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

Citation: *C. Z. v. Minister of Employment and Social Development*, 2017 SSTADIS 219

Tribunal File Number: AD-16-655

BETWEEN:

C. Z.

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 10, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the General Division's decision dated April 7, 2016, which determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2014.

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

[5] In her application for leave to appeal, the Applicant requested a reconsideration of the General Division's decision. She submitted that she had not been properly represented

during the hearing and that she should have retained legal counsel. She further submitted that the General Division failed to review or consider the following:

a) that her physician would not sign a release that she could return to her former employment;

b) that a physiatrist was of the opinion that she is disabled, and that her condition is likely to worsen with age and unlikely to improve significantly; and

c) the fact that she is heavily medicated, which clouds her thinking.

[6] To ensure that the Applicant had the opportunity to make her case in full, the Social Security Tribunal asked her to provide full and detailed grounds of appeal as required by the DESDA. In response, the Applicant filed additional records, including her family physician's medical report of September 18, 2014 (AD1A-9 to AD1A-10), consultation reports of a physiatrist and anesthesiologist, dated January 20, 2016 and May 7, 2015, respectively (AD1A-11 to AD1A-15) and a CT scan of her lumbar spine taken on May 8, 2016 (AD1A-7). The Applicant also confirmed that she had a consultation with a psychiatrist scheduled for October 18, 2016 (AD1A-8).

[7] On December 1, 2016, the Applicant filed additional medical records, including an MRI report dated September 25, 2016, and an updated consultation report dated July 21, 2016, from her physiatrist (AD1B).

a) Alleged erroneous findings of fact

[8] The Applicant submits that the General Division failed to consider several facts. It is well established in the jurisprudence that a decision-maker is not required to refer to all of the evidence before it, as it is presumed to have been considered: *Simpson v. Canada (Attorney General)*, 2012 FCA 82. This presumption can be rebutted if an applicant can establish that the evidence was of such probative value that the decision- maker ought to have considered it.

[9] The Applicant alleges that the General Division failed to consider that she could not return to her previous employment because she could not obtain medical clearance, and that

her former employer was unable to provide any accommodations. However, it is implicit in its analysis that the General Division was aware that she could not return to her former employment at Costco, as it required that she seek alternate employment with another employer. The General Division had determined that, although she was unable to perform her "regular job," she nevertheless exhibited some residual work capacity. The General Division cited *Klabouch v. Canada (Social Development)*, 2008 FCA 33 at paragraph 15, where the Federal Court of Appeal held:

> […] the determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work, i.e. any substantially gainful occupation.

[10] It was on this basis that the General Division required that the Applicant undertake efforts to obtain alternate employment.

[11] The Applicant argues that the General Division failed to consider her physiatrist's opinion, but in fact, the General Division referred to the physiatrist's report, at paragraph 25, and specifically noted that "[s]he is disabled and likely to worsen, and not likely to improve […]" The General Division also noted the physiatrist's opinion that facet joint blocks and a caudal epidural block would be helpful in potentially reducing her pain and improving her quality of life.

[12] Finally, the Applicant alleges that the General Division failed to consider that she is heavily medicated, but the General Division noted her medications, which were listed in the various medical records. Although she alleges that the medications cloud her thinking, I do not see any documentary evidence of this. Indeed, the Applicant does not complain or suggest in the questionnaire accompanying her application for a disability pension that she suffers any cognitive impairments as a result of being medicated (GD2- 50).

[13] Essentially, the Applicant is seeking a reassessment. As the Federal Court held in *Tracey*, a reassessment is beyond the jurisdiction of the Appeal Division, as the grounds of appeal are limited to those under subsection 58(1) of the DESDA. There is no role for the

Appeal Division to reassess the evidence or reweigh the factors considered by the General Division, when determining whether to grant or refuse leave to appeal. Additionally, I am mindful of the words of the Federal Court in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[14] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

b) Medical records

[15] The General Division indicated that there were no reports from the Jim Pattison Pain Clinic. In response, the Applicant has now filed a May 7, 2015 consultation report of an anesthesiologist (AD1A-13 to AD1A-15). She has also filed two medical records that were prepared after the hearing before the General Division. The Applicant is seeking to introduce new evidence or to clarify existing issues.

[16] New evidence generally does not constitute a ground of appeal. As the Federal Court held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367:

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[17] New evidence can be considered on an appeal to the Appeal Division only under very limited circumstances, where they address any of the grounds of appeal. Those circumstances, however, are not present here.

[18] I note that the General Division had referred to and considered both the family physician's report of September 18, 2014, and the physiatrist's January 20, 2016 consultation report. Essentially, the Applicant is seeking a reassessment. As I have indicated

above, a review or reassessment of the evidence does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA, and it is not the Appeal Division's role to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave should be granted or refused. I am not satisfied that there is a reasonable chance that the Applicant will succeed in demonstrating that a reassessment is appropriate.

c) Legal representation

[19] Finally, the Applicant seeks a reassessment, on the basis that she did not have proper legal representation. This does not constitute a proper ground of appeal.

CONCLUSION

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

Janet Lew
Member, Appeal Division