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

Citation: *D. O. v. Minister of Employment and Social Development*, 2017 SSTADIS 239

Tribunal File Number: AD-16-1277

BETWEEN:

D. O.

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 25, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant applied for a disability pension under the *Canada Pension Plan* (CPP) on March 18, 2015. On June 15, 2015, the Respondent approved the application, specifying a deemed date of disability onset of December 2013, which it determined was the maximum retroactivity period permitted under the legislation.

[2] The Respondent denied the Applicant's request for reconsideration. The Applicant then appealed to the the General Division of the Social Security Tribunal, claiming that she had been incapacitated from applying+ earlier for the CPP disability pension. On August 9, 2016, the General Division conducted a hearing by teleconference and determined, in reasons issued on August 13, 2016, that the Applicant was not incapable, according to the definition set out in subsection 60(8) of the CPP, of forming or expressing an intention to make an application earlier than March 18, 2015. Accordingly, it upheld December 2013 as the deemed date of disability.

[3] On November 7, 2016, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW CPP

[4] Subsections 60(8) to 60(10) of the CPP set out the requirements for a finding of incapacity:

> (8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit

could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

(b) the person had ceased to be so incapable before that day, and

(c) the application was made

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

[5] According to paragraph 42(2)(*b*) of the CPP, a person cannot be deemed disabled, for payment purposes, more than fifteen months before the Respondent received the application for a disability pension. According to section 69 of the CPP, payments start four months after the date of disability.

DESDA

[6] 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.

[7] 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.

[8] 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
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> (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.

[9] 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]

[10] 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

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

SUBMISSIONS AND ANALYSIS

[12] The Applicant submitted an 11-page letter with the application for leave, much of it recapitulating submissions that, from what I can gather, were already presented to the General Division. She emphasized that she had been found to suffer from a severe and prolonged disability, as defined by the CPP, which also left her incapacitated from forming or expressing an intention to make an application earlier than she did. She said that Post-Traumatic Stress Disorder (PTSD) renders people both mentally and physically disabled. The General Division

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

failed to recognize that PTSD does not come with exact identifiers that are the same for everyone; the symptoms are different for every individual, and every individual's trauma is unique. Nobody wins in a process in which medical information must be interpreted by assessors, such as the Respondent or the General Division, "who suddenly become privy" to a claimant's health records.

[13] In my view, these broad allegations do not signify how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that they were incapable during the relevant period.

[14] The Applicant pointed to various aspects of her submissions before the General Division that she believes were overlooked, but it is settled law that an administrative tribunal charged with finding fact is presumed to have considered all of the evidence before it and need not discuss each and every element of a party's submissions.[3] That said, my review of the decision indicates that the General Division analyzed the evidence underlying the Applicant's claim of incapability and came to a defensible conclusion that was supported by the facts and law. I see no indication that it ignored, or gave inadequate consideration to, any significant component of the Applicant's evidence.

[15] The General Division referred to the significant items of documentary evidence made available to it and summarized the Applicant's testimony. It addressed the Applicant's various medical conditions—primarily symptoms associated with anxiety and PTSD—in order to determine whether her impairments pointed to a finding of incapability under subsection 60(8). I see no indication that it misapplied the law. The decision closed with an analysis that suggested the General Division meaningfully assessed the evidence and had defensible reasons supporting its conclusion that the Applicant was capable of forming or expressing an intention to apply for CPP disability benefits prior to March 18, 2015. While the General Division did

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

not arrive at the conclusion the Applicant would have preferred, it is not my role to reassess the evidence but to determine whether the decision is defensible on the facts and the law. An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) of the DESDA and whether any of them have a reasonable chance of success.

[16] With all that being said, the Applicant's submissions did contain a number of specific allegations, which I will address below.

Declaration of Incapacity

[17] The Applicant alleges that the General Division relied on Dr. Pirzada's Declaration of Incapacity dated August 20, 2015 in finding that she was not incapacitated from submitting a CPP disability application earlier than March 18, 2015. However, Dr. Pirzada is not a psychologist or a psychiatrist, but a general practitioner, and his opinion is therefore less credible than other evidence, in particular, Dr. Waldman's psychiatric report dated October 2009. In the same Declaration of Incapacity, Dr. Pirzada also stated that the Applicant's incapacity commenced on November 2, 2008—well before his first contact with her.

[18] I see no reasonable chance of success on this ground. The Applicant has not identified any error committed by the General Division but instead argues that the Declaration of Incapacity was assigned excessive weight, given Dr. Pirzada's lack of qualifications to pronounce on incapacity. However, the Applicant has offered no reason why a general practitioner's opinion on his patient's capacity to express or form an intention to apply for benefits should be completely devalued. It is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, decide on its weight and determine what, if anything, it chooses to accept or disregard. The Federal Court of Appeal addressed this topic in *Simpson v. Canada*,[4] in which the appellant's counsel argued that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted selected medical reports. In dismissing the application for judicial review, the Court held:

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

> 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…

[19] I do not see how Dr. Pirzada's statement that the Applicant's incapacity commenced on a date prior to his first contact with her can be taken as an indictment of the General Division's decision. The General Division presumably took into consideration the fact that Dr. Pirzada made a retrospective diagnosis, which physicians have been known to do based on their assessment of patient histories and past medical records.

Application for Disability Tax Credit

[20] The Applicant further alleges that the Respondent selected one piece of information from a questionnaire completed by Dr. Pirzada in support of the Applicant's claim for the Canada Revenue Agency (CRA) Disability Tax Credit, yet failed to note that this doctor found that she was "not fit" to work on the same form. It was the Applicant's view that this contradicted the Respondent's finding of fact. However, the CRA is a different department of government than Employment and Social Development Canada, which administers the CPP disability regime, with different definitions, policies and regulations. It is evident that the form was not drafted with the assistance of medical professionals.

[21] On the same form, alleged the Applicant, Dr. Pirzada also checked "yes" to "markedly restricted," which is defined by the CRA to indicate that a person may take an inordinate amount of time to complete tasks. The Applicant submits that, in comparison to what she was capable of prior to her PTSD diagnosis, everything takes an inordinate amount of time. Dr. Pirzada also erred (at GD2-117) in indicating "2006" as the year in which her "marked restrictions" began.

[22] Again, I see no arguable case here. These allegations, this time directed against Dr. Pirzada's Disability Tax Credit questionnaire, also go to the weight the General Division has seen fit to assign the evidence. While it is true that the criteria for the Disability Tax Credit differ from those required for CPP disability benefits or a finding of capacity under subsection 60(8), I do not think that the information elicited by the questionnaire at issue can be reasonably

seen as irrelevant to the Applicant's appeal. This is especially so, since Dr. Pirzada explicitly stated that the Applicant was able to independently find solutions without difficulty and was able to make appropriate judgments most of the time. On the other hand, the fact that Dr. Pirzada found her "markedly restricted in the mental functions necessary for everyday life" was not necessarily determinative either, as this statement did not coincide with the CPP's definition of incapacity and, in any case, was just one of many, apparently contradictory, items of evidence that the General Division was required to assess in coming to its decision.

Number of Appointments with Dr. Pirzada

[23] The Applicant alleges that between December 2009, when she first started seeing Dr. Pirzada, and June 2010, when she began the application process for the CRA's Disability Tax Credit, Dr. Pirzada would have seen her possibly five times:

> [S]ometimes additional issues must be addressed at a later appointment or in a second appointment with doctors generally allowing for two concerns per patient visit while iron injections were administered once a month and being one reason of the medical issues for concern and care to be in Dr. Pirzada's office for.

[24] However, in his letter dated June 25, 2013, Dr. Pirzada indicated that he saw the applicant "11 times" between January 2011 and November 2011. The Applicant submits that the General Division may have been persuaded that those visits were made pursuant to her efforts to win approval from the Manitoba Teacher Society's Disability Benefits Plan (MTS-DBP).

[25] I see no arguable case on this point, which does not point to any error on the part of the General Division. Dr. Pirzada did, in fact, write that he saw the Applicant 11 times, and the General Division was entitled to rely on this statement. Similarly, the Applicant was entitled to raise evidence to correct or qualify this statement, and she had ample opportunity to do so in the period leading up to the hearing and during the hearing itself. However, an application to the Appeal Division is not an occasion in which new evidence can be introduced, under the provisions of subsection 58(1) of the DESDA and I have no mandate to re-hear evidence on its merits.

Return to Work Plan

[26] The Applicant notes that the MTS-DBP directed her to follow a return to work plan in March 2009, thereby triggering cognitive dissolution that, to add to her already traumatized mental state, left her further incapable of expressing an intention to make an application. The General Division failed to apply a principle of natural justice by failing to consider this fact.

[27] I see no arguable case on this ground. As discussed, an administrative tribunal is presumed to have considered all the evidence and I note that the Applicant had previously submitted to the General Division that she was emotionally traumatized by her private insurer's attempt to push her back into the workforce. Such evidence, however, does not mean that the trier of fact is bound to find that she lacked the capacity to form or express an intention to apply for benefits during the relevant time period.

"Inhumane" Outcome

[28] The Applicant submits that the General Division's denial of her CPP disability back pay is inhumane. She has been found disabled and is in severe financial straits. She has been outnumbered by professionals throughout the claims and appeal process. She has endured numerous traumas, including physical and mental disability, homelessness and the illness and death of loved ones, all of which have left her "incapable of forming or expressing an intent to apply" for CPP disability.

[29] In my view, this argument would have no reasonable chance of success on appeal. The Applicant suggests that she should be granted relief on compassionate grounds, but the General Division was bound to follow the letter of the law, and so am I. If the Applicant is asking me to exercise fairness and reverse the General Division's decision, I lack the discretionary authority to do so and can only exercise such jurisdiction as granted by the DESDA. Support for this position may be found in *Pincombe v. Canada*,[5] among other cases, that held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

[5] *Pincombe v. Canada (AttorneyGeneral)*, [1995] FCJ No. 1320 (FCA).

Alleged Errors of Law

[30] The General Division cited *Morrison v. Minister of Human Resources and Development*,[6] later endorsed by the Federal Court of Appeal,[7] wherein the Pension Appeals Board held that, in order to assess an ability to "form or express an intent to apply" it was necessary to consider both the medical evidence and the relevant activities of the claimant during the claimed period of incapacity. The Applicant submits that this approach is not only outdated but also has no applicability to PTSD. Contrary to the General Division's assertion, it is not a difference of beliefs or "world view'' to refer to capacity in relation to PTSD. The Applicant further submits that amounts for which she was approved have not been paid; although she was approved as of April 2014, she has not received payments for "December 2013, January 2013, February 2013 or March 2013."[8]

[31] The Applicant has failed to convince me that the General Division misapplied *Morrison* or *Danielson*, which it correctly cited for the principle that everyday activities, such as driving, may be taken as evidence of capacity. Furthermore, I do not see where the General Division minimized or denied the reality of PTSD, which can indeed be disabling. That said, a diagnosis of PTSD does not necessarily equate with a finding of incapacity; it was the General Division's task to consider all of the evidence and decide, on a balance of probabilities, whether the Applicant was capable of forming or expressing an intention to apply.

[32] Finally, the Applicant suggests that the Respondent, and by implication, the General Division, erred in failing to award her retroactive disability payments from December 2013 to March 2014, inclusively. I see no error in how the Applicant's entitlement was calculated, and note that section 69 of the CPP requires that payments start four months after the date of disability, in this case, December 2013, which was found to be the deemed date of disability by virtue of her having applied in March 2015.

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[6] *Morrison v. Minister of Human Resources and Development*, CP04182, March 7, 1997.
[7] *Canada (Attorney General) v. Danielson*, 2008 FCA 78; *Canada (Attorney General) v. Kirkland*, 2008 FCA 144.
[8] I will assume that this is a typographical error, and that the Applicant meant to write "December 2013, January 2014, February 2014 or March 2014."

CONCLUSION

[33] As the Applicant has not presented an arguable case on any ground, the application for leave to appeal is refused.

Member, Appeal Division