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

Citation: *U. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 372

Tribunal File Number: AD-16-1161

BETWEEN:

U. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Peter Hourihan

Date of Decision: July 26, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 12, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* was not payable, finding that that Applicant did not have a severe disability on or before December 31, 1997, which was the end of his minimum qualifying period (MQP). The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division on October 20, 2016.

ISSUE

[2] I must decide whether the appeal has 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* (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.

[4] Subsection 58(1) of the DESDA identifies the following as the only grounds of appeal available to the Appeal Division:

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.

[5] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied the appeal has no reasonable chance of success.

[6] In determining whether leave to appeal should be granted, I am required to determine whether there is an arguable case. The Applicant does not have to prove the case at this stage; he has to prove only that the appeal has a reasonable chance of success, that is, "some arguable ground upon which the proposed appeal might succeed": *Osaj v. Canada (Attorney General)* 2016 FC 115, at paragraph 12.

[7] The Federal Court of Appeal concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, 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.

SUBMISSIONS

[8] The Applicant submits that she has had knee problems since she fell in 1982 and that her disability goes back to that fall.

[9] The Applicant submits that the General Division indicated that she has undergone left- knee surgery on three occasions when, in fact, she has had five surgeries on her left knee.

[10] The Applicant submits that she has had back problems since she fell in 1982, which have contributed to her disability.

[11] The Applicant submits that she suffers from chronic pain, takes medication and receives treatment from her physician.

ANALYSIS

[12] I examined the Applicant's application requesting leave to appeal to the Appeal Division to determine the possible grounds of appeal under subsection 58(1) of the DESDA, as the Applicant did not articulate these herself. Her submissions were in the form of handwritten letters indicating her disagreement with the General Division decision. My analysis addresses her four submissions as errors of fact, where 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.

[13] Further, I examined the medical evidence in relation to *Karadeolian v. Canada (Attorney General*), 2016 FC 615, at paragraph 10, where the Federal Court stated: "If important evidence has been arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted notwithstanding the presence of technical deficiencies in the application for leave."

[14] In respect of the Applicant's submission that the General Division neglected that the Applicant had had knee problems since 1982, I find that this is not an arguable case. The General Division acknowledged that the Applicant "has suffered with knee problems, specifically as regards the left knee, throughout much of her adult life" (paragraph 29). It is not necessary that every piece of evidence be considered: "[A] tribunal need not refer in its reasons to each and every piece of evidence before it, but it is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact" (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). The General Division considered the medical evidence as well as the Applicant's subjective evidence. The focus was on the issue of whether the disability was severe as of the MQP date of December 31, 1997. The General Division acknowledged that the Applicant had long-standing knee problems.

[15] In respect of the Applicant's submission that the General Division noted only three knee surgeries, this is not correct. The General Division noted five knee surgeries, in 2000, 2001, 2012, 2013 and 2014. The first three were noted in paragraph 14, the fourth in paragraph 20 and the fifth in paragraph 22. All five were considered by the General Division. I find that this is not an arguable case.

[16] In respect of the Applicant's submission that the General Division neglected to consider her back problems contributing to her disability, I find that this is not an arguable case. The Applicant indicated that she suffered from back pain as noted in paragraph 14 of the General Division decision. The General Division noted, at paragraph 36, that the Applicant's claim that back pain contributed to her disability was not supported by the medical evidence, specifically where it stated that "there is a dearth of medical evidence on this point." I reviewed the medical evidence and found no reference to back pain. In respect of the

Applicant's own evidence, I note at page GD2-68, that the Applicant indicated that she has not been able to work since 1999 due to her left knee and she highlighted the five surgeries she had undergone. The Applicant did mention back pain in the December 18, 2012, Service Canada medical questionnaire, where she indicated that she was "unable to stand for a long period of time because of back pain" (GD2-110) and that she had visited her doctor due to back and knee pain (GD2-112). The General Division's finding is supported by the evidence.

[17] In respect of the Applicant's submission that the General Division neglected to consider that she suffers from chronic pain, for which she takes medication and receives treatment, I find that this is not an arguable case. The General Division acknowledged that the Applicant was taking pain medication, specifically Oxycocet and Tylenol 3 (paragraph 16 of its decision). The medical evidence, as noted above, did not contain references to any back pain or treatment for back pain.

[18] In her application requesting leave to appeal before the Appeal Division, the Applicant included new evidence that had not been provided to the General Division, specifically six letters and medical reports authored by physicians. Four were dated prior to the General Division decision: August 13, 2002; December 2, 2003; March 8, 2004; and May 25, 2016. Two were dated after the General Division decision: August 23, 2016, and August 25, 2016. I have not considered any of these letters as I am limited to the grounds of appeal in section 58. In *Canada (Attorney General) v. O'keefe*, 2016 FC 503, at paragraph 28, the Federal Court held that "[u]nder sections 55 to 58 of the DESDA, the test for obtaining leave to appeal and the nature of the appeal has changed. Unlike an appeal before the former PAB, which was *de novo*, an appeal to the SST-AD does not allow for new evidence and is limited to the three grounds of appeal listed in section 58." See also *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at paragraph 73.

[19] The General Division considered the evidence presented to it and found that the Applicant did not suffer from a severe disability. I find that the Applicant's submissions of errors of fact on the part of the General Division are without basis and that there is no arguable case. There is no reasonable chance of success in this case.

CONCLUSION

[20] The Application is refused.

Peter Hourihan
Member, Appeal Division