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

Citation: *D. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 299

Tribunal File Number: AD-16-866

BETWEEN:

D. S.

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 28, 2017

Canada

REASONS AND DECISION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated April 30, 2016. That decision confirmed that the date upon which the Applicant had a severe and prolonged disability, under the *Canada Pension Plan* (CPP), was April 1, 2012.

[2] The only grounds of appeal to the Appeal Division are those identified in s. 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] Pursuant to s. 56(1) of the DESDA, "An appeal to the Appeal Division may only be brought if leave to appeal is granted." 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] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It is an initial and appreciably lower hurdle to be met. 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 may succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Appeal Division should not weigh the evidence at the leave stage, or dispose of the case on the merits; leave should be granted unless the Appeal Division concludes that "no one could reasonably believe in [the appeal's] success": *Canada (Attorney General) v. Bernier*, 2017 FC 120.

[5] In her application requesting leave to appeal, the Applicant indicated that leave to appeal should be granted because she has had a medical problem for many years, and the reason for the appeal is that she "should have asked earlier" and could not work anymore. The Applicant attached a number of documents to her application, including: certain medical reports that were before the General Division; one from Dr. B. Greig dated June 26, 2016 which post-dates the General Division decision; and a written statement about her friend who lived with her and who died in 2012.

[6] New evidence is generally not admitted at the Appeal Division, because the appeal does not constitute a hearing *de novo* (a fresh hearing): *Marcia v. Canada (Attorney General)*, 2016 FC 1367. I have determined that the new medical report from Dr. Greig and the Applicant's written statement are not admissible: these documents were not before the General Division in April 2016, and as such they can have no bearing on a claim that the General Division made an error at that time. Moreover, the existence of new evidence is not an independent ground of appeal to the Appeal Division, under the DESDA. Consequently, I am unable to consider the contents of Dr. Greig's June 2016 report or the Applicant's written statement in this decision.

[7] As outlined above, there are very limited grounds of appeal to the Appeal Division. Since the application did not reveal any of these grounds, the Applicant (who is self-represented) was invited to provide further information with respect to her claim. On June 6, 2017, the Applicant wrote "see Dr. Greg [*sic*]," and selected one of the examples in the Tribunal's correspondence, that "the General Division made an important error regarding the facts contained in the appeal file." From this, I understand that the Applicant is claiming the ground of appeal found in s. 58(1)(*c*), that 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.

[8] First, to the extent that the Applicant may be disputing the General Division's statement in paragraph 25 that she "was also looking after a disabled individual who was living at her house and passed away in February 2012," I note the following statement found in a medical report written by psychiatrist Dr. M. Dua on November 25, 2012: "She stated that she was looking after a disabled individual who was living at her house, but he passed away in February." Similarly, psychiatrist Dr. M. Miresco wrote the following in a report of June 21,

2012: “Over the past two years she was also working as a guardian for a ‘challenged adult’ who was boarding with her. She had grown quite close with him, and he died of cancer in February 2012.” Accordingly, I see no reasonable chance of success on the basis that the General Division made an erroneous finding of fact without regard to the material before it, with respect to the Applicant’s role in looking after this individual.

[9] Secondly, while the Applicant did not elaborate upon her request that the Appeal Division “see” Dr. Greig, in her initial application she underlined a statement from Dr. Greig (in one of the reports before the General Division) that she had been totally disabled since 2011. In a hand-written comment in support of the Applicant’s eligibility for the Disability Tax Credit, Dr. Greig wrote on May 27, 2014, “I believe she is totally disabled at this time, has been since 2011[…]” This comment is contrary to other evidence before the General Division, and may be relevant to the Applicant’s date of disability for CPP purposes. It was not specifically referenced in the decision, and consequently the extent to which it was considered by the General Division is unclear.

[10] The statutory grounds of appeal include an erroneous finding of fact made without regard for the evidence and a failure to observe a principle of natural justice; the latter includes the obligation to consider all the relevant evidence. I reiterate that leave to appeal requires only an arguable ground upon which the appeal might succeed; an in-depth review of the evidence and jurisprudence is not undertaken at this stage. I am satisfied that the Applicant has raised an arguable case which ought to be explored on the merits, with respect to a possible error of fact or a failure to observe a principle of natural justice, in relation to the General Division’s consideration of Dr. Greig’s above-cited comment.

CONCLUSION

[11] The application for leave to appeal is granted.

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

Shirley Netten
Member, Appeal Division