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

Citation: *Minister of Employment and Social Development v. C. J.*, 2017 SSTADIS 392

Tribunal File Number: AD-16-1317

BETWEEN:

Minister of Employment and Social Development

Applicant

and

C. J.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: August 3, 2017

REASONS AND DECISION

INTRODUCTION

[1] On August 22, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable.

[2] The General Division held an in-person hearing, and it determined that:

a) the Respondent's minimum qualifying period (MQP) had ended on December 31, 2015;

b) her evidence was believable and credible;

c) she had stopped work for medical reasons in 2013;

d) the Respondent's mental health issues include generalized anxiety disorder, panic attacks, depression and social anxiety disorder;

e) her lack of education, transferable skills, past work experience and life experience make her unemployable in the "real world";

f) the impact of the mental health issues are overwhelming in comparison to the Respondent's lifestyle and her work capacity;

g) the Respondent has a severe disability that was extant as of her MQP and that continues; and

h) her disability is prolonged.

[3] Based on these conclusions, the General Division allowed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on November 17, 2016, within the 90-day time limit.

ISSUE

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

THE LAW

[6] Pursuant to paragraph 57(1)(*b*) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the DESD Act, 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.

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

[9] Subsection 58(1) of the DESD Act states that 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

[10] The Applicant's grounds of appeal are that the General Division failed to observe a principle of natural justice and that it made erroneous findings of fact in arriving at its decision. The Applicant's arguments can be summarized as follows:

a) The General Division based its decision on evidence that was not before the parties. It relied on outside research that neither party had put into evidence.

b) It is not clear where the information in paragraphs 43 to 51 of the General Division decision was obtained from. The General Division used this outside research to assess the Respondent's employability.

c) The General Division failed to observe a principle of natural justice when it relied on this evidence without giving the parties the opportunity to present their observations on this.

d) The General Division made findings of fact without regard to the material before it when it ignored the medical notes of Dr. Chalal. Paragraph 40 of the decision refers briefly to Dr. Chalal, but the General Division did not consider Dr. Chalal's concerns about the impact of marijuana on the Respondent's anxiety and possible need for addictions counseling or his diagnosis of Anxiety NOS (not otherwise specified), Cannabis Use Disorder, or a possible learning disorder.

e) It also erred in fact without regard to the material before it when it found the Respondent's limited use of marijuana not to be a deciding factor in her overall health and employment functionality. Dr. Chalal's notes clearly demonstrate that he considered the Respondent's marijuana use to be affecting her health and employability. Other medical reports also noted that the Respondent had used marijuana regularly.

ANALYSIS

Natural justice

[11] The General Division's decision discussed generalized anxiety disorder, major depressive disorder and panic disorder at paragraphs 43 to 51. The General Division Member then concluded that the symptoms described in those paragraphs "accurately describe the observations made by a number of physicians who have examined [the Respondent] and most important, have been articulated by [her]."

[12] The Federal Court, in *Canada (Attorney General) v. Blackman*, 2016 FC 488, held that basing a decision on evidence that the applicant was unable to contest or make observations on

"is a fundamental infringement on a party's ability to be heard before a decision-maker and to participate fully in the discussion." The Court observed that "if the decision-maker made [his or] her decision on any evidence, [he or] she should allow the parties to be heard on it, so that it can be contested and argued." The Federal Court found that the decision-maker had based the decision solely on undisclosed information that the parties had not tested. This resulted in a breach of procedural fairness.

[13] The Applicant submits that the General Division breached procedural fairness by failing to give the parties the opportunity to present their observations on evidence referred to in its decision and upon which the General Division relied to arrive at its conclusions.

[14] The Applicant also submits that if the General Division was taking judicial notice of this evidence, there is a strict threshold to dispensing with the need to prove the facts and that that threshold has not been met in the present case. The Applicant refers to *R. v. Find*, [2001] 1 SCR 863, 2001 SCC 32, and *Smith v. Canada (Citizenship and Immigration)*, 2009 FC 1194.

[15] I find that the Applicant's ground of appeal based on breach of procedural fairness has a reasonable chance of success.

[16] The General Division did refer to evidence that does not appear to have been put to the parties prior to the General Division's rendering of its decision. If it did so on the basis of taking judicial notice of that evidence, that is not apparent on the face of the decision, nor is any analysis of whether this evidence met the threshold to be appropriate for taking judicial notice.

[17] While the Applicant will need to establish, on the merits of this appeal, that the evidence at issue was not put to the parties before or at the General Division hearing or prior to the General Division's decision, the Applicant's submissions on this point, as set out in the Application, are sufficient to satisfy me that the appeal has a reasonable chance of success at the leave to appeal stage.

[18] I note that, on the merits of this appeal, the Appeal Division will need to address whether, by choosing not to attend the General Division hearing, the Applicant lost its opportunity to test evidence before the General Division. Specific submissions are requested on this issue (in addition to all other issues relevant to this appeal).

Alleged erroneous findings of fact

[19] The Applicant argues that the General Division made an erroneous finding of fact when it found that the Respondent suffered from a prolonged disability, because it ignored medical reports that were in the appeal record.

[20] 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. In response to the Respondent's arguments that the Appeal Division was required to refuse leave to appeal on any ground it found to be without merit, Dawson J.A. stated that subsection 58(2) of the DESD Act "does not require that individual grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." This application is one of the situations described in *Mette*.

[21] Because the alleged breach of natural justice may be interrelated to the analysis of whether the Respondent's medical condition was severe and prolonged, I will not parse the grounds of appeal any further at this stage of the proceedings.

CONCLUSION

[22] The Application is granted.

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

Shu-Tai Cheng
Member, Appeal Division