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

Citation: *G. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 126

Tribunal File Number: AD-16-329

BETWEEN:

G. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: March 29, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada, dated November 20, 2015, which determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable to her.

[2] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the *Department of Employment and Social Development Act* (DESDA):

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.

[3] Pursuant to s. 56(1) of the DESDA, "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." Accordingly, I must determine whether the Applicant's appeal has a reasonable chance of success on at least one of the permissible grounds.

ANALYSIS

[4] A leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and lower hurdle to be met, and the Applicant does not have to prove the case at the leave stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal may succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human*

Resources Development) v. Hogervorst, 2007 FCA 41. Leave ought not to be granted on a purely theoretical basis, where there is no claim or evidence underpinning a particular ground of appeal: *Canada (Attorney General) v. Hines*, 2016 FC 112.

[5] In support of the leave application, the Applicant's representative argues that the General Division made a number of errors, which he categorized within ss. 58(1)(*a*) and (*c*) of the DESDA.

[6] First, the representative notes that the Applicant "should receive an impartial hearing so she may put forth his [*sic*] evidence of his [*sic*] disability." However, the representative fails to provide any information as to how the hearing before the General Division was not impartial, or how the Applicant was precluded from presenting her evidence. I note that the representative had supplemented the record with additional medical evidence in July 2015, and the Applicant provided oral testimony during a hearing by videoconference in October 2015. In the absence of any specific allegations, I see no reasonable chance of success with respect to a potential failure to observe a principle of natural justice.

[7] Secondly, the Applicant's representative outlines a number of errors "regarding the facts." He states that the General Division member failed to apprehend the significance of the poor prognosis given by the family physician. I note that, in paragraph 13, the member mentions the statement in the June 2012 Medical Report that the prognosis for the Applicant's osteoarthritis was poor. The member does not restate this evidence in his analysis, presumably because the prognosis, made six months beyond the end of the qualifying period (December 2011), is irrelevant to the severity of disability prior to December 2011. A medical prognosis is a forecast of the likely course of an ailment, and thus relates to a prospective rather than retrospective period. Similarly, the representative asserts that the member failed to apprehend the significance of the fact that the Applicant has had multiple surgeries without major improvement. As he points out, the first surgery was in February 2013. The timeframe for the surgeries, and lack of improvement, is thus well beyond the Applicant's qualifying period, and again irrelevant to the extent of her disability prior to December 2011. I see no reasonable chance of success in respect of these arguments.

[8] The Applicant's representative also points out specific errors in the member's recitation of the evidence. Whereas paragraph 10 indicates that the Applicant testified that her family physician had given her a knee injection, the representative asserts that only the orthopedic surgeon provided injections. Even assuming that the member made an implicit finding of fact that the Applicant had received an injection from her family doctor, and even assuming that this is incorrect as claimed, the matter of which practitioner(s) had injected the knee is not one upon which the General Division based its decision. The ground of appeal under s. 58(1)(*c*) arises only when 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. A potential error in an immaterial finding of fact does not raise an arguable case, and I do not find the Applicant to have a reasonable chance of success in this respect.

[9] The Applicant's representative also points out that "OA", likely referring to osteoarthritis, is mentioned in a clinical note on March 14, 2011. Having expressed some difficulty in reading the handwritten clinical notes, the General Division member was unable to find a legible entry regarding the knees prior to May 2011. I agree that he may not have recognized the apparent reference to osteoarthritis in March 2011, but find that an earlier diagnosis ultimately would not have affected his analysis. In his conclusion, the member based his decision on a number of factors, including "the lack of medical evidence between the time the Appellant stopped work in 2009 and May 2011." In this context, the fact that there was a relevant clinical note in March rather than May 2011 does not alter the essence of the member's finding, which focused upon the substantial gap in medical evidence beginning with the layoff from work in 2009. Moreover, the member emphasized that such medical evidence could have provided "important information on how her knee problems affected her ability to function at work"; this absence of contemporaneous evidence of the Applicant's functional abilities would not have been rectified by the earlier mention of OA, with no further detail, in the March 2011 clinical notes. As required by the statutory definition of a severe disability, the member's analysis focused upon evidence of the Applicant's function and capacity to work, rather than her diagnosis. I see no reasonable chance of success with respect to the possible oversight of an earlier osteoarthritis diagnosis in the clinical notes.

[10] It is unclear to me what the Applicant's representative means when he states that the General Division "failed to recognize that the appellant had made notes just as Dr. Hanna comments in her clinical notes dated June 18, 2012." That clinical note states "knee pain; can't do house work; can't walk longer than 1 block; unable to work x 3 years… OA severe… applying for disability…", and does not refer to any notes made by the Applicant. The June 18, 2012 clinical note is accurately described in paragraph 26 of the General Division decision. It is the role of the General Division to consider and weigh the evidence. As discussed above, it is apparent from the member's analysis that he placed greater weight on the lack of contemporaneous evidence regarding the Applicant's function than on Dr. Hanna's retrospective report of the Applicant's assertion that she had been unable to work for three years. I see no reasonable chance of success on the basis that the General Division member overlooked this clinical note.

[11] Finally, the Applicant's representative submits that the General Division member "must keep in mind factors such as ages [*sic*], level of education, language proficiency and past work and life experience" in accordance with *Villani v. Canada (Attorney General)*, 2001 FCA 248. In submitting that the Applicant's chances of returning to suitable employment are diminished in a real-world context, the Applicant's representative is simply attempting to re-argue his case. The General Division member explained his responsibility to consider the *Villani* factors in paragraph 24 of the decision. He made clear findings with respect to the Applicant's age, education, difficulty communicating in English and limited transferable skills, as well as the unlikelihood of retraining, in paragraph 25. These factors were not determinative of the Applicant's eligibility for benefits, in light of the member's findings with respect to residual work capacity and insufficient employment efforts. I see no reasonable chance of success on the basis that the General Division did not properly apply *Villani*.

[12] I note that the Applicant's representative also made general statements that the General Division erred by "not taking into consideration the totality of the evidence and material before it", and that "numerous reports indicated that the appellant was unable to work due to his [*sic*] condition." He did not respond to a request from the Appeal Division, in September 2016, to identify these reports. I have assumed, therefore, that the more specific errors addressed above constitute the totality of the errors claimed by the Applicant. The representative also refers

generally to evidence supporting a finding of severe disability. This assertion does not fall within the statutory grounds of appeal. The role of the Appeal Division is not to reweigh the evidence (see *Marcia v. Canada (Attorney General)*, 2016 FC 1367), and an appeal to the Appeal Division is not an opportunity to re-argue the case and ask for a different outcome.

[13] Having found that the Applicant does not have a reasonable chance of success in respect of the grounds of appeal found in the pleadings, leave to appeal is refused.

CONCLUSION

[14] The application for leave to appeal is refused.

Shirley Netten
Member, Appeal Division