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

Citation: *A. B. v. Minister of Employment and Social Development,* 2017 SSTADIS 268

Tribunal File Number: AD-16-1303

BETWEEN:

A. B.

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: June 9, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated October 18, 2016. The General Division had earlier conducted an in-person hearing and determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because her disability was not severe during her minimum qualifying period (MQP), which ended on December 31, 2015.

[2] On November 18, 2016, within the specified time limitation, the Applicant submitted an incomplete application requesting leave to appeal to the Appeal Division. Following a request for further information, the Applicant perfected her appeal on December 6, 2016.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Canada Pension Plan

[4] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

Department of Employment and Social Development Act

[5] 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.

[6] 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.

[7] 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

(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.

[8] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal 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]

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial 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 to appeal stage, the applicant does not have to prove the case.

ISSUE

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

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

SUBMISSIONS

[11] In a letter appended to the application for leave to appeal, the Applicant's husband and authorized representative indicated that he continued to gather medical reports documenting his wife's disability. He also enclosed prescription receipts and a chronology of the various claims for benefits she had made in recent years.

[12] In a letter dated November 25, 2016, the Tribunal advised the Applicant that she had advanced insufficient grounds of appeal and reminded her of the provisions of subsection 58(1) of the DESDA. It asked her to provide, within a reasonable timeframe, more detailed reasons for her request for leave to appeal. In a letter dated December 6, 2016, the Applicant's representative replied that the General Division failed to observe a principle of natural justice, specifically:

(a) It did not mention in its decision that Dr. Prutis had treated the Applicant in 2013.

(b) It wrote that the Applicant applied for regular Employment Insurance (EI) benefits, rather than sickness benefits.

(c) It failed to note that the Applicant was injured in 2002.

(d) It made no mention of the "fake" Record of Employment (ROE) slip.

(e) It overlooked the fact that the Applicant was fired from her job because she told her employer that she intended to apply for Worker's' Compensation benefits.

ANALYSIS

[13] Although the Applicant submits that the General Division failed to observe a principle of natural justice, her specific criticisms of the decision are better categorized as alleged erroneous findings of fact. Under subsection 58(1) of the DESDA, a factual error by itself is insufficient to overturn a decision; the General Division must have also *based* its decision on that error, which itself must have been "made in a perverse or capricious manner or without regard for the material before it." In other word, the error must be material *and* egregious.

Dr. Prutis

[14] The Applicant suggests that the General Division was negligent in failing to note in its decision that Dr. Prutis saw her in 2013. I note that there are two reports from Dr. Prutis on file—one dated February 3, 2014, and another dated August 27, 2014. From what I can determine, neither report indicates that Dr. Prutis saw the Applicant prior to 2014, and even if she had, I am not sure that this fact, if recognized, would have affected the outcome of the appeal one way or another. While the General Division summarized only the second report,[3] a trier of fact is presumed to have considered all the material before it, and it appears that the two reports did not differ in substance.

[15] I am not convinced this ground would have a reasonable chance of success on appeal.

Regular Versus Sick Benefits

[16] The General Division found that the Applicant had applied for regular EI benefits, rather than sickness benefits, and it is fairly clear that this finding was a factor in its decision:

> [27] There is conflicting evidence regarding the reason the Appellant stopped working in January 2014. According to the documents from the Appellant's employer, she was laid off because of the lack of work. However, the Appellant testified that she stopped working because of her deteriorating health. The Appellant applied for regular unemployment benefits in January 2014. The Appellant herself noted in the CPP questionnaire that she planned to return to work when she got better in a few months. The Tribunal did not find the Appellant's claims of total work stoppage due to health conditions only. The Appellant claimed to be fit to return to work as part of employment insurance benefits request and also stated that she expected to return to work in her CPP questionnaire. The Tribunal having weighed the evidence finds that the ending of employment on January 13, 2014 was due to a lay-off by SWCSN and not the Appellant's lack of capacity to work.

[17] My review of the evidentiary record indicates that, contrary to the General Division's assertion, the Applicant disclosed in her February 2014 CPP disability application that she had *not* applied for regular EI benefits (GD3-67). I have also listened to the audio recording of the hearing and heard nothing to contradict this statement.

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[3] The General Division described Dr. Prutis as a rheumatologist, although the record suggests that she is in fact a physiatrist. This would appear to be an error, but I do not consider it material.

[18] As the General Division clearly inferred from the Applicant's purported receipt of regular EI benefits that she had capacity, I see an arguable case that it May have based its decision on an erroneous finding of fact. Whether it did so in a "perverse or capricious manner or "without regard for the material" is a matter best left for further consideration.

Injury of 2002

[19] The Applicant criticizes the General Division for having disregarded an injury that she suffered in 2002. I do not think this submission discloses an arguable case, not least because I could find no mention of such an injury in the evidentiary record. A trier of fact cannot be blamed for failing to take into account evidence that was not presented to it. In any case, the evidence clearly established that the Applicant managed to work for many years after 2002 until her withdrawal from the workforce in 2013. Whatever injuries she suffered in 2002 were unlikely to have had bearing on her impairment by the end of the MQP.

[20] If it so happens, as I suspect, that the Applicant's representative intended to refer to the Applicant's injury of 20*12*, having transcribed in error "2002," then I still see no reasonable chance of success on this ground. My review of the General Division's decision indicates that it was well aware of the Applicant's claim that her health and functionality sharply deteriorated at some point in 2012:

> [10] The Appellant stated that from 2012 onwards, she requested less hours of work due to her health issues. She was no longer able to volunteer at a school lunch program. She stated that she developed throbbing and pinching pain in her left shoulder which extended to her left elbow.

Reasons for Termination and "Fake" Record of Employment

[21] As seen in paragraph 27 of its decision (quoted above), the General Division found "conflicting evidence" surrounding the reason the Applicant stopped working, particularly on the issue of whether she left her job because of an injury or, as indicated in the January 28, 2014 ROE from the Somali Women's and Children Support Network (SWCSN), because of a "shortage of work and/or end of contract." In the end, the General Division concluded that the Applicant ceased work for reasons other than lack of capacity. However, the Applicant submits that, in doing so, the General Division failed to consider significant evidence that (i) the

SWCSN terminated her employment after she filed a claim with the Workplace Safety and Insurance Board (WSIB) and (ii) misrepresented the reason for her termination on the ROE.

[22] There is no doubt that the evidentiary record documents several instances (at GD2-17 and GD2-55) in which the Applicant alleges that her former employer relayed false information. My review of the audio recording also indicates that the Applicant presented a narrative in which her impairment and declining performance prompted her to apply for worker's' compensation, which in turn led the SWCSN to constructively dismiss her. At the hearing, the Applicant's former representative stressed that the SWCSN had a financial incentive to deny that one of their employees had suffered a workplace injury. Although the General Division's decision mentioned the WSIB claim in passing, it did not address the Applicant's attempt to explain why her former employer might have attributed her departure to non-medical factors.

[23] Instead, it appears that the General Division took the ROE at face value and relied on it in coming to its decision to deny the Applicant CPP disability benefits. A case can be made that the General Division based its decision on an erroneous finding of fact by failing to meaningfully grapple with the Applicant's evidence that her injuries led to her dismissal.

CONCLUSION

[24] I am granting leave to appeal on the basis that the General Division May have based its decision on erroneous findings of fact when it:

(a) Found that the Applicant applied for regular EI benefits; and

(b) Ignored evidence that she was dismissed from her last job because of a workplace injury.

[25] Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[26] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division