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

Citation: *S. E. v. Minister of Employment and Social Development,* 2017 SSTADIS 365

Tribunal File Number: AD-16-999

BETWEEN:

S. E.

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 25,2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated May 13, 2016, which had determined that the Applicant was not entitled to receive 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 8, 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." Determining leave to appeal is a preliminary step to a hearing on the merits and is an initial hurdle for an applicant to meet; however, the hurdle is lower than the one that must be met at the hearing stage of an appeal on the merits.

[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." In order for leave to be granted, the Applicant must establish that there is some arguable ground upon which the proposed appeal might succeed in order for leave to appeal to be granted (*Kerth v. Canada (Minister of Human Resources Development)*, 1999 CanLII 8630). An arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success (*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *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 the General Division based its decision on an erroneous finding of fact made in a perverse and capricious manner when it found that the Applicant's evidence had been "hampered" by her inability to remember dates. In fact, her forgetfulness is attributable to her disability.

[7] The Applicant submits that the General Division made an erroneous finding of fact in determining that there had been insufficient evidence in the record at the time of, or prior to, the MQP date to support a finding that the Applicant was disabled under the CPP.

[8] The Applicant further submits that the General Division made an erroneous finding of fact in determining that Dr. Khan had not had personal knowledge that the Applicant's depression pre-dated 2006.

ANALYSIS

[9] I will address the Applicant's second submission, set out in paragraph 7 above, before providing my analysis of her other arguments. I am addressing this argument first, as the Applicant has enclosed with her application requesting leave to appeal a letter from Dr. Dhanji, which is dated July 12, 2016. This is new evidence that was not in the record before the General Division. The Applicant filed the new evidence to support her request for an appeal, and the letter provides further clarification of the Applicant's medical condition, her prognosis and an opinion on her capacity to work from 2001 until 2004.

[10] Hearings before the Appeal Division are not *de novo* hearings. The Appeal Division cannot consider evidence that was absent from the record before the General Division; an appeal before the Appeal Division is not considered an opportunity for a new trial. Section 58 of the DESD Act sets out the grounds of appeal, and the Appeal Division is limited to considering appeals pursuant to those three grounds. The submission of new evidence is not one of the grounds enumerated under section 58 for which leave to appeal can be granted (see *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100). As a result, in deciding whether leave to appeal should be granted, the Appeal Division cannot consider the letter from Dr. Dhanji. Leave to appeal is not granted on this ground.

[11] Returning to the first argument the Applicant has made in support of her request for leave to appeal, as set out in paragraph 6 above, the Applicant has argued that the General Division erred in finding that the reliability of her evidence had been hampered by her inability to remember dates. The Applicant argues that the General Division should have recognized that her forgetfulness was attributable to her disability and that, when determining whether she had met her evidentiary burden, the General Division should not have "penalized" the Applicant regarding her inability to remember certain dates.

[12] On listening to the recording of the hearing before the General Division in its entirety, and having reviewed the documentary evidence in its entirety, I do not find that, during the hearing or on the basis of the evidence in the record, the General Division "penalized" the Applicant for experiencing some difficulty remembering dates. While I do note that the General Division does recognize that the Applicant's "testimony was hampered by her inability to recall dates," I do not find that the General Division relied on this fact in determining whether the Applicant had met her evidentiary burden.

[13] The standard of proof that the Applicant must meet is the civil standard of proof; she must prove her claim "on a balance of probabilities." This means the Applicant must show that it was more probable than not that she had been disabled on or before her MQP date, which was December 31, 2006. The General Division found that she had not met her evidentiary burden in this regard, and the principal reasons for this finding are stated in paragraphs 36, 38 and 40 of the decision. These paragraphs read, in part, as follows:

> [36] […] In March 2014, Dr. Dhanji, noted that he supported the Appellant’s application for a disability based on her diagnosis of degenerative disc disease of her lumbar spine, which is deemed to be non-surgical. She was “presently unable to work”. From this medical information written by Dr. Dhanji, the Tribunal cannot conclude that the Appellant suffered from a severe and prolonged disability at the date of her MQP.
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> [38] Dr. Khan’s report was written nine years post the Appellant’s MQP. However, as noted above, the Appellant indicated that she began seeing Dr. Khan in 2009, so he did not have personal knowledge that her depression began in 2002, nor did he have any knowledge of what effect, if any, the depression had on her ability to engage regularly in substantially gainful employment at the time of her MQP. As a result, the Tribunal gives little weight to Dr. Khan’s evidence regarding when the Appellant’s depression began, or the effect it had on her ability to regularly engage in substantially gainful employment.
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> [40] […] All of the medical evidence submitted by the Appellant was post her MQP, and based on the Tribunal’s analysis; does support the Appellant’s disability claim. Based on the evidence summarized above, it is the Tribunal’s finding that the Appellant has not submitted any medical evidence to confirm that her doctors considered her incapable regularly of pursuing any substantially gainful employment.

[14] I recognize that the medical evidence in the record notes several health conditions, including problems with memory and some forgetfulness. However, her inability to remember dates in her oral testimony, or her forgetfulness, was not a factor in the General Division finding that she had failed to establish that she had been, more likely than not, disabled on or before her MQP date. The General Division based its finding on a determination that the medical evidence in the record did not support a finding that she was disabled under the CPP. There was insufficient objective medical evidence dated shortly before or after her MQP to support her claim that she had been disabled on or before that date. The medical evidence that did discuss her health condition around the time of her MQP date was not found to be objective, as the physician offering his opinion on her health status at that time began to treat her three years after her MQP and had no actual knowledge of her physical state around her MQP to support his opinion. The Applicant has filed a letter with the Appeal Division from Dr. Dhanji attempting to fill the evidentiary gap in the time frame prior to her MQP date but, for reasons that I have already provided, I am not able to consider this new evidence in deciding whether to grant leave to appeal in this case.

[15] I do not find that the Applicant has raised a ground of appeal that has a reasonable chance of success, and leave to appeal is not granted on the ground that the General Division based its decision on an erroneous finding of fact in stating that the Applicant's evidence had been "hampered" by her forgetfulness.

[16] Finally, the Applicant has submitted that the General Division's finding that Dr. Khan had no personal knowledge that the Applicant suffered from depression and that her depression affected her ability to work was an erroneous finding of fact. In her submission, the Applicant argues that Dr. Khan had actually begun treating her for depression before 2006, but she did not identify any evidence in the record to support this assertion.

[17] I have reviewed the evidence in the record and, as the General Division found, there is medical evidence from Dr. Khan that states that the Applicant suffers from depression and is unable to work as a result. However, the Applicant stated in her CPP benefit questionnaire that she had not started to see Dr. Khan until 2009. None of the medical reports in the record from Dr. Khan is dated prior to 2006. In fact, a letter dated March 24, 2016, from Dr. Khan states that the Applicant has been known to him since 2010.

[18] I do not find that there is any reliable, objective evidence in the record to support the argument that Dr. Khan had begun treating the Applicant for depression before 2006. I also do not find that the General Division erred in making the same determination. This argument does not have a reasonable chance of success on appeal.

[19] Leave to appeal is refused on the ground that the General Division erred in finding that Dr. Khan had not had personal knowledge of the Applicant's depression prior to 2006.

CONCLUSION

[20] The Application is refused.

Meredith Porter
Member, Appeal Division