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

Citation: *Minister of Employment and Social Development v. M. W.,* 2017 SSTADIS 107

Tribunal File Number: AD-16-878

BETWEEN:

Minister of Employment and Social Development

Applicant

and

M. W.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 20, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated March 27, 2016. The General Division had earlier conducted an in-person hearing and determined that the Respondent was eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found her disability was "severe and prolonged" during the minimum qualifying period (MQP), which ended on December 31, 1998.

[2] On June 27, 2016, within the prescribed time limit, the Applicant filed an application with the Appeal Division 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 "[l]eave 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] 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.

[7] At the leave stage, the Applicant does not have to prove the case. 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]

ISSUE

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

SUBMISSIONS

Applicant

[9] In its application requesting leave to appeal,[3] the Applicant offered numerous criticisms of the General Division's decision, which it categorized as follows:

Alleged Errors in Law

> (a) The General Division failed to apply the correct test for disability, disregarding the "incapable regularly" portion of the test for severity as of the Respondent's MQP. This was all the more notable considering the evidence in the file that the Respondent's condition "waxed and waned," suggesting that the condition was not regular at the time of her MQP. There was even less evidence that the Respondent was '"incapable regularly" of pursuing substantially gainful employment in December 1995, when the General Division determined that she became disabled.

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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.
[3] The substance of the Applicant's submissions are contained in a brief buried on page 374 of a 770-page submission that is comprised largely of case law.

(b) The General Division failed to apply Federal Court of Appeal jurisprudence[4] requiring CPP disability claims to be supported by objective medical evidence. The Federal Court of Appeal has also stated that a disability determination cannot be based solely on a claimant's subjective evidence.[5] In this case, the General Division concluded that the Respondent was disabled despite an absence of medical reports at the time of her MQP confirming her condition was severe and prolonged. It also relied almost entirely on the Respondent's testimony and her written statements, despite little objective medical evidence that the Respondent was disabled during the MQP.

Alleged Erroneous Findings of Fact

(a) The General Division's conclusion, in paragraph 89 of its decision, that the Respondent's disability was severe and prolonged in December 1995, is irreconcilable with the evidence before it. The clinical records of Dr. Dow, who only started seeing the Respondent in February 1995, indicate no disabling event or condition from that date to the end of the MQP.

(b) While the General Division cited the correct test for severity, it did not apply the test reasonably. There was little evidence of a severe disability in early 1995, when the General Division determined that the Respondent had become disabled, nor was there any evidence that supported a finding of severe disability at the Respondent's MQP of December 1998. The General Division appears to have ignored overwhelming evidence that the Respondent did not have a severe disability and, as such, made an erroneous finding of fact without regard for the material before it.

(c) The General Division failed to address highly probative contradictory evidence about when the Respondent might have become incapable of employment. The General Division chose to give weight to a letter written in October 2012, almost

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[4] *Villani v. Canada (Attorney General)*, 2001 FCA 248; *Gorgiev v. Canada (Minister of Human Resources Development)*, 2005 FCA; *Canada (Attorney General) v. Fink*, 2006 FCA 354; *Warren v. Canada (Attorney General)*, 2008 FCA 377.
[5] *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA.

15 years after the Respondent's MQP, which stated that the Respondent had not been able to work since February 1995. However, in her questionnaire of October 2011, the Respondent disclosed that her last day of work was in July 2008, and she stated that she could no longer work as of April 2011, 13 years after her MQP. Her family physician, Dr. Dow, also initially stated that the Respondent could no longer work as of April 2011. Although the General Division mentioned the contradictory evidence in paragraphs 52 to 54 of its decision, its analysis was deficient. A decision maker need not refer to each and every piece of evidence and is presumed to have considered all of the evidence, but where there is highly contradictory medical evidence, as there is here, the General Division must deal with it in its reasons and engage in a meaningful analysis.

(d) The General Division ignored overwhelming evidence that the Respondent's condition was not "prolonged" from 1995 onwards, according to the statutory definition, including the following documentary items:

- Dr. Dow's January 1999 clinical note, in which she remarked that the Respondent's lupus seemed "quiescent";
- Dr. Henderson's April 2002 report, in which he noted that the Respondent's energy had been "good" and that she was "staying active walking three miles four times a week";
- Dr. Pelkey's September 2009 report, in which he noted that the Respondent's lupus had been in remission for quite some time despite stopping her Plaquenil, although she continued to have "minor flares but nothing serious."

(e) The General Division erred in finding that the Respondent lacked work capacity post-MQP and that her attempts to work after 1998 were evidence that she could not pursue a substantially gainful occupation. It stated that her 2007 and 2008 earnings were not substantially gainful because the jobs she held were not

> sustainable. The Federal Court has determined that a return to work lasting only a few days can be considered a failed attempt, but not two years of earnings consistent with the claimant's history. In 2007, almost ten years after her MQP, the Respondent's Record of Earnings indicated that she earned $22,679, which was the highest amount that she had ever earned. In an earlier submission, she indicated that she returned to work from 2007 to 2008 "out of sheer financial necessity," but this cannot be relevant to the determination of whether a claimant has a severe and prolonged disability.[6]

Respondent

[10] In a written submission dated November 29, 2016, the Respondent's authorized representative argued that the Applicant's grounds of appeal had no reasonable chance of success and should be refused at leave. He maintained that the General Division did not err in law, nor did it make any erroneous findings of fact. There was sufficient medical evidence before the General Division to support its finding that the Respondent had a severe and prolonged disability as of the MQP, and it was corroborated by the Respondent's testimony, which went unchallenged during the hearing.

[11] The Respondent's representative suggested that the Applicant appeared to be incorrectly fixated on the notion that medical evidence beyond the MQP either cannot or does not speak to the Respondent's condition prior to the MQP. This completely ignored the retrospective nature of diagnoses and the practice of reviewing a patient's medical history.

[12] Finally, the Respondent submits that leave to appeal should be refused given the Applicant's failure to appear before the General Division. The Applicant is merely attempting to challenge, on appeal, evidence and testimony that it could have contested at the hearing of September 14, 2015. The responsibility to dispute facts and to question the material before the General Division rests solely with the Applicant, and it should not now be allowed to do on appeal what it should have done at the initial hearing.

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[6] *Carter v. Canada (Attorney General)*, 2008 FC 1046.

ANALYSIS

[13] Having reviewed the submissions of the parties against the record, I am satisfied that at least some of the grounds advanced by the Applicant have a reasonable chance of success on appeal. This is not the place to address in detail each and every one of the issues raised by the parties, but I will note what strikes me as the Applicant's more compelling arguments at this preliminary stage:

Pre-1999 Evidence

[14] The Respondent's MQP ended long ago, and the bulk of the available medical evidence was dated after December 31, 1998. As noted by the Applicant, the General Division referred to only two pre-1999 medical reports (Dr. Henderson's April 1996 rheumatological report and Dr. McKelvey's August 1998 neurological report), both of which suggested the Respondent's condition was stable. Instead, the General Division's analysis relied largely on the Respondent's testimony and on the retrospective assessment of her family physician, Dr. Dow, dated October 31, 2012. Although the file contained a copy of Dr. Dow's clinical notes going back to 1995, including a contemporaneous account of the Respondent's condition during the most relevant period of 1997–99, the General Division's decision made no reference to them, and it is not clear whether the General Division gave them any consideration.

[15] If not, there is an arguable case that the General Division may have breached a principle of natural justice, as well as committed an error of mixed fact and law, by failing to consider relevant, objective evidence in determining whether the Respondent's disability was "severe" as of the MQP.

Contradictory Statements Regarding Date of Disability

[16] I agree with the Applicant that the Respondent and her treatment providers appear to have, at different times, put forward various dates to mark when she was no longer capable of employment. The General Division chose to accept Dr. Dow's October 2012 opinion that the Respondent had been disabled since early 1995, but it did not attempt to reconcile this date with ostensibly contradictory evidence, including the family physician's earlier statement implying that she was capable of work as late as April 2011.

[17] I see an arguable case that the General Division may have made a finding of fact on this question without regard for the material before it. I also see a potential argument that the General Division breached a rule of natural justice by failing to provide intelligible reasons to support a material finding.

Post-MQP Employment

[18] The General Division addressed the Respondent's work after December 31, 1998 as follows:

> [82] The Appellant testified to the various jobs she held after the MQP date. While it is true that she held various term positions for short period of times, the Tribunal cannot evacuate the fact that these jobs have all been marked with significant difficulties. These difficulties are evidences by the ongoing problems to maintain employment, the need for constant breaks and pace herself. On this specific topic, the Appellant offered candid but compelling evidence that she was trying hard to maintain employment but was unable to do so. The Tribunal accepts this evidence without reserve.
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> [83] While the Appellant had earnings in 2007 and 2008, these earnings simply cannot equate to a substantially gainful employment because the jobs she held during this period of time was clearly not sustainable for her. In fact, it led to a flare-ups [*sic*] of her health issues and the impossibility to continue with these jobs. In fact, this trend of trying and failing has been consistent for years after the MQP date.

[19] The Respondent persuaded the General Division that her post-MQP employment consisted entirely of a series of work trials that failed because symptoms related to her lupus prevented her from offering regular performance. However, I do see an arguable case that the General Division misapplied the prevailing case law when it found that her more than $22,000 earnings from her desk job at a rehabilitation centre fell short of "substantially gainful." The Applicant has also pointed to documentary evidence, unaddressed by the General Division, that the Respondent left this job for reasons other than just her medical condition.

CONCLUSION

[20] I am allowing leave to appeal on all grounds claimed by the Applicant.

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

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

Member, Appeal Division