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

Citation: *F. J. v. Minister of Employment and Social Development,* 2017 SSTADIS 175

Tribunal File Number: AD-16-511

BETWEEN:

F. J.

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 25, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] This is an application for leave to appeal the decision of the General Division dated December 11, 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 arisen between December 31, 1997 and December 31, 2001.

ISSUE

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

GENERAL BACKGROUND

[3] The Applicant applied for a Canada Pension Plan disability pension in August 1996. The Respondent refused her application initially, and it refused her request for reconsideration on December 10, 1997. A Canada Pension Plan Review Tribunal heard her appeal on August 19, 1998. It issued a decision on October 19, 1998, dismissing her appeal. The Applicant sought leave to appeal the Review Tribunal's decision to the Pension Appeals Board. Leave to appeal was refused on August 11, 1999.

[4] On October 31, 2002, the Applicant applied for a disability pension for a second time. The General Division determined the following:

- At the time of the 1998 Review Tribunal hearing, the Applicant's minimum qualifying period (MQP) had ended on December 31, 1997, i.e. she had to prove that her disability was severe and prolonged by this date, and that it was long continued and of indefinite duration or likely to result in death. The member noted that the Review Tribunal had not explicitly determined the end date of the MQP.

- The Review Tribunal had not addressed the issue of whether the Applicant's disability might have become severe and prolonged at any time after December 31, 1997.

- Following a division of unadjusted pensionable credits, the Applicant's MQP ended on December 31, 2001.

ANALYSIS

[5] 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.

[6] Before granting leave to appeal, 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. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300 (CanLII).

[7] The Applicant submits that the General Division based its decision on several erroneous findings of fact that it had made in a perverse or capricious manner or without regard for the material before it.

The General Division's "Evidence" section

[8] Several of the alleged erroneous findings of fact appear in the "Evidence" section and do not form any part of the analysis. For instance, at paragraph 11, the member wrote

that the Applicant was born in 1957, when the documentation clearly indicates that she was born in 1956. Despite the obvious error, it was not a fact upon which the General Division had based its decision. The Applicant also cites the error at paragraph 13 where the member wrote that the Applicant had begun working as a licensed practical nurse in October 1991, rather than in July 1991. These types of errors do not fall under subsection 58(1) of the DESDA, given that the erroneous findings of fact must not only have been made in a perverse or capricious manner or without regard for the material before it, but must also be ones upon which the member based their decision.

[9] The Applicant has identified several errors throughout the "Evidence" section, from paragraphs 11 to 43, but unless they were findings of fact upon which the member based her decision, they do not fall under subsection 58(1) of the DESDA.

[10] The Applicant argues that the General Division overlooked material evidence that should have formed part of her assessment. This includes when she had trained as a licensed practical nurse or the fact that she had applied for a credit split and "risked getting beat up" by her spouse. In the case of credit splitting, although the General Division did not refer to this issue at paragraph 12, where it discussed the Applicant's contributions to the Canada Pension Plan, the member referred to it at paragraph 25 and again at paragraph 54, in determining the applicable MQP.

[11] As for some of the other facts that the Applicant claims merited consideration, the courts have consistently held that it is unnecessary for a decision-maker to write exhaustive reasons addressing all the evidence and facts before it. The decision-maker is entitled to express only the most salient findings and justifications: *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 (CanLII). They would be required to consider and discuss the evidence if it is of some probative value, but that is not what is being alleged here, and I fail to see the issue of when she trained as a licensed practical nurse as having any probative value.

[12] The Applicant argues that, at paragraphs 15 and 16, the General Division should have mentioned the back injuries that she had sustained in an attack on

December 25, 1994. She denies that she was even aware that decompression surgery had ever been recommended to her, because her family physician failed to discuss this with her, as paragraph 15 suggests. However, paragraphs 15 and 16 represent the General Division's summary of the Review Tribunal's decision. The Review Tribunal referred to the Applicant's chronic pain issues, thoracic outlet syndrome, and cervical issues, but it did not expressly refer to her back injury. Hence, it would have been inappropriate for the General Division to make findings that the Review Tribunal had not already made.

[13] The Applicant contends that, at paragraph 20, the General Division misapprehended the evidence in suggesting that she had not experienced any back problems until after 1996. Again, the member relied on the Review Tribunal's findings in this regard, although the member nonetheless reviewed the medical evidence that had been before the Review Tribunal and saw no evidence of any complaints regarding the Applicant's back. In any event, the issue is moot as to whether the Applicant's back injury arose in 1994 or sometime after 1996, given that the issue before the General Division was whether the Applicant's disability became severe and prolonged after December 31, 1997.

[14] The Applicant asserts that the General Division erred at paragraph 22 in finding that she had testified that injections relieved some of her symptoms for upwards of several months, when she claims that she testified that, at most, the injections were "akin to freezing … [lasting] for about an hour". However, these facts, even if erroneous, were not ones upon which the member based her decision. Similarly, although the Applicant denies that she ever testified that she had been bedridden when she was not performing air cadet duties, this was not a fact upon which the member based her decision.

[15] The Applicant is now also attempting to add or explain some of the evidence. For instance, at paragraph 39, the Applicant seeks to introduce evidence, to rebut the rheumatologist's opinion that there was no evidence of any disc involvement to account for her back pain. The member also noted that the Applicant was taking Elavil and that it helped with her sleep. The Applicant claims that she has since stopped taking Elavil because of side-effects. Neither the leave to appeal nor the appeal provides further avenues to add to or explain the evidence. As for the statement regarding the lack of evidence of disc

involvement, the member accurately quoted the rheumatologist's opinion dated August 22, 2012 (GD3-209), so it cannot be said that there was an error in this regard.

[16] The Applicant maintains that the General Division should have mentioned her back injury and ongoing pain, at paragraphs 36, 38 and 39. In fact, the member discussed the back pain in paragraphs 38 and 39. At paragraph 36, the member focused on the changes to the Applicant's condition after December 1997. The Applicant claims that her back problems arose in December 1994, but since the member restricted paragraph 36 to a discussion of the changes to the Applicant's medical condition after December 1997, obviously the member would not have been discussing her back pain as well.

The General Division's "Submissions" section

[17] The Applicant contends that the General Division erred at paragraphs 44 and 45; however these represent a summary of the parties' submissions, rather than any actual findings of fact. The Applicant argues that the member misstated her position. While that might not represent an erroneous finding of fact *per se*, it is critical for the member to properly understand an applicant's position so that they can properly assess her appeal. The member wrote that the Applicant had submitted that she qualifies for a disability pension because her condition had been severe and prolonged since before December 31, 2001. The Applicant, on the other hand, claims that she has been disabled since being attacked on December 25, 1994, and notes that she had not encountered any problems before then. I do not see any error or misunderstanding on the part of the member in this regard.

The General Division's "Analysis" section

[18] The Applicant argues that the member erred at paragraph 47. The Applicant argues that her disability is severe and prolonged, as she has had been symptomatic for approximately 22 years and underwent or was offered surgery. I am not satisfied that this raises an arguable ground, as the member properly set out the test for a severe and prolonged disability at paragraph 8. Although the member neglected to consider whether the Applicant's disability was prolonged, the test for disability has two parts and if an applicant fails to meet the severity aspect of this two-part test, then he will fail to meet the disability

requirements under the legislation. As the member indicated, it was unnecessary under those circumstances to undertake an analysis on the prolonged criterion.

[19] At paragraph 57, the member wrote that the Applicant had not received any help from the Workers' Compensation Board. The Applicant claims that the member failed to properly record her testimony in this regard. While that may be so, the member indicated that any evidence regarding this issue was irrelevant to her consideration. As such, I am unprepared to find that this raises an arguable case.

[20] At paragraph 65, the General Division wrote that the Applicant held volunteer positions and paid jobs that revealed a regular capacity for substantially gainful employment. The Applicant questions this finding, claiming that she held unpaid volunteer positions and that she lives in a very small town and has no transportation or money "to run one". However, there was both documentary evidence and oral testimony that the Shoppers Drug Mart employed the Applicant at two different locations.

[21] The Applicant disputes the member's finding at paragraph 66 that she had failed to adduce any evidence to substantiate the fact that she had suffered a heart attack or was medically unable to continue. The Applicant claims that she had obtained a letter from a physician at Mount Royal University stating that she had to medically withdraw because of a mild heart attack. She mentioned that she also has to carry Nitroglycerine spray. However, this evidence was produced after the hearing before the General Division (AD1-13). Given that the letter from Mount Royal University is dated March 30, 2010 and the physician indicates that the Applicant had become a patient in February 2010, it would have been immaterial to the General Division's consideration because it determined whether the Applicant had become disabled between December 31, 1997 and December 31, 2001. The physician with Mount Royal University did not offer any opinion regarding the Applicant's condition within this time frame.

[22] At paragraph 67, the General Division found that the Applicant did not have fibromyalgia, tinnitus, allergies to dust and mold, comprehension difficulties, bad knees, or any related symptoms, or that she had sought medical treatment for any of these conditions between December 31, 1997 and December 31, 2001. The Applicant argues that the

General Division erred, as she had been "constantly in the doctors' office for help". I have reviewed the medical records and do not see any medical records that refer to the complaints of tinnitus, comprehension difficulties or allergies to dust and mold. The only reference to allergies is contained in the Applicant's questionnaire for disability benefits (GD3-218), but otherwise there are no indications that she had this further investigated or sought any treatment for her allergies.

[23] As for the Applicant's complaints of bad knees, her history includes knee arthroscopies, and these are referred to in the neurologist's consultation reports of May 1996, but otherwise there were no other references to any knee issues again until August 2012 when a rheumatologist saw the Applicant for osteoarthritis as well as for fibromyalgia. This is also the only reference in the documentary evidence to the Applicant's fibromyalgia. Following this consultation with the rheumatologist, the Applicant had X-rays taken of both knees (GD3-208 to GD3-210). However, there was nothing in the documentary evidence to show that the Applicant had complained about her knees or symptoms relating to fibromyalgia for the time frame between December 31, 1997 and December 31, 2001.

[24] At paragraph 68, the General Division wrote that there was no evidence to indicate that the Applicant's condition had changed "in any significant way". The Applicant points to the fact that she has developed fibromyalgia as evidence that her condition has changed significantly. The member in this case indicated that she was focused on the time frame "in and after" December 31, 1997 and December 31, 2001. The Applicant is correct to point out that she had developed fibromyalgia (likely sometime after this time frame), but given that she was required to prove that she had become disabled between December 31, 1997 and December 31, 2001, the fact that she had developed fibromyalgia after this time frame was immaterial to this consideration.

[25] To some extent, the Applicant is seeking a reassessment. However, as the Federal Court held in *Tracey*, it is not the Appeal Division's role to conduct a reassessment when determining whether leave to appeal should be granted or refused, as a reassessment does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

CONCLUSION

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

Janet Lew
Member, Appeal Division