary record was significantly more expansive in the *South Yukon* case, the same principles apply in the matter before me.

[11] The Applicant is asking that the Appeal Division reweight the evidence in a manner more favourable to her position. 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. In this regard, 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."

[12] Finally, although the General Division set out some of the Applicant's personal characteristics at paragraph 9 of the Evidence section, it is not apparent that the General

Division considered and undertook any analysis of the Applicant's personal characteristics in a "real world context", which it was required to do in assessing the severity of her disability: *Villani v. Canada (Attorney General)*, 2001 FCA 248. On this basis alone, I am satisfied that the appeal has a reasonable chance of success on this ground, notwithstanding the fact that the Applicant did not raise this ground of appeal.

CONCLUSION

[13] The application for leave to appeal is granted in respect of only the issue as to whether or not the General Division erred in failing to apply *Villani* and not considering the Applicant's personal characteristics in a "real world" context. This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division