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

Citation: *P. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 144

Tribunal File Number: AD-16-303

BETWEEN:

P. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: April 5, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On November 6, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable. The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on February 11, 2016.

ISSUE

[2] The member must decide whether 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* (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."

[4] 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."

[5] According to subsection 58(1) of the DESD Act, 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.

SUBMISSIONS

[6] The Applicant has submitted that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction in failing to consider a medical report that had been filed, but which had not been included in the record before the General Division.

[7] The Applicant further submits that the General Division should have considered the serious nature of her health condition at the time of her minimum qualifying period (MQP), and the prognosis that her health condition would deteriorate following the MQP date in determining her eligibility to receive disability pension payments under the CPP.

ANALYSIS

[8] Despite the submission of medical reports that post-date the General Division decision, the filing of new evidence is not a ground for appeal enumerated under subsection 58(1) of the DESD Act, and a reassessment or re-weighing of the evidence is beyond the scope of the Appeal Division's authority. As a general rule, the Appeal Division will proceed based on the evidence that was before the General Division (see for example *Marcia v. Canada (Attorney General)*, 2016 FC 1367). The Appeal Division is limited to the grounds of appeal enumerated in subsection 58(1) of the DESD Act, and the Appeal Division has no authority to intervene or to hear appeals on a *de novo* basis.

[9] Leave cannot be granted on the ground that the General Division failed to consider the deterioration of the Applicant's health condition following the MQP date and the date of the General Division's decision.

[10] The Applicant filed a complete Application Requesting Leave to Appeal on February 11, 2016, and additional submissions were filed on February 28, 2017. The Applicant was asked to file additional submissions with the expectation that the grounds, as stated in the application filed in 2016, would be both clarified and more fulsome with respect to both the arguments that the Applicant put forward, as well as the evidence or legal basis upon which she is basing her arguments. While there is additional information contained in the documents filed, much of the evidence filed with the request for leave to appeal post-dates both the MQP date

and the date of the General Division decision. As a result, the Appeal Division cannot consider much of the information.

[11] The first ground that the Applicant enumerated in her submissions is that the General Division had failed to observe a principle of natural justice or had otherwise acted beyond or had refused to exercise its jurisdiction. Following this statement, the Applicant asserts that her argument rests on the fact that material was missing from the record before the General Division. The Applicant fails to indicate which document she is referring to and she fails to detail the relevance of the document to the General Division's decision.

[12] The Applicant does note, in submissions dated February 2017, that "the Appellant had re-applied for Disability Benefits under the CPP legislation in 2016 based on medical reporting that had not been available to the General Division." It may be that the Applicant is seeking, through the filing of new evidence, to have the Appeal Division rescind or amend the General Division's decision.

[13] For cases related to the CPP, paragraph 66(1)(*b*) of the DESD Act sets out when the Tribunal may rescind or amend a decision. The Tribunal may rescind or amend a decision it gave in respect of any particular application if "a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence."

[14] If the Applicant wants to present evidence to rescind or amend the General Division's decision, the Applicant must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*. This duty to comply means that she must file an application to rescind or amend the decision with the General Division, because according to subsection 66(4) of the DESD Act, only the Division that made the decision is empowered to rescind or amend its decision based on new facts. In addition to filing an application, section 66 of the DESD Act requires the Applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The Appeal Division, in these circumstances, does not have jurisdiction to rescind or amend a decision based on new facts.

[15] I cannot find a basis for the assertion that the General Division has failed to observe a principle of natural justice or that the General Division acted beyond or refused to exercise its jurisdiction. Leave cannot be granted on this ground.

[16] The Applicant has also submitted that the General Division should have considered the prognosis contained in the medical reports filed that the Applicant's medical condition would deteriorate as opposed to improve. The Applicant submitted that the General Division, in making a determination regarding entitlement to a disability pension under the CPP, should have given more weight to the fact that medical reports that the Applicant had filed indicated an expectation that her medical condition would worsen.

[17] The General Division was required to determine whether the Applicant could be found disabled by her MQP date of December 31, 2012. Evident in its decision, the General Division considered all of the medical and other evidence before it. Ultimately, the General Division determined that the Applicant could not be found severely disabled by the MQP. It is irrelevant whether the Applicant's disability has deteriorated since her MQP date.

[18] The General Division identified the legal test that the Applicant was required to meet under paragraph 42(2)(*a*) of the CPP. The Appeal Division agrees that the test for disability under the CPP is a two-part test: the first step is a determination as to whether the disability is "severe"; and, the second step is to determine whether the disability is "prolonged". It may be the Applicant's position that, while the General Division considered the "severe" criterion in its decision, it failed to properly consider the "prolonged" nature of the Applicant's health condition. The test for disability is two-part and, if an applicant fails to meet one aspect of the test, then he (or she) will fail to meet the disability requirements under the legislation. The General Division correctly indicates in its decision that it is unnecessary under the circumstances to undertake an analysis on the prolonged criterion if the severe criterion is not met. In *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33, the Federal Court of Appeal stated that:

> [10] The fact that the Board primarily concentrated on the "severe" part of the test and that it did not make any finding regarding the "prolonged" part of the test does not constitute an error. The two requirements of paragraph 42(2)(*a*) of the CPP are

cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the CPP fails.

CONCLUSION

[19] The Application is refused.

Meredith Porter
Member, Appeal Division