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

Citation: *S. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 73

Tribunal File Number: AD-16-1049

BETWEEN:

S. C.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: February 27, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated May 26, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that her disability was not "severe" during the minimum qualifying period (MQP), which ended December 31, 2014.

[2] On August 25, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division an application requesting leave to appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[4] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[5] According to subsection 58(1) of the DESDA, the only grounds of appeal are 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 made in a perverse or capricious manner or without regard for the material before it.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[9] The Applicant's request for leave to appeal focused on paragraph 17 of the decision, in which the General Division wrote:

> […] There was *no* evidence provided to suggest that any of the noted physical conditions required ongoing treatment or were disabling individually or in the combination with the totality of her health condition. The Tribunal finds that neither of the physicians' finding are consistent with a severe diagnosis [emphasis added].

The Applicant's authorized representative submitted that the General Division based its decision on the following erroneous findings of fact:

(a) Paragraph 17 denied there was evidence that the Applicant required ongoing treatment, and paragraph 20 found she had not "done everything within her ability to medically assist and treat her medical conditions." These findings were made without regard for the Applicant's submission, noted at paragraph 12(b) of the decision, that she uses both prescription and over-the-counter medications.

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[1] *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

This was further supported by Dr. Boyrazian's medical report dated September 4, 2012 (GD2-50), which said the Applicant's medical treatment was "ongoing" and listed the prescription medications she was taking at the time, albeit to poor response. The Applicant's family physician went on to conclude that her prognosis was "poor." The likelihood that the Applicant's injuries will progressively worsen is supported by the May 2012 MRI of her knee, which described her condition as degenerative. In short, it is puzzling how the General Division could conclude that (i) the Applicant was not under treatment and (ii) had she been under treatment, her condition would have likely improved. The evidence before the General Division indicated the precise opposite of those two findings.

(b) Paragraph 17 also found that the Applicant's disability was not severe. This finding of fact was made without regard to Dr. Boyrazian's medical report, in which he noted that his patient's combination of a torn and osteoarthritic right knee ACL, chronic depression and obesity resulted in "disabilities that are prolonged and severe." Dr. Boyrazian also stated that she was "unfit to resume any type of gainful job at present." This finding, in conjunction with her representative's submissions that she suffered an acute lack of functional capacity, provided a persuasive suggestion that the Applicant's condition was indeed disabling as of the MQP.

ANALYSIS

No Ongoing Treatment

[10] The Applicant submits that the General Division erred in categorically stating that there was *no* evidence of "ongoing treatment," pointing to her use of prescription and non-prescription medications and her family doctor's description of her treatment as "ongoing."

[11] I see an arguable case on this ground. Dr. Boyrazian's medical report indicates that the Applicant was prescribed antidepressants and painkillers more than two years prior to the end of her MQP. Much depends on whether there was evidence that she continues to take medication and whether the General Division's use of the words "ongoing treatment" could reasonably be

held to encompass passive intake of medication, as opposed to more active interventions, such as physiotherapy or surgery. The parties should also bear in mind that the General Division's error, if it was that, is returnable only if it was a significant factor in the decision outcome and "perverse or capricious" or "without regard for the material."

[12] The Applicant stands on shakier ground in her claim that the General Division erred when it found she had not pursued treatment. There was evidence that the Applicant had refused to submit to arthroscopic surgery, and the General Division devoted paragraph 20 to an analysis of whether this was a reasonable choice, ultimately concluding, having weighed the evidence, that it was not. The General Division cited case law in support of its decision to draw an adverse inference from the Applicant's failure to help herself, and I see no error, and thus no arguable case, on this ground. The mere fact that a doctor deemed her prognosis "poor" or her condition "degenerative" did not relieve the Applicant of the obligation to mitigate her impairment by seeking appropriate treatment.

Finding of Non-severity

[13] The Applicant also alleges the General Division erred in paragraph 17 when it found no evidence of a "severe" condition.

[14] I see no reasonable chance of success on this ground. Whether the Applicant's impairments crossed the threshold to "severe," as it is defined by subparagraph 42(2)(*a*)(i) of the CPP, is, of course, one of the central questions of appeals of this kind. Merely expressing disagreement with the General Division's decision does not constitute a valid ground of appeal, and I find the Appellant's submissions on this point to be so broad that they amount to a request to reconsider the evidence on its merits. An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) and whether any of them have a reasonable chance of success.

[15] The Applicant alleges the General Division disregarded Dr. Boyrazian's medical report, but I see no indication of this in its decision, which summarized and meaningfully weighed the available medical evidence before concluding the Applicant did not meet the applicable

legislative criteria. The fact that Dr. Boyrazian declared her unfit to work because her disabilities were "prolonged and severe" does not by itself decide the matter; only the General Division has the jurisdiction to apply the law to the facts and determine whether the Applicant qualifies for the CPP disability pension.

CONCLUSION

[16] I am allowing leave to appeal on the sole ground that the General Division may have based its decision on an erroneous finding of fact, specifically its determination that there was no evidence that the Applicant was receiving "ongoing" treatment.

[17] I invite the parties to provide submissions on whether a further hearing is required and, if so, what type of hearing is appropriate.

[18] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division