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

Citation: *A. W. v. Minister of Employment and Social Development*, 2017 SSTADIS 305

Tribunal File Number: AD-17-193

BETWEEN:

A. W.

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: June 29, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 13, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that disability pension payments under the *Canada Pension Plan* (CPP) were not payable. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on March 3, 2017.

ISSUE

[2] Does the appeal have 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] As set out in *Canada (Attorney General) v. Jean*, 2015 FCA 242, 2015 FCA 242, the Appeal Division's mandate is limited to hearing appeals pursuant to subsection 58(1) of the DESD Act. According to 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 made the following submissions:

a) The General Division failed to properly weigh medical evidence in the record before it, including the Applicant's diagnosis of inflammatory arthritis and the opinion of Dr. Emamsh.

b) The General Division was unduly influenced by the fact that the Applicant filed her application for a CPP disability pension "prematurely," and ought to have focused its analysis on whether the Applicant met the criteria for a severe and prolonged disability at the time of her hearing before the General Division.

c) The General Division failed to properly consider and apply the "real world" factors enunciated in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

d) The General Division ought to have considered the accommodating relationship found in the Applicant's employment as a homecare provider.

e) The General Division ought to have afforded greater weight to the Applicant's willingness to participate in rehabilitation programs offered by the CPP and/or Service Canada.

ANALYSIS

[7] The Applicant filed new evidence to support her request for an appeal. She included with her application a letter written from her representative to Dr. Emamsh dated January 15, 2017, requesting further clarification of the Applicant's medical condition and prognosis as well as an opinion on her capacity to work (both now and in the future). A response letter from Dr. Emamsh was also filed with the Applicant's leave to appeal application. This letter is not dated. Although there was evidence in the record from Dr. Emamsh, this letter was not part of the

record. It was written after the hearing before the General Division and then filed with the Appeal Division.

[8] Hearings before the Appeal Division are not *de novo* hearings. The Appeal Division cannot consider evidence that was absent from the record before the General Division. Additionally, section 58 of the DESD Act sets out the grounds of appeal to the Appeal Division and the submission of new evidence is not one of those grounds (*Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100). As a result, the Appeal Division cannot consider the letter to Dr. Emamsh, or his reply letter.

[9] Subsection 59(1) sets out the powers of the Appeal Division:

> The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[10] For cases related to the CPP, paragraph 66 (1)(*b*) of the DESD Act sets out when the Tribunal may rescind or amend a decision. The Tribunal may rescind or amend a decision given by it in respect of any particular application if "a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence."

[11] If the Applicant wants to present the correspondence with Dr. Emamsh to rescind or amend the General Division decision, she must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations* (SSTR). This means that she must file an application to rescind or amend the General Division decision because according to subsection 66(4), only the division that made the decision is empowered to rescind or amend its decision based on new facts. In addition to filing an application, section 66 of the DESD Act requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. In these circumstances, the Appeal Division does not have jurisdiction to rescind or amend a decision based on new facts.

[12] The Applicant submits that the General Division failed to properly consider the evidence before it and failed to assign proper weight to the medical evidence filed in support of her

application for a disability pension under the CPP, in particular, the Applicant's diagnosis of inflammatory arthritis and Dr. Emamsh's note pertaining to the Applicant's current absence from work. The note from Dr. Emamsh, to which I am referring here, was included in the record before the General Division. However, with respect to the Applicant's argument that the General Division failed to properly consider the Applicant's diagnosis of inflammatory arthritis, the Applicant does not provide any details as to how the General Division failed to consider it. I note that the General Division decision references the diagnosis at paragraph 25:

> In March 2016 the Appellant saw Dr. Saeed, Rheumatologist, for pains in her hands and stiffness in her ankles. He noted her heart was "essentially unremarkable". Dr. Saeed diagnosed the Appellant as having fibromyalgia with a possible element of inflammatory arthritis (because of some mild clinical signs of inflammation). He recommended gym activity, physiotherapy and massage therapy and **if these did not work**, **he indicated that medication could be needed**. A follow-up appointment was scheduled for September 2016. [my emphasis]

[13] On reviewing the record in its entirety, the above statement by the General Division is not a misstatement of the medical evidence regarding a diagnosis of inflammatory arthritis. The General Division does not disregard the evidence but notes that the success of the recommended treatment remained open-ended at the time of the hearing, as the treatment had not yet been completed and the results from a follow-up appointment had not yet been assessed by the attending physician, Dr. Saeed. The General Division finds that the Applicant's claim that she has a severe and prolonged disability as a result of her health condition is resultantly premature. I agree with the General Division's finding.

[14] It may be the case that the Applicant simply disagrees with the General Division's finding on the issue of the diagnosis of inflammatory arthritis and is asking that the Appeal Division reconsider the evidence and substitute its decision for that of the General Division. As set out above in paragraph 5, the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration or reassessment of evidence already considered by the General Division. The Appeal Division does not have broad discretion in deciding leave to appeal pursuant to the DESD Act. It would be an improper exercise of the Appeal Division's authority to grant leave to appeal on grounds not included in section 58 of the DESD Act (*Canada (Attorney General) v. O'keefe*, 2016 FC 503).

[15] Turning to the note from Dr. Emamsh, dated October 11, 2016 (submitted before the General Division), which states that the Applicant "is following up with Rheumatologist in St. John's. She will be off work for long time for medical reason for your kind attention!"

[16] The Applicant argues that the General Division ought to have given this note considerable weight, as Dr. Emamsh is the only attending physician with a "global view" of the Applicant's health condition. Additionally, the Applicant argues that if the General Division considered that the opinion expressed in the note was weak and deserved little weight, then the General Division ought to have adjourned the hearing and delayed its decision to give Dr. Emamsh the opportunity to further clarify his opinion. This argument holds little weight. I do not find that the note provides any opinion whatsoever. The note merely states that the Applicant is seeing a rheumatologist and that she will be "off work for long time for medical condition." The note offers no probative evidence of a particular health condition, associated symptoms or limitations, treatment options, a prognosis for recovery, or the duration of the Applicant's absence from work.

[17] The Applicant asserts that the General Division ought to have adjourned the hearing or delayed its decision and offered Dr. Emamsh the opportunity to clarify his note with further details. This suggestion is at odds with the general principle found in section 2 of the SSTR, which states that the Regulations should be "interpreted so as to secure the just, most expeditious and least expensive determinations of appeals and applications." Paragraph 3(*a*) of the SSTR states that the Tribunal "must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." I also note that section 29 of the (SSTR), states:

> If a notice of hearing is sent to the parties, the Income Security Section must make its decision without delay after the conclusion of the hearing."

[18] The Applicant was notified by letter dated August 10, 2016, that she had until September 12, 2016, to file documents. The filing period was extended to October 25, 2016, after the Applicant secured the assistance of her representative, and was extended once again to November 21, 2016, after an adjournment request from the Applicant was granted so she could obtain a medical report from a new doctor that she was scheduled to see on November 10,

2016. By letter dated December 1, 2016, the Applicant and her representative were notified that the filing period had ended and that any further documentation would be admitted at the discretion of the Tribunal Member assigned to her appeal. A notice of hearing was sent to the parties dated November 23, 2016, and the hearing proceeded on December 9, 2016.

[19] The Applicant was afforded the opportunity to submit her application and file any documentation she believed to be relevant. She was also notified of the General Division's intent to proceed with a hearing based on the information she had already provided, and she had been allowed additional time to file any further documentation that she had not already submitted. Nothing indicates that she was not provided with the opportunity to present her case fully and fairly. I cannot find any evidence to support the Applicant's submission that the hearing ought to have been adjourned in order to allow Dr. Emamsh to provide further details. There had been ample opportunity to provide a more comprehensive report or opinion from Dr. Emamsh prior to the hearing in December. Leave to appeal cannot be granted on this ground as it does not have a reasonable chance of success.

[20] The Applicant has argued that the factors enunciated in *Villani* were not properly applied in this case. However, the Applicant failed to explain how, had it properly applied the *Villani* factors, the General Division might have reached a different decision. At the time of the Applicant's hearing, she was 32 years old. She had completed a grade 12 education and her employment history includes working at a grocery store, installing water heaters and furnaces, working at a convenience store and working as a homecare worker. There were no identified issues with her language proficiency. There were also no remarkable circumstances noted in her past work or life experience. Her health condition does not reflect any cognitive impairment that would impact her ability to further her education or engage in some retraining for employment within her limitations. I cannot find that an assessment of the *Villani* factors changes the General Division's determination in any way.

[21] As a result, I do not find that her assertion that *Villani* was incorrectly applied has a reasonable chance of success. Leave to appeal is not granted on this ground.

[22] The Applicant also argues that the General Division ought to have considered the special and accommodating relationship that the Applicant had in her position as a homecare

worker. The Applicant accepts that her employer was not a benevolent employer, but additional weight ought to have been given to her employment circumstances. Again, no details regarding this relationship were provided in the Applicant's submissions.

[23] I note that paragraph 19 of the General Division decision reads:

> The Appellant indicated that she was not provided any special accommodations to do her work as a homecare worker and that she did not tell her employer about her condition because she needed the job in order to pay her bills and to stay out of bankruptcy. (GD4-7)

[24] The Applicant was found by the General Division (at paragraph 18 of the decision) to have worked, on average, 28 hours per week as a homecare worker and sometimes she worked as many as 40 hours per week. (GD4-6) I cannot find how the relationship with this employer was either special or accommodating. She worked a substantial number of hours each week and, although she asserts that she was required to be absent from work two days per week because of her health condition, the hours she worked as reflected by her earnings is not consistent with this assertion. The details of her employment history as a homecare worker do not reflect regular absences from work, and there is no evidence that her employer ever indicated to her that her availability to work or the hours she actually worked were inadequate. There is no basis for her assertion that she had a special and accommodating relationship in the homecare setting. The Appeal Division is also not in a position to reweigh the evidence already considered by the General Division. As set out above in paragraph 5, the grounds for which the Appeal Division may grant leave to appeal do not include a reconsideration of evidence already considered by the General Division.

[25] As this is not a ground that has a reasonable chance of success, I cannot grant leave to appeal on this ground.

[26] Finally, the Applicant argues that the General Division ought to have given greater weight to the Applicant's willingness to engage in rehabilitation programs offered by the CPP and/or Service Canada. The basis of this argument is unclear. The General Division indicated that the Applicant was premature with her application for CPP disability benefits because she had not exhausted her treatment options and her minimum qualifying period date was in the future.

[27] Applicants seeking disability benefits under the CPP are required to show evidence of managing their health condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). Applicants are also expected to follow prescribed medical treatment and to pursue all treatment options as well as to follow the advice of their attending medical professionals regarding prescribed medications and other types of treatment intended to mitigate troublesome health conditions, unless there is a reasonable explanation for not doing so (*Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211). The Applicant must adduce evidence of her efforts to manage her health condition and, where there is incapacity to work, that incapacity must be the result of her health condition. Although I note that the Applicant may have expressed her willingness to participate in rehabilitation programs, she has not demonstrated that she has exhausted her treatment options or that she has incapacity regularly to pursue any substantially gainful occupation as a result of her health condition (*Inclima v. Canada (Attorney General)*, 2003 FCA 117). The result of her following the treatment options advised by her physician have yet to be determined and I therefore cannot find that she has demonstrated all efforts to mitigate her health condition or that she lacks capacity to work at any gainful employment.

[28] Leave to appeal cannot be granted on this ground as it does not have a reasonable chance of success.

CONCLUSION

[29] The Applicant has failed to raise a ground of appeal that has a reasonable chance of success on appeal. The Application is refused.

Meredith Porter
Member, Appeal Division