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

Citation: *C. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 216

Tribunal File Number: AD-16-1279

BETWEEN:

C. C.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: May 9, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated August 9, 2016. The General Division had earlier conducted a hearing by videoconference and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), because her disability was not "severe" prior to the minimum qualifying period (MQP), which was determined to end on March 31, 2011, by application of the proration provision.

[2] On November 19, 2016, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division detailing alleged grounds for appeal.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[5] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[6] According to subsection 58(1) of the DESDA, 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 made in a perverse or capricious manner or without regard for the material before it.

[7] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[10] In her application requesting leave, the Applicant submitted a number of grounds of appeal, which I have categorized as follows.

Form of Hearing

[11] The General Division failed to observe a principle of natural justice when it held the hearing by videoconference. The Applicant acknowledged that she was advised that a videoconference hearing had been scheduled, but she assumed it was meant to accommodate her representative and an essential witness, who were both located in X. At that point, "a decision was made for counsel to travel and be present in Hamilton believing that the decision maker would be present in the hearing room." The Applicant paid her representative's expenses to travel from X to Hamilton, return, only to find that the General Division member would not be present and would be conducting the hearing by video link. Had he known about the format, her representative would have instead simply participated by videoconference himself. As it was, the hearing was two dimensional and neutralized the human component of the Applicant's

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

plea for disability benefits. As noted by the General Division, the issues under appeal were complex and should have been adjudicated in person.

Weight Attributed to Credibility of Witnesses

[12] The General Division failed recognize the importance of credibility as an issue in her appeal—not just her own, but that of the two witnesses who gave evidence at the hearing. The General Division placed little, if any, weight on the evidence of the Applicant's husband and former co-worker, which supported her claim that she suffers from a severe and prolonged disability.

Credentials of Member

[13] The Applicant believes that her appeal should have been heard by someone with medical credentials, such as a physician or registered nurse, who would have been better able to assess the documentary evidence.

Weight Attributed to Cessation of Employment

[14] The General Division also failed to properly consider that the Applicant had not worked at any employment since March 6, 2010. Its decision made no reference to this important fact.

Relative Weights Assigned to Medical Reports

[15] The General Division erred in placing little, if any, weight upon the medical evidence of Dr. Khanna and Dr. Barbeau, the Applicant's family physicians, who were in the best position to provide a professional opinion about her disability during the MQP. By contrast, the General Division placed undue weight upon the medical opinions of other physicians, who either examined the Applicant only once physically or saw her briefly and periodically. While the General Division stated, at paragraph 35 of his decision, that it respected the opinions of Dr. Barbeau and Dr. Khanna, it disregarded them both, even though they were unequivocally in support of the Applicant's claim. On the other hand, Dr. El-Saidi saw the Applicant for a one-time psychiatric assessment, yet the General Division relied upon his opinion in finding that her depressive symptoms were only moderate and likely to improve (see paragraph 38).

ANALYSIS

Videoconference

[16] The Applicant alleges that the Tribunal led her and her representative to believe that she would have a face-to-face hearing with the General Division member assigned to preside over her appeal, leading her to waste resources on transporting her counsel from X to Hamilton, only to find that the member was appearing by video link.

[17] I see no arguable case on this ground of appeal. It is clear from the record that the Applicant and her representative misunderstood the nature and format of the proceedings stipulated by the member, but I do not see how the Tribunal's actions contributed to this misunderstanding, nor do I see any unfairness in how the hearing ultimately played out.

[18] When the Applicant submitted her appeal to the General Division in July 2013, she lived in X, Ontario, as did her representative. Although she moved to X, Ontario in early 2014, she kept her representative, as was her right. On March 24, 2015, the Applicant's representative returned a completed Hearing Information Form (HIF) to the Tribunal. As the HIF itself indicates, it is designed to assist General Division members in: (a) deciding the appropriate form of hearing and (b) scheduling a hearing. Asked whether there was any type of hearing in which the Applicant could *not* participate, the Applicant's representative check marked "written questions and answers," "teleconference (by telephone)" and "videoconference (at a Service Canada Centre)" thereby indicating that only a hearing by personal appearance of the parties at a Service Canada Centre would be acceptable to him and his client. He noted that the "interaction between the Appellant, her witnesses, her solicitor and the Tribunal is much more transparent and accessible in terms of the credibility of herself and her witnesses."

[19] There was nothing in the HIF that would have reasonably given rise to an expectation that the Applicant's preference would determine the form of hearing. Section 21 of the *Social Security Tribunal Regulations* states that the General Division may hold a hearing by one of several methods. Use of the word "may" in the absence of qualifiers or conditions in the text suggests that the General Division has discretion to make this decision. This is not to suggest that the General Division's discretion to make such a decision can be completely divorced from reason. However, the Federal Court of Appeal has confirmed that setting aside a discretionary

order requires an appellant to prove that the decision-maker committed a "palpable and overriding error,"[3] and I see nothing like that here.

[20] As it happens, the General Division exercised its discretion to select what it believed was the most appropriate form of hearing and advised the Applicant and her representative of its choice in a notice of hearing dated January 15, 2016. It read in part:

> The Social Security Tribunal of Canada has scheduled a **videoconference hearing** in the above-mentioned appeal. Please review this letter carefully, as it contains important information regarding the next steps in this matter.
>
> **Details of Hearing:**
>
> | | |
> |---|---|
> | **Date of Hearing:** | May 16, 2016 |
> | **Time:** | 1:00 pm Eastern Time |
> | **Location:** | 1550 Upper James Street
1st floor, Multipurpose Room
Hamilton, ON |

[21] The notice of hearing clearly indicated that the hearing was to be held by videoconference, as did a second notice that was issued to the parties after the first hearing was adjourned to August 4, 2016. The Applicant was summoned to a Service Canada Centre, yet she was surprised to find, once there, that the General Division member would be appearing by videoconference. I would submit that, had the General Division member been there in person, then the hearing would not, by definition, have been a videoconference. I also note that telephone calls and emails documented in the record indicate that the Applicant's representative contemplated participating by videoconference himself but, in the end, elected not to do so. He must have been well aware that multiple participants could be accommodated through videoconferencing technology, because his office arranged the testimony of a witness from X.

[22] The Applicant and her representative further suggest that, aside from the confusion over the format and the needless travelling expense, there was something inherently unfair about

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[3] *Imperial Manufacturing Group Inc. and Home Depot of Canada Inc. v. Décor Grates Incorporated*, 2015 FCA 100; *Horseman v. Twinn, Electoral Officer for Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139.

conducting the hearing by videoconference, which they say sacrificed the human element from the assessment of witness credibility.

[23] Again, I am not convinced this argument would have a reasonable chance of success on appeal. In *Baker v. Canada*,[4] the Supreme Court of Canada held that the concept of procedural fairness is variable and is to be assessed in the specific context of each case. *Baker* listed a number of factors that may be considered to determine what the duty of fairness requires in a particular case, including the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[24] I accept that the issues in this matter are important to the Applicant, but I also place great weight on the nature of the statutory scheme that governs the General Division. The Social Security Tribunal was designed to provide for the most expeditious and cost effective resolution of disputes before it. To accomplish this, Parliament enacted legislation that gave the General Division the discretion to determine how hearings are to be conducted, whether in person, by videoconference or in writing, etc. The discretion to decide how each case will be heard should not be unduly fettered.

[25] While the General Division has wide discretion to rule on this matter, its decision to hear the appeal by videoconference was not made on a whim, but for reasons explained, albeit cursorily, in its decision, including the complexity of the appeal and the availability of videoconferencing in the Hamilton area. The Applicant also failed to explain, beyond vague generalities, why a videoconference is a poor substitute for an in-person hearing, given that the former also permits inspection of visual cues commonly associated with credibility.

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[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 699 (SCC), [1999] 2 SCR 817.

Witness Credibility

[26] An extension of the Applicant's criticism of the General Division's refusal to hold an in-person hearing was her allegation that it failed to acknowledge the importance of witness credibility to her case.

[27] Again, I see no reasonable chance of success on this ground, which, like many of the Applicant's submissions, is based on the premise that the General Division did not weigh the evidence properly. Testimony is but one form of evidence that must be weighed against others. In this case, it appears the General Division chose to place greater weight on selected medical reports, and I see no reason to interfere with its judgment on this matter, in the absence of a specific allegation of error. If the Applicant is requesting that I re-weigh the evidence that was available at the hearing and come to a different conclusion than the General Division's, that is beyond the scope of a leave application. The Appeal Division may not substitute its view of the evidence for that of the trier of fact. The DESDA does not contemplate a reassessment of the evidence at the leave stage. It does, however, require an applicant to satisfy the Appeal Division that there is at least one reviewable error that has a reasonable chance of success, and the Applicant has not done so in this regard.

Credentials of Member

[28] The Applicant suggests that her appeal should have been heard by a General Division member with medical training, but I see no arguable case on this ground. There is nothing in the Tribunal's enabling legislation or associated regulations that requires specific qualifications to adjudicate CPP disability appeals, which, it should be noted, involve not just medical, but legal and occupational, issues. I would also note that the Applicant has not identified a specific instance in which the General Division member misapprehended a material fact regarding her health conditions.

Cessation of Employment

[29] The Applicant alleges that the General Division made no reference in its decision to her withdrawal from work after March 2010. I see no arguable case on this point, as it revolves around a question of evidentiary weight, rather than error. In any event, it appears that the

General Division was well aware of the length of time that had passed since the Applicant was last employed, as it summarized Dr. Barbeau's November 2012 report as follows:

> [25] On November 15, 2012, Dr. Barbeau reported that the Appellant also had, in addition to the conditions reported initially, hypothyroidism, acne, obesity and GERD. The Appellant was injured in in March 2010 and has not worked since. All of these conditions have been present continuously since March 2011. The Appellant is not capable of performing any type of work since March 2011 and continuously to her date of application.

[30] I note that the same information was relayed in the General Division's summary of Dr. Khanna's March 2016 report at paragraph 28.

Weight of Medical Reports

[31] The Applicant criticized the General Division for how it assigned weight to the various items of medical evidence before it, alleging that it gave too little significance to Dr. Khanna and Dr. Barbeau's opinions, while placing undue weight upon the reports of other physicians, with whom she had relatively brief involvement.

[32] Again, I am not convinced there is an arguable case here. The Applicant questions how the General Division could declare its "respect" for the opinions of her physicians while "disregarding" their conclusions that she was totally disabled from work, but I disagree that this necessarily created a contradiction. In its next sentence, the General Division wrote, "The Tribunal notes, however, there is very little objective medical evidence to support these opinions," expressing, to my mind, its view that it simply preferred alternative medical evidence. Within its analysis, the General Division chose to place greater weight on the reports of treating specialists such as Dr. El-Maraghy, the orthopedic surgeon, and Dr. El-Saidi, the psychiatrist. I also reject the Applicant's somewhat simplistic suggestion that greatest weight is to be assigned to the opinion of the assessor who sees the Applicant most frequently.

[33] An administrative tribunal is presumed to have considered all the evidence before it, and in this case, the General Division made its decision after conducting what appears to be a thorough survey of the evidentiary record. While the Applicant may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the relevant facts,

assess the quality of the evidence, determine what evidence, if any, it chooses to accept or disregard, and decide on its weight.

[34] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals inadequately weighed the evidence. In *Simpson v. Canada*,[5] the appellant's counsel identified a number of medical reports, which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

[35] The thrust of the Applicant's submissions on this point is that I reconsider and reassess the evidence and decide in her favour. I am unable to do this, as my authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the enumerated grounds of subsection 58(1), and whether any of them have a reasonable chance of success.

CONCLUSION

[36] In my view, the Applicant has not presented an arguable case on any ground. The application for leave to appeal is refused.

Member, Appeal Division

[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.