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

Citation: *C. G. v. Minister of Employment and Social Development*, 2017 SSTADIS 313

Tribunal File Number: AD-16-703

BETWEEN:

C. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: July 4, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant is seeking leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated February 24, 2016, which denied the Applicant a disability pension under the *Canada Pension Plan* (CPP). The Applicant's minimum qualifying period (MQP), or the date by which she had to be found disabled, ended on December 31, 2010. The General Division had found that the Applicant did not meet the criteria for "severe and prolonged" disability set out in paragraph 42(2)(*a*) of the CPP by the end of her MQP. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on May 17, 2016.

ISSUE

[2] The member must decide whether the appeal has a reasonable chance of success.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "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."

[4] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." A reasonable chance of success has been equated to "an arguable case" (*Fancy v. Canada (Attorney General)*, 2010 FCA 63).

[5] According to subsection 58(1) of the DESD Act, 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

[6] The Applicant submits that the General Division failed to consider the totality of the evidence in the record before it, which is a breach of the principles of natural justice.

[7] The Applicant also asserts that the General Division, in neglecting to assess the Applicant's capacity for substantially gainful employment in a real-world context, failed to consider the totality of the evidence in the record before it, which constitutes an error of law.

[8] The Applicant submits that the General Division, by misconstruing statements that the Applicant made under oath in an Examination for Discovery, which was held in the process of litigating a motor vehicle accident, based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it.

[9] The General Division based its decision on an erroneous finding of fact when it relied on only a portion of the vocational assessment report that Debbie Soligo had completed. The Applicant submits that Debbie Soligo had indicated that the Applicant was unable to be gainfully employed, and her opinion is consistent with the views of Dr. Karp—who had also completed a vocational assessment on the Applicant—and Dr. Mah, as they had found the Applicant "incapable of competitive employment" and "unlikely to pursue gainful employment in the future," respectively.

[10] The General Division based its decision on an erroneous finding of fact when it confused the diagnosis date with the impairment date. This confusion resulted in an error of law, as the Applicant was not found disabled by her MQP date.

[11] The General Division, in determining that the Applicant was not disabled, erred in law by relying on Dr. Cisa's diagnosis, which was that the Applicant was not suffering from a "catastrophic impairment." The Applicant argues that disability under the CPP is not defined this way (as "catastrophic impairment").

ANALYSIS

[12] The test for granting leave to appeal has been well-developed. The test is whether there is some arguable ground on which the appeal might succeed (*Canada (Attorney General) v. St-Louis*, 2011 FC 492). The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success (see *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Applicant does not have to prove the case at the leave to appeal stage (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630 (FC)), but I must be satisfied that there is some arguable ground on which the appeal may proceed (*Osaj v. Canada (Attorney General)*, 2016 FC 115).

[13] In granting leave to appeal, I must be satisfied that the Applicant has identified how the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction or made an error in law, or that the Applicant has identified an erroneous finding of fact that it, in coming to its decision, may have made in a perverse or capricious manner or without regard for the material before it. Although the DESD Act permits me to consider whether the General Division committed an error in law, regardless of whether it appears on the face of the record, I am not permitted to grant leave to appeal on theoretical grounds (*Canada (Attorney General) v. Hines*, 2016 FC 112).

[14] Turning to the Applicant's submissions, I will first address the Applicant's assertion that the General Division's alleged failure to consider the totality of the evidence in the record before it constitutes a breach of the principles of natural justice. Specifically, the Applicant's submissions read: "The General Division failed to take into account the totality of the evidence which is not an exercise of natural justice."

[15] The principles of natural justice are concerned with ensuring that parties to litigation are able to present their case fully and fairly, that they are able to know the case against them, and that the parties are provided with a decision made by an impartial decision-maker based on all the evidence and with clearly articulated reasons. The concept of procedural fairness is part of natural justice and it is primarily concerned with the procedures followed at a hearing. In this case, the Applicant has alleged that the General Division failed to consider the totality of the

evidence in the record before it. Relevant to the issue of a breach of natural justice, the Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by administrative appeal tribunals such as this Tribunal. Rather, such appellate tribunals are to apply the grounds of appeal as set out within their home statutes (*Canada (Attorney General) v. Jean*, 2015 FCA 242). In reading paragraph 58(1)(*a*) of the DESD Act, the wording is not ambiguous in any way. In appeals before the Tribunal's Appeal Division, no deference is owed to the General Division on questions of natural justice.

[16] The Applicant has argued that the General Division breached a principle of natural justice in failing to consider the totality of the evidence. However, the Applicant provided no particular details in this initial submission (as it reads in paragraph 14 above). On reading the Applicant's submissions in a complete context, I note that there are several submissions regarding the General Division's failure to put evidence in the record to the Applicant during her hearing as set out in paragraph 8 above. The Applicant argues that the General Division erred in subsequently drawing incorrect inferences from the evidence. For the most part, the evidence stems from an Examination for Discovery that was held October 8, 2010, as part of the ongoing litigation of a motor vehicle accident involving the Applicant. The Applicant's counsel has framed this error as an erroneous finding of fact.

[17] The Applicant in this case asserts that the General Division concluded that, because the Applicant had stated that she was not appealing the refusal of her first application for a disability pension on reconsideration at the time that the Examination for Discovery was held, this statement did "not reflect the disposition of a severely disabled person with a prolonged disability" (paragraph 12 of the General Division decision).

[18] Quoting from the Examination for Discovery Document specifically, the relevant section that the General Division relied on begins with question number 732, and reads:

> Q. So they were actually testing you for whether or not you need a catastrophic diagnosis?
>
> A. Yeah, that's what they were assessing me for.

Q. Okay. Has anyone told you yet what the ...

A. Oh, no.

Q. …result is?

A. I guess it's -- got to wait six weeks, I guess, for them to do their reports. That's what the guys are -- well, the doctors are saying.

Q. Okay. Have you made an application to the Canadian Pension Plan disability?

A. Yeah, yeah, and they refused.

Q. Are you appealing that?

A. Not at this time.

[Counsel for the Defendant]: Counsel, can we have the records in relation to the C.P.P. disability application?

[Counsel for the Applicant]: Yes.

[Counsel for the Defendant]: And I guess the denial letter.

[Counsel for the Applicant]: Yes.

[19] The Applicant submits that the General Division had no basis to conclude that the Applicant did not represent an individual with a disposition of someone with a severe and prolonged disability simply because the Applicant had confirmed that she was not appealing the denial of her CPP application at the time of the Examination of Discovery in 2010. The Applicant submits that that statement ought not to have been a reason for, nor was it at all related to, a finding of disability before the General Division in 2016.

[20] On reading the above portion of the transcript, one could conclude that the Applicant was not appealing the refusal of her application 'at that time' as she waited for the catastrophic diagnosis referred to in question # 732 of the Examination transcript. Rather than stating that she was not pursuing a disability pension at any time in the future, she appealed the refusal of her first application by filing a second application in 2012.

[21] Additionally, the General Division reproduced a portion of the transcript relating to the Applicant's treatment through Blue Sky Physiotherapy. At paragraph 18 of the decision, the

General Division finds that the Applicant's evidence during the hearing was at odds with her evidence in the Examination transcript. The General Division found that the Applicant's health condition was "mostly fixed" through the treatment plan that Blue Sky Physiotherapy had provided. However, on reading the Examination transcript, I see that the pain level was reduced by a minor amount as a result of the treatment with Blue Sky but not "mostly fixed." The Applicant's evidence during the Examination was that, while her ribs were not popping out as often as they had been previously, they did continue to be displaced. Furthermore, the headaches, burping and gagging continued as well. Because the treatment at Blue Sky was unsuccessful, the Applicant then received acupuncture from the physiotherapist there. That treatment did not work, so the physiotherapist referred the Applicant to a massage therapist. The Applicant continued this treatment until her insurance coverage ended.

[22] I find that the General Division's findings regarding the improvement of the Applicant's health condition may be at odds with the evidentiary record. This is a ground on which I am granting leave to appeal.

[23] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, stated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an Applicant raises. In *Mette*, Dawson J.A. stated that subsection 58(1) 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." The other grounds of appeal that the Applicant submitted are inter-related to the analysis of whether her health condition is severe and prolonged. As a result, I am not required to address the other grounds submitted in the application for leave to appeal that the Applicant filed.

CONCLUSION

[24] The Application for leave to appeal is granted.

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

[26] I invite the parties to make further written submissions within the allowed 45-day timeframe, including whether a hearing is necessary.

Meredith Porter
Member, Appeal Division