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

Citation: *B. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 335

Tribunal File Number: AD-16-989

BETWEEN:

B. 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: July 14, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated May 10, 2016, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability had not been "severe" on or before the end of her minimum qualifying period, on December 31, 2015.

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 would need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] In her application for leave to appeal, the Applicant wrote that there has been no improvement in her medical condition and that she is unable to do any work. She continues to require medications for ongoing pain and problems involving her left foot. She indicated

that her physician advised her "not to work." She submits that she is "still disable[d]" and incapable of working.

[6] The Applicant submits that the General Division erred under this first ground. Her letter of August 19, 2016 suggests that the General Division failed to admit a medical report into evidence. She suggests that this medical report would have established that, despite three surgeries—in July 2012, May 2014 and October 2015—she continues to experience chronic pain and swelling in her left ankle. She is now seeing a new orthopaedic surgeon, as her last one has closed his practice. She provided an updated medical report, dated September 13, 2016, from her new orthopaedic surgeon. She reported that her pain rated 9 out of 10 in severity and that she continued to have pain with weight-bearing activity. Dr. Wang gave her a prescription for Tylenol #3 and was going to follow up with her after she had a CT scan of her left ankle to assess the healing of her ankle fusion (AD1B-4 to 5).

[7] The Applicant also provided copies of scans of the left ankle that were performed in October 2011 (AD1B-6) and September 2014 (AD1B-7). The most recent of these examinations showed mild degenerative changes associated with the ankle joint, particularly posteriorly, with loss of joint space.

[8] The Applicant also provided a copy of a consultation report dated August 25, 2014, prepared by her former orthopaedic surgeon (AD1B-8). He indicated that he had referred her to aggressive physiotherapy, with the goal of increasing the range of movement in her left ankle. He was of the opinion that it might take two to three months before she could return to light work. He would see her in approximately six weeks with repeat X-rays for reassessment.

[9] On October 18, 2016, the Applicant provided a copy of an updated report prepared by her family physician. Dr. Chaudhry wrote that the Applicant's chronic pain "markedly decreases her exercise tolerance and impairs her ability to work." Dr. Chaudhry noted that the Applicant required analgesia on a daily basis to cope with the pain and to perform her activities of daily living. Dr. Chaudhry is of the opinion that the Applicant has a degenerative condition that is expected to gradually worsen over time. Dr. Chaudhry

enclosed a copy of a CT scan from October 3, 2016, which showed partial bony union and bony ankyloses. He also enclosed a note from the orthopaedic surgeon, who wrote that the Applicant "will be permanently disabled [secondary to] chronic left ankle pain post ankle fusion."

[10] The Applicant argues that she does not have any skills or work experience, other than as a farm labourer and mill worker. She notes that she has limited education and argues that it would be impossible for her to acquire any new skills at her age. She advises that these considerations, together with her deteriorating health and functional limitations, prove that she is "[unemployable] in any meaningful way." This suggests that the General Division may have erred in law if it failed to assess the severity of her disability in a real-world context by considering her particular circumstances, such as her age, education and past work and life experience. However, I see that, at both paragraphs 20 and 27, the General Division did consider the Applicant's particular circumstances in a real-world context.

[11] The Applicant alleges that the General Division failed to observe a principle of natural justice by refusing to admit a medical report into the evidentiary record. However, she did not identify any particular medical report. I have reviewed the hearing file and see in the General Division's summary of the evidence that the member referred to each of the medical opinions in the hearing file, including the orthopaedic surgeon's report of August 25, 2014 (which appeared at pages GD3-40 and GD3-41 of the General Division's hearing file).

[12] The two diagnostic examinations (AD1B-6 and AD1B-7) were performed in 2011 and in 2014 but do not appear to have been filed with the General Division. It appears that the Applicant provided copies of these two reports for the first time after the General Division had already rendered its decision. Accordingly, it cannot be said that the General Division refused to admit these documents. In any event, the diagnostic examinations alone do not establish the severity of the Applicant's disability, as clinical correlation would be required.

[13] For the most part, the Applicant seeks a reassessment, largely on the basis of the updated medical records and reports. As the Federal Court held in *Tracey*, it is not appropriate for the Appeal Division, in determining whether leave should be granted or denied, to reassess the evidence or reweigh the factors considered by the General Division. Neither the leave nor the appeal stage provides opportunities to relitigate or reprosecute the claim.

[14] I have nevertheless examined the evidence that was before the General Division and compared it to the decision, to ensure that the member did not overlook or possibly misconstrue any important evidence, and to ensure that it did not otherwise err in its evidentiary assessment.

[15] The 2014 medical reports may have been of limited utility in assessing her overall condition, given that the Applicant's left ankle has reportedly deteriorated over time and as the Applicant underwent surgery in October 2015. Deterioration of her left ankle is not unexpected or unusual, as the Applicant has been diagnosed with osteoarthritis in her left ankle. In that regard, the member unduly relied on Dr. Bajwa's August 2014 report.

[16] In October 2015, the Applicant underwent an arthroscopic debridement and arthrodesis and removal of internal fixation in her left ankle, along with bone grafting harvesting of the left tibia, approximately three months prior to the end of her minimum qualifying period. This was so close to the end of the minimum qualifying period that, ultimately, it did not provide much time for appropriate assessment by the Applicant's health caregivers, following the Applicant's recovery period and rehabilitation.

[17] The only post-operative report that was before the General Division was the brief report dated April 8, 2016 of her family physician. At that time, Dr. Chaudhry indicated that the Applicant continued to have significant pain and swelling in her left ankle and that the pain continued to impair the Applicant's tolerance for activity. He noted that it was a degenerative process and was not expected to improve. He would be referring her to another specialist, as the Applicant's former orthopaedic surgeon had closed his practice. The family physician did not identify the Applicant's functional limitations or what activities she

could tolerate, but the operative report of October 5, 2015, indicates that, following surgery, the Applicant should refrain from weight-bearing activities for about six weeks. As the General Division member noted, the family physician's report is brief and failed to address whether the Applicant had any residual functional capacity for work.

[18] As the evidence indicated that the Applicant should refrain from weight-bearing activities, the General Division determined that she was capable of retraining for work, provided that it did not involve prolonged standing or walking.

[19] While the member may have unduly relied on the pre-operative medical reports, at the same time, there was relatively little in the way of medical opinions before him regarding the Applicant's functionality and capacity. Overall, I do not see that the member overlooked or misconstrued important evidence, and his conclusions are consistent with the evidence that was before him. Clearly, the Applicant will continue to face functional limitations, but there is no indication from the medical evidence that was before the General Division that she is altogether precluded from all activities, including non-weight-bearing ones. In this regard, I am not satisfied that the appeal has a reasonable chance of success.

[20] Finally, I note that the Applicant has filed supporting medical evidence that was not available when the General Division rendered its decision. It has now become well-established law that new evidence is generally not permitted on an appeal under section 58 of the DESDA. In *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28, Manson J. determined that:

> Under sections 55 to 58 of the DESDA, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former [Pension Appeals Board], which was *de novo*, an appeal to the [Social Security Tribunal – Appeal Division] does not allow for new evidence and is limited to the three grounds of appeal listed in section 58.

[21] In *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31, Russell J. determined that "new evidence is not admissible except in limited situations […]." More recently, in *Glover v. Canada (Attorney General)*, 2017 FC 363, the Federal Court adopted

and endorsed the reasons in *O'Keefe*, concluding that the Appeal Division had not erred in refusing to consider new evidence in that case, in the context of the application for leave to appeal. The Court also noted that the DESDA makes provisions under section 66 for the General Division to rescind or amend a decision where new evidence is presented by way of application.

[22] Based on the facts before me, I am unconvinced that there are any compelling reasons why I should admit the report as there is no indication that it falls into any of the exceptions. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for new evidence.

[23] The Applicant could have considered making an application to the General Division to rescind or amend its decision; however, there are strict deadlines and requirements. Section 66 of the DESDA 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. Section 66 of the DESDA also requires that an application to rescind or amend be made within one year after the day on which a decision was communicated. At this juncture, the Applicant would be late in making such an application, but she likely would have been hard-pressed to establish the materiality of the new facts, given that the September 2016 and October 2016 reports do not substantially address the Applicant's functionality and capacity. (The October 2016 report refers to surgeries for her right foot problem, but this is likely a typographical error, as the Applicant has had surgeries for her left ankle.) The General Division indicated that it was particularly interested in, and that it based its decision on, whether any of the medical evidence specifically discussed the Applicant's residual functional capacity. However, neither 2016 report addressed the Applicant's residual functional capacity.

CONCLUSION

[24] Given the above considerations, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division