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

Citation: *Y. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 157

Tribunal File Number: AD-16-387

BETWEEN:

Y. L.

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 12, 2017

REASONS AND DECISION

INTRODUCTION

[1] On November 29, 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 March 4, 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] 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.

[5] The Federal Court has indicated that, when deciding whether to grant leave to appeal, I need to be satisfied that the reasons that the Applicant has put forward fall within the enumerated grounds of appeal under subsection 58(1) of the DESD Act, and that the appeal has a reasonable chance of success. (*Tracey v. Canada (Attorney General)*, 2015 FC 1300 (CanLII))

SUBMISSIONS

[6] The Applicant submitted that:

i. The General Division erred by considering medical evidence that was dated post-minimum qualifying period (post-MQP);

ii. The General Division erred in failing to consider the totality of the medical evidence in the record before it;

iii. There was no evidence of work capacity and the General Division erred in applying *Inclima v. Canada (Attorney General)* 2003 FCA 117.

ANALYSIS

Considering Post-MQP Medical Evidence

[7] The Applicant has submitted that the General Division erred in law by referring to, as well as relying on, post-MQP evidence. Specifically, the Applicant has argued that it was incorrect for the General Division to consider a report from Dr. Ho, family physician, dated August 20, 2014, in which he had reported improvements to one of the Applicant's problematic health conditions. The MQP of the Applicant was determined to be December 31, 2013, or as late as January 31, 2014, if proration is applied.

[8] The General Division was required to determine whether the Applicant could be found disabled by her MQP date of December 31, 2013, or January 31, 2014. The Appeal Division agrees that evidence of deterioration of a health condition, or evidence of improvement, which postdates the Applicant's MQP, may be irrelevant for determining the "severity" of a disability on or before the MQP date in some circumstances. However, the CPP requires that in all cases a disability must be found to be both "severe" and "prolonged" on or before the MQP date. Furthermore, because it is the severity of the disability that must be prolonged, the General Division can consider evidence post-MQP in determining whether an Applicant is severely disabled on the MQP date and continuously thereafter. Dr. Ho's report dated August 2014 is, consequently, not necessarily an irrelevant report in determining a disability under the CPP. His report reflects that the severity of the Applicant's disability, following surgery in 2014, had

subsided and that the Applicant was capable of "modified light duty work". The General Division found this report to be evidence that, in assessing the severity of the Applicant's health condition, there had not been sufficient indication that the condition was severe on the MQP date and continuously thereafter.

[9] The General Division is also expected to consider the Applicant's capacity to work in a real-world context, considering such factors as age, education level, language proficiency, past-work experience and life experience (*Villani v. Canada (Attorney General)* [2002] 1 FCR 130, 2001 FCA 248). At paragraph 38, the General Division considered that the Applicant was 53 years old at the time of her MQP, with a grade 7 education that she had obtained in China. She did not pursue any further education or training since moving to Canada in 1985, but did attend two semesters of English language classes soon after she had arrived in the country. Although she has limited English language skills, her opportunities for improving her language skills were not pursued by the Applicant because she disliked learning from English-speaking instructors. She has also been successful for many years in finding employment where she could speak Cantonese, which reflects the fact that language proficiency in English has not been a factor in her inability to obtain employment. She has maintained employment in sewing and packing jobs since arriving in Canada. The General Division failed to consider that any of these factors supported the claim that "[t]here is no job in the current labour market that would allow [the Applicant] to earn a substantially gainful salary" as the Applicant has put forward.

[10] As a result, this ground of appeal is not one that has a reasonable chance of success.

Failure to Consider the Totality of the Medical Evidence

[11] The Applicant has submitted that the General Division erred in failing to properly consider the totality of the evidence in the record before it. Most of the evidence referred to in the Applicant's submissions that she relies on to support her argument on this issue, at paragraphs 24 and 25, post-dates the MQP date. I have already addressed the issue of post-MQP evidence and determined that the General Division did not err in considering evidence that reflected both an improvement in the Applicant's health condition and some work capacity. The issue that the Applicant has raised is that the General Division "selectively" considered both

pre-MQP and post-MQP medical evidence in making its determination regarding disability and work capacity.

[12] The Applicant relies on the argument that the medical evidence, in its totality, demonstrates that prescribed treatments have not corrected the Applicant's health condition, and the General Division should have assigned more weight to this evidence.

[13] The Applicant is asking the Appeal Division to reconsider the evidence and substitute its decision for the General Division's decision. As set out above in paragraph 5, the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence that the General Division has already considered. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act. It would be an improper exercise of the delegated authority granted to the Appeal Division to grant leave to appeal on grounds not included in section 58 of the DESD Act (see *Canada (Attorney General) v. O'keefe*, 2016 FC 503 (CanLII)). This is not a ground of appeal with a reasonable chance of success for which I am prepared to grant leave to appeal.

Incorrect Application of *Inclima*

[14] The Applicant has cited the Federal Court of Appeal's decision in *Inclima*, which stated that where it has been determined that an applicant has some capacity to work, it is the Applicant's burden to provide evidence of efforts to obtain and retain employment. Where efforts have been made to work, the applicant must demonstrate that those efforts have failed because of the serious medical condition.

[15] The Applicant has argued that the General Division erred in finding that she had not met the requirements under *Inclima*. In particular, she states that the General Division should not have required evidence that she had made efforts to obtain and maintain employment because the finding that there was evidence of work capacity was an erroneous finding on the General Division's part. It is noted that at paragraph 42, the General Division found that the Applicant had failed to provide evidence that she tried to seek any other employment suitable to her physical limitations and that she could not maintain employment due to her medical conditions:

> [42] […] In this case, the Appellant attempted to find alternate work in the form of packaging and restaurant jobs, but was told they were not hiring. She did not continue looking for work after these attempts nor has she attempted to retrain or upgrade her English language skills. The Tribunal is not satisfied that she has made reasonable efforts to obtain and maintain employment that were unsuccessful by reason of her health condition.

[16] However, the General Division determined that the Applicant had retained some work capacity and, on that basis, the General Division was entitled to require that she continue to show efforts to obtain and maintain employment appropriate for her limitations beyond the few applications that she had made to packaging and restaurant jobs. The General Division was also entitled to determine that the Applicant's decision to forego retraining and upgrading her language skills (unless taught by her preferred instructor) was insufficient for meeting both the requirement of efforts made to obtain employment contemplated by the Federal Court of Appeal in *Inclima* and the requirement that an inability to find employment be demonstrated to have resulted from the Applicant's health condition as opposed to some other reason.

[17] I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

CONCLUSION

[18] The Application is refused.

Meredith Porter
Member, Appeal Division