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

Citation: *M. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 347

Tribunal File Number: AD-16-1003

BETWEEN:

M. K.

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 19, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated May 17, 2016, denying the Applicant a disability pension under the *Canada Pension Plan* (CPP). The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on August 5, 2016.

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] 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:

a) The General Division failed to observe a principle of natural justice, as the Applicant was not able to understand the process for appealing to the General Division and cannot read the materials that the Tribunal sent to her.

b) The General Division erred in law by failing to attribute appropriate weight to the Applicant's oral evidence, and it required that her testimony be corroborated by objective medical evidence.

c) With regard to its finding that the Applicant had failed to pursue all available treatment options, as well as its finding that Dr. Thomas' report was not objective or persuasive, the General Division based its decision on an erroneous finding of fact.

ANALYSIS

Did the General Division Breach a Principle of Natural Justice?

[7] The Applicant has argued that the General Division denied her the ability to put her case forward fully and fairly as a result of the fact that the Applicant could not read or understand the materials that the Tribunal had sent to her and, subsequently, was not able to submit all the evidence prior to the ending of the filing period. The Applicant asserts that this is a breach of a principle of natural justice, pursuant to section 58(1)(*a*) of the DESD Act.

[8] On review of the record of correspondence between the Applicant and the Tribunal, the following is a brief summary of relevant communications:

- A Notice of Hearing before the General Division was sent to the Applicant dated November 23, 2015, and reads (in part) as follows:

> FILING PERIOD
>
> If parties have additional documents or submissions to file, they must be received by the Tribunal no later than **December 30, 2015**. A copy of any new documents

received by the Tribunal will be provided to the other parties and they will be given an opportunity to respond.

RESPONSE PERIOD

The Filing Period is followed by a Response Period. If a party wishes to respond to any documents filed during the Filing Period, the response must be received by the Tribunal no later than **January 29, 2016**.

DOCUMENTS FILED LATE

Documents filed after the time periods set out above will be provided to the other parties but, it will be up to the Tribunal Member to decide whether they will be considered. Parties will be informed whether documents filed late will be excluded or considered by the Tribunal Member in making the decision, either in writing or at the hearing.

- A revised Notice of Hearing was sent to the Applicant dated January 28, 2016, with changed teleconference details. However, the filing, response and late filing details were unchanged in this letter;

- An Adjournment Request and Authorization to Disclose document was received from the Applicant's new representative on February 19, 2016, requesting an adjournment to review the file, advise the Applicant properly and prepare for the hearing;

- The General Division granted the adjournment, dated February 22, 2016. The new hearing date was April 6, 2016, and the revised method of proceeding was changed from teleconference to videoconference. With respect to the filing and response periods, however, the Notice of Hearing document reads:

FILING AND RESPONSE PERIODS

Following the re-scheduling of the hearing in this matter, the Tribunal Member assigned to the file has determined that there are no changes to the Filing and Response periods specified in the letter from the Tribunal dated **January 28, 2016**. To clarify, if parties have additional documents or submissions to file, they must have been received by the Tribunal no later than **December 30, 2015**, and if parties wish to respond to any documents filed during the Filing Period, the response must have been received by the Tribunal no later than **January 29, 2016**.

[9] It is a basic principle of natural justice that, if they are to have a fair hearing, persons must know the case against them and have a reasonable opportunity to meet that case. They must be given the opportunity to be heard and to put their case forward fully and fairly. The right to a fair hearing includes such assurances as adequate notice of the application to be heard; the reasonable opportunity to participate in the hearing; and the right to an unbiased decision-maker. The common right to a fair hearing includes the right to be understood and to understand what is going on. The Applicant has submitted that natural justice was breached, as she did not understand the process leading up to the hearing, including the right to file additional evidence during the filing period.

[10] I have set out the details relating to the filing and response periods above. I note that the correspondence dated February 22, 2016, does not provide additional time to file documents or to respond to the materials already filed prior to the hearing. However, the opportunity to speak to the evidence in the record was provided during the hearing, which had been changed from a teleconference to a videoconference because, among other reasons, there were information gaps that required clarification, and the issues under appeal were complex.

[11] The Applicant has asserted that she did not understand that she could collect additional documentation until she had retained counsel and, by that time, the deadline for filing had passed. The Applicant has further argued that the General Division drew "adverse inferences" as a result of the fact that more recent medical imaging of the Applicant's spine and knees had not been provided.

[12] I do not find this argument persuasive. The Applicant was supposed to have knee replacement surgery in May 2015 on one knee, with surgery on the other knee to occur six months later. She did not have the surgery following her husband's passing. As she had not undergone the surgery as scheduled, her evidence at the hearing, as found in the General Division's decision, was that she would have to undergo all of the X-rays once again before she could schedule a new surgery date. At paragraph 17 of the General Division decision, the Applicant confirmed that she could not provide more recent medical imaging of her knee, as she had not pursued any further X-rays and did not have, at that time, a family doctor to refer her for imaging and further tests.

[13] I have listened to the recording of the General Division hearing in its entirety. The Applicant's representative was provided the opportunity to question the Applicant at the General Division hearing, and the issue of her inability to comprehend the appeal process was never raised in the context of her filing additional evidence. The issue of a breach of natural justice was never raised during the hearing testimony, and the Applicant's representative did not raise the issue during her final submissions. It would have been appropriate to do so, as the issue of a breach of natural justice ought to be raised as soon as possible.

[14] I do not find that the General Division breached a principle of natural justice, and leave to appeal is not granted on this ground.

Did the General Division err in law?

[15] The Applicant has further argued that the General Division did not attribute proper weight to Applicant's subjective assessment of her health condition. In fact, the Applicant asserts that the General Division erred in law, pursuant to section 58(1)(*b*) of the DESD Act, by requiring that the Applicant corroborate her testimony with objective medical evidence. The Applicant provided a list of no fewer than 13 decisions of the former Pension Appeals Board (PAB) supporting her argument that an applicant can be found disabled under the CPP based on "subjective" evidence, which includes oral testimony found to be credible. The Applicant also relies on the Supreme Court of Canada's comments regarding chronic pain syndrome, found in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54, at paragraph 1:

> There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.

[16] The Tribunal is not bound by decisions of the former PAB. The Tribunal is, however, bound by the body of jurisprudence that sets out the proper test for determining disability under the CPP. Although the Supreme Court of Canada's commentary recognizes that there may not always be objective evidence supporting the existence of chronic pain, this observation does

little to support the Applicant's position. Disability is not assessed in accordance with the Applicant's medical diagnosis or health condition (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in *Villani v. Canada (Attorney General)*, 2001 FCA 248:

> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". **Medical evidence will still be needed** as will evidence of employment efforts and possibilities." [my emphasis]

[17] The Federal Court of Appeal further articulated the *Villani* principles in *Inclima v. Canada (Attorney General)*, 2003 FCA 117, stating that applicants seeking to demonstrate that they suffer from a severe disability under the CPP must adduce evidence of a serious health problem and, where there is capacity to work, must also show that efforts to obtain and maintain employment have failed because of that health problem. It is not the applicant's inability to do his or her particular job that matters, but rather his or her inability to perform any work, i.e. "any substantially gainful occupation." (*Klabouch* at paragraph 15)

[18] The General Division was required to consider objective medical evidence in the record before it and, on listening to the recording of the hearing in addition to the General Division's findings in its decision, I find that the General Division thoroughly canvassed and considered the medical evidence in the record. The Applicant's oral testimony is summarized in paragraphs 11 to 21 of the General Division decision. Despite the absence of medical records in the evidence file that post-date the Applicant's MQP date, the General Division acknowledges at paragraph 39 of the decision that it is not the diagnosis of a health condition that determines disability; rather, disability is determined based on the Applicant's capacity to work. Considering the Applicant's subjective assessment of her capacity to work, the Applicant stated that she did not have the cognitive ability or reading comprehension to work. The General Division considered her evidence but found that "[t]he Tribunal is persuaded that the Appellant demonstrated her mental capabilities when she testified that she was the superintendent of four apartment buildings with some building having over 100 units. Her CPP questionnaire for

disability benefits indicated that she was a superintendent 2008 and 2010." Further, the Applicant argues that her capacity to work was limited due to her chronic health condition and, considering this evidence, the General Division found, at paragraph 41, that:

> [t]he Tribunal is not convinced that the Appellant took all measures available to treat her knees. The Appellant testified that she was supposed to have the first of two knee replacement surgeries in May 2015. She indicated that the doctor had told her that the knee replacement would help with her mobility and that she would be able to improve her walking. […] The Tribunal finds that the Appellant failed to make any attempts to reschedule her knee replacement or have her name placed on the waiting list.

Finally, the General Division finds the following, at paragraph 42 of the decision:

> The Appellant was 57 years of age when she initially applied for a CPP disability pension. She completed up to grade 9 education and one course in English at an adult learning centre. The Tribunal finds no evidence on file to substantiate that the Appellant's claim that she could not read. The Appellant is fluent in English. The Appellant's work history includes being superintendent of four apartment buildings ranging from 28 units to 138 units. She also worked for Esso making sandwiches and as a cashier. She worked for Tim Horton's and the Tea Room in the kitchen. The Tribunal is persuaded, based on the Appellant's age, level of education, language proficiency and past work and life experience, that the Appellant had transferable skills that could be used in other employment that did not require physical exertion.

[19] I do not find that the General Division failed to consider the Applicant's subjective evidence or her self-assessed capacity to work. The General Division decision reflects due consideration of the Applicant's oral evidence, as well as an acknowledgment that the General Division's findings are not based solely on that fact that there was a lack of objective medical evidence post-dating the Applicant's MQP date. I cannot find that the Applicant has identified an error of law that the General Division made, and the Applicant has not raised a ground of appeal that has a reasonable chance of success. Leave to appeal is not granted on this ground.

Did the General Division Base its Decision on an Erroneous Finding of Fact?

[20] Finally, the Applicant has argued that the General Division based its decision on an erroneous finding of fact, pursuant to section 58(1)(*c*) of the DESD Act, on two instances; 1) the reasons why the Applicant did not pursue recommended knee surgery; and 2) in finding the report of Dr. Thomas was not objective.

[21] At paragraph 17 of the decision, the General Division states:

> The [Applicant] stated that she was supposed to have her first knee replacement in May 2015 and her second knee replacement six months following her first. She did not have her knee replacement because she was dealing with her husband's death.

[22] The Applicant asserts that this finding is incorrect, as her evidence was that she would have needed to rely on her husband's assistance following her knee surgery and, once he had passed away, she no longer had the necessary support and did not proceed to have the surgery. The Applicant argues that the General Division ought to have considered whether the Applicant's explanation for not pursuing recommended treatment options was reasonable.

[23] At the outset, on listening to the recording of the General Division hearing, I note that the Applicant's representative stated in her final submissions that the Applicant had decided not to proceed with the surgery because she no longer had her husband's support. It was not the Applicant's testimony. Regardless, the General Division found that the Applicant had not made reasonable efforts to reschedule the knee surgery despite the medical evidence in the record that reflected the fact that the surgery would help with her mobility and improve her walking. She had not placed her name on a waiting list for surgery either. This evidence did not, in the General Division's view, constitute exhaustive efforts to pursue all treatment options.

[24] The Applicant has taken issue with the General Division's findings that Dr. Thomas' evidence was not given much weight. In particular, Dr. Thomas' medical reports were considered unpersuasive, as the opinions contained therein were not supported by test results or referrals to specialists. For example, Dr. Thomas concluded that the Applicant lacked the cognitive capacity to do any work other than manual labour, but she had never sent the Applicant for any cognitive testing. She concluded that the Applicant was permanently

disabled, but she had never referred the Applicant to an orthopedic surgeon, neurologist or chronic pain clinic. The General Division provided reasons, in paragraph 40 of the decision, for not placing more weight on Dr. Thomas' evidence. The General Division's findings are clear. The Applicant appears to be asking the Appeal Division to reconsider the evidence and substitute its decision for the General Division's decision. 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 that the General Division has already considered. 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 delegated authority conferred upon the Appeal Division to grant leave to appeal on grounds not included in subsection 58 of the DESD Act (*Canada (Attorney General) v. O'keefe*, 2016 FC 503). As a result, leave to appeal cannot be granted on this ground.

[25] This is not a ground of appeal that has a reasonable chance of success. Leave to appeal is not granted on this ground.

CONCLUSION

[26] The Application is refused.

Meredith Porter
Member, Appeal Division