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

Citation: *S. Z. v. Minister of Employment and Social Development*, 2017 SSTADIS 336

Tribunal File Number: AD-17-10

BETWEEN:

S. Z.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 14, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated September 28, 2016. The General Division had previously conducted a hearing by videoconference and had determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was not "severe" prior to her minimum qualifying period (MQP), which ended on December 31, 2013.

[2] On January 3, 2017, within the specified time limitation, taking into account a presumptive delivery period, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division.

THE LAW

[3] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted. The Appeal Division must either grant or refuse leave to appeal.

[4] According to subsection 58(1) of the DESDA, 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 made in a perverse or capricious manner or without regard for the material before it.

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

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

ISSUE

[8] The Appeal Division must decide whether this appeal has a reasonable chance of success.

SUBMISSIONS

[9] In the application requesting leave to appeal, the Applicant's representative submits that the General Division:

(a) erred in law by failing to take into account the totality of the evidence, according to *Bungay v. Canada*,[3] in its assessment of the severity of the Applicant's disability; and

(b) erred in fact and in law in finding that the Applicant had unreasonably failed to comply with medical advice.

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[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[3] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

ANALYSIS

Totality of Evidence

[10] The Applicant alleges that the General Division failed to consider the totality of the evidence before it in assessing the severity of her impairments. As noted by the Applicant's representative, the Federal Court of Appeal in *Bungay* held that "[a]ll of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment."

[11] At the hearing, the Applicant testified that she suffered from multiple conditions that prevented her from working, including major depression, anxiety, diabetes, insulin allergy, diabetic neuropathy, celiac disease, osteoporosis, liver disease, *hidradenitis suppurativa*, irritable bowel syndrome (IBS) and diverticulitis. The Applicant notes that, although the General Division mentioned *Bungay* in its decision (which was rendered only one day after the hearing), it assessed each condition individually and appears not to have considered some of them at all.

[12] I see no reasonable chance of success on this point. It is settled law that an administrative tribunal charged with finding fact is presumed to have considered all the evidence before it and need not discuss each and every element of a party's submissions.[4] That said, I have reviewed the General Division's decision and found no indication that it ignored, or gave inadequate consideration to, any significant aspect of the evidentiary record.

[13] In paragraph 12 of its decision, the General Division listed the conditions that the Applicant had claimed, in her May 2014 CPP questionnaire, prevented her from working. In the next paragraph, the General Division referred to additional issues that she cited as impediments to work. Between the two paragraphs, all the conditions that the Applicant listed in her application requesting leave to appeal were touched upon by the General Division, with the exceptions of diverticulitis and *hidradenitis suppurativa.*

[14] As it happens, diverticulitis and IBS are not easily distinguishable and produce similar gastrointestinal symptoms. *Hidradenitis suppurativa*, which I understand is a skin condition,

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[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

was apparently not raised in any of the medical documents made available to the General Division. The Applicant alleges that this condition, along with the others, was discussed during the hearing, but that the General Division ignored her testimony. I have reviewed the audio recording of the hearing and can confirm that all the conditions and associated symptoms listed above were mentioned, but not all of them were discussed in depth, and the General Division's decision broadly reflects that reality. *Hidradenitis suppurativa*, for example, was raised in passing once but not referred to again. I note that the Applicant cited (at the 15:25 mark) depression as the biggest factor in her disability, and it is presumably for this reason that the General Division's decision dwelt on this condition and its associated symptoms. A decision-maker cannot realistically be expected to incorporate into its reasons every detail, however immaterial, of the written and oral evidence before it.

[15] While it is true that the General Division devoted a significant portion (paragraphs 42 to46) of its analysis to a sequential consideration of the Applicant's major conditions in isolation from each other, I cannot agree that the General Division failed in its responsibility to address the Applicant's condition in its totality, as demanded by *Bungay*. In paragraph 47, the General Division focused on the May 2014 report of Dr. Jean Hudson, who, as the Applicant's family doctor, was best positioned to pronounce on her whole condition. Within the boundaries set out in subsection 58(1) of the DESDA, a finder of fact is entitled to sort through the available evidence and weigh it as it sees fit; for this reason, I find that the General Division was within its authority to rely on Dr. Hudson's overview in assessing the Applicant's condition in its totality.

[16] A final note: Because the General Division issued its decision on the same day as the hearing, the Applicant implied that this meant that her appeal was given scant attention. I do not see an arguable case on this point. The mere fact that the General Division prepared and finalized its decision within a day of the hearing does not necessarily mean that it inadequately considered the Applicant's evidence and arguments. It should be kept in mind that the work of reviewing the available documentary evidence can (and should) be done in advance of the oral hearing. In any event, the proof of whether a particular disposition or outcome is supported by considered reasons lies in the written decision itself. My review of the decision in this case indicates that the General Division analyzed the Applicant's medical condition in detail how it

affected her capacity to regularly pursue substantially gainful employment. I see no indication that the General Division ignored, or gave inadequate consideration to, any significant component of the evidence that was before it.

Refusal of Treatment

[17] The Applicant submits that the General Division made a finding of fact that was not supported by the evidence before it; specifically, it found that the Applicant had unreasonably failed to comply with medical advice. In the alternative, the Applicant submits that the General Division failed to properly assess why she could not comply with her doctors' recommendations. The Applicant recognizes that cases such as *Lalonde v. Canada* and *Bulger v. Canada*[5] oblige CPP disability applicants to comply with treatment recommendations, but they also require the trier of fact to consider the reasonableness of their non-compliance.

[18] I see no arguable case on these grounds. In its decision, the General Division noted the Applicant's reluctance to follow treatment recommendations. It was open to the Applicant to explain to the General Division why she was disregarding medical advice, and its decision indicates that it took her explanation into account.

[19] In this case, the Applicant submits that the General Division drew an adverse inference from her supposed failure to follow separate recommendations from Drs. Macaulay and Muhammad to consider physical exercise as part of her treatment regimen. In fact, the evidence before the General Division at the time of the hearing actually provided two strong reasons—insomnia and depression—why the Applicant would have been unable to follow her doctors' recommendations. While the General Division found that the Applicant's insomnia did not preclude physical activity, it failed to appreciate evidence that her sleeplessness contributed to an inability to exercise. The Applicant provided medical documentation of her insomnia in the form of reports from Drs. Rasul and Muhammad, but the General Division was unconvinced by this evidence because a different physician, Dr. Hudson, did not refer to it in her notes between November 2008 and the MQP date. However, the Applicant submits that it is unreasonable to reject the evidence of two medical professionals and the Applicant's own sworn testimony merely because another medical professional did not make reference to it in her notes.

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[5] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Bulger v. Canada (Minister of Human Resources Development)* (May 18, 2000) CP 09164 (PAB).

[20] My review of the decision suggests that the General Division gave serious consideration to the Applicant's reasons for not exercising. Paragraph 49 is concerned entirely with an assessment of insomnia as an excuse for inactivity and, after weighing the competing evidence of Dr. Rasul and Dr. Hudson, the General Division concluded that the Applicant's explanation for her lack of exercise was unconvincing—not least because insomnia was not disclosed as a medical issue until April 2014. It is important to recognize that it is not the Appeal Division's role to agree or disagree with the General Division's findings of fact, but rather to assess whether, if material, its findings are perverse, capricious or without regard for the record. In this case, where the General Division has offered intelligible and defensible reasons for discounting the Applicant's explanation for her conduct, I see no reason to interfere.

[21] The Applicant also submits that the General Division failed to consider the possibility that her depression could have prevented her from exercising. It is well known that depression results in reduced energy levels, which in turn can make physical exercise difficult if not impossible. The Applicant submits that her case is comparable to the situation in *Cameron v. Canada*,[6] where the applicant was a 39-year-old woman who suffered from major depression and who did not exercise or attempt to retrain or look for work. The Pension Appeals Board (PAB) granted the appeal on the basis that the claimant's non-compliance and credibility issues were most likely caused by her depression.

[22] I am not bound by decisions of the now-defunct PAB, but I do acknowledge that, depending on specific factual circumstances, depression could conceivably explain a failure to undertake an exercise program. In this case, however, the Applicant never specifically pleaded her psychological condition as one of the reasons why she failed to follow treatment recommendations, and the General Division therefore cannot be blamed for failing to consider it. Moreover, exercise was specifically recommended by the Applicant's psychiatrist for the purpose of ameliorating her depression; it strikes me as perverse that the disease itself should be used as an excuse to eschew treatment for it. It should be recalled that the onus lies on the Applicant to prove that she is disabled; it is not the Respondent's task to prove that she is not. By extension, the General Division should not have to cast about for justifications of the Applicant's behaviour.

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[6] *Cameron v. Canada (Minister of Human Resources Development)* (2003), CEB & PGR 8791 (PAB).

CONCLUSION

[23] As the Applicant has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division