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

Citation: *M. O. v. Minister of Employment and Social Development*, 2017 SSTADIS 182

Tribunal File Number: AD-16-545

BETWEEN:

M. O.

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 26, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 28, 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 to the Applicant. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on April 9, 2016.

ISSUE

[2] The member must decide whether the Applicant has raised a ground of appeal that 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 submitted that the General Division made an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it in failing to properly consider the evidence in the record before it, citing the following arguments:

i. The Applicant argued that the General Division failed to consider that the Applicant's private insurers had determined that, due to the severity and unpredictability of her health condition, the Applicant was "not a candidate for retraining or able to perform any reasonable alternate occupation."

ii. The Applicant further submitted that the General Division failed to properly consider that, in the past, the Applicant had worked "through the barrier of pain" because she loved her job and had "continued to work until [her] body decided it could do no more."

iii. The Applicant also submitted that, as a result of her health condition, she has modified her lifestyle and her day-to-day functioning.

ANALYSIS

[7] The Applicant's minimum qualifying period (MQP) date was December 31, 2014. In determining whether the Applicant was disabled on or before her MQP date, the General Division considered both case law and the medical evidence on the record before it. A videoconference was held on December 16, 2015, and the General Division also considered the Applicant's oral evidence in determining that the Applicant had not met the threshold required for entitlement to a disability pension under the CPP.

[8] Essentially, the General Division found that there was no objective medical evidence supporting the Applicant's claim that she lacked work capacity for any conceivable type of employment. The General Division found the Applicant to be credible. The evidence she gave was somewhat consistent with the medical evidence in the record. The General Division found that at the time of the Applicant's MQP date, she suffered from mild to moderate mental health issues for which she had not considered or attempted all treatment options. Regarding treatment for physical ailments, such as fibromyalgia, neck and back pain from congenital scoliosis, some

pain medications had been prescribed and the Applicant had attempted the medications, each for a brief period of time (three to eleven days). She experienced side effects from each of the medications prescribed and resolved on her own to stop taking them. The General Division noted that there remained several treatment options. It was also the opinion of her attending physician that if the Applicant remained on the prescribed medication for at least a two-week period, her side effects would likely have decreased. Applicants seeking disability benefits under the CPP are required to show evidence of managing their health condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33), including following prescribed medical treatment and pursuing all treatments options. Applicants are expected to follow the advice of their attending medical professionals regarding prescribed medications and other types of treatment intended to mitigate troublesome health conditions, unless there is a reasonable explanation for not doing so (*Kambo v. Canada (Human Resources Development)*, 2005 FCA 353). On the evidence, the General Division could not find any reasonable excuse for the Applicant's failure to mitigate her health condition.

[9] The General Division acknowledged and accepted that the Applicant was unable to return to her previous employment due to her health conditions. There simply wasn't any evidence that she was incapable regularly of pursuing any employment, as contemplated by the CPP's disability provisions. In fact, as of April 2014, her family physician assessed the Applicant to be a candidate for employment that offered a less stressful environment, sedentary working conditions and part-time opportunities that could evolve into full-time work.

[10] In finding that the Applicant had some capacity to work, the General Division contemplated whether there was evidence that the Applicant had attempted to obtain alternate employment within her limitations, or had engaged in any retraining opportunities (*Inclima v. Canada (Attorney General)*, 2003 FCA 117). There was no evidence that any alternative employment had been either sought or attempted. There was also a void of evidence that the Applicant had attempted any retraining or furthering of her education.

[11] On the issue of employability, *Villani v. Canada (Attorney General)*, 2001 FCA 248 stands for the principle that the circumstances of each applicant seeking a disability pension under the CPP should be assessed in a "real world" context. Their age, level of education,

language proficiency, and past work and life experience should be taken into consideration. The Applicant was 59 years old at the time of her MQP. At paragraph 29 of its decision, the General Division acknowledges that the Applicant had completed high school and had also received additional schooling in bookkeeping and secretarial training. She had worked full-time in a position with high responsibility and pressure for over 20 years. She was a responsible employee. There were no issues regarding her language proficiency.

[12] It is noted that, in her submissions as set out in paragraph 6 above, the Applicant raises several examples of how she believes the General Division failed to properly consider the evidence in the record before it. However, it is not my role to reassess the evidence. The authority of the Tribunal's Appeal Division members is to determine whether the General Division's decision is defensible on the facts and the law. If the Applicant is requesting that I reconsider and reassess the evidence and substitute my decision for that of the General Division, I am unable to do this. I must simply determine whether any of the Applicant's reasons for appealing falls within the specified grounds of subsection 58(1) of the DESD Act, and whether any of them has a reasonable chance of success. A reconsideration of the evidence is not one of the grounds enumerated in subsection 58(1).

[13] I cannot find a ground of appeal that has a reasonable chance of success.

CONCLUSION

[14] The Application for leave to appeal is refused.

Meredith Porter
Member, Appeal Division