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

Citation: *B. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 221

Tribunal File Number: AD-16-849

BETWEEN:

B. B.

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: May 12, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the General Division's decision dated April 27, 2016. The General Division determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it had found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2001.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social 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.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant submits that, because she has been without effective advocacy from the time of her initial request to her hearing before the General Division, the General

Division thereby failed to observe a principle of natural justice. She claims that, had she had effective representation, she would have been able to communicate her thoughts better.

[6] This does not constitute an appropriate ground of appeal under subsection 58(1) of the DESDA. As the Federal Court stated in *McCann v. Canada (Attorney General)*, 2016 FC 878, in a case where an applicant represented himself:

> [26] I am fully aware that the Applicant is representing himself and that this may have affected the way his arguments were articulated throughout this process, including in the present proceedings. However, the law is the same for all and does not vary depending on whether a litigant chooses to be represented or to represent himself or herself (*Kalevar v Liberal Party of Canada*, 2001 FCT 1261, 110 ACWS (3d) 236, at para 24; *Cortirta v Missinnipi Airways*, 2012 FC 1262, at para 13, aff'd 2013 FCA 280). The Applicant had a test to meet and, unfortunately for him, he failed on the most important factor, that of the merit of his claim against the decision of the Appeal Decision.

[7] The Applicant argues that, by focusing on the Applicant's mental health issues without also considering her physical condition, which the Applicant attributes to incomplete medical information, the General Division based its decision on an erroneous finding of fact that it had made without regard for the material before it. The Applicant queries whether the General Division had a copy of a report dated October 3, 2001, from the Regina Health District, Pasqua Hospital. The Applicant had undergone a pulmonary function test and was subsequently diagnosed with severe chronic obstructive pulmonary disease. The Applicant expected that the General Division would have had a copy of this report, given that she had provided the Respondent with an authorization for the release of medical records from third-party providers. The Applicant now requests that the Appeal Division consider her life chronology and medical history, which includes a double-lung transplant in November 2005.

[8] At paragraph 8, the General Division noted that the Applicant reported that her primary disabling condition at that time was lung disease, which caused her to stop working in January 2004. In paragraphs 12 to 15, as well as in paragraphs 17 to 20, the member described the Applicant's problems relating to her chronic obstructive pulmonary disease. The member noted that there was a hospital discharge summary that indicated that the

Applicant had been admitted on September 27, 2002 with an exacerbation of chronic obstructive pulmonary disease by a respiratory infection. She was better following treatment and was discharged on September 29, 2002, on antibiotics, decreasing doses of Prednisone and Zithromax as well as inhaled bronchodilators. She was to commence inhale steroids later (GD8-7). The discharge summary gave no indication how the chronic obstructive pulmonary disease generally impacted the Applicant's capacity or functionality.

[9] The member also noted from the Applicant's oral testimony that she had been diagnosed with chronic obstructive pulmonary disease in 2001, that she had been placed on a transplant list in 2003 and that she had had her lung transplant in 2005. However, the member found that, while the documentary evidence in or around the end of the Applicant's minimum qualifying period established that she had mental health issues, there was no discussion about how her pulmonary issues impacted her capacity regularly of pursuing any substantially gainful occupation. The member acknowledged that, while there was some reference to the Applicant's asthma, there was "no medical evidence to indicate that the [*sic*] she was having any medical issues in regards to her breathing that caused her to leave work."

[10] Hence, it cannot be said that the General Division failed to consider that the Applicant had been diagnosed with a chronic obstructive pulmonary disease in 2001. The General Division addressed the issue in its analysis but ultimately found that the documentary evidence failed to establish that, together with her mental health issues, the disease was severe at that time, or that it had much impact, if any, on her capacity regularly of pursuing any substantially gainful occupation.

[11] I have also reviewed the underlying record to determine whether the General Division might have either misconstrued the evidence or failed to properly account for any of it. I do not see that to be the case. Although the General Division did not analyze a respirologist's report, dated December 7, 2004, I find that the report was of limited utility in addressing the issue of whether the Applicant could be found disabled on or before her minimum qualifying period.

[12] Although the respirologist first treated the Applicant in September 2001 (before the end of her minimum qualifying period), had diagnosed her with severe chronic obstructive pulmonary disease, and found that the prognosis was not favourable, he did not provide any indication how her lung function affected her overall capacity by the end of her minimum qualifying period. I note that the respirologist indicated that the Applicant had experienced respiratory failure in January 2004, but there is no indication that she experienced this regularly or for any extended duration by December 31, 2001, such that it affected her capacity regularly of pursuing any substantially gainful occupation (GD3-117 to GD3-120).

[13] The Applicant indicates that the 2001 pulmonary function test established a diagnosis of severe chronic obstructive pulmonary disease, but a diagnosis alone likely would not have been sufficient to establish severity, as the General Division would still have needed to assess how the disease impacted the Applicant's capacity. I am aware that such a diagnosis no doubt impairs lung function, particularly in activities requiring exertion, but the ultimate test is whether one is incapable regularly of pursuing a substantially gainful occupation.

[14] The Applicant suggests that the Appeal Division consider her life and medical history, but that calls for a reassessment, which falls beyond the jurisdiction and scope of an appeal before the Appeal Division. Subsection 58(1) of the DESDA provides for very limited grounds of appeal. The subsection does not provide for a re-hearing. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or reweigh the factors when determining whether leave to appeal should be granted or refused.

CONCLUSION

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

Janet Lew
Member, Appeal Division