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

Citation: *C. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 142

Tribunal File Number: AD-16-569

BETWEEN:

C. L.

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: April 4, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated January 19, 2016. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2010, or with proration, by February 28, 2011.

[2] The Applicant applied for leave to appeal on April 14, 2016. She submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond and refused to exercise its jurisdiction, that it erred in law, and that it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner without regard for the material before it. She can only succeed on this application if I am satisfied that the appeal has a reasonable chance of success.

ISSUE

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

SUBMISSIONS

[4] 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.

[5] Before leave can be granted, 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 of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[6] The Applicant argues that the General Division made the following errors:

(i) It failed to give significant weight to the medical opinion of her primary treating physician from 2008 to 2013. She argues that her physician was in the best position to observe her and provide an opinion on whether she was employable and whether her condition was severe and prolonged.

(ii) It selectively referred to evidence and drew "unfair and unfounded conclusions" without any evidentiary basis. She claims, for instance, that the General Division found that, had she not stopped taking medications, she might have otherwise seen some pain relief.

(iii) It failed to consider or give any weight to her testimony that:

i. she had stopped taking medication as it "made [her] feel like a zombie";

ii. she had purchased a swimming pool, done home exercises and been prescribed medical marijuana for medical management;

iii. the Workplace Safety and Insurance Board (WSIB) had stopped a labour market re-entry academic retraining program as it aggravated her chronic back disability, which caused her to be unable to continue attending;

iv. she was unable to complete a three-month WSIB placement, at which she performed various clerical duties for a few hours a day, as the duties aggravated her neck, back, elbows and bilateral carpal tunnel syndrome, and also caused severe headaches; and

v. she had unsuccessfully attempted numerous treatment modalities.

(iv) It found that her participation in a vocational rehabilitation program demonstrated capacity.

[7] The Applicant contends that the evidence clearly shows that she was compliant with all treatment recommendations, and that she attempted academic retraining and employment, but that her efforts failed due to severe and prolonged disabilities.

ANALYSIS

(a) Weight of evidence

[8] The Applicant argues that, as her family physician was in the best position to provide an opinion on her disability from 2008 to 2013, the General Division should have assigned more weight to his opinions. The Applicant argues that there was other evidence too that merited having greater weight assigned to it.

[9] The issue of the weight to be ascribed to evidence does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Federal Court of Appeal has declined to interfere with a decision-maker's assignment of weight to the evidence, holding that weighing evidence is a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. Similarly, I would defer to the General Division's assessment of the evidence. As the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I am therefore not satisfied that the appeal has a reasonable chance of success. I cannot conclude that the General Division should have placed more weight or given greater consideration to the medical report of the Applicant's family physician, or to some of the other evidence, such as her treatment efforts and her participation in a labour market re-entry program or work placement.

(b) Unfounded conclusions

[10] The Applicant argues that the General Division selectively referred to evidence and drew "unfair and unfounded conclusions" without any evidentiary basis. She claims, for instance,

that the General Division found that had she not stopped taking medications, she might have otherwise seen some pain relief. She explains that she stopped taking medication because of the adverse side effects. The General Division noted the Applicant's evidence in this regard at paragraph 12 of its decision.

[11] At paragraph 41, the General Division made the following findings:

> The evidence established the Appellant stopped taking medications for pain on her own initiative, did not pursue Lidocaine intravenous infusions or other therapy, which might reasonably be expected to provide relief of pain and/or permit the Appellant to better cope with pain. The Tribunal concluded the Appellant's condition might reasonably have been ameliorated, or could be ameliorated, and therefore could not be determined to be of indefinite duration and, accordingly, prolonged.

[12] The findings made by the General Division that the Applicant might see some relief or be better able to cope were not limited to the Applicant's use of pain relief medication. The General Division also indicated that the Applicant had received other treatment recommendations, but had yet to pursue them.

[13] The General Division made these findings in the context of whether the Applicant's disability was prolonged. In concluding that the Applicant might have seen some relief had she pursued treatment recommendations, the General Division relied on *Smith v. Minister of Human Resources Development* (May 29, 1998), CP 5068 (PAB), a decision of the Pension Appeals Board. While there may not have been any definitive medical evidence that improvement or pain management was imminent with medication or other treatment, it was reasonable for the General Division to have concluded that there might be some improvement, based on the legal authorities. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(c) Other evidence

[14] The Applicant submits that the General Division failed to consider some of the evidence relating to her treatment and her participation in a WSIB work placement and labour market re-entry program. She suggests that the General Division should have recognized that her disabilities ultimately forced her to stop.

[15] The Applicant indicates that she was unable to complete the programs, but the decision suggests that the Applicant managed to complete both the labour market re-entry program and the work placement. At paragraph 30, the General Division wrote that the Applicant attended a WSIB labour market re-entry educational upgrading, job search training, and job placement program from 2010 to 2012. There is no indication in the decision that the Applicant stopped participating in either the labour market re-entry program or the work placement, for reasons relating to her disabilities. The General Division based its decision that the Applicant had some work capacity, in part, on the fact that she had participated in the labour market re-entry program and work placement. If indeed the Applicant was forced to prematurely stop participating in either the labour market re-entry program or work placement program for medical reasons, and if the General Division found that the Applicant had otherwise fully participated in these two programs over two years, then this could constitute an erroneous finding of fact for the purposes of subsection 58(1) of the DESDA.

[16] The Applicant will need to refer me to the evidence that was before the General Division to support her allegations that she stopped and did not fully participate in the labour market re-entry program or work placement program, if she is to establish that the member made an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it.

(d) Vocational rehabilitation

[17] The Applicant argues that the General Division erred as it found that her participation in a vocational rehabilitation program was evidence of work capacity. The General Division wrote:

> [34] The Tribunal determined the Appellant's participation in the WSIB LMR program, the Appellant's conservative treatment prior to and subsequent to her MQP, the absence of any treatment by specialists, and the minimal pathology shown on investigative reports, constituted evidence of work capacity as at the date of the Appellant's MQP, and at the completion of the LMR program.

[18] The General Division considered several factors such as the fact that the Applicant had conservative treatment and had not been seen by any specialists, in assessing whether the Applicant demonstrated work capacity. The General Division did not view the Applicant's

participation in a vocational rehabilitation program in isolation or as the determinative factor in assessing work capacity or severity. The General Division also examined some of the duties that the Applicant performed. It recognized that the Applicant experienced pain, but nonetheless determined that she was able to complete the program. Given that the General Division considered several other factors, and more significantly, examined, to some extent, the nature of the vocational rehabilitation program, ordinarily I would find that there is no arguable case on this ground. However, this ground may be inter-related to the Applicant's contention that she did not complete the vocational rehabilitation program and, for that reason, the appeal may have a reasonable chance of success on this ground too.

CONCLUSION

[19] The application for leave to appeal is granted. This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division