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

Citation: *E. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 272

Tribunal File Number: AD-16-637

BETWEEN:

E. R.

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: June 12, 2017

Canada

REASONS AND DECISION

[1] This is an application for leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), which determined that the Applicant was not entitled to a disability pension under the *Canada Pension Plan* (CPP).

[2] Pursuant to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal from a decision of the General Division: first, a breach of natural justice; second, an error in law; and third, an erroneous finding of fact made in a perverse and capricious manner or without regard to the material before it. The use of the word "only" in s. 58(1) means that no other grounds of appeal may be considered: *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at para. 72.

[3] Leave 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 s. 58(1) of the DESDA: *Belo-Alves*, 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.

[4] The sole issue before me on this application is whether the Applicant's proposed appeal has a reasonable chance of success.

BACKGROUND

[5] On January 25, 2013, the Applicant applied for a CPP disability pension. She was then 55 years of age. Her application was denied at the initial determination on April 12, 2013, and upon reconsideration on June 12, 2013. The reconsideration decision noted that according to an occupational therapy assessment dated April 23, 2013, she was completely independent with respect to her current activities, apart from a few limitations with mobility, and that she provided 24-hour-a-day supervision and care to her husband. The reconsideration decision stated that the information filed did not indicate that the Applicant's condition prevented her from pursuing some form of work suitable to her limitations.

[6] The Applicant appealed the reconsideration decision to the General Division. A hearing by videoconference was held.

[7] In reasons issued on March 4, 2016, the General Division member found that the minimum qualifying period (MQP) date was December 31, 2014.

[8] The General Division member noted in his reasons that the Applicant had worked as an activity worker with the Vancouver Island Health Authority from 1993 until January 2011, when she stopped work due to her medical condition. He noted that she described her main disabling condition as Stage 2 posterior tendon dysfunction and acquired flat foot deformity. The Applicant testified that these conditions were progressive and had resulted in a decline in her mobility and activities of daily living.

[9] In his reasons, the General Division member reviewed the medical evidence. He also summarized the testimony given by the Applicant at the oral hearing. I have listened to the recording of the hearing and have concluded that the summary of the Applicant's testimony, set out in paragraphs 28 through 39 of the member's reasons, is accurate.

[10] The member referred in his reasons to the comments made by Dr. Love in a November 13, 2013 form that was prepared in relation to the Applicant's long-term disability (LTD) claim to a private insurer. On the form, Dr. Love checked the box "Yes" indicating that he had discussed with the Applicant a return to work plan (GD8-18). The reasons state:

> [33] The Appellant was asked what return to work plan she discussed with Dr. Love as detailed in his comments to her long term disability provided in a November 13, 2013 form. The Appellant stated she did not know what plan there would be because she's unable to return to work. The Appellant was asked to clarify whether she had a discussion with Dr. Love and she would not provide an explanation.

[11] The Applicant testified that her husband has Alzheimer's disease and she cares for him. The member asked her to describe the extent and nature of the care she provided to her husband. The reasons summarize the Applicant's testimony as follows:

> [35] The Appellant was asked about her average day. The Appellant stated her average day is very busy. She stated that her husband has Alzheimer's and she is his family caregiver. She stated that she cares for him 24 hours a day.

> The Appellant was asked several times to describe the nature and extent of the care she provides to her husband. The Appellant provided only broad information and would not convey specific details although invited to do so on several occasions.
>
> [36] The Appellant stated that she monitors and supervisors [sic] her husband. She feeds him. She takes care of his personal hygiene. The Appellant ensures that her husband is safe and properly looked after. She stated as a result she has a hardship to her health physically and mentally.
>
> […]
>
> [39] The Appellant was asked about her average day. She stated that she tries to do her basic activities of daily living. When asked to provide clarification she stated that she just tries to do basic activities of daily living. She stated that her husband requires 24 hours a day of supervision and that causes her stress. The Appellant stated that she has been the primary caregiver for her husband for the past 25 years.

[12] The Applicant testified she has not been provided with or discussed with her employer the opportunity for accommodation in the workplace. She testified that she has not looked for other work because her disability is "long-continued and of an indefinite duration."

[13] In his reasons, the member noted the adverse inferences he drew from the Applicant's failure to provide responsive answers to his questions at the hearing. The member found that the Applicant was evasive in her responses as to her level of function and her role as her husband's primary caregiver. The member concluded that the Applicant had residual work capacity. In this regard, he stated:

> [48] She was pressed several times to provide specific details on the nature and extent of her role as the primary caregiver. Her responses were vague and unhelpful in assisting the Tribunal to understand the extent of her functional capacity. However, the Appellant did detail that she supervises and monitors her husband 24 hours a day. She further detailed that she assisted him with his activities of daily living. The Tribunal draws from these facts that the Appellant has the capability to assist her husband in his daily activities and therefore there is likely a residual capacity that may enable her to continue working. While the Tribunal is sympathetic to her requirement to be the primary caregiver for her husband this fact does not preclude a finding of work capacity.
>
> [49] With respect to her level of function the Appellant would not provide details on her daily routine except to say that her disability prevented her from working. Her responses did not squarely address the questions posed to her but

> rather were argumentative (not factual) in nature. The Tribunal again draws an adverse inference from the responses of the Appellant and finds that she likely has a continued capacity for work.

[14] Having concluded that the Applicant had residual work capacity, the member found she had not established that her medical condition was severe within the meaning of the CPP. Given his finding that the disability was not severe, it was not necessary to make a finding on the "prolonged" criterion.

SUBMISSIONS

[15] The Respondent did not file submissions on the application.

[16] In her application for leave to appeal, the Applicant asserts breaches of all three grounds listed under s. 58(1) of the DESDA.

[17] With respect to s. 58(1)(*a*) of the DESDA, she submits (AD1A-4):

> Failure to observe principle(s) of natural justice CPP regulations time factors greater possibility of unfairness, method of proceeding disrespected the requirements under the Social Security Tribunal regs. denies fairness and natural justice to the right of law, appeallant [sic].

[18] From this, I understand the Applicant to plead that the principles of natural justice were not observed because of the method of proceeding, which allegedly did not conform to the requirements under the *Social Security Tribunal Regulations* (SST Regulations), giving rise to possible unfairness because of time factors.

[19] With respect to s. 58(1)(*b*) of the DESDA, the Applicant pleads (AD1A-5):

> The General Division made an error in law in its decision. The member of the General Division based its decision on the "severe and prolonged" demonstrated the functional limitations associated disability persistent, continuous, uninterrupted the disability more likely than not to be long continued and of indefinite duration. It is more likely than not that the appeallant meets the CPP "severe and prolonged" meet the two criteria for CPP disability benefit. I demand to be made whole and complete. [sic]

[20] With respect to s. 58(1)(*c*) of the DESDA, the Applicant pleads (AD1A-4):

> Failure [of] the member of the General Division based its decision on a full review, facts submitted documentation. Decision to deny is disputable, debateable and/or open to question.
>
> I have demonstrated continuing intent, file documents number of file documents to the Social Security Tribunal January 2011–May 30, 2016 five years. [*sic*]

NEW DOCUMENTS

[21] In her application, the Applicant has included a number of documents that were not before the General Division. These additional documents comprise:

a) Documents filed on March 13, 2017 (AD1C-1 to AD1C-45): results of a foot X-ray taken on October 28, 2015; a report dated November 30, 2015 of a Dr. K. Martin; a report on the results of bloodwork dated June 27, 2016; a laboratory requisition dated June 29, 2016; a letter from a naturopath, J. P., dated August 3, 2016; claim forms relating to the Applicant's LTD benefits through a private insurer dated August 30, 2016; and a brochure titled, "Circle of Care: Supporting Family Caregivers in BC" dated October 2016;

b) Documents filed on March 27, 2017 (AD1D-1 to AD1D-3): a letter from J. P., dated March 14, 2017 and a report on the results of bloodwork dated February 16, 2017; and

c) Document filed April 10, 2017 (AD1E-1 to AD1E-2): completed form "Zarit Burden Interview (Short Version)" taken from the brochure "Circle of Care: Supporting Family Caregivers in BC" dated October 2016.

[22] The Federal Court recently confirmed 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." (See also *Marcia v. Canada (Attorney General)*, 2016 FC 1367.) These principles apply at the leave to appeal stage as well as on appeal. There are limited exceptions to the rule barring new evidence, such as to address a procedural fairness issue or to provide background information: *Daley v. Canada (Attorney General*), 2017 FC 297, at para.14.

[23] In the present case, although the Applicant has alleged a breach of the principles of natural justice based on the form of hearing, the new documents are not probative of or relevant to this issue. Nor do they constitute background information. I therefore conclude that these documents are inadmissible and I have not considered them further.

[24] I turn now to the alleged breaches under s. 58(1) of the DESDA.

ANALYSIS

Principles of natural justice

[25] The Applicant submits that the principles of natural justice were breached due to the method of proceeding because the SST Regulations were not respected, and time factors gave rise to a greater possibility of unfairness.

[26] Section 28 of the SST Regulations provides that the General Division, Income Security Section may decide an appeal on the basis of the documents and submissions filed; or if it determines that a further hearing is required, may send a notice of hearing to the parties. Where a notice of hearing is sent, s. 21 of the SST Regulations provides that the Tribunal may hold the hearing by way of (a) written questions and answers; (b) teleconference, videoconference or other means of telecommunication; or (c) the personal appearance of the parties.

[27] In the present case, a notice of hearing was sent advising the Applicant that a videoconference hearing had been scheduled. The notice advised that the General Division had decided to proceed by videoconference hearing because (a) the Applicant was the only party attending the hearing; (b) videoconferencing was available within a reasonable distance of where the Applicant lived; (c) the issues under appeal were complex; and (d) proceeding by videoconference respected the requirement under the SST Regulations to proceed as quickly and informally as circumstances, fairness and natural justice permit. In my view, there is no basis to conclude that the member failed to comply with the SST Regulations.

[28] A videoconference hearing was held on March 4, 2016. As noted earlier, I have listened to the recording of the hearing. At the outset, the Applicant was told she could make opening submissions, but she chose not to do so. As the Respondent had chosen not to appear at the

hearing, the hearing proceeded with questions by the member followed by the Applicant making submissions on her own behalf. It is evident from the recording that the Applicant was given as much time as she required to present her evidence and make submissions. The hearing was not rushed in any way.

[29] The Applicant does not provide any information as to how the hearing before the General Division failed to comply with the SST Regulations or the principles of natural justice. In the absence of any specific allegations, I see no reasonable chance of success with respect to a potential failure to observe a principle of natural justice.

Error of law

[30] The Applicant submits that the General Division erred in law in finding on the evidence before it that her condition did not meet the "severe and prolonged" requirement under s. 42(2) of the CPP. The Applicant submits that it is more likely than not that she meets the severe and prolonged criteria under the CPP.

[31] Leave ought not to be granted on a purely theoretical basis where there is no claim or evidence underpinning a particular ground of appeal: *Canada (Attorney General) v. Hines*, 2016 FC 112. Here, the Applicant has provided no particulars to support the allegation that the General Division erred in law in making its decision.

[32] I conclude that this allegation does not raise an arguable ground upon which the proposed appeal might succeed.

Error of fact

[33] In her application for leave to appeal, the Applicant states that prior to the MQP she had, and at present she has, a disability that prevents her from working. The Applicant has not provided any particulars of where the member allegedly made an erroneous finding of fact, but she alleges generally that he failed to base his decision on a full review of the facts and documentation.

[34] In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, the Federal Court of Appeal provided direction on how a claimant's medical condition should be assessed. The Court stated (at para. 8) that such an assessment is a:

> […] broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment. The approach of assessing the claimant's condition in its totality is consistent with section 68(1) of the [*Canada Pension Plan*] *Regulations*, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

[35] I have reviewed the evidence that was before the General Division. The member canvassed the relevant medical documentation in his reasons (at paras. 14 through 27). His description of the evidence covered the totality of the Applicant's condition, which was relatively straightforward.

[36] The member correctly set out that the onus was on the Applicant to prove on a balance of probabilities that her disability was severe and prolonged as of the MQP date (paras. 43 and 51). He was troubled by what he found to be evasive answers provided by the Applicant in her testimony on the key issues of her level of function and efforts to return to work. My review of the recording of the hearing supports the member's view that the Applicant was evasive and, at times, argumentative in her responses to questions.

[37] Listening to the Applicant's oral testimony, one is struck by the fact that, when asked to provide specifics about her functional limitations or the possibility of a return to work, she on a number of occasions gave what appeared to be a rehearsed, set answer, rather than addressing the issue in the member's question. I set out a number of examples of this, below.

[38] As noted above, the member referred in his reasons to a form completed by Dr. Love, in support of the Applicant's application for LTD benefits through a private insurer (found at GD8-16 to GD8-18). On the form, Dr. Love answered "Yes" to the question, "Have you discussed a return to work plan with your patient?" When the member asked the Applicant whether she had discussed with Dr. Love the possibility of returning to work (recording at 20:57), she testified there would be no reason for such a conversation because she could not

return to work. She then stated, “My functional limitations associated with my disability are persistent, continuous and uninterrupted and my disability is more likely than not to be long-continued and of indefinite duration.” When asked whether she had asked Dr. Love whether he thought she might return to work, the Applicant did not answer the question in a responsive manner but instead gave the same word-for-word response. Later, the Applicant testified that she had not looked for any other work (recording, 31:40). When the member asked her why, she did not answer the question in a responsive manner but gave the identical word-for-word response.

[39] I find there was a basis for the member to conclude that the Applicant’s answers on these key issues “did not squarely address the questions posed to her but rather were argumentative (not factual) in nature.” Based on his assessment of the Applicant’s testimony, and her failure to squarely address his questions in her answers, the General Division member made a factual finding that the Applicant had a residual work capacity.

[40] I bear in mind the Federal Court’s decision in *Griffin v. Canada (Attorney General)*, 2016 FC 874, where Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal under s. 58(1) of the DESDA:

> [20] It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., *Tracey*, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 at para 52, [2016] FCJ No 155. Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 at para 10, [2016] FCJ No 615. (Emphasis added.)

[41] I have reviewed the underlying record, both documentary and the oral testimony. The Applicant first applied for CPP disability benefits in January 2013. The initial decision was made on April 12, 2013, and the reconsideration decision was dated June 12, 2013. The Applicant had surgery on her right foot on September 12, 2013. She had surgery on her left foot on October 16, 2014. Her MQP date was December 31, 2014. The initial and reconsideration decisions were both made before the Applicant had surgery on either foot.

[42] The documentation filed by the Applicant in her appeal before the General Division included two medical reports of Dr. Love: one prepared in July 2011 (GD9-3 to GD9-6) and the other in November 2013 (GD8-16 to GD8-18). I note that both of these documents are forms created by the Applicant's private LTD insurer, which Dr. Love has filled in. His responses in answer to the questions on the forms are brief and somewhat opaque. The July 2011 report, which was made before either surgery, is of little assistance in assessing the Applicant's condition as of the MQP date. The November 2013 report was made after the right foot surgery in September 2013 but before the surgery on the Applicant's left foot in October 2014 and, therefore, is also of limited assistance in assessing the Applicant's condition on the MQP date. On both forms, Dr. Love has checked the box "No" in answer to the question "Were any functional capacity evaluations performed?" (GD9-5 and GD8-17) In the November 2013 report, in the box "Have you discussed a return to work plan with your patient," Dr. Love responded "Yes" with the notation "but she needs to wait for next surgery also." (GD8-18) The forms do not ask, and Dr. Love does not indicate, whether the Applicant was capable of any work.

[43] A report dated June 9, 2015, by Dr. K. Wing, orthopedic surgeon, was prepared as a follow-up to the second surgery performed in October 2014. This report does not address the Applicant's functional capabilities or whether she is capable of work of any kind. None of the medical reports that were before the General Division addresses the issue of whether the Applicant is capable of working at any occupation on or before the MQP date.

[44] The weight to be assigned to the various pieces of evidence is essentially the province of the trier of fact, here the General Division. An appeal to the Appeal Division is not an opportunity to re-argue the case and ask for a different outcome: *Marcia*. Given my review of the documentary and oral evidence, I have not identified any basis on which to question the member's assessment of the evidence, leading to his finding that the Applicant had a residual work capacity (reasons, paras. 46−51).

[45] In *Inclima v. Canada (Attorney General)*, 2003 FCA 117, the Federal Court of Appeal stated that to establish that a disability is severe, a claimant must show not only that she has a serious health problem, but, where there is evidence of work capacity, she must also show that

efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition. In the present case, the principle in *Inclima* (cited by the member at para. 45) was engaged once the member had found that the Applicant had a residual capacity to work.

[46] The Applicant testified that she had not worked since 2011, had not looked for other work, and had never discussed with her employer returning to work with accommodations (reasons, paras. 11, 37, 38). In light of this testimony, there was a basis for the member to find that she had not met her burden of proof to establish she met the criteria for a CPP disability benefit. Her testimony did not support a finding that she had made efforts at obtaining and maintaining employment and, therefore, she was in no position to establish that she was unsuccessful in this regard due to her health condition.

[47] The burden was on the Applicant to demonstrate she was disabled within the meaning of s. 42(2) of the CPP on or before the MQP. I am unable to conclude that the General Division erred in its finding that the Applicant failed to discharge her burden or that it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner.

[48] I find that the allegation that the General Division member breached s. 58(1)(*c*) of the DESDA has no reasonable chance of success on appeal.

CONCLUSION

[49] Based on my review of the General Division record, and having found that the Applicant does not have a reasonable chance of success in respect of the grounds of appeal found in the Applicant's submissions, leave to appeal is refused.

Nancy Brooks
Member, Appeal Division