



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 150

Tribunal File Number: AD-16-474

BETWEEN:

C. M.

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 6, 2017

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division dated December 30, 2015, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability had not been “severe” by the end of her minimum qualifying period on December 31, 2012.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and 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 under subsection 58(2) of the DESDA. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300 (CanLII).

[5] In *Mette v. Canada (Attorney General)*, 2016 FCA 276 (CanLII), the Federal Court of Appeal indicated that it is unnecessary for the Appeal Division to address all the grounds

of appeal that an applicant has raised. In response to the respondent's arguments in that case that the Appeal Division was required to deny leave on any ground that it had found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESDA "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." One such occasion is before me.

[6] The Applicant raises several grounds of appeal. The Applicant submits that the General Division erred in law and based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it. In particular, the Applicant alleges that the General Division erred:

- in failing to properly apply the "real world" test set out in *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248 (CanLII);
- in finding, without considering the Applicant's testimony or the medical evidence, that the Applicant had the capacity to perform regular part-time work, modified activities or sedentary occupations;
- in finding that, as her symptoms had improved considerably with treatment, she therefore exhibited capacity;
- in failing to properly consider the Applicant's cognitive issues; and
- in failing to consider the idea of the "competitive workforce" and how her functional and cognitive limitations impact her capacity.

[7] In essence, the Applicant is arguing that the General Division misapprehended or possibly misconstrued the evidence regarding her cognitive deficits. Each of these grounds relates to the Applicant's alleged cognitive deficits, and it is impracticable to parse the grounds in this case.

[8] The Applicant largely relies on the speech-language pathology assessment report dated July 20, 2012 (GD3-144 to 162). The Applicant notes that one of her test scores

indicated she had moderate difficulty comprehending sentences of 7 to 12 words in length in a one-on-one conversation in a quiet setting. The Applicant further notes that the assessment indicated that she had difficulty organizing and formulating her language for oral expression, and that she also had difficulty with word-finding during communicative interactions (GD3-151). She notes that the pathologist was of the opinion that she exhibited difficulties with attention/concentration, auditory comprehension, oral expression, memory, reading comprehension, written expression and areas of executive functioning (GD3-159).

[9] The Applicant argues that, with these considerations, the member failed to properly apply the “real world” test. Although the member considered the Applicant’s personal characteristics, including the fact that she is very well-educated and holds a Master’s degree in business, as well as several college and university certificates and degrees, this was without a consideration of the overall evidence. The Applicant argues that her educational accomplishments and work experience are no longer relevant in the real-world context, given the severity of her cognitive deficits, following a motor vehicle accident that occurred in January 2009.

[10] The member concluded that the Applicant’s symptoms had improved considerably with treatment. She relied on the psychologist’s medical reports dated September 27, 2012 (GD3-139 to 143), and March 5, 2013 (GD3-38 to 41/GD3-42 to 45), in coming to this finding. The Applicant argues that the member misrepresented the September 27, 2012 opinion in suggesting that there had been vast improvement in her cognitive abilities. I note in this regard that the psychologist indicated that the Applicant “still [felt] that her mind does not function as it did prior to the accident. Furthermore, the improvements in her sleep, pain and anxiety management have not led to significant cognitive gains” (GD3-142). In my review of the March 5, 2013 report, the psychologist indicated that there had been some improvement but, in his prognosis, he noted that the Applicant’s problems persisted on a daily basis, and that these included fatigue, cognitive fatigue and mental slowness. The Applicant also argues that the member overlooked the October 30, 2012 speech-language pathology progress report.

[11] Given these considerations, I am satisfied that the Applicant has raised an arguable case that the General Division may have misapprehended the evidence regarding the severity of her cognitive deficits and that other errors may have flowed from this.

CONCLUSION

[12] 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