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

Citation: *T. Z. v. Minister of Employment and Social Development*, 2017 SSTADIS 246

Tribunal File Number: AD-16-662

BETWEEN:

T. 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 29, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division decision dated February 16, 2016. The General Division determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" by the time of her hearing on February 11, 2016. She has a minimum qualifying period that ends on December 31, 2019.

ISSUE

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

GROUNDS OF APPEAL

[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, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant submits that the General Division erred under each of the grounds set out in subsection 58(1) of the DESDA. She argues that the General Division's decision is insufficient, as it does not allow for a meaningful review of its correctness. She further argues

that the General Division committed several errors of law: it contravened *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504, failed to correctly apply the test for severity, and failed to consider that her non-compliance with treatment recommendations was reasonable. Finally, she argues that the General Division based its decision on evidence that was not before it.

[6] The General Division found that there was no evidence that the Applicant had ever attended a comprehensive pain management program or fibromyalgia support program. From this, it appears that the General Division determined that the Applicant had failed to mitigate her damages.

[7] The Applicant submits that the General Division erred in failing to explain why the Applicant should have participated in a pain management or fibromyalgia support program, whether the Applicant had a reasonable explanation for failing to attend such programs, and what impact, if any, her refusal to attend might have had on her disability status if the refusal had been considered unreasonable. The Applicant argues that the General Division failed to apply the principles set out by the Federal Court of Appeal in *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, in which the Federal Court of Appeal held:

> The "real world" context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable.

[8] The Applicant has not cited whether there was any evidence before the General Division explaining why she had not attended either the pain management or fibromyalgia support program. Nevertheless, I am satisfied that there is an arguable case that the General Division may have erred in failing to consider whether the Applicant had a reasonable explanation for failing to attend either or both programs, and what impact that might have had on her disability status. In granting leave, the Applicant should refer me to the evidence that was before the General Division that supports her allegations that she had a reasonable explanation for failing to participate in pain management and fibromyalgia support programs. If there was no evidence of this nature before the General Division, the Applicant is unlikely to succeed on this issue.

[9] The Applicant has raised other grounds of appeal as well, but as the Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276 indicated, it is unnecessary for the Appeal Division to address all of the grounds of appeal raised by an applicant. In response to the respondent's argument in that case, that the Appeal Division was required to deny leave on any ground that it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESDA "does not require that individual grounds of appeal be dismissed." As such, I find it unnecessary to address these other grounds at this juncture.

CONCLUSION

[10] The application for leave to appeal is granted. This decision granting leave does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division