



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. D. B.*, 2017 SSTADIS 140

Tribunal File Number: Appeal Division-16-980

BETWEEN:

Minister of Employment and Social Development

Applicant

and

D. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: April 3, 2017

REASONS AND DECISION

INTRODUCTION

[1] On April 29, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal of a decision of the Minister of Employment and Social Development (Applicant). The Respondent had been denied benefits on a claim for a disability pension under the *Canada Pension Plan* (CPP). The Applicant appealed to the General Division of the Tribunal.

[2] The General Division held a hearing by videoconference, and it determined that:

- a) The Respondent had a "severe" and "prolonged" disability in May 2008;
- b) She applied for CPP disability benefits in July 2012;
- c) She is, therefore, deemed disabled in April 2011; and
- d) Payments of CPP benefits start as of August 2011.

[3] Based on these conclusions, the General Division allowed the appeal.

[4] The Applicant filed an application for leave to appeal (application) with the Appeal Division of the Tribunal on July 29, 2016, within the 90-day time limit.

ISSUE

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

LAW AND ANALYSIS

[6] Pursuant to paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, “An appeal to the Appeal Division may only be brought if leave to appeal is granted” and “The Appeal Division must either grant or refuse leave to appeal.”

[8] Subsection 58(2) of the DESD Act provides that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[9] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

[10] The Applicant’s grounds of appeal are that the General Division erred in law and made an erroneous finding of fact in arriving at its decision. The Applicant’s arguments can be summarized as follows:

- a) The General Division erred in law when it failed to consider binding Federal Court of Appeal jurisprudence on the meaning of “severity” under the CPP, in particular, it erred in its application of (or failure to apply) *Villani v. Canada (Attorney General)*, *Gorgiev v. Canada (Minister of Human Resources Development)*, *Warren v. Canada (Attorney General)*, *Canada (Attorney General) v. Fink*, *Klabouch v. Canada (Minister of Social Development)*, *Miceli-Riggins v. Canada (Attorney General)*, and *Canada (Minister of Human Resources Development) v. Angheloni*.
- b) Contrary to this jurisprudence, the General Division relied almost entirely on the Respondent’s testimony.

- c) There was no supporting medical evidence that the Respondent was unable to do sedentary work, modified activities or part-time work.
- d) The General Division accepted that the Respondent could not do any type of work based on her assertion that her physician “knows that she cannot do any type of work”; however, there is no indication in the record that this is the opinion of the Respondent’s physician.
- e) The General Division accepted that the Respondent had been seen “by various treatment providers with no change to her pain symptoms”; however, there is no evidence in the record to support this finding and there is contradictory evidence in the report of Dr. Hudy (stating that the Respondent had not been referred for any consultations or further medical investigations).
- f) Dr. Hudy’s medical report does not suggest that the Respondent had a severe and prolonged disability within the meaning of the CPP; it suggests that the Respondent retained a capacity to do modified, sedentary or part-time work - not that she could not do any type of work. It also stated that the Respondent’s condition was “status quo,” which is not the same as permanent.
- g) The General Division ignored evidence that the Respondent’s condition was not severe and prolonged and relied on findings of fact that were unsupported or even contradicted by the medical record.

[11] The General Division summarized the medical evidence in the file as follows:

Medical report in support of CPP disability benefits

[16] On July 19, 2012 the Appellant Dr. Hudy, family physician, submitted a medical report in support of the Appellant’s CPP disability benefits.

[17] Dr. Hudy detailed that she had been the Appellant’s family physician for 5 years and that she had started treating the Appellant for her primary medical condition in 2006.

[18] Under the heading of diagnoses Dr. Hudy detailed the following:

a) Fibromyalgia; b) Chronic pain syndrome; c) Hypertension; d) COPD; and e) Increased body mass index.

[19] Dr. Hudy also noted that the Appellant had a decreased ability to ambulate, chronic pain syndrome and that she was unable to walk. Dr. Hudy further noted that no further consultations or medical investigations were planned and that the Appellant's prognosis was status quo.

Additional medical evidence

[20] The Appellant submitted a number of diagnostic imaging reports. These documents are generally of little assistance in clarifying the Appellant's functional limitations and capacity to perform employment.

[12] The General Division decision determined an effective payment date of August 2011. It did so on the basis of an MQP date of December 31, 2011, a CPP application date of July 2012, and a deemed disability date of April 2011.

Alleged Errors of Law

[13] The General Division decision does not mention any of the jurisprudence referred to in the application. The only law it refers to is the CPP (sections 42 and 44).

[14] As for medical evidence, the General Division refers to one medical report of Dr. Hudy (dated July 2012) and "a number of diagnostic imaging reports" that it found to be "of little assistance." The General Division's decision found that Dr. Hudy noted, among other things, that "no further consultations or medical investigations were planned."

[15] The Applicant argues that the General Division relied almost entirely on the Respondent's testimony and that this approach is contrary to established jurisprudence of the Federal Court of Appeal.

[16] The General Division decision refers to and summarizes one medical report. It notes that diagnostic imaging reports were of little assistance. Upon review of the record, there does not appear to be any other medical evidence in the file.

[17] In the circumstances, whether the General Division erred in law in making its decision warrants further review.

Alleged Erroneous Findings of Fact

[18] As for the Applicant's arguments that the General Division ignored evidence in the record that the Respondent's condition was not severe and prolonged, specifically, Dr. Hudy's report that suggests that the Respondent retained capacity to do modified, sedentary, or part-time work and that her condition was "status quo," they may be inter-related to the grounds of appeal based on errors of law.

[19] In *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13, the Federal Court of Appeal cautioned that if a Board (or Tribunal) decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision. Failing to do so presents a risk that its decision will be marred by an error of law or be qualified as capricious.

[20] Moreover, the Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated that it is unnecessary for the Appeal Division to address all of the grounds of appeal raised by an applicant. In response to the Respondent's arguments that the Appeal Division was required to deny leave on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESD Act "does not require that individual grounds of appeal be dismissed [...] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." This application is one of the situations described in *Mette*.

[21] Because the errors asserted may be inter-related to the analysis of whether the Applicant's medical condition was severe and prolonged, I will not parse the grounds of appeal any further at this stage of the proceedings.

Leave to Appeal Granted

[22] On the ground that there may be an error of law, I am satisfied that the appeal has a reasonable chance of success.

[23] Because the alleged errors of law relate to the issues of insufficient or contradictory evidence, severity, and retained capacity, among others, whether 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, as it relates to the alleged errors of law, should also be considered.

CONCLUSION

[24] The application is granted under paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

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

[26] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, on the form of the hearing, and also on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division