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

[TRANSLATION]

Citation: *C. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 263

Tribunal File Number: AD-16-633

BETWEEN:

C. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: June 7, 2017

REASONS AND DECISION

[1] On March 30, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable to the Applicant. The Applicant filed, before the Tribunal's Appeal Division, an application for leave to appeal.

[2] The only grounds for appeal before the Appeal Division are those provided for in Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA):

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.

[3] In accordance with subsection 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[4] I emphasize that the leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and lower hurdle to be met. The Applicant does not have to prove the case at the leave to appeal stage: *Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC). Rather, the Applicant is required to establish that the appeal has a reasonable chance of success. This means having, at law, some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Appeal Division should not weigh the evidence at the leave to appeal stage, nor should it dispose of the case on the merits; leave to appeal should be granted unless the Appeal Division

concludes that "no one could reasonably believe in [the appeal's] success:" *Canada (Attorney General) v. Bernier*, 2017 FC 120.

[5] In this case, I must determine whether there is at least one admissible ground of appeal according to subsection 58(1) of the DESDA that could give the appeal a reasonable chance of success.

[6] Among the grounds of appeal, the Applicant (representing herself) argues that the medical opinion of her specialist, Dr. Perkins, supported her position that she could not work. On the other hand, the General Division determined that there was [translation] "no proof that she would not be able to find another job based on her transferable skills or to be retrained for another more suitable position" and "no proof that she would be incapable of working due to her condition." The General Division also stated that Dr. Perkins opinion "that she would not be able to carry out any physical work [...]" is not supported by the evidence.

[7] I have noted the comments by the orthopedist, Dr. Perkins:

> Little improvement with respect to the last surgery performed (medial osteoarthritis of the knee) on her right knee […] In the scenario that the patient stays very inconvenienced and suffers, it will be necessary to plan for another type of surgery, such as reconstructive knee arthroplasty […] However, given the condition this patient is in, as well as other associated factors (obesity), the prognosis risks remaining poor. Hardly functional – some level of residual pain. It is difficult to conceive that this patient could resume her job or any other type of work in the future [October 16, 2012]
>
> […] we have decided to postpone, for as long as possible, such a surgical procedure [total arthroplasty] […] However, it is clear that this patient continues to have a lot of functional limitation due to the osteoarthrosic state in her right knee. Furthermore, she also continues to have residual pain secondarily to the phlebitis and experiences significant weakness in her right quadriceps. She can therefore stay standing for long periods of time with difficulty or can walk only a short distance before feeling pain. Synovitis conditions then emerge.

> It is therefore clear that this patient cannot carry out any physical type of work. The same is true for work for which she would stay seated in a prolonged way, which would also have a similar effect, namely, one of rest pain. [May 9, 2013]

[8] The Applicant indicated in her Questionnaire (October 31, 2012) the following facts: she had stopped working at a pizzeria in 2011 due to pain in her right knee; she received regular Employment Insurance benefits; the pain and the risk of falling prevented her from working, because her knee could not tolerate it; and with respect to functional limitations, she gets up, walks and bends down with difficulty; she uses a cane but, for sitting, she indicated "ok seated."

[9] The General Division is authorized to give precedence to certain evidence over other evidence. It is not the Appeal Division's role to assess or weigh evidence again to arrive at a different conclusion: *Tracey v. Canada (Attorney General)*, 2015 FC 1300. However, the General Division has the obligation to "engage in a meaningful analysis of the evidence:" *Dossa v. Canada (Pension Appeal Board)*, 2005 FCA 387. If the General Division potentially ignored or misinterpreted pertinent evidence, leave to appeal should normally be granted: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

[10] In this case, there are two preoccupying components in the General Division's decision pertaining to the fundamental obligation to consider all the pertinent evidence and to assess it accordingly: a) the references to "no proof" raise the possibility that the member did not conduct such a test; and b) the citing of Dr. Perkins' opinion on only the physical work indicates that the member perhaps ignored his opinion that work requiring long periods of sitting would also present problems (rather than weighing this evidence against the other evidence). I gather that this here could confer to the appeal a chance of success, according to the grounds for appeal listed in paragraphs 58(1)(*a*) and (*b*).

[11] It is not entirely clear whether the Applicant is presenting other grounds for appeal. Whatever it may be, after having concluded that there is a defendable case according to the above-mentioned grounds for appeal, I am not bound to review the other grounds of appeal at this stage. Subsection 58(2) does not provide for each ground of appeal to be reviewed and allowed or dismissed: *Mette v. Canada (Attorney General)*, 2016 FCA 276. According to subsection 58(3), the Appeal Division must simply grant or refuse leave to appeal. Leave to

appeal is granted, and the Applicant is not limited in her capacity to pursue other grounds for appeal contained in her application for leave to appeal.

[12] However, I emphasize that I have not admitted into evidence the new documents that the Applicant has submitted (a medical report from Dr. Perkins dated June 13, 2016, and the notes handwritten by the Applicant on June 22, 2016). New evidence is generally not admitted before the Appeal Division, since the appeal is not a *de novo* hearing: *Marcia v. Canada (Attorney General)*, 2016 FC 1367. These documents, which the General division did not have in March 2016, cannot have an impact on the allegation that the General Division committed an error at that time. Furthermore, according to the DESDA, the existence of new evidence does not constitute an independent ground for appeal before the General Division.

CONCLUSION

[13] The application for leave to appeal is granted.

[14] This decision does not in any way presume the results of the appeal based on the merits of the case.

Shirley Netten
Appeal Division Member