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

Citation: *N. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 391

Tribunal File Number: AD-16-1016

BETWEEN:

N. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 3, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the General Division decision dated May 11, 2016. The General Division determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability had not been found "severe" by the end of her minimum qualifying period on December 31, 2010.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Of these, the Applicant submits that the General Division erred in law and that it based its decision on erroneous findings of fact made without regard for the material before it.

[5] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within any of the above grounds of appeal and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

(a) Capacity to work

[6] The Applicant submits that the General Division erred in law in determining that she necessarily retained some residual capacity to work. She claims that its finding is flawed, as it is based on the mistaken assumption that she must be the primary caregiver for her children, given that her spouse continues to be employed. She claims that the General Division failed to examine the evidence and appreciate the fact that her spouse does the bulk of parenting and is also responsible for housework. Indeed, she notes that her spouse had quit his employment at a factory, so he could take on work that was more flexible, which would enable him to assume parenting and household responsibilities. The Applicant also notes that her sister-in-law assists.

[7] At paragraphs 12 and 13, the General Division sets out the evidence regarding the Applicant's family and domestic situation as follows:

> [12] The Appellant testified that her husband works as a taxi driver because his hours can be more flexible. Before that, he worked in a factory but was always in trouble with hind boss for taking time off to help look after his wife. He takes care of all household chores including looking after the babies with some help from his sister. The Appellant further testified that her husband desperately wanted children and that he would have left her if she did not agree to adopt children.
>
> [13] The Appellant claimed that she suffered from depression due to pain, infertility and family pressures. She is not able to cook for her husband, do housework or look after her children. Her husband gets very angry with her. Before the MVA, she was able to work, prepare food and look after the house, although she experienced pain from endometriosis and back pain.

[8] The Applicant clearly testified that she was unable to cook, do housework or look after her children.

[9] Then, in its analysis, the General Division wrote, "While she testified that she had some help from her husband and sister-in-law, her husband still worked as a taxi driver. Caring for two infant children is an enormous responsibility and takes a huge amount of time and effort."

[10] Despite the Applicant's testimony that she was unable to cook, do housework or look after her children, the General Division found that the Applicant was not only expending time and effort caring for the children, but assumed that she was necessarily the primary caregiver for them. The General Division did not make any explicit findings regarding the extent of the husband's or sister-in-law's involvement in caring for the children but, when it wrote that the Applicant received "some help," it clearly found that their roles were secondary to the Applicant's role.

[11] The Applicant has raised an arguable case that the General Division may have misconstrued the evidence in this regard. Accordingly, I am satisfied that the appeal has a reasonable chance of success.

(b) Prolonged disability

[12] The Applicant has raised several other issues in support of her application requesting leave to appeal. The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, indicated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an applicant has raised. As I have already granted leave to appeal, it is unnecessary to address each ground at this juncture, although I will address the Applicant's argument that the General Division should have assessed whether her disability had been prolonged by the end of her minimum qualifying period.

[13] A disability is prolonged if it is likely to be long continued and of indefinite duration or likely to result in death. Although the Applicant argues that the General Division erred in finding that her limitations are not long continued and of an indefinite nature, the fact is that, having found that the Applicant's disability was not severe, the General Division also found that it was unnecessary to make any finding on the prolonged criterion.

[14] The test for disability is two-part and, if a claimant does not meet one aspect of this two-part test, then he or she will not meet the disability requirements under the Canada *Pension Plan.* It is unnecessary to analyze the prolonged criterion when the appellant has not established that he or she is severely disabled. In *Klabouch v. Canada (Social Development)*, 2008 FCA 33, at para. 10, the Federal Court of Appeal stated that:

> [...] The two requirements of paragraph 42(2)(*a*) of the [*Canada Pension Plan*] are cumulative, so that if an applicant does not meet one or the other condition, his application for a disability pension under the [*Canada Pension Plan*] fails.

[15] And, in *McCann v. Canada (Attorney General)*, 2016 FC 878, the Federal Court stated that "the fact of concentrating on one feature of the test and of not making any findings regarding the other … does not constitute an error." The Federal Court determined that Mr. McCann's argument that the Appeal Division should have granted leave to appeal on the basis of the General Division's failure to consider the "prolonged" part of the disability test was bound to fail.

[16] Given that the General Division had determined that the Applicant was not severely disabled, it was unnecessary to assess whether the Applicant's disability could be considered prolonged. This issue does not raise an arguable case.

CONCLUSION

[17] The application for leave to appeal is granted, although this decision of course is not determinative of whether the appeal itself will succeed.

[18] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may: (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file. The parties may make submissions regarding the form the hearing of the appeal should take (e.g. by teleconference, videoconference, in person or on the basis of the parties' written submissions), together with submissions on the merits of the appeal.

Janet Lew
Member, Appeal Division