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

Citation: *R. E. v. Minister of Employment and Social Development*, 2017 SSTADIS 355

Tribunal File Number: AD-17-67

BETWEEN:

R. E.

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 21, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated December 2, 2016. After conducting a hearing by videoconference on November 3, 2016, the General Division determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was not severe during her minimum qualifying period (MQP), which ended on December 31, 2016.

[2] On January 25, 2017, within the specified time limitation, the Applicant submitted an application requesting leave to appeal to the Appeal Division. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

Canada Pension Plan

[3] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[4] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[5] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long-continued and of indefinite duration, or is likely to result in death.

Department of Employment and Social Development Act

[6] 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 and the Appeal Division must either grant or refuse leave to appeal.

[7] 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.

[8] 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.

[9] 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]

[10] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an applicant to meet, but it is lower than the one that must be met on the

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

hearing of the appeal on the merits. At the leave to appeal stage, the applicant does not have to prove the case.

ISSUE

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

SUBMISSIONS

[12] In her application requesting leave to appeal, the Applicant alleges that, four days after her hearing, she received a letter from the Respondent dated November 1, 2016. Tribunal staff later advised her that this letter should have been delivered to her before the hearing. As she has a brain injury, she found this letter very confusing.

[13] The Applicant also alleges that the General Division erred in stating that she:

- had migrated to Canada in 1984 (paragraph 8);
- does not like to rely on medications (paragraph 9);
- has overused medications (paragraph 11);
- has exhibited poor glucose control (paragraph 11); and
- has declined medications (paragraph 15).

[14] The Applicant also enclosed a letter dated December 23, 2016 from Dr. Michael Rathbone, a neurologist and professor at McMaster University.

ANALYSIS

[15] At this juncture, I will address only the argument that, in my view, offers the Applicant her best chance of success on appeal. Although she does not frame it as such, the Applicant suggests that the General Division failed to observe a principle of natural justice by rendering its decision without giving her an opportunity to respond to a late submission from the Respondent.[16] On July 11, 2016, the General Division scheduled a videoconference hearing for November 3, 2016 and notified the parties that they had until September 2, 2016 to

file additional documents. The Tribunal also established a response period with a deadline of October 3, 2016.

[17] On August 22, 2016, the Applicant submitted a report dated August 10, 2016 from Dr. Rathbone. On November 1, 2016, well after the response period had elapsed, the Respondent filed with the Tribunal a document entitled "Addendum to the Submissions of the Minister" (GD8). This document supplemented a written argument that the Respondent had submitted in November 2015, and it addressed not only Dr. Rathbone's August 10, 2016 report, but also his initial consultation report, dated November 4, 2015.

[18] Dr. Rathbone's reports described extensive neurological testing and appear to be the first to diagnose the Applicant with multiple sclerosis. In its decision, the General Division summarized both reports (at paragraphs 21 and 23) and made significant use of them in its analysis proper:

> [28] […] In August 2016, her neurologist Dr. Michel P. Rathbone diagnosed her with Multiple Sclerosis and Post-Concussion Syndrome. He made no comment on her functional limitations, her response to treatment or her prognosis.
>
> [32] […] The Appellant has been under the care of a Dr. Rathbone a neurologist. He has diagnosed her with multiple sclerosis and Post-Concussion Syndrome but has not made any comment on her documented headaches or as to whether the headaches are debilitating to an extent that the Appellant is incapable of working or that the headaches affects her ability to work.
>
> [36] The Appellant's diagnosis was reported by Dr. Rathbone in August 2016 to include Multiple Sclerosis and Post-Concussion Syndrome. There is no evidence currently that she has developed complications from these medical issues that affect her ability to work. Dr. Rathbone made no comment on her functional condition or impairments and limitations that might affect her ability to work. In fact none of her physicians have said she is incapable of working […]

[19] Although the Respondent's addendum was filed after the response period, there was nothing in the file to indicate that the General Division noticed the missed deadline—and certainly nothing to suggest that the late submission was potentially problematic. Neither the General Division's decision nor its remarks during the hearing addressed the issue of whether

to admit the addendum, but I note that the General Division's analysis of the Rathbone reports closely mirrored that of the Respondent:

> Dr. Rathbone made no comment on Mrs. R. E.s' functional condition or impairments and limitations that she might be experiencing. He merely stated she had a diagnosis of multiple sclerosis and post-concussion syndrome, was in treatment and under his care.

[20] This suggests that the General Division relied on the addendum to dismiss the appeal, even though the record shows that the Applicant had not yet received it—or had not even been aware of it—at the time of hearing. Although the General Division would have instantly had access to the addendum as soon as the Respondent had uploaded it onto a shared server, the Applicant did not receive it until November 7, 2016—four days after the hearing—at which point she telephoned the Tribunal in an attempt to understand what it meant. A Tribunal staff member documented the call in a memorandum:

> The appellant called to ask for clarification on SST's letter dated Nov 1 that she just rec'd, as the hearing was held Nov 3rd.
>
> I explained that it was the respondent's addendum submission which she should've rec'd prior to the hearing.
>
> She also asked about post-hearing submissions. I advised she is welcome to make them but the decision to accept them or not rests with the TM [Tribunal member].

[21] In my view, the Applicant has an a arguable case that, as a matter of procedural fairness, the General Division should have advised her at the hearing that the Respondent had submitted a late document to which she did not yet have access. The Applicant also has an arguable case that the General Division should have offered the parties an opportunity to make submissions on whether the addendum, having arrived four weeks after the response deadline, was best admitted to the record. Finally, the Applicant has an arguable case that, having unilaterally decided to admit the addendum (on which it later relied), the General Division should have explained its reasons for doing so and offered her an opportunity—either during the hearing or by way of post-hearing submissions—to respond to the Respondent's commentary on the Rathbone reports.

[22] It is true that the Applicant was advised of the possibility of post-hearing submissions, but this message came, not from the General Division itself, but rather from a Tribunal staff member,

who made it clear that any decision to admit additional documents would be at the General Division's discretion. As it happens, the General Division had already communicated its reluctance to admit post-hearing documents after the Applicant, toward the end of her oral submissions on November 3, 2016, raised the possibility of forwarding another medical report. At the 1:05:30 mark of the audio recording, the General Division member presiding over the hearing can be heard telling the Applicant that she had already been given an opportunity to submit documentation and that "I will be writing my decision as soon as I can." Given this, it would not be surprising if the Applicant concluded that it was too late to respond to the Respondent's addendum.

[23] A final note: The Applicant has submitted a medical report with her application requesting leave to appeal that was prepared after the issuance of the General Division's decision. An appeal to the Appeal Division is not ordinarily an occasion on which new evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the Appeal Division any authority to make a decision based on the merits of the case.

CONCLUSION

[24] I am granting non-restrictive leave to appeal on the basis that the General Division may have failed to observe a principle of natural justice when it relied on a late addendum to the Respondent's written submissions without offering the Applicant an opportunity to respond to it.

[25] Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

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

Member, Appeal Division