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

Citation: *C. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 75

Tribunal File Number: AD-16-622

BETWEEN:

C. 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 27, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated February 20, 2016, 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" by the end of her minimum qualifying period on December 31, 2015.

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 without regard for the material before it. She further submits that the General Division failed to take all of the evidence into consideration.

[6] At various points in her submissions, the Applicant responds to the General Division decision. For instance, at paragraphs 22 and 49, the General Division discussed the Applicant's ongoing smoking habit. The Applicant explains that she continues to smoke because it is the last remaining activity she can continue to enjoy. These types of responses are not germane to this leave application, as the leave does not present any opportunities to revisit, reweigh and re-assess the evidence. 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.

[7] The Applicant also points to several instances where the General Division provided an incomplete summary of the evidence. For instance, at paragraph 23, the General Division wrote that the Applicant stated that she has to learn how to live with fibromyalgia. The Applicant states that she had also testified that fibromyalgia affects everyone differently and that treatment options vary per individual. Unless the evidence is of such probative value, or unless the stated information, on its own, is misleading without the balance of information, the trier of fact is not required to fastidiously remark on every fact or detail. 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.

The General Division's Evidence and Submissions sections

[8] The Applicant cites several areas from the evidence section that she alleges are incorrect or misleading. However, to the extent that these statements were contained in the evidence section and did not form any part of the basis upon which the General Division made its decision, they do not meet the requirements under paragraph 58(1)(*c*) of the DESDA. The erroneous finding of fact must be one upon which the General Division based its decision. For instance, although the General Division found that the Applicant took an online chronic disease

program, it was immaterial to its decision when the Applicant took the course, so the fact that she had taken it in 2013, rather than 2005 as stated in paragraph 13, was irrelevant.

[9] At paragraph 12, the Applicant argues that the General Division erred in implying that she experienced pain-free days when she claims that her husband had in fact testified that she has "good days and bad days" but that she was always in pain, with some days worse than others. This may be one way in which to interpret the General Division's sentence that the Applicant "was fine some of the time, but there were also days where she was not good". The Applicant also argues that the General Division erred in suggesting that she performed some of the cooking and grocery shopping. However, the General Division did not refer to any of this evidence nor rely upon it in coming to its decision.

[10] The Applicant correctly identified that the General Division erred at paragraph 15 when it wrote that "from May October 2010 to May 2011 she was recovering from the back injury". The preceding passage in the General Division decision indicates that the Applicant worked from February 2003 until September 2010, when she was injured in a work-related accident, either in August or September 2010. There is no indication in the General Division's analysis that the timeframe within which the Applicant recovered from her back injury was at all a material consideration in its decision.

[11] The Applicant did not file a copy of any reports from her former family physician, preferring instead to read a report dated May 16, 2011 into the evidence. While there may be some discrepancies between what the family physician reported regarding the chronicity of the Applicant's pain condition, ultimately the General Division did not rely upon this opinion. The General Division relied on the family physician's opinion that the Applicant does not have radiculopathy. The Applicant does not dispute this but suggests that the General Division erred and misconstrued the evidence when it failed to mention that the family physician had also written that the Applicant was left with a chronic pain condition. However, it seems to be implied from the General Division's analysis that it accepted that the Applicant has chronic pain. After all, at paragraph 45, the General Division wrote that it was insufficient to have a diagnosis of chronic pain to establish a severe disability.

[12] At paragraphs 17, 18, 19 and 20, the General Division discussed the Applicant's work history, including the frequency of absences and the reasons she might have been terminated from her last employment, and the number of interviews resulting from her job search efforts. However, these were not factors that the General Division considered when arriving at its final conclusion.

[13] The Applicant argues that the General Division erred at paragraphs 20 and 52 in suggesting that she took limited amounts of medication only because of her fears of addiction, when there are several reasons to account for her limited use of medications, such as adverse side-effects and their lack of efficacy. While the General Division did not fully set out her explanation for her limited use of medications, it is clear from the expression "further mentioned" that the General Division was cognizant of and had considered these other explanations, yet chose to mention only the fear of risk of addiction. In passing, I note that there does not appear to be any supporting documentary trail that the Applicant had ever voiced any concerns to her physicians about any side-effects or that there were any discussions that she try other medications to determine if they might have been more effective and had fewer side-effects. On the other hand, an entry dated August 9, 2013 in the medical records indicates that the Applicant sought a renewal of an old prescription for Baclofen, as she found that effective. It is unclear whether the General Division rejected the Applicant's explanations for her limited use of medications, in light of the documentary record.

[14] However, it does not appear as if the General Division member considered whether her explanation for her limited use of medication was reasonable, in light of the alleged severity of her medical condition. While, generally, an appellant is expected to pursue all reasonable treatment recommendations, including taking pain relief medication to alleviate his or her pain, an applicant may be excused from doing so, provided that he or she has a reasonable explanation. The Applicant suggests that her efforts include those described in paragraph 21. This may constitute an error of law if the General Division failed to consider the reasonableness of her efforts at mitigation. This is not to suggest that the Applicant's explanations were necessarily reasonable and I make no judgment in that regard. I am satisfied, however, that the appeal has a reasonable chance of success on the basis that the General Division may not have

considered whether the Applicant's explanations regarding her limited use of medications were reasonable, given the circumstances.

[15] The Applicant contends that the General Division erred at paragraph 39, but the paragraph represents a summary of the Respondent's submissions, rather than any actual findings of fact.

The General Division's analysis

[16] The Applicant alleges that the General Division erred at paragraphs 44, 45, 47, and 54. However, the General Division set out the issue that it determined was relevant in assessing whether the Applicant's disability was severe, as well as the law regarding mitigation, in these paragraphs. I do not find that any findings of fact were made within these two paragraphs. Similarly, in paragraph 46, the member made generic statements regarding treatment for fibromyalgia, chronic pain and fatigue, and did not make any findings of fact *per se*.

[17] The Applicant argues that the General Division erred at paragraph 48 in finding that she has "not had the benefit of a targeted and intense intervention aimed specifically at her fibromyalgia …", and claims that the member failed to consider that she had taken an online course, or that the course itself was designed for those with chronic pain disorders such as fibromyalgia. However, the General Division acknowledged at the outset within the same paragraph that the Applicant "had taken an online Chronic Disease Self-Management program". The member simply determined that the online course was insufficient and that she should pursue something that was tailored for her.

[18] The Applicant further argues that the member erred in finding that her family physician, Dr. Jonker, had recommended conservative treatment. She claims that these were merely suggestions, rather than recommendations. The General Division wrote that "treatment options remain open … considering that on July 2, 2013, Dr. J. Jonker, Family Physician, reported conservative treatment would continue such as physiotherapy, massage therapy, acupuncture, and chiropractic care". The family physician's report of July 2, 2013 (at GD2-167 to 170) indicated that the Applicant would "continue conservative treatment". From this, it was a reasonable interpretation for the General Division to have determined that treatment options remained open for the Applicant and consequently, I am not satisfied that this amounts to an

erroneous finding of fact. In any event, it is largely indistinguishable whether these options might have been suggestions as opposed to recommendations. After all, it is unlikely that a physician would make any suggestions for treatment if there were no prospects whatsoever for any improvement or relief from any symptomology, or if greater harm were to ensue from pursuing these options.

[19] The Applicant asserts that the General Division contradicted itself at paragraph 50 in finding that she could not have severe, disabling pain if she had not been referred to a specialist for her fibromyalgia and was to continue with conservative treatment. The Applicant explains that fibromyalgia has been only recently recognized as a medical condition and, hence, treatment and diagnoses remain in the "beginner stage". She also explains, as she did before the General Division, that her family physician is of the opinion that there are no specialists in the area of fibromyalgia. Firstly, I do not see any contradiction in the member's finding and, secondly, I do not accept that fibromyalgia is a relatively new medical condition and that diagnoses remains in the "beginner stage". The literature and jurisprudence is well-established that fibromyalgia is not a recent medical issue, and that there are specialists in the field. Indeed, the Applicant's own testimony appears to support this fact, as she had enquired about the possibility of seeing a rheumatologist. Essentially, the Applicant argues that the General Division erred in failing to consider why she has not been referred to nor seen by a specialist, such as a rheumatologist, and is requesting that we consider these factors and the fact that she continues to be followed by her own family physician. As I have indicated above, subsection 58(1) of the DESDA does not provide for or contemplate reassessments.

[20] At paragraphs 53 and 57, the Applicant submits that the General Division failed to consider all of the evidence before it, including evidence that she is unable to function on a daily basis at a level that would be conducive to working, and that she functions in pain on a daily basis. The issue regarding the Applicant's functionality was a matter of determination for the General Division, based upon its assessment of the evidence. Essentially, the Applicant is seeking a reconsideration and reweighing of the evidence, which is beyond the purview of the Appeal Division.

[21] At paragraph 55, the General Division found that the Applicant had not attempted alternate employment within her functional limitations and medical conditions since her employment with Claire's Home Care Services Ltd. The Applicant argues that this represents an erroneous finding of fact, as she claims that there was evidence that she had attempted other employment other than as a care aide. She explains that her employment with Claire's Home Services was sedentary but that she was unable to meet the requirements of the position and was terminated due to her health and medical issues. She relies on the employer's notice of termination (GD5-6 to 7), which does not in fact refer to any medical issues, although does confirm the Applicant's chronic absenteeism or tardiness. However, the General Division indicated that it was looking to see whether there was any evidence that the Applicant sought other employment after her position with Claire's had ended. Apart from pointing to her employment with Claire's, the Applicant does not otherwise challenge the findings of the General Division on this specific point that she had not sought other employment after May 2012.

[22] The Applicant submits that the General Division erred at paragraph 56 and in its conclusion in finding that the medical evidence does not establish that the Applicant lacks the residual capacity to pursue alternative work within her medical conditions and functional limitations, and that she had failed to satisfy the test set out in *Inclima v. Canada (Attorney General),* 2003 FCA 117. These submissions again call for a reassessment, but 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.

[23] As a final footnote, the medical records do not extend beyond December 2013 and the General Division was limited to making an assessment based on the evidence before it. It might have been of some assistance had there been updated medical records after 2013, given that the end of the Applicant's minimum qualifying period was December 31, 2015.

CONCLUSION

[24] 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 consider the reasonableness of the Applicant's limited use of medications. 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