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

Citation: *R. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 128

Tribunal File Number: AD-16-696

BETWEEN:

R. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: March 29, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 11, 2016, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe".

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (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 erred in finding that she will recover from an L5-S1 herniated disc, given the medical evidence. She suggests that there is

medical evidence that supports a finding that her disability is severe and prolonged. She filed the following in support of her application requesting leave to appeal:

- medical letter of Dr. M. Gosal, dated May 9, 2016
- medical letter of Dr. Gerald Nemanishen, dated January 10, 2016
- medical letter of Dr. Navraj Heran, dated February 11, 2016
- MRI of lumbar spine, dated January 7, 2016

[6] The General Division accepted that the Applicant has long-standing chronic back pain and that it significantly limits her, particularly with prolonged walking, sitting and standing. Although the Applicant argues that the General Division found that she will recover from her L5-S1 herniated disc, the member did not actually make this finding. However, she did note Dr. Gosal's opinion of July 29, 2013, that the Applicant would likely recover over 3 to 12 months. The member noted that the Applicant's neurosurgeon had strongly recommended that she consider a left-sided L5-S1 discectomy and that he was surprised that she preferred conservative treatment. The member also noted the Applicant's testimony that, given the severity of her pain, she would undergo surgery, yet she had declined and had not proceeded with this option. There were few other options available to her to otherwise alleviate the severity of her pain and to improve her overall functionality. The member noted that the Applicant had undergone epidural injections, but these provided only temporary relief.

[7] Drs. Gosal and Heran provided opinions that the Applicant is incapable of working because of severe L4-5 and L5-S1 disc herniations. The General Division was mindful of these two medical opinions but held that the Applicant is under a duty to consider and pursue all reasonable treatment recommendations. In this case, the General Division determined that it was unreasonable that the Applicant had not pursued the "strongly recommended left sided L5-S1 discectomy recommended by Dr. Heran on May 1, 2014". After all, as the member suggested, more interventionist treatment could result in some improvement, such that it could render her capable regularly of pursuing any substantially

gainful occupation. In this regard, I note that the Federal Court of Appeal has determined that a claimant's unreasonable refusal to follow recommended treatment may be fatal to his or her claim for disability benefits: *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[8] The Applicant is requesting that the Appeal Division reconsider and reassess her claim, on the basis of the medical records that she filed with her leave application. The General Division had copies of the MRI and medical letters of Drs. Nemanishen and Heran. The medical letter of May 9, 2016 was prepared after the hearing before the General Division. In it, Dr. Gosal noted that the neurosurgeon, Dr. Heran, had seen the Applicant on February 11, 2016, and that he had expressed the same opinion that the Applicant is disabled from work due a disc herniation and associated severe chronic recurrent low back pain.

[9] A reassessment is not a ground of appeal under subsection 58(1) of the DESDA. As the Federal Court determined in *Tracey*, the DESDA does not confer any jurisdiction on the Appeal Division to conduct a reassessment or reweigh the factors considered by the General Division when determining whether to grant or refuse leave to appeal. The Federal Court also held in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference".

[10] Similarly, it has now become well-settled law that new evidence generally does not constitute a ground of appeal. As the Federal Court held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367:

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v. Canada (Attorney General)*, 2014 FC 1100 at para 73).[…]

[11] New evidence can be considered on an appeal to the Appeal Division only under very limited circumstances, where they address any of the grounds of appeal. Those

circumstances, however, are not present here to enable me to consider Dr. Gosal's medical opinion of May 9, 2016.

CONCLUSION

[12] The application for leave to appeal is refused. I note, however, that the Applicant still has the opportunity to reapply for a disability pension because the information that is available concerning her Canada Pension Plan contributions indicates that her minimum qualifying period is not scheduled to end before December 31, 2019.

Janet Lew
Member, Appeal Division