Citation: *P. K. v. Minister of Employment and Social Development,* 2017 SSTADIS 120

Tribunal File Number: AD-16-1134

BETWEEN:

P. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 27, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated July 20, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible for the disability benefit under the *Canada Pension Plan* (CPP), because her disability was not “severe” prior to the minimum qualifying period (MQP) ending on December 31, 2008.

[2] On September 19, 2016, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. Following a request for further information, the Applicant perfected her appeal on October 11, 2016, within the specified time limitation. 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 the 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 AND ANALYSIS

[9] The Applicant's submissions of September 19, 2016 and October 11, 2016 contained detailed commentary and annotation of the General Division's decision. She cited several instances in which she alleged the General Division based its decision on erroneous findings of fact. I have summarized and addressed these allegations below.

Inaccuracies in Summary of Applicant's Testimony

[10] The Applicant states that she never went to physiotherapy, contrary to the General Division's suggestion in paragraph 29 of its decision, and she never said that she saw Dr. Haapala, her family physician, on a weekly basis, contrary to the assertion in paragraph 30. In addition, it is not that she "did not fully understand the difference between provincial plans and

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

the CPP disability benefit," as the General Division wrote in paragraph 31, but that she was misinformed by a representative of the Respondent when she initially made her inquiry.

[11] My review of the audio recording of the hearing indicates that the Applicant testified that she and her family physician agreed that it was not worthwhile to travel to Sault Saint Marie from Thessalon for physiotherapy, when the lengthy drive there and back would likely undo whatever benefit was produced by the sessions. It appears the General Division misunderstood this point and assumed that the Applicant had attended at least a few sessions of physiotherapy:

> [29] She discussed physiotherapy with her physician. However she has to go to the Sault for treatment, a one hour drive away. Driving an hour makes her sore, then attending a half hour of physiotherapy makes her feel better but the hour drive back home annuls the benefit and she is sore again. Together they decided it would not be of benefit.

[12] I agree that the General Division made a minor error in this instance, but I do not see it as perverse, capricious or made without regard for the record. Moreover, I do not think the decision turned on this misapprehension; indeed, the General Division gave the Applicant credit for more treatment than she actually received.

[13] As for the frequency of the Applicant's visits to her family physician, the General Division asked her how often she saw Dr. Haapala at the 37:20 mark. She replied, "Whenever I need to." Again, while the General Division's decision refers to weekly visits, I do not see this as a material error.

[14] If, as the Applicant alleges, she was misled about her CPP disability eligibility by Service Canada staff, that does not in itself render untrue the General Division's assertion that she did not fully understand the difference between federal and provincial disability plans. As an aside, if she was, in fact, the victim of poor guidance, she may have recourse under subsection 66(4), which authorizes the Respondent to offer relief where it is satisfied a claimant has received erroneous advice. However, the Tribunal cannot provide a remedy under the provision if the Minister has chosen not to exercise that discretionary power.

[15] I see no arguable case on these grounds.

Mental Health Treatment and Progression of Condition

[16] The Applicant objects to the General Division's statement, in paragraph 37 of its decision, that she had never seen a mental health specialist and that her family physician described her condition as "stable and managed with medications." The Applicant maintains that both of these statements are inaccurate. Indeed, Dr. Haapala said that her condition has been the same for years.

[17] I see no reasonable chance of success on these grounds. First, paragraph 37 is clearly meant to be a distillation of the Respondent's submissions, and they cannot be said to represent findings of fact by the General Division. From what I can determine, the General Division faithfully conveyed the Respondent's position, and I note that Dr. Haapala did in fact describe her condition as "relatively stable" (GD2-50). As well, I see nothing in the record to indicate that the Applicant has, in fact, seen a mental health specialist.

Finding of Disability by Private Insurer

[18] The Applicant alleges that the General Division erred when it cited the test for CPP disability in paragraph 38 of its decision but failed to give consideration to the fact that she was deemed disabled by Great West Life, an independent insurance board.

[19] I do not see an arguable case on this ground. Private disability insurance plans are governed by a set of criteria that differ significantly from the CPP disability regime, and the Applicant's approval by Great West Life had no applicability to the proceeding before the General Division.

Efforts to Continue Working

[20] The Applicant submits that the General Division erred when it suggested that she had made insufficient effort at maintaining her employment. In fact, after going on sick leave in 2006, she did return to work because she needed the income but then realized that she was no longer capable of doing her job. She feels that she demonstrated a willingness to try to continue working despite her disability.

[21] Again, I find no reasonable chance of success on this ground. In paragraph 15, the General Division relayed the Applicant’s testimony on this subject as follows:

> The Appellant explained that she had suffered from back pain since about 2003. She would take Ibuprofen to control the pain but by October 2006 her sleep was interrupted and she decided to stop work. She went on EI sick benefits until they expired. At that time, there being no light duty for a lead hand at a plywood mill she made the decision not to return to work.

[22] Having listened to the audio recording of the hearing, I heard nothing to contradict this account. I also note that, in her CPP questionnaire (GD2-64), the Applicant wrote: “In 2006, when I left work, I was stressed out and in pain. I went on EI and never went back.”

[23] The General Division correctly cited relevant jurisprudence surrounding mitigation in paragraph 41 and went on to find the following in paragraph 43:

> Since making the decision to stop working the Appellant has not sought any other type of employment stating that with her physical limitations on walking, sitting, bending, reaching and carrying together with her fatigue and inability to focus and concentrate as well as memory problems all due to pain she cannot identify what kind of work would be available for her to perform.

[24] In my view, the General Division had reason to find that the Applicant, despite her submissions before the Appeal Division, did not make a significant attempt to remain in the workforce. Even if the General Division had found that the Applicant returned to the plywood mill after receiving Employment Insurance benefits, the evidence would have still showed that she had not investigated lower-impact employment alternatives.

Tenure at Mill

[25] In paragraph 42, the General Division wrote that she “worked in a mill for most of her working life.” The Applicant has no idea where that information came from, as she did not start millwork until 2002 or 2003.

[26] I see no arguable case on this ground. Having reviewed the evidentiary record, I am satisfied that the General Division committed a factual error “without regard for the material” on this point, as it appears the Applicant was employed by a plywood processor for only 2½ years of a working career that extended, albeit sporadically, as far back as the late 1970s.

However, under paragraph 58(1)(*c*), an error of fact is grounds for appeal only if the General Division *bases its decision* on it. In my view, the error was immaterial. I see no indication that the General Division's decision was significantly influenced by this relatively minor misapprehension of fact.

Availability of Work

[27] The Applicant disputes the General Division's assertion, in paragraph 43 of its decision, that the availability of work is not a relevant consideration in determining disability.

[28] I see no arguable case on this point, although I understand the Applicant's confusion. It appears the General Division cited *Canada v. Rice*[3] in support of the proposition that socio-economic factors such as labour market conditions are irrelevant in determining whether an individual is disabled, with the focus properly on an applicant's personal circumstances, not on whether real jobs are available. This happens to be valid law, but since it is not clear to me that the Applicant pleaded non-availability of suitable work during the proceedings, I am not sure how this point was relevant to the General Division's analysis. That said, in the context of the entire decision, I do not think it was a significant factor in the outcome.

Inference of Retrospective Severity

[29] In paragraph 44, the General Division found that, on a balance of probabilities, the Applicant was disabled as of the date of the hearing, yet it also found that she was likely not disabled as of December 31, 2008. In making this determination, the Applicant alleges that the General Division disregarded her doctor's note stating that that her disability had been the "same for years." It was thus reasonable to infer that she was incapable of work from 2006 onwards.

[30] The Applicant's hearing date came more than seven years after her MQP, a length of time in which there was ample scope for her condition to deteriorate. The General Division was making a reasonable point that being disabled now does not mean one was disabled in the past.

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[3] *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47.

However, it is a leap in logic to suggest, as does the Applicant, that a physician's vague mention of the longevity of his patient's condition demands an inference of retrospective "severity" going back to the MQP.

[31] Here, I see no error on the part of the General Division and find this ground has no reasonable chance of success on appeal.

Severe and Prolonged

[32] In her submissions of October 11, 2016, the Applicant added that she believed she was disabled before her MQP. She felt that her claim for benefits should not have been prejudiced because of the length of time it took her to obtain a diagnosis. She has suffered from chronic pain for years, and it will not get any better.

[33] The Applicant also enclosed the following documents:

- An attending physician statement prepared by Dr. Eric Haapala, general practitioner, on July 30, 2008, pursuant to an application for private disability insurance;
- A diagnostic imaging report of the lumbar spine, elbows and hands dated March 13, 2009; and
- Dr. Haapala's clinical note dated July 15, 2008.

[34] The Applicant suggests that the General Division dismissed her appeal despite medical evidence indicating that her condition was "severe and prolonged" according to the criteria governing CPP disability.

[35] However, outside of this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the General Division analyzed in detail the Applicant's medical conditions—primarily osteoarthritis and chronic pain—and how they affected her capacity to regularly pursue substantially gainful employment. In doing so, the General Division took into account

the Applicant's education and employment history before concluding there was insufficient evidence of incapacity as of the hearing date. The General Division's decision closed with an analysis that suggests it meaningfully assessed the evidence and had defensible reasons supporting its conclusion. I see no indication that the General Division ignored, or gave inadequate consideration to, any significant component of the evidence that was before it.

[36] As for the medical documents that were submitted with this appeal, I note that one (the imaging report) was already made available to the General Division, while the other two have been newly produced. Unfortunately, the Appeal Division has no mandate, given the constraints of subsection 58(1) of the DESDA, to re-hear disability claims on their merits, nor does it ordinarily accept new evidence. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations*. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also need to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[37] I see no arguable case for the grounds claimed by the Applicant.

CONCLUSION

[38] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division