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

[TRANSLATION]

Citation: *D. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 270

Tribunal File Number: AD-17-201

BETWEEN:

D. G.

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 9, 2017

Canada

REASONS AND DECISION

[1] On November 24, 2016, the General Division of the Social Security Tribunal (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable to the Applicant. The Applicant, who was representing herself, filed an application for leave to appeal before the Tribunal's Appeal Division.

[2] The only grounds of appeal before the Appeal Division are 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] As provided for in subsections 56(1) and 58(3) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal." 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] A leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and lower hurdle to be met, and the Applicant does not have to prove the case at the leave 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 could succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. Where there is no claim or evidence underpinning a particular ground of appeal, leave to appeal ought not to be granted on a purely theoretical basis: *Canada (Attorney General) v. Hines*, 2016 FC 112.

[5] In this case, I must therefore 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] In the correspondence that followed the claim, the Applicant stated that the General Division made a significant error with respect to the facts, because her physician had said, on November 24, 2014, April 27, 2015, that she would not be going back to work. The Applicant suggested that the General Division "forgot" about the medical reports in the docket.

[7] By way of background, the Applicant submitted a disability pension claim in September 2014. At 57, the Applicant stopped working as a health care attendant in July 2014 due to pain in her left knee. Her minimum qualifying period (MQP) ends on December 31, 2017, so the General Division had to determine whether the Applicant had a severe and prolonged disability on or before the date of the hearing—October 18, 2016.

[8] The General Division noted that, in November 2014, the orthopedic surgeon,

(Dr. Perkins) affirmed that, while awaiting other tests, the Applicant was incapable of returning to her work. The General Division also noted that, in June 2016, Dr. Perkins stated that he had discussed total arthroplasty and, even though the surgery can alleviate symptoms, the Applicant would not be able to return to her previous position.

[9] I note the comments of the orthopedist, Dr. Perkins, in the docket:

> [Translation]
>
> [The Applicant] is a patient whom I have known for several years now due to the osteoarthritis problem with her left knee. She had already had an arthroscopy on her left knee on September 23, 2011...she deteriorated steadily to the point where even on the last visit, namely in October 2014, an infiltration was attempted. [...] I am referring the patient to radiology and I will see her again following those tests in order to decide what will be the type of surgical treatment that we recommend. In the meantime, she is still unfit to resume working. I have mentioned to her that even with arthroplastic surgery, there would be no greater capacity for her to resume working. [November 24, 2014]
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> During the last visit in March 2015, namely six weeks ago, we had had an infiltration. The patient says that the pain in her left knee has subsided by about 75% [...] I explained to the patient that, if the infiltration had no further positive effects, we will

> have to then think about a type of arthroscopic surgery with the possibility of osteotomy of valgization in her left knee. [April 27, 2015]
>
> Limitation tied to the prolonged use of both knees [...] Must do only sedentary work [August 11, 2015]
>
> In talking with her, we report that there is an opportunity to help her condition but that unfortunately will not enable her to resume working to the extent she had been doing so previously. [June 21, 2016]

[10] According to subparagraph 42(2)(*a*)(i) of the CPP:

> **(i)** a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation

[11] The General Division wrote the following:

> [Translation]
>
> Dr. Perkins indicated that the Appellant cannot currently resume her previous employment, but that a total prosthetic knee can alleviate her pain. The Tribunal is not concerned by the issue of knowing whether an appellant can return to his or her previous employment, but whether he or she can work in any capacity. While the Appellant may not be able to return to her previous position due to the current state of her knee, the evidence does not show that she would be incapable of working in a more suitable work environment now or in the future.

[12] Although the Applicant argues that the General Division made a significant error concerning Dr. Perkins' reports, I believe that the General Division did not draw a conclusion that is incompatible with the evidence. The General Division member was conscious of the fact that the Applicant, in accordance with Dr. Perkins' advice, could not resume working as health care attendant. As a result, I consider that the appeal has no reasonable chance of success on the ground that the General Division based its decision on an erroneous finding of fact without accounting for Dr. Perkins's relevant reports. The decision was based on the requirement (mentioned above) according to which a person is incapable regularly of holding any substantially gainful "occupation," that is to say, whatever type of substantially gainful occupation, and not just former occupation (see, for example, *Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[13] The Applicant also explained in her correspondence to the Appeal Division that she could not give a new medical report to the General Division member in October 2016 because her next appointment with Dr. Perkins was on January 17, 2017. It is mentioned that she will undergo an operation in August 2017.

[14] According to the DESDA, new evidence does not constitute an independent ground of appeal before the Appeal Division. Furthermore, the medical reports that the General Division did not have at its disposal in October 2016 cannot have an impact on an allegation that the General Division committed an error at that time. In other words, it is not an error when the General Division does not review documents that were not submitted: *Marcia v. Canada (Attorney General)*, 2016 FC 1367. As a result, I consider that the Applicant has not identified a reviewable error, according to subsection 58(1) of the DESDA, concerning the circumstances of 2017.

[15] Due to the fact that the Applicant has not raised an admissible ground of appeal that could give the appeal a reasonable chance of success, I am refusing leave to appeal the General Division's decision of November 24, 2016.

[1] If the Applicant believes that she has new and pertinent facts and evidence substantiating a serious and prolonged disability (according to the definitions in the CPP) after the date of the hearing before the General Division, she may file a new disability pension claim, including the new evidence, with Service Canada. In this procedure, the Respondent could review only the issue of whether the Applicant became disabled between October 18, 2016 (date of the General Division hearing), and December 31, 2017 (the end date of the MQP). The Applicant still has the burden to prove that she is incapable regularly of pursuing any substantially gainful occupation and that her disability is likely to be long continued and of indefinite duration.

CONCLUSION

[16] The application for leave to appeal is refused.

Shirley Netten
Member, Appeal Division