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

Citation: *D. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 185

Tribunal File Number: AD-16-593

BETWEEN:

D. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: April 27, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), issued on March 11, 2016, which dismissed the Applicant's appeal of the reconsideration decision of the Respondent denying the Applicant a disability pension under the *Canada Pension Plan* (CPP).

[2] For the reasons that follow, the application for leave to appeal is refused.

BACKGROUND

[3] The Applicant applied for a CPP disability pension on December 12, 2011. The Respondent denied the application initially and on reconsideration. The Applicant exercised her right to appeal to the General Division.

[4] The hearing before the General Division proceeded on the record for reasons that were stated in the Notice of Hearing dated December 31, 2015, namely that this method of proceeding provided for the accommodations required by the parties, the issues under appeal were not complex, credibility was not a prevailing issue and a hearing on the record respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[5] In its March 11, 2016, decision, the General Division concluded that the Applicant was not eligible for a disability pension under the CPP because her disability was not severe during her minimum qualifying period (MQP), which ended on December 31, 2008.

[6] On the issue of severity, the General Division concluded:

> The [Applicant] has not established she had a medical condition involving her eyes, shoulder or stress which rendered her incapable regularly of pursuing any substantially gainful occupation by her MQP. Her left shoulder condition, physical limitations and symptoms may significantly limit her employability since June 2010, as indicated by the [Applicant], but this is subsequent to her MQP and is not relevant to a determination of whether she is incapable regularly of pursuing any substantially gainful occupation by her MQP in December 2008.

Having found that the Applicant's disability was not severe, the General Division considered it unnecessary to determine whether the disability was prolonged and dismissed the appeal.

[7] In her appeal to the Appeal Division, in correspondence dated April 21, 2016 (AD1-2), the Applicant stated:

> On my original CPP Disability application, my doctor at the time, Dr. Khare, stated that the CPP Disability Application should "refer to affairs/appeals with WCB". My WCB application focused on my left rotator cuff/shoulder, and not on any other disabilities that I currently have. Other disabilities include: vision, bone density, scoliosis, osteoarthritis and COPD. I believe all these other disabilities should be taken into consideration with the Appeals Division. All these disabilities are on-going, and prior to I submitted documentation that was not considered to my appeal [*sic*].

The Applicant stated in her letter that her application for leave to appeal is on the basis that the General Division erred in law in making its decision, whether or not the error appears on the face of the record, and she requested that she be able to submit documentation to support her appeal.

[8] In correspondence dated June 1, 2016 (AD1B-1), the Applicant stated:

> My reasons for requesting an appeal are that the General Division will not take into consideration all of my evidence including evidence of new or ongoing health issues from prior to my MQP – for example issues to do with my vision. I would like to have permission to submit this evidence. If given the opportunity to move forward with this appeal I would like to submit more recent documentation to support my application for CPP-disability.

[9] Tribunal staff wrote to the Applicant on June 14, 2016, to advise her that her application for leave to appeal was incomplete. The Applicant was asked to provide "any statements of fact that were presented to the General Division and that you are relying on in this application." In response, in a letter dated July 7, 2016 (AD1C-3), the Applicant wrote:

> My vision has deteriorated continuously and caused visual problems –depth perception and decreased vision difficulties and will continue to deteriorate. A specialist appointment is forecasted within the next year or two to determine if an operation would be possible to correct my eyesight […] Other health issues have surfaced and continue to prevent me from gainful employment – osteoporosis, osteo scoliosis, stage 1 COPD, depression, and elevated cholesterol. Dr Hundal had informed CPP, that I am unable to work and not ever

> able to obtain gainful employment again due to my above listed health issues. There has been an ongoing appeal with WorkSafe BC for a rotator cuff tear injury. As decided by the Tribunal Division of WorkSafe BC in May 2016, I am 100% unemployable. […] This injury with its limitations and restrictions has prevented me from gainful or any type of employment.

[10] Given the Applicant's reference in her June 1, 2016, letter to the fact that "the General Division will not take into consideration all of [her] evidence including evidence of new or ongoing health issues from prior to [her] MQP," a member of the Appeal Division directed that a letter should be sent to the Applicant requesting, among other things, a description of the new documents (date and who prepared them), and proof the Applicant tried to file them with the General Division. The letter to the Applicant, dated July 26, 2016, asked "Are you looking to rescind or amend (i.e. change) the decision of the General Division, on the basis of these new documents? If so, then you might wish to apply to the General Division to rescind or amend its decision."

[11] In her response of August 26, 2016, the Applicant confirmed she had new documents and enclosed seven documents with her response. I will describe these documents later in these reasons. She also indicated she would like to apply to rescind or amend the General Division's decision. Given this, Tribunal staff sent a blank application form to the Applicant in order for her to apply to the General Division to rescind or amend its decision. The application for leave to appeal was placed in abeyance pending the outcome of that proceeding.

[12] On February 9, 2017, the General Division issued its decision denying the application to rescind or amend. The Applicant's application for leave to appeal the General Division's initial decision of March 11, 2016, has therefore been moved to active status and is before me on this application.

THE TEST FOR LEAVE TO APPEAL

[13] Appeals to the Appeal Division are governed by Part 5 of the *Department of Employment and Social Development Act* (DESD Act). In accordance with subsection 56(1) of the DESD Act, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) mandates that "[t]he Appeal Division must either grant or refuse leave to appeal."

[14] Under subsection 58(2) of the DESD Act, "Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[15] 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.

[16] The requirement to obtain leave to appeal to the Appeal Division serves the objective of eliminating appeals that have no reasonable chance of success: *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at para. 34, and leave will only be granted where the Applicant demonstrates that the appeal has a reasonable chance of success on one or more of the grounds identified in subsection 58(1) of the DESD Act: *Alves v. Canada (Attorney General)*, 2014 FC 1100, at paras. 70-73. In this context, having a reasonable chance of success means "having some arguable ground upon which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

[17] It is not the Appeal Division's role to hear the case completely afresh (i.e. *de novo*). Rather, the Appeal Division's role is to determine whether a reviewable error set out in subsection 58(1) of the DESD Act has been made by the General Division and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene.

ANALYSIS

Grounds of appeal

[18] The Applicant has alleged that the General Division erred in law by failing to consider documentation that she says she tried to submit before the General Division rendered its decision.

[19] In her letter to the Tribunal of June 1, 2016 (AD1B-1), she stated, "My reasons for requesting an appeal are that the General Division will not take into consideration all of my evidence including evidence of new or ongoing health issues from prior to my MQP – for example issues to do with my vision. I would like to have permission to submit this evidence."

[20] In response to the Tribunal's letter dated July 26, 2016, asking that she identify this documentation, in her letter of August 26, 2016, she identified and provided seven documents (AD1D-3).

[21] The Applicant has not pointed to any failure by the General Division to take into account any evidence in particular, other than these seven documents.

Additional documents submitted by the Applicant

[22] The seven documents submitted by the Applicant, which she has requested be admitted into evidence before me, are[1]:

(i) March 7, 2013, Spirometry diagnostic testing (AD1D-13 to AD1D-14);

(ii) March 18, 2013, Spirometry diagnostic testing (AD1D-11 to AD1D-12);

(iii) April 10, 2014, Imaging Report − Bone Mineral Densitometry. Reason for exam: diagnostic bone densitometry (AD1D-8 to AD1D-9) (GD1-16 to GD1-17);

(iv) April 15, 2014, Note from Dr. Hundal, family physician (AD1D-6) (GD1-8);

[1] The location of each document in the Appeal Division record is indicated in parentheses by "AD." If the document was before the General Division, the location in the General Division record is indicated in parentheses by "GD."

(v) September 5, 2014, Imaging Report – Magnetic Resonance Imaging. Reason for exam: rotator cuff tear (AD1D-4 to AD1D-5) (GD2-1 to GD2-2);

(vi) January 7, 2015, Report of Dr. Dennis, optometrist (AD1D-7) (GD at GD6-1); and

(vii) November 27, 2015, Imaging Report – Diagnostic Radiology. Reason for exam: chest pain (AD1D-10).

[23] In her August 26, 2016, letter, the Applicant stated "Yes most of these I attempted to file prior to the General Divisions [*sic*] decision March 11, 2016" (AD1D-3).

[24] I note that four of the seven documents (i.e. documents (iii) through (vi)) were included in the record before the General Division. The General Division did not expressly refer to the four documents in its reasons. However, it is not necessary for a decision-maker to refer in its reasons to each and every piece of evidence before it; rather it is presumed to have considered all the evidence: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. A reviewing tribunal will consider putting aside this presumption only when the probative value of the evidence that is not expressly discussed is such that it should have been addressed: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration*), (1998) 157 FTR 35, at paras. 14-17.

[25] In this case, the probative value of the four documents is nil as they all relate to a period long after the MQP of December 31, 2008, and say nothing about the Applicant's condition on or before the MQP. For example, document (iv), a letter from Dr. P. Hundal dated April 15, 2014, (which would appear to be the document referred to earlier in these reasons (at paragraph 9), which the Applicant claimed in her appeal materials should have been considered by the General Division) was before the General Division and makes no mention of the Applicant's condition on or before the MQP.

[26] I conclude that no reviewable error under subsection 58(1) of the DESD Act arises in relation to these four documents.

[27] I now turn to consider whether the remaining three documents (i.e. documents (i), (ii) and (vii)) should be accepted as new evidence on this appeal. Generally, new evidence is not admissible on appeal to the Appeal Division. There are limited exceptions to this principle,

such as when there are allegations of a breach of a principle of natural justice pursuant to paragraph 58(1)(*a*) of the DESD Act. While the Applicant has not expressly pleaded a breach of this provision of the DESD Act, what she alleges, in effect, is that she tried to submit the remaining three documents, but the General Division refused to accept them. If this were the case and the documents were relevant, it could conceivably give rise to a claim that the General Division failed to observe a principle of natural justice. However, there is no evidence that the Applicant sought to file these documents or that they were rejected by the General Division. There is no correspondence in the General Division file from the Applicant attempting to put these documents before the General Division and no indication in the Tribunal's docket that they were ever received. The Applicant has conceded that she did not attempt to file all of the seven documents, though she was unspecific about which ones she did attempt to file. In light of the lack of any evidence supporting the contention that the Applicant attempted to file these three documents with the General Division, I conclude she did not do so and no principle of natural justice was violated. Consequently, there is no reason to accept these documents as new evidence on this appeal.

[28] In the event that I am wrong in this regard, I have considered each of the three documents (March 7, 2013, Spirometry diagnostic testing; March 18, 2013, Spirometry diagnostic testing; and November 27, 2015, Imaging Report – Diagnostic Radiology). These three documents were all created years after the MQP of December 31, 2008. Even if they had been before the General Division, they would have made no difference to the outcome as they say nothing about the Applicant's condition on or before the MQP and therefore they have no bearing on whether the Applicant qualifies for a disability pension.

[29] I find there is no basis for finding a reviewable error under subsection 58(1) of the DESD Act in relation to these three documents.

[30] The Applicant also makes the general allegation that the General Division did not take into consideration all of her evidence "of new or ongoing health issues from prior to [her] MQP – for example issues to do with [her] vision." In its decision, the General Division expressly referred to the Applicant's health issues relating to her shoulder limitations, vision and stress (at paragraph 22). These issues were referred to in the reports filed by the

Applicant before the General Division. To the extent the Applicant is asking me to re-weigh the evidence that was before the General Division and come to a different conclusion than that of the General Division, this I am unable to do: *Simpson, supra*. I note that any evidence of "new" health issues arising after the MQP is not relevant since it is the Applicant's status on or before the MQP that is relevant to whether she is entitled to a disability pension; a point made by the General Division when it stated, "deterioration of [the Applicant's] condition after her MQP cannot be considered for determination of disability by her MQP."

[31] I have read the entire General Division record and carefully considered its decision. I find there is no basis for concluding that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. I have not identified any errors in law or any erroneous findings of fact that the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[32] I see no arguable ground upon which the proposed appeal might succeed and I am satisfied that an appeal in this case has no reasonable chance of success.

CONCLUSION

[33] The application for leave to appeal is refused.

Nancy Brooks
Member, Appeal Division