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

Citation: *C. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 277

Tribunal File Number: AD-16-905

BETWEEN:

C. S.

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: June 13, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the General Division decision dated April 26, 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" at the time of the hearing. The Applicant's minimum qualifying period ended on December 31, 2016.

ISSUE

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

ANALYSIS

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

[5] The Applicant submits that the General Division erred under each of these grounds. In particular, she alleges the following:

(a) The member was not a registered physician capable of rendering a medical opinion, i.e. he was unqualified to assess her claim for a Canada Pension Plan disability pension.

(b) At paragraph 13, the member misconstrued the results of an MRI of her lumbar spine that had been taken on December 11, 2013.

(c) The member erred in concluding that she is capable regularly of pursuing a substantially gainful occupation, given that physicians are of the opinion that she has limitations and restrictions. She argues that, given her limitations, there are no jobs available that allow her to obtain a substantially gainful occupation.

She also alleges that the member failed to consider the evidence set out in paragraph 17 of its decision that she requires workplace accommodations and can work only a reduced work schedule.

(d) The member erred in suggesting at paragraphs 16 and 21 that nothing substantive came out of a consultation she had with a neurosurgeon in October 2014, or a visit to the HealthPointe Interdisciplinary Clinic on March 21, 2016. The Applicant explains that the neurosurgeon had not provided her with a copy of his consultation report but that he had verbally informed her that she will require surgery, albeit at the risk of paralysis. She advises that doctors at the clinic have taught her how to manage her chronic pain.

(e) The member erred in finding that her disability has not prevented her from earning a living. The Applicant explains that she has "since been laid off from [her] place of employment where [she] <u>was not earning a living</u>." She also indicates that she relies on others to sustain herself.

(f) The member failed to fulfil his duties when he neglected to assess whether her disability is prolonged.

[6] The Applicant filed additional supporting documentation, including the results of an MRI dated May 2016 (AD1C); emails dated December 2016 and February 2017 in response to her applications for positions as a program and service delivery clerk (AD1D) and payment services officer (AD1F); and submissions from the Applicant regarding her medical status and the possibility that she may be undergoing surgery (AD1E and AD1G). She also prepared a recent letter indicating that she can remain employed while collecting a Canada Pension Plan disability pension (AD1H).

[7] Much of the additional supporting documentation constitutes "new evidence." New evidence generally does not constitute a ground of appeal. As the Federal Court held in *Marcia v. Canada (Attorney General)*, 2016 FC 1367:

> [34] New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*. As Ms. Marcia's new evidence pertaining to the General Division's decision could not be admitted, the Appeal Division did not err in not accepting it (*Alves v Canada (Attorney General)*, 2014 FC 1100 at para 73).

[8] New evidence can be considered on an appeal to the Appeal Division only under very limited circumstances, where they address any of the grounds of appeal. Those circumstances, however, are not present here, as the Applicant has provided this evidence simply to support her claim for a Canada Pension Plan disability pension.

(a) Member's qualifications

[9] The Applicant argues that the member should have been medically qualified and capable of rendering a medical opinion. It is irrelevant whether the member has any medical qualifications, as there is no role for the General Division to undertake any medical assessments. Its role is to determine whether an applicant meets the requirements under the *Canada Pension Plan* and, in the case of a disability pension, to determine whether an applicant is incapable regularly of pursuing a substantially gainful occupation. Further, unlike the provisions that governed Canada Pension Plan Review Tribunals, the DESDA does not require that any of its members be medical practitioners.

(b) Results of MRI

[10] The Applicant argues that the member misconstrued the results of an MRI (GD8-5) as he left an incomplete and inaccurate impression. The MRI reads as follows:

> Impression: spondylolisthesis of L5 on S1 with bilateral L5 pars defects. Severe bilateral foraminal stenosis.

whereas the member wrote:

> [13] A magnetic resonance imaging (MRI) scan of the lumbar spine on December 11, 2013 showed spondylolisthesis (forward displacement of a vertebra) of L5 and S1 with bilateral pars defects (break in the pars interarticularis or the bone between the two joints).

[11] The Applicant argues that the MRI shows that she has "severe bilateral foraminal stenosis." The Applicant suggests that, as the member failed to note that the radiologist used the word "severe," he could not have appreciated the severity of her disability.

[12] However, at paragraph 30 in its analysis section, the member was clearly cognizant of the diagnostic findings. The member again referred to the initial part of the finding, that the MRI showed spondylolisthesis of L5 on S1 with bilateral L5 pars defects, but it also wrote: "Severe bilateral foraminal stenosis." Despite that, it would have been insufficient and inappropriate for the member to rely on diagnostic results alone to measure the severity of an appellant's disability, without correlating it to an appellant's own clinical experience. In this case, the member set out to examine the Applicant's clinical experience, noting that, despite her symptoms, she was nevertheless working on a part-time basis, albeit with some workplace accommodations.

[13] Although the member did not explicitly analyze the stenosis, and although he confined his examination of the documentary record to the spondylolisthesis, the Applicant does not point to any other records, apart from the MRI, to suggest that her spinal stenosis was severe. As I have indicated above, however, diagnostic findings alone are insufficient for establishing the severity of a disability.

(c) Limitations and workplace accommodations

[14] The Applicant argues that the General Division failed to consider the evidence at paragraph 17 of its decision that she has limitations and requires workplace accommodations, which in this case consists of a reduced work schedule. I note that paragraph 15 also refers to the Applicant's limitations on lifting, carrying and walking/standing, and at paragraph 19 that the Applicant had advised in an e-mail dated November 23, 2015, that she was "only able to work part-time at 20 hours per week doing light cleaning duties due to limitations related to her medical condition." The Applicant argues that the General Division should have concluded that she is necessarily severely disabled because there is no suitable employment for her, given her limitations and restrictions.

[15] Although the Applicant argues that the General Division failed to consider her limitations, it is clear that it was mindful of them. Not only did the member set them out in the "Evidence" section, but he also noted at paragraph 28 in his analysis that, when the Applicant had begun working part-time, the employer provided her with work "within her medical restrictions" and also committed to assessing future requests for accommodations. Similarly, at paragraph 34, the member referred to the Applicant's correspondence of November 2015, in which she noted limitations.

[16] The Applicant argues that because she has limitations, she is incapable regularly of pursuing a substantially gainful occupation. However, the Applicant herself reported that she was capable of working on a part-time basis doing light-cleaning duties.

(d) Consultations

[17] The Applicant saw a neurosurgeon in October 2014 and attended an interdisciplinary clinic in March 2016. The member noted that he did not have copies of any medical reports from either the neurosurgeon or the medical clinic. The Applicant advises that the neurosurgeon provided her with a verbal opinion and that doctors at the medical clinic have provided her with pain management measures. However, this constitutes an effort to adduce new evidence, which, as I have indicated above, generally falls beyond the

scope of an appeal. Significantly, the Applicant does not allege that the member either erred in law or based its decision on an erroneous finding of fact in regards to these medical visits.

(e) "Earning a living"

[18] The Applicant submits that the member erred in finding that her disability has not prevented her from earning a living. She has since been laid off from her last employment and now relies on others.

[19] I note that the Applicant claimed in her Notice of Appeal filed with the General Division that she was unable to maintain a livelihood and was able to work only part-time because of her limitations.

[20] At the time of the hearing before the General Division, she was working part-time as a janitor. However, she now claims that she was "not earning a living" at this employment. I understand from this that she is essentially alleging that her employment did not constitute a "substantially gainful occupation" under the *Canada Pension Plan.*

[21] It appears that the Applicant is arguing that she was not earning a sufficient livelihood because she was working on only a part-time basis. However, even part-time employment can constitute a substantially gainful occupation. In *Ferreira v. Canada (Attorney General)*, 2013 FCA 81, the Federal Court of Appeal found that it was not unreasonable for the Pension Appeals Board to have inferred from her family physician's letter (which stated that she was incapable of a full day's work) that she was capable of part-time employment and that her medical condition was thus not "severe" within the meaning of the *Canada Pension Plan*.

(f) Prolonged

[22] The Applicant claims that the General Division failed in its duty to consider whether her disability is prolonged.

[23] The test for disability is two-part and if a claimant does not meet one aspect of this two-part test, then he or she will not meet the disability requirements under the *Canada Pension Plan.* As the General Division indicated, it is unnecessary to undertake an analysis

on the prolonged criterion when the appellant has not established that he or she is severely disabled. In *Klabouch v. Canada (Social Development)*, 2008 FCA 33 at para. 10, the Federal Court of Appeal stated that:

> [...] The two requirements of paragraph 42(2)(*a*) of the [*Canada Pension Plan*] are cumulative, so that if an applicant does not th th th th th th th th meet one or the other condition, his application for a disability pension under the [*Canada Pension Plan*] fails.

[24] The Federal Court affirmed this approach in *McCann v. Canada (Attorney General)*, 2016 FC 878, stating that "the fact of concentrating on one feature of the test and of not making any findings regarding the other […] does not constitute an error." The Federal Court determined that Mr. McCann's argument that the Appeal Division should have granted leave to appeal on the basis of the General Division's failure to consider the "prolonged" part of the disability test was bound to fail.

(g) Reassessment

[25] Essentially, the Applicant is seeking a reassessment of her appeal. However, a review or reassessment of the evidence also does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave to appeal should be granted or refused.

CONCLUSION

[26] I am not satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is refused. I note, however, that the Applicant's minimum qualifying period ended on December 31, 2016. Given that the General Division had heard the appeal on March 29, 2016, the Applicant can re-apply for a Canada Pension Plan disability pension. She would be required to establish that she became severely disabled between March 30, 2016 and December 31, 2016.

Janet Lew
Member, Appeal Division