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

Citation: *J. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 346

Tribunal File Number: AD-17-6

BETWEEN:

J. F.

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 19, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated October 4, 2016. The General Division had previously conducted an in-person hearing and had determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP), because it found that her disability was not "severe" prior to her minimum qualifying period (MQP), which ended on December 31, 2011.

[2] On December 30, 2016, within the specified time limitation, 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 the appeal has a reasonable chance of success.

SUBMISSIONS

[9] In the application requesting leave to appeal dated December 30, 2016, the Applicant's representative made the following submissions:

(a) The Applicant suffers from cognitive deficits caused by cerebral palsy and it is obvious from the medical record that she does not appreciate the extent of her limitations. Her condition significantly compromised her ability to present her case to the General Division. For example, she did not understand the fact that the onus was placed upon her to prove beyond a reasonable doubt that she suffered from a severe and prolonged disability during the relevant dates. Cerebral palsy is commonly known to affect an individual's vision, learning, hearing, speech and intellectual functioning. Although the Applicant has managed this disorder throughout her life, she has also minimized its effects out of pride. Furthermore,

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

and to the Applicant's detriment, she only retained legal counsel on this matter after her hearing before the General Division had concluded on August 15, 2016.

(b) The General Division made determinations about the Applicant's disability by focusing only on medical records that supported its position and by ignoring other information that opposed it. A review of the entirety of the medical evidence clearly shows that the decision to deny the appeal was perverse and capricious. The Applicant acknowledges that her family physician, Dr. Spadafora, provided inconsistent reports on her disability but alleges that the General Division chose to rely on, and to draw negative inferences from, selected findings. For example:

- At paragraphs 27 and 62 of its decision, the General Division referred to a January 2012 functional capabilities report, wherein Dr. Spadafora indicated that the Applicant had restrictions with walking, standing and lifting. The General Division highlighted Dr. Spadafora's finding that the Applicant was not subject to restrictions regarding manual dexterity, memory, concentration or ability to deal with customers, notwithstanding the fact that Dr. Spadafora did not observe the Applicant with customers, nor did he conduct any memory or cognitive tests.

- At the same time, the General Division appeared to ignore Dr. Spadafora's July 2014 report, which found that the Applicant's limitations included poor concentration and a slowed ability to learn new tasks. The Respondent argued that this report demonstrated Dr. Spadafora's inconsistency in describing the Applicant's conditions, noting that it did not list depression among her ailments and suggesting that the omission discredited her position—this despite the fact that her psychological condition is mentioned countless times throughout her medical file. It should be noted that paragraph 36 of the General Division's decision referred to a October 2013 mental health consultation, which resulted in a diagnosis of somatic symptom disorder and major depressive disorder, neither of which have been treated sufficiently or appropriately. In addition, a February 2014 mental health assessment found

that the Applicant had difficulties coping with physical and mental issues and that she had attended counselling on several occasions. Another assessment, from March 2014, noted that the Applicant was highly anxious, frustrated and overwhelmed with stressors, including a fear that she would be bullied should she return to work.

(c) The General Division relied on questionable evidence to discredit the Applicant's application and therefore based its decision on erroneous findings of fact. For example:

- At paragraph 42 of its decision, the General Division referred to counselling notes that said, "the reason for [the Applicant's] disability was that she did not like her job as it was not for her and she might get hurt." The Applicant submits that this remark is further evidence of her cognitive limitations and her inability to effectively communicate her condition. It is not evidence that her disability is somehow fabricated.

- At paragraph 51 of its decision, the General Division stated: "[I]t is clear to the Tribunal the Applicant had the ability and knowledge required for her to find representation as she has done this in the past." The Applicant submits that the fact that she has retained counsel in the past but did not do so for this matter until it was nearly too late indicates her lack of the requisite understanding of the magnitude of her situation and highlights her cognitive limitations.

- At paragraph 58 of its decision, the General Division stated that the Applicant chose not to investigate other employment possibilities and made no attempt to pursue other suitable employment that would be appropriate for her specific limitations. The Applicant submits that that statement demonstrates that the General Division underestimated the Applicant's physical, cognitive and emotional state, which has rendered her unable to continue to look for gainful employment. The Applicant resigned from her last job at Metro because she felt she was being discriminated against due to

> her employer's failure to accommodate her physical limitations. The Applicant has not searched for alternative employment since then because there are no realistic job prospects for which she is qualified that would accommodate her many limitations. The General Division found that there was not enough evidence of the Applicant's efforts to mitigate her condition, notwithstanding the fact that she had participated in all recommended rehabilitation, physiotherapy and counselling.

ANALYSIS

[10] At this juncture, I will address only the argument that, in my view, offers the Applicant her best chance of success on appeal. The Applicant's representative has presented what amounts to an argument that the General Division conducted the hearing in defiance of a principle of natural justice by proceeding despite evidence that she lacked the capacity to understand the case against her.

[11] I see at least an arguable case here. My review of the evidentiary record indicates that, while mental capacity was not at the forefront of the Applicant's disability claim, she has been diagnosed with conditions (cerebral palsy, depression and anxiety) that can (although not always) impair cognition. Furthermore, the medical documentation made available to the General Division indicates that the Applicant has previously reported memory loss, occasional confusion and inability to focus—although whether these symptoms would have affected her ability to pursue and manage her appeal remains an open question. I acknowledge that, where applications for benefits under the CPP are concerned, the burden of proof lies with the claimant—it is not the Respondent's task to show that the Applicant is disentitled to the disability pension; it is the Applicant's task to show that she is entitled to it. I also note that the Applicant misstated the applicable standard of proof. In proceedings before the General Division, as it is with most administrative tribunals of this kind, claimants are required to prove their case on a balance of probabilities and not beyond a reasonable doubt, the latter being a far more onerous standard to meet.

[12] This appeal raises the elemental question of whether there exists a presumption that a claimant is competent to represent himself or herself before this Tribunal—whether

it be the General Division or Appeal Division. If such a presumption exists, under what circumstances is it rebutted? If there is no such presumption, what steps, if any, must the Tribunal take to satisfy itself that a claimant has the capacity to present his or her case? Except where a claimant submits a late appeal, there appears to be nothing in the applicable legislation that obliges the Tribunal to address a claimant's competence to prosecute his or her application for benefits or, if applicable, the appeals process that may follow it. I will therefore be particularly interested to hear the parties' submissions on case law that is relevant to the situation at hand.

CONCLUSION

[13] For the reasons discussed above, I am granting the Applicant unrestricted leave to appeal. Should the parties choose to make further submissions, they are also free to offer their views on whether an oral hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division