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

Citation: *C. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 354

Tribunal File Number: AD-16-943

BETWEEN:

C. N.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: July 20, 2017

Canada

REASONS AND DECISION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), which determined that she was not entitled to a disability pension under the *Canada Pension Plan* ("CPP").

[2] The grounds of appeal to the Appeal Division are set out in s. 58(1) of the *Department of Employment and Social Development Act* ("DESDA"):

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.

[3] Pursuant to s. 56(1) of the DESDA, an appeal to the Appeal Division may be brought only if leave to appeal is granted. Subsection 58(2) provides that leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. In this context, having a reasonable chance of success means "having some arguable ground upon which the proposed appeal may succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12.

[4] The issue before me is whether the Applicant's proposed appeal has a reasonable chance of success.

BACKGROUND

[5] The Applicant's application for a CPP disability pension was made on October 31, 2013. The Respondent denied the application initially and upon reconsideration.

[6] The Applicant appealed the reconsideration decision to the General Division. A hearing by videoconference was held.

[7] In reasons issued on April 12, 2016, the General Division member found that the minimum qualifying period (MQP) date was December 31, 2014. He canvassed the medical evidence of the medical specialists and concluded it did not support a diagnosed medical condition of such severity that the Applicant was unable to return to work. He noted that objective testing, including an MRI of the cervical spine, X-rays, CT scan, audiological testing and a gastrointestinal examination, did not demonstrate a severe disability (para. 36).

[8] At paragraph 38 of the reasons, the General Division member set out his rationale for giving more weight to the opinions of the medical specialists over that of the Applicant's chiropractor. He noted that the Applicant's chiropractor, Dr. Kanwischer, had said the Applicant was likely unable to return to work, but he had not addressed her functional capacity to work in general, in sedentary or part-time work; nor had he addressed whether his opinion related to a return to her former employment or to any work. The member also noted that Dr. Kanwischer had not commented on the lack of objective testing support for a significant list of the Applicant's complaints, which the member noted were "said not to have a specific etiology".

[9] The member noted that where there is evidence of work capacity, an appellant must be unsuccessful by reason of her health condition, citing *Inclima v. Canada (Attorney General)*, 2003 FCA 117. He concluded that the Applicant had a significant residual level of work capacity but had made no effort to attempt to return to employment or retrain (paras. 41– 42). He found that the Applicant's complaints of a considerably limited level of functioning or tolerances for sitting, standing, walking, lifting, carrying, reaching and bending were not supported by the medical information or objective testing. He noted that the Applicant had tolerated sitting for a significant period of time at the hearing, and that she did not allege diminished cognitive capacity to retrain or to become re-employed in a lighter or more sedentary job suitable to her limitations (at para. 42). He found that the Applicant had not tried to return to any alternate employment and had not engaged in any retraining since stopping work.

[10] The General Division member found that the Applicant's testimony was not credible. In this regard, he stated:

> [34] The Tribunal is skeptical of the Appellant's testimony. There are numerous inconsistencies between her testimony and the medical information. She testified no one examined her, is listening to her, or is helping her. The Tribunal finds this is an exaggeration and is contradictory to the indication by Dr. Reebye that the Appellant has been thoroughly investigated by competent neurosurgeons and ENT surgeons and there are no musculoskeletal or neurological causes for concern. The Tribunal does not accept that specialist Dr. Reebye refused to read her file, and finds this to be an exaggeration by the Appellant. The Appellant provided information of a severely restricted ability to tolerate sitting, yet the Tribunal observed the Appellant tolerate sitting at the hearing for a substantial period of time.

[11] The member was not satisfied on the balance of probabilities that the Applicant suffered from a severe disability in accordance with the CPP criteria on or before the MQP, and he dismissed the appeal.

SUBMISSIONS

[12] In her application for leave to appeal, the Applicant states she is "appealing because I have not exaggerated any information. I swore to tell the truth at the beginning of my hearing." From this I conclude that the Applicant believes the member erred in finding her testimony was not credible.

[13] The Applicant also states, "The Tribunal has interpreted the vague reports from the doctors I've seen in an inaccurate way. I understand these situations with the physicians such as Dr. Reebye appear irregular. But my condition is not A-typical which has led to improper referrals, diagnosis and mistreatment by doctors."

[14] The gravamen of the Applicant's allegations is that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard to the material before it, allegations falling within the ambit of s. 58(1)(*c*) of the DESDA.

ANALYSIS

[15] The Applicant disagrees with the General Division's assessment of the medical evidence. She also believes the member erred in making a negative finding regarding her credibility.

[16] I have not identified any basis on which to question the member's assessment of the medical evidence. He reviewed the medical evidence in detail and made findings based on his assessment of the evidence. He provided a rational basis for giving more weight to the evidence of the medical specialists than to the evidence of the Applicant's chiropractor, Dr. Kanwischer. With respect to the negative finding regarding the Applicant's credibility, the member provided a reasoned basis to support his skepticism regarding the Applicant's testimony at para. 34 of the reasons.

[17] Assessing and weighing the evidence and making findings of credibility are tasks firmly within the remit of the trier of fact. An appeal to the Appeal Division is not an opportunity to re-argue the case in the hope of obtaining a different outcome: *Marcia v. Canada (Attorney General)*, 2016 FC 1367. The Applicant has provided no basis to find the General Division member committed a reviewable error. I conclude the Applicant's arguments do not have a reasonable chance of success on appeal.

[18] The Applicant also claims she has been subject to "improper referrals, diagnosis and mistreatment by doctors". The Applicant's argument in this regard does not fall within any ground of appeal under s. 58(1) of the DESDA. The Applicant bore the onus to establish on a balance of probabilities that she suffered from a severe disability in accordance with the CPP criteria on or before the MQP. She provided medical evidence to support her claim and appeal to the General Division. If she believed her medical evidence was based on "improper referrals, diagnosis and mistreatment by doctors", it was open to her to obtain further treatment and medical reports to be relied on as evidence. I conclude this argument has no reasonable chance of success on appeal.

[19] In her application for leave to appeal, the Applicant states that she has been waiting for an appointment with the B.C. Women's Hospital and Health Centre for two years. She also

states, “I just had an appointment June 21/16 with an internist D. C. MacCllom [*sic*]. She diagnosed my situation and referred to me as disabled unable to work and from there is recommending I attend the Changepain Clinic in Vancouver.”

[20] The submissions made by the Applicant that she has been waiting for an appointment at the BC Women’s’ Hospital and Health Centre and what the internist may have said just before she filed her application for leave to appeal are not relevant to the issues before me on this application for leave to appeal. In any event, these statements constitute new evidence, which cannot be considered on this application. As the Federal Court recently confirmed in *Parchment v. Canada (Attorney General)*, 2017 FC 354, at para. 23, “In considering the appeal, the Appeal Division has a limited mandate. They have no authority to conduct a rehearing […]. They also do not consider new evidence.” These principles apply at the leave to appeal stage as well as on appeal.

[21] I have borne in mind the Federal Court’s decision in *Griffin v. Canada (Attorney General)*, 2016 FC 874, where Justice Boswell provided guidance as to how the Appeal Division should address applications for leave to appeal:

> [20] It is well established that the party seeking leave to appeal bears the onus of adducing all of the evidence and arguments required to meet the requirements of subsection 58(1): see, e.g., *Tracey*, above, at para 31; also see *Auch v. Canada (Attorney General)*, 2016 FC 199 at para 52, [2016] FCJ No 155. Nevertheless, the requirements of subsection 58(1) should not be applied mechanically or in a perfunctory manner. On the contrary, the Appeal Division should review the underlying record and determine whether the decision failed to properly account for any of the evidence: *Karadeolian v. Canada (Attorney General)*, 2016 FC 615 at para 10, [2016] FCJ No 615.

[22] I have reviewed the underlying record and have found no instance where the General Division decision failed to properly account for any of the evidence.

[23] I conclude the Applicant has not raised any arguable ground upon which the proposed appeal might succeed.

DISPOSITION

[24] I am satisfied the appeal has no reasonable chance of success. The application is therefore refused.

Nancy Brooks
Member, Appeal Division