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

Citation: *K. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 213

Tribunal File Number: AD-16-741

BETWEEN:

K. 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: May 10, 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 March 2, 2016.

[2] The General Division conducted an in-person hearing on February 9, 2016. There is no dispute that the minimum qualifying period in the Applicant's case is December 31, 2020. As this is a date in the future, the Applicant had the burden to prove, on a balance of probabilities, that she was disabled on or before the date of the hearing.

[3] In its March 2, 2016, decision, the General Division determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was not "severe" as defined in paragraph 42(2)(*a*) of the CPP.

[4] The Applicant filed this application for leave to appeal on May 24, 2016.

THE TEST FOR LEAVE TO APPEAL

[5] 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."

[6] 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; and

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.

[7] 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."

[8] 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 to appeal will be granted only 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: *Belo-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.

[9] As the Federal Court recently held in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at para. 23, "In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing […]. They also do not consider new evidence." Moreover, it is not the Appeal Division's role to re-weigh the evidence: *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 33. This principle applies at both the leave to appeal and appeal stages. 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.

SUBMISSIONS

[10] The Respondent made no submissions on this application for leave to appeal.

[11] The Applicant rests her application on paragraph 58(1)(*c*) of the DESD Act: that the General Division based its decision on an erroneous finding of fact. Specifically, in her application, she states:

> […] I believe that the tribunal member misinterpreted the medical note written by my specialist. I feel that if the medical doctor was able to submit a new letter clarifying a few critical points, then the decision would definitely cause the appeal to have a strong chance of success. I am still waiting to hear back from the specialist's office which I have left 4 messages requesting a doctor appointment [*sic*].
>
> I feel the tribunal member based her decision on misinterpreted evidence. The specialist did not make it clear in his medical reports. I feel that if the doctor

> explained the facts in more detail in a new medical report then the member would find that I meet the requirements of severe and prolonged.

[12] The Applicant did not include in her application for leave to appeal a "new letter" or "new medical report" from her specialist. I note that the Applicant has not provided such a letter or report to this Tribunal between the date of filing her application for leave to appeal and the date of this decision.

ANALYSIS

[13] The Applicant suffered a neurological injury (bilateral foot drop following delivery of her first child), and her neurological specialist was Dr. K. Kimpinski.

[14] Essentially, the Applicant has two objections: first, she disagrees with the General Division's interpretation of Dr. Kimpinski's medical reports and, second, she believes his reports were not sufficiently clear. She wishes to repair that deficiency by filing further evidence before me, namely a new letter or report (which she apparently has yet to obtain from Dr. Kimpinski) that was not before the General Division.

[15] My task is to determine whether, on the basis of the evidence that was before the General Division, the General Division committed an error falling within the scope of subsection 58(1) of the DESD Act that has a reasonable chance of success. As noted above, an appeal to the Appeal Division is not an opportunity for an applicant to have a fresh trial. Also, new evidence is not admissible on either an application for leave to appeal or an appeal. There are limited exceptions to this rule, such as when there is an allegation of a breach of natural justice, which is not alleged here. Therefore, even if the Applicant had produced a new letter from her medical specialist, it would be neither admissible on this application nor relevant to the question of whether her appeal has a reasonable chance of success.

[16] In the proceeding before the General Division, the Applicant bore the onus to establish, on a balance of probabilities, that she was disabled within the meaning of subsection 42(2) of the CPP. If the Applicant believed Dr. Kimpinski's reports were not sufficiently clear and, if she believed that more was necessary to make out her case, it was open to her to obtain further and better reports and then file them with the General Division. This she did not do, and it is too

late now to claim that the General Division would have reached a different result had different evidence been before it.

[17] In *Hideq v. Canada (Attorney General)*, 2017 FC 439, the Federal Court noted that, on an application for leave to appeal, the Appeal Division "is expected to review the underlying record and determine if the SST-GD [General Division] failed to account for any evidence, or if it misconstrued or overlooked evidence. Leave to appeal should normally be granted where this review of the underlying record demonstrates the evidence was not appropriately considered." (at para. 14).

[18] I have reviewed both the documentary record and the recording of the in-person hearing. My review of the evidence that was before the General Division does not lead me to conclude that it overlooked or misconstrued the evidence.

[19] The General Division, in its reasons, reviewed the medical evidence and the Applicant's testimony at the hearing. In particular, it reviewed the reports of Dr. Kimpinski in some detail (paras. 11, 12, 15 and 19). The General Division referred at para. 38 to a January 2014 report of Dr. Kimpinski, noting that it stated that the condition suffered by the Applicant would "keep her from doing certain types of jobs" (GD3-46). In para. 38, the General Division stated:

> The pain and discolouration to which Dr. Davies and Dr. Greensmith refer was affecting the [Applicant] while she was seeing Dr. Kimpinski and before he issued his letter of January 30, 2014. Had the circulation issues that result in the Appellant's [Applicant's] pain and discolouration been a reason that the Appellant [Applicant] could not work at any occupation the Tribunal is confident that Dr. Kimpinski would have considered that.

Given that, as noted in the reasons at para. 11, Dr. Kimpinski had been treating the Applicant since July 2012, this was not an unreasonable conclusion.

[20] The General Division went on to state that it preferred "the evidence of the specialist neurologist to that of the [Applicant's] internist and family physician. Dr. Kimpinski has specialist experience and knowledge of the [Applicant's] condition not possessed by her family physician or internist." Making findings of credibility and weighing the evidence are functions firmly within the domain of the General Division as the trier of fact. I see no basis for interfering with these conclusions.

[21] The General Division set out the correct legal test from *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248, that the "severe" criterion must be assessed in a real-world context, taking into account factors such as the Applicant's age, level of education, language proficiency, and past work and life experience. The General Division's decision that the Applicant had failed to establish that her disability meets the definition of "severe" under the CPP was based on and linked to the evidence relating to these factors (paras. 42–44).

[22] Given the above, I am not satisfied that an appeal has a reasonable chance of success and I must therefore refuse the application under subsection 58(2) of the DESD Act.

CONCLUSION

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

Nancy Brooks
Member, Appeal Division