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

Citation: *Minister of Employment and Social Development v. B. H.*, 2017 SSTADIS 287

Tribunal File Number: AD-16-1283

BETWEEN:

Minister of Employment and Social Development

Applicant

and

B. H.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: June 20, 2017

REASONS AND DECISION

INTRODUCTION

[1] On July 6, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable.

[2] The General Division held an in-person hearing, and it determined that:

a) The Respondent's minimum qualifying period (MQP) had ended on December 31, 1999;

b) A previous Review Tribunal decision found that the Respondent did not meet the definition of "severe and prolonged" as of April 13, 1999;

c) The Respondent must prove on a balance of probabilities that she had a severe and prolonged disability from April 14, 1999, through to December 31, 1999;

d) In December 1999, the Respondent met the criteria required to establish that her condition was "severe and prolonged" as those terms are defined in the CPP;

e) The Applicant received this application in November 2013;

f) Therefore, the Respondent is deemed disabled as of August 2012; and

g) Payments of CPP benefits start as of December 2012.

[3] Based on these conclusions, the General Division allowed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on September 30, 2016, within the 90-day time limit.

ISSUE

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

THE LAW

[6] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within

90 days after the day on which the decision appealed from was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, 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.

[8] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[9] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[10] The Applicant's grounds of appeal are that the General Division erred in law and made erroneous findings of fact in arriving at its decision. The Applicant's arguments can be summarized as follows:

a) The doctrine of *res judicata* applies to this appeal.

b) The General Division found that the Respondent's established date of onset of her disability was December 1997; however, a Review Tribunal had previously found that

the Respondent was not disabled on or before April 13, 1999. Therefore, the General Division erred in law in finding that the Respondent had been disabled prior to April 14, 1999.

c) The evidence from the time of the MQP does not support a finding of disability between April 14, 1999, and December 31, 1999.

d) The General Division did not explain why it preferred Dr. Voll's 2013 and 2014 reports over his report at the time of the MQP.

ANALYSIS

Alleged error of law

[11] The General Division mentioned the Review Tribunal's decision at paragraphs 7 and 24. The General Division's decision noted that: "As the Appellant had a previous Review Tribunal decision the found that the Appellant did not meet the definition of 'severe and prolonged' as of April 13, 1999, there remains a period of time in the Appellant's MQP that has not been assessed."

[12] Although the General Division did not discuss the doctrine of *res judicata*, the member appears to have been aware that the Review Tribunal's finding—that the Respondent did not have a severe and prolonged disability as of April 13, 1999—had an impact on the present issue before the General Division. The General Division framed the issue as whether the Respondent had a severe and prolonged disability between April 14, 1999, and December 31, 1999.

[13] I read the General Division's decision as not having analyzed the doctrine of *res judicata* because it considered that the issue before the Review Tribunal was different than the one before the General Division. The failure to discuss this doctrine is not, on its face, an error of law.

[14] The Applicant argues that by making a finding (at paragraph 29 of the General Division decision) that the Respondent had a severe and prolonged disability in December 1997, the

General Division erred in law because the issue of the Respondent's disability before April 14, 1999, is *res judicata*.

[15] The Applicant's submissions on this point, as set out in the Application, are sufficient to satisfy me that the appeal has a reasonable chance of success at the leave to appeal stage.

[16] However, on the merits of the appeal, I will need to be convinced that the doctrine of *res judicata* applied to the General Division decision, specifically that the conditions set out in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44, and other jurisprudence pertaining to this doctrine are met.

[17] I note that the General Division found that, in December 1999, the Respondent met the criteria required to establish that her condition was severe and prolonged (paragraph 27).

Alleged erroneous findings of fact

[18] The Applicant argues that the General Division made an erroneous finding of fact when it found that the Respondent suffered from a prolonged disability, because evidence from the time of the MQP does not support a finding of disability between April 14, 1999, and December 31, 1999.

[19] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated that it is unnecessary for the Appeal Division to address all of the grounds of appeal that an applicant has raised. In response to the Respondent's arguments that the Appeal Division was required to refuse leave to appeal on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESD Act "does not require that individual grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." This application is one of the situations described in *Mette*.

[20] Because the alleged error of law may be interrelated to the analysis of whether the Applicant's medical condition was severe and prolonged, I will not parse the grounds of appeal any further at this stage of the proceedings.

CONCLUSION

[21] The Application is granted.

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

Shu-Tai Cheng
Member, Appeal Division