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

Citation: *S. E. v. Minister of Employment and Social Development*, 2017 SSTADIS 387

Tribunal File Number: AD-17-14

BETWEEN:

S. 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 31, 2017

Canada

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated September 21, 2016, which determined that she was ineligible for a disability pension under the *Canada Pension Plan* (CPP) because her disability was not "severe" prior to her minimum qualifying period (MQP), which ended on December 31, 2013.

BACKGROUND

[2] The Applicant applied for CPP disability benefits on December 5, 2011. In her application, she disclosed that she was 45 years old and had no higher than an elementary school education from Iran, her country of origin. After immigrating to Canada in 1992, she worked in a series of jobs as a cleaner. From January 2007 to June 2011, she was employed as a seamstress by a clothing manufacturer, a job she left following a repetitive strain injury to her back.

[3] The Respondent refused the application initially and on reconsideration, on the ground that the Applicant's claimed disability was not severe as of the MQP. In July 2012, the Applicant appealed these decisions to the Office of the Commissioner of Review Tribunals (OCRT), and her appeal was transferred to the Tribunal in April 2013.

[4] Following a hearing by way of written questions and answers, the General Division dismissed the appeal in a decision dated August 24, 2015. The Applicant appealed this decision to the Appeal Division, which granted leave to appeal on March 9, 2016, finding an arguable case that the General Division had failed to apply the "real world" test set out in *Villani v. Canada.*[1] Later, with the Respondent's consent, the Appeal Division returned the matter to the General Division for a *de novo* hearing. On September 20, 2016, a different member of the

[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

General Division conducted a hearing by videoconference but, again, found that the Applicant's claimed disability did not meet the standard of severity established by paragraph 42(2)(*a*) of the CPP.

[5] On February 6, 2017, within the specified time limitation, the Applicant's authorized representative submitted an application requesting leave to appeal to the Appeal Division, alleging various errors on the part of the General Division with respect to its second decision.

ISSUE

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

THE LAW

[7] 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. The Appeal Division must either grant or refuse leave to appeal.

[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] 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.

[10] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal to be granted: *Kerth v. Canada.*[2] The Federal Court of Appeal has determined

[2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (QL).

that an arguable case at law is akin to determining whether, legally, an appeal has a reasonable chance of success: *Fancy v. Canada*.[3]

[11] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

SUBMISSIONS

[12] In an email dated December 20, 2016, the Applicant's authorized representative filed a request to appeal on behalf of his client and asked that her claim be heard again. He attached the following medical documents:

- A letter from Mohammad Sabouba, family physician, dated December 18, 2016;
- An X-ray of the lumbar spine, sacrum, coccyx and bilateral ankles, dated July 27, 2016;
- A report from Arthur W. Vanek, sleep specialist, dated December 6, 2014;
- An MRI of the lumbar spine dated September 14, 2014;
- An ultrasound of the cervical spine dated April 9, 2013;
- Laboratory blood test results dated August 3, 2016.

[13] In a letter dated January 5, 2017, the Tribunal reminded the Applicant's representative of the specific grounds of appeal permitted under subsection 58(1) of the DESDA and asked him to provide, within a reasonable timeframe, more detailed reasons for the request for leave to appeal. On February 6, 2017, he replied that the Applicant's medical evidence was strong enough and contained all the criteria required to support a "severe and prolonged" disability that pre-dated the MQP date. He alleged that the General Division erred in its assessment of medical facts, which indicated that the Applicant suffers from both physical and psychological impairments that prevent her from working in any capacity. He added that, in particular, the General Division failed to acknowledge and address the psychological component of the Applicant's disability.

[3] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ANALYSIS

New Documents

[14] The Applicant's request for leave to appeal was accompanied by several medical reports that were apparently never presented to the General Division; indeed, one of them was not prepared until after the General Division had already issued its decision. I note that, by the time of her second hearing before the General Division, the Applicant had been prosecuting her appeal for more than three years—by any reasonable standard, a sufficient length of time in which to gather relevant medical evidence.

[15] In any case, given the constraints of subsection 58(1) of the DESDA, the Appeal Division does not ordinarily hear arguments on the merits of disability, nor does it consider evidence that was, or could have been, submitted to the General Division as trier of fact. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised, although an applicant does have the option of making an application to the General Division to rescind or amend its decision. However, in that event, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations*, which impose strict deadlines and require an applicant to demonstrate that any new facts are material and could not have been discovered at the time of the hearing without exercise of reasonable diligence.

Alleged Failure to Consider Medical Evidence

[16] For the most part, the Applicant's submissions on these grounds amount to a recapitulation of evidence and arguments that, from what I was able to determine, were already presented to the General Division. In essence, the Applicant argues that the General Division gave inadequate consideration to evidence that she felt proved she was suffering from a severe and prolonged disability as of the hearing date.

[17] In this case, the General Division made its decision after conducting what appears to be a fairly thorough survey of the evidentiary record. While the Applicant may not agree with the General Division's conclusions, it is open to an administrative tribunal to sift through the relevant facts, assess the quality of the evidence, determine what evidence, if any, it might

choose to accept or disregard, and to decide on its weight. The Applicant alleges that the General Division disregarded her psychological condition, but my review of the decision indicates that it adequately addressed this issue in its analysis:

> [47] The Appellant reported that she is depressed due to pain and suffers from sleep apnea. However, the Appellant is not on any medication for her sleep apnea or her depression. It is difficult to reconcile the effect of the depression on the Appellant in the absence of her being on any medication for it and or lack of referral to a specialist who can help her with the condition.

[18] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all the evidence. In *Simpson v. Canada*,[4] the appellant's counsel identified a number of medical reports, which she said the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but 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. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

[19] Otherwise, the thrust of the Applicant's submissions is that I reconsider and reassess selected documentary evidence and decide in her favour. I am unable to do this, as my authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the enumerated grounds of subsection 58(1), and whether any of them have a reasonable chance of success. In the absence of any specific allegation of error, I do not think there is an arguable case that the General Division gave insufficient consideration to the medical evidence.

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[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

CONCLUSION

[20] As the Applicant has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division